IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,153

OLEN CLAY GORBY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR BAY COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal is from the denial of Olen Clay Gorby's motion for post-conviction relief by Circuit Court Judge Dedee S. Costello, Fourteenth Judicial Circuit, Bay County, Florida, following an evidentiary hearing. This proceeding challenges both Mr. Gorby's conviction and his death sentence. References in this brief are as follows:

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

"PCR __." The post-conviction record on appeal.

"PCS __." The supplemental post-conviction record on appeal.

All other references will be self-explanatory or otherwise explained herein.

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Gorby 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. Gorby, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

On June 27, 1990, a Bay County Grand Jury indicted Olen Gorby for murder in the first degree, armed robbery, grand theft auto, and burglary (R 1849-50). Fourteenth Judicial Circuit Court Judge for Bay County, the Honorable Don T. Sirmons, presided over the jury trial which commenced June 24, 1991. On July 2, 1991, Gorby was found guilty as charged on 3 counts and guilty of the lesser offense of robbery (R 2495-96). On July 5, 1991, the jury recommended Gorby be sentenced to death by a vote of 9 to 3 (R 2546). On Aug. 30, 1991, Judge Sirmons sentenced Gorby to death for first degree murder, to 15 years for robbery, to 5 years for grand theft, and life for burglary, all sentences to run consecutive with the death sentence but concurrent with each other (R 2621-29).

In aggravation, Judge Sirmons found that: 1) the murder was committed while Gorby was under sentence of imprisonment having been paroled from the state of Texas on April 11, 1990; 2) Gorby was previously convicted of a felony involving the use or threat of violence to a person based on Gorby's 1987 Texas "Robbery Threats" conviction; 3) the crime was committed for financial gain based on evidence that property and an automobile were taken from the victim's home and on evidence that Gorby was found guilty of robbery, grand theft auto and burglary; and 4) that the crime was especially heinous, atrocious or cruel (PCR 2622).

In support of his finding that the crime was especially heinous, atrocious or cruel, Judge Sirmons wrote:

> The evidence establishes that the victim was attacked by the Defendant while the victim was in the hallway of his home. The victim received seven (7) blows to his

> head with a claw hammer. One (1) blow was near the front top of the victim's head, one (1) blow was on the left back of the victim's head and give (5) blows were to the right side of the victim's head. Several of these blows were sufficient to punch holes through the victim's skull and cause fracture lines to the skull. The medical examiner's testimony establishes that any one of these blows could have been sufficient to cause the victim's death by hemorrhage to the surface of the victim's brain. The victim also had abrasions on the nose, left cheek and left eye which were not counted in the blows to the head. The physical evidence from the blood spatters indicates that several of the blows to the victim's head were delivered when the victim was lying on the floor in the hallway. This was not an instantaneous death. The medical examiner's testimony, based upon the amount of blood in the hallway, indicates the victim was alive in the hallway lying down for at least ten to fifteen minutes before being moved to the bathroom. The medical examiner indicated that the victim **could** have been conscious after the first **or** second blow (emphasis supplied) but there is no way to tell how much time passed between blows being delivered to the victim's head and exactly when the victim became unconscious. The victim was found with a shirt with one knot wrapped around his neck with a phone cord containing a complex pattern of knots tied around his neck over the shirt. Over the top of all of that was a red extension cord around the victim's neck which was looped through a handle of a drawer in the bathroom where the victim's body was found and extending into the hallway. All of these items were tied tightly around the victim's neck but none were tied tightly enough to produce strangulation. There is nothing from the physical evidence to determine when these items were placed around the victim's neck in relation to when the blows were delivered. Other than the physical evidence, the only evidence as to what happened at the time of death is from the defendant, Olen Clay Gorby's, perspective in a statement made by the defendant to his cellmate that "he didn't like homosexuals and he beat the dude down with a hammer". These factors, plus the victim's lack of mobility due to his bout with polio, support a finding that this killing indicates a consciousless (sic) and pitiless regard for the victim's life and this homicide was especially heinous, atrocious or cruel.

(R 2623-24).

Judge Sirmons rejected trial counsel's argument that the court should find statutory mitigation by noting that trial

counsel had presented no proof of statutory mitigation. Judge Sirmons gave little weight to the resultant non-statutory mitigation:

> In reviewing these mitigating circumstances, this Court cannot find that the defendant has reasonably established, by the greater weight of the evidence, that the crime for which he is to be sentenced was committed while he was under the influence of **extreme** mental or emotional disturbance or that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was **substantially** impaired. (emphasis supplied) The defendant's neuro-psychologist testified the defendant suffers from organic personality syndrome and from alcohol dependence. The expert opined that alcohol enhances the defendant's tendency for a short temper and that once he starts something, he has trouble stopping. Some evidence was presented that the defendant was drinking the evening in question but it was not established how much and to what extent he was impaired. Furthermore, the defendant's main theory in his defense has been that he was not the person who committed this crime and he was not there at the scene. The defendant gave no indication to the psychologist that he used alcohol during or before the crime, or that he committed a crime. There is no evidence from any witness that the defendant was exhibiting any of these behavioral characteristics at the time of the murder or what his mental state was prior to, during or after the event. However, this Court will consider this testimony as non-statutory mitigating circumstances by eliminating the adjectives of extreme and substantially. This Court will therefore evaluate this conflict in the evidence in the weight to be given these two non-statutory circumstances.

(R 2625-26) (emphasis added).

As additional non-statutory mitigation, Judge Sirmons found Gorby came from a poor background, had an abusive father, a failed marriage, was affected by his sisters being shot, and was the victim of a car accident at age 4. He gave little weight to the argument that he loved his family and was loved by them because

Gorby had not seen his son or daughter in 8-9 years or his mother in 5 years (R 2626).

This Court affirmed Gorby's convictions and sentences. Gorby v. State, 630 So. 2d 544 (Fla. 1993). Gorby's petition for writ of certiorari in the United States Supreme Court was denied Oct. 3, 1994. Gorby v. Florida, 115 S. Ct. 99 (1994).

On Oct 3, 1995, Gorby timely filed his original Rule 3.850 Motion (PCR 1-145). On Oct. 20, 1995, the Honorable Judge Glenn L. Hess ordered the State to file a response (PCR 148).

On July 1, 1996, pursuant to Florida Rule of Judicial Conduct 2.050(b)(4), Judge Hess transferred the case to Judge Sirmons (PCR 184). On July 18, 1996, Gorby filed a Motion to Disqualify Judge Sirmons (PCR 185-232). On Aug. 28, 1996, Judge Sirmons granted the motion and assigned the case to the Honorable Judge Dedee S. Costello (PCR 253).

In 1996, information regarding Dr. William Sybers, the medical examiner who testified against Gorby, came to the attention of collateral counsel. Public records requests were made to state agencies involved in the investigation of the death of Kay Sybers and when most agencies provided only limited information[1] and claimed exemptions citing the on-going criminal investigation, the court considered the issue (PCR 274-79). On Oct. 8 and Oct. 30, 1996, Judge Costello issued orders[2] on Gorby's

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[1]Def. Ex. 2A, 2B, 8, and 9.

[2]Foreclosing Gorby from seeking public records regarding the Sybers investigation because of an ongoing criminal investigation and thus exempt from disclosure under the Public Records Act. §

Motion to Compel denying access to records requested regarding any investigation by the State into whether Sybers was responsible for the murder of his wife (PCR 306; 260-61; 272-73; 274-279; see also PCR 289-98; 299-308). On Oct. 22, 1996, the State filed a response to Gorby's 3.850 motion (PCR 262-271).

Judge Costello issued an order granting Gorby's request for leave to amend his Rule 3.850 Motion (PCR 308) and pursuant to that order, on May 30, 1997, Gorby filed an Amended Rule 3.850 Motion (PCR 309-525). Thereafter, during the 1997-1998 CCR-CCC transition period, Gorby was without counsel for five months (PCR 529-31; 544-545). On Dec. 9, 1997 (PCR 533-42) the State filed another response to Gorby's Rule 3.850 motion. Judge Costello conducted a telephonic hearing Dec. 9, 1997 regarding the status of counsel. On Feb. 12, 1992, a status conference was attended by new collateral counsel.

Judge Costello conducted Gorby's Huff hearing June 1, 1998 (PCR 556) and scheduled Gorby's evidentiary hearing for June 29, 1998 (PCR 557). On June 1, 1998, the Huff hearing was held (PCR 556; 865-945). On June 16, 1998, Judge Costello ruled the evidentiary hearing would cover claims 7, 8, 9, 11, 13, 16, and 17[3], that all of claims 10, 12, 18-26, 30-36 were procedurally barred, and that claims 1-4, 27 and 31-32 were legally insufficient and/or otherwise not a proper basis for relief (PCR

119.07(3)(b)(1995).

[3]The ruling limited the scope of the issues to be heard that were raised in claims 7, 8, 9, and 11.

594-5). On June 16, 1998, Judge Costello granted Gorby's request for a short continuance (PCR 558-80), and the evidentiary hearing was scheduled for July 14-15, 1998 (PCR 592). The evidentiary hearing was conducted on July 9, 1998 (Def. Ex. 23-24); July 13-14, 1998 (PCR 946-1426), Sept. 22, 1998 (Def. Ex. B), and Oct. 9, 1998 (PCR 658; 1427-1526). On July 15, 1998, Judge Costello issued a warrant for witness Jerry Wyche's arrest for failure to appear (PCR 669-70). On Nov. 25, 1998, Judge Costello issued an order denying claims 7, 8(a)-(e), 9, 11, 13, 16, 17 and all other ineffective assistance of counsel allegations (PCR 675-734).

While Gorby's rehearing motion (PCR 743-52) was pending, the court informed Gorby's counsel that Wyche was and had been in custody. Gorby filed a Combined Motion to Reopen Evidentiary Hearing and for Protective Order (PCR 771-781; see also PCR 735-36; 769-70).[4] A hearing was ultimately held Feb. 15, 1999 (PCR 805-7) at which Wyche was appointed counsel and invoked his Fifth Amendment rights not to be compelled to testify regarding his trial testimony against Gorby or his affidavit recanting that testimony (PCR 1537; 1543). Judge Costello denied Gorby's Motion for Rehearing (PCR 1543; 814) and this appeal follows.

STATEMENT OF THE FACTS

1. Dr. William Sybers

At trial, Sybers testified that: 1) he did not go to the scene (R 1370); 2) Raborn did not die of strangulation (R 1377);

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[4]Gorby also filed a timely Rule 3.852 request for information about his jury in light of this Court's opinion in Buenoano v. State, 708 So. 2d 941, 951 (1998) (PCR 737-40).

3) Raborn suffered 7 blows to the head - 5 of which were in 1 grouping; and 4) Raborn would have had to be alive for 10-15 minutes to lose as much blood as was at the scene and was dragged over an hour later down the hall to the bathroom after the blood had clotted (1380-87).

Collateral counsel presented the available records demonstrating that Sybers was a suspect in the investigation of the death of his wife and the available records regarding Sybers' shoddy practice of failing to supervise non-medical personnel permitted to conduct autopsy procedures (Def. Ex. 2A, 8, 9). This evidence demonstrated that the State began an investigation of Sybers' role in the death of his wife within 12 hours of her death after a confidential informant provided information about the unusual circumstances of her death and embalming (see A Cloud of Suspicion, Miami Herald, Jan. 24, 1993; Prosecutor Will Investigate Death of Former Medical Examiner's Wife, Tallahassee Democrat, Jan. 7, 1993 in Def. Ex. 9; see also Def. Ex. 2A and Memorandum of FDLE agent Kent McGregor dated Oct. 14, 1991) Collateral counsel also presented evidence that Sybers utilized persons who were not medical doctors in the autopsies conducted in his office and failed to assure that these persons were supervised by a medical doctor (see Memorandum of Cpl. Mark Smith, Panama City Beach Department dated May 6, 1992 in Def. Ex. 8). Trial counsel testified he had no knowledge there was even a suggestion of foul play at the time of trial and did not request an independent medical examiner (PCR 1066; 1075).

2. Dr. Leroy Riddick

Collateral counsel presented an independent medical examiner, Dr. Leroy Riddick.[5] Riddick had reviewed a video of the crime scene, photographs of the crime scene, the autopsy and autopsy protocol, Sybers' deposition and trial testimony, and McKeithen's investigation report[6] (PC 1255). Riddick also relied on the opinions of Stuart James, an independent forensic scientist[7] retained by collateral counsel, including findings that: 1) there was no evidence of an active struggle during bloodshed and no evidence that the victim sustained defensive wounds; 2) the "ligatures" and plaid shirt were manipulated after bloodshed; 3) there is no blood pattern evidence to indicate the ligatures were in place at the time the blows were struck but rather were placed around the victim's neck after; 4) there is no evidence of blows being struck in the bathroom where the victim was found; 5) there is no evidence of any other violent activity in the house; 6) there is evidence of the presence of undisturbed firearms and knives in the house and numerous items of value left undisturbed; and 7) there is evidence consistent with the victim having engaged in sexual activity prior to his death (Def. Ex. 22).

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[5]See Dr. Riddick's curriculum vitae (Def. Ex. 33).

[6]Def. Ex. 17, Tab 2.

[7]Who in reaching his opinions, had reviewed crime scene and autopsy photographs, crime scene video, the physical evidence admitted at trial, police reports including forensic crime lab reports, and three volumes of materials provided by collateral counsel which included deposition and trial testimony, diagrams of the scene and other pertinent materials (Def. Ex. 22).

Riddick testified that the victim was unconscious almost immediately:

> Q. Can you explain the underlying basis for that opinion?
> A. Well, he received multiple blows to the head and the blows were to the right back side of his head and also to the left back side of his head forceful enough to split the scalp and also to cause depressed skull fractures. When you strike the head at an oblique angle or from behind because it has a different inertia from the skull and this puts a twist on the brain stem and can cause immediate unconsciousness. There we see this dramatically on television is during a boxing match when somebody gets a blow to the, right cross to the chin, the head goes one way, the brain goes the other and the person drops immediately. The evidence in this case that's been presented was that he was struck with a blow, fell to the ground and then other blows were struck.

(PCR 1263). In Riddick's opinion, all 7 blows could have been inflicted within 5 seconds and unconsciousness could have occurred 1-2 seconds after the first blow. Id. Thus, Sybers' estimate that the victim survived 10-15 minutes was erroneous. Although the victim may have bled for that amount of time, he was rendered unconscious and brain dead within 1-2 seconds of the first blow. Though brain dead, the victim's heart continued to pump producing the blood at the scene (PCR 1267; 1276-78).

Regarding the wound pattern, Riddick testified that the first blow was the blow to the left and it was sufficient to have knocked the victim to the floor and unconscious. The cluster of blows on the right was then inflicted while the victim was on the floor (PCR 1265).

Regarding Sybers' lack of adherence to generally accepted practices, Riddick noted that Sybers did not go to the scene but did nevertheless testify about it (PCR 1267-68). Moreover,

Sybers' failure to go to the scene caused problems with his determination of time of death and understanding of blood spatter evidence. Finally, Sybers issued his report about the brain injuries prior to making a thorough examination and failed to ever examine the brain microscopically (PCR 1268-69). Riddick also noted the length of time between when the death of the victim and when Sybers finally examined the brain was too long for Sybers to have been able to rule out or prove diffuse axonal damage to the brain as a cause of death (PCR 1269).

Riddick testified that any finding, based on the amount of blood in the hallway, that the victim was alive for 10-15 minutes before being moved to the bathroom, would be erroneous (PCR 1279). And finally that he would have been available to testify in 1991 or to have reviewed the case (PCR 1272).

3. Molly Sheridan/Kay Hicks

At trial, the State presented Allen Brown, a deaf and mute drug addict to whom Gorby allegedly made a written confession (R 788-850). In addition, the State called Marissa Brown, Allen Brown's wife who was deaf and did not understand English (R 851-88). The Browns' testimony was interpreted by Kay Hicks. Trial counsel testified at the evidentiary hearing that he was unfamiliar with sign language, did not know there were different kinds of sign language or what he would have done with the information had he known (PCR 979). He recalled that cross examination was frustrating and difficult (PCR 980). An independent sign language interpreter, Molly Sheridan, met and interviewed Allen and Marissa and reviewed materials and

affidavits. Sheridan concluded that Hicks failed to fulfill her duties as an officer of the court and according to Marissa, signed in English Sign Language rather than the American Sign Language she and Allen used. Sheridan proffered that Florida fails to meet national standards by not requiring video-taping and fails to require that court interpreters be nationally certified. The State presented Kay Hicks (PCR 1352-57) who testified that there were no certified legal interpreters in northwest Florida at the time of trial. Hicks explained that she was trained in both American and English sign language. Hicks stated it would have been the attorney and/or the court's responsibility to ensure the quality of the communication between the attorney and deaf witness, not hers. Hicks explained that her role was simply to interpret, not to ensure good examination or cross-examination. Hicks testified that trial counsel did not request her assistance (PCR 1357). Hicks agreed that compound questions and questions with double negatives were particularly difficult to interpret into sign language and that it is helpful when attorneys seek her assistance in advance about the best way to phrase a question for sign interpretation (PCR 1357).

4. Cleo Calloway

At trial, the State presented Texas inmate Cleo Calloway to provide eyewitness identification[8] testimony (R 970-1052). At the

[8]The identification was found to be unnecessarily suggestive but, given the totality of the circumstances, not presenting a substantial likelihood of misidentification.

evidentiary hearing[9], Calloway explained he had been hearing voices and seeing visions since he was 17 years old (Def. Ex. B at 5). Calloway testified that before he understood his problem, he tried to control his hallucinations with drugs and alcohol, id. at 7, but by 1991, he had been diagnosed and prescribed psychotropic drugs. Id. Calloway admitted to still having mental problems at the time of trial. Id. at 9. Calloway's Texas prison psychiatric records corroborate the existence of Calloway's psychiatric illness (Def. Ex. 1).

Trial counsel testified that when he deposed Calloway at the Texas prison, he did not know the prison was for mentally ill inmates (PCR 974). He testified that he neither took steps to investigate Calloway's background nor reviewed Calloway's Texas prison or medical records (PCR 997-98). However, after reviewing the records obtained by collateral counsel, trial counsel agreed the information would have been useful in his efforts to suppress the identification and attack Calloway's credibility at trial (PCR 971-978).

5. Jan Johnson/Leroy Parker

At trial, the State called FDLE crime analyst Jan Johnson to testify about the crime scene and blood spatter evidence (R 1117-63; 1285-96). Johnson was qualified as a bloodstain pattern expert on the basis of her experience and her attendance at Judith Bunker's "Bloodstain Pattern School" in Orlando, Florida. The State bolstered Bunker's reputation during Johnson's qualification

[9]Testimony obtained by deposition to perpetuate (PCR 1418).

by calling Bunker the "mother of bloodstain pattern analysis" (R 1285-86). Defense counsel conducted no voir dire examination of Johnson's qualifications (R 1286).

Collateral counsel presented evidence that Bunker has repeatedly misrepresented her experience and credentials as a blood spatter expert and that Johnson had little other training than the training she received from Bunker (Def. Ex. 3). Trial counsel testified that he did nothing to investigate Johnson's training and experience (PCR 1070). The State presented Leroy Parker who testified that he independently verified Johnson's findings (PCR 1313-24).

6. Robert Jackson

At trial, key State witness Robert Jackson (R 538-613), was held in the Calhoun County Jail during the course of Gorby's trial. Pre-trial, Jackson wrote the State Attorney about his grievances and demands (Def. Ex. 4). In the letter, Jackson accused the State of forcing him to testify and threatened that if certain conditions were not met he would "certainly become an unwanted witness." Trial counsel testified that the State never disclosed the letter but should have because Jackson was seeking benefits, special treatment and making threats to change his testimony (PCR 954-55).

7. Jerry Wyche

At trial, Jerry Wyche was originally listed as a defense witness[10] (R 2418). However, he ultimately testified for the State that Gorby had told him he did not like homosexuals and had "beat a dude down with a hammer" (R 1302). Wyche gave collateral counsel an affidavit recanting his testimony and stating that Assistant State Attorney Meadows arranged for him to have sex with his girlfriend during a contact visit in exchange for his testimony against Gorby (Def. Ex. 37). When Wyche failed to appear at the evidentiary hearing, Gorby requested the court admit Wyche's affidavit into evidence on the theory that the State had rendered him unavailable by threatening him and failing to grant him immunity from prosecution for perjury (PCR 1350; 1402). When Wyche later appeared, having been held in custody on a failure to appear capias issued by Judge Costello, Wyche was appointed counsel and invoked his right not to be compelled to testify regarding his testimony against Gorby or his sworn recantation of that testimony (PCR 1537; 1543).

[10]Presumably to testify, as had the other defense inmate witnesses, about the conditions in the cell pod and how Gorby conducted himself in the pod.

8. Ernie Gorby

Collateral counsel presented Ernie Gorby's testimony.[11] Ernie Gorby, now a retired steel mill worker, had met Olen's mother Wanda in 1946 after returning from military service at 25 (Def. Ex. 24 at 2; 4). Ernie finished 6th grade and began working for his brother hauling mine equipment in 1936 (Def. Ex. 24 at 43). Wanda had a 3 year old daughter, Garnet, when she met Ernie (Def. Ex. 24 at 2; 4). Wanda's father was an abusive drinker who had left home when Wanda was about 15 (Def. Ex. 24 at 38). Wanda had finished 4th or 5th grade and given birth to Garnet when she was 15 or 16 (Def. Ex. 24 at 38; 43). Wanda had 3 brothers, 2 of whom also drank (Def. Ex. 24 at 44). Wanda and Ernie had 3 children: Mary Jane, Olen and Wilma (Def. Ex. 24 at 2; 4).

In 1950, after the birth of Mary Jane and Olen, Ernie went to Weirton, W. Va., about 90 miles away, to work in a steel mill. There was no work in his hometown of Littleton, W. Va. He left Mary Jane and Olen with Wanda. Wilma was not yet born (Def. Ex. 24 at 4). For the first few years Ernie worked 6 days a week with little time other than Sundays to come home. When he came home, he explained, "[s]ometimes I didn't find nobody, only the kids.

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[11]Olen Clay Gorby was born to Wanda and Ernie Gorby on Nov. 27, 1949 at Littleton, W. Virginia (Def. Ex. 17, tab 15). Ernie Gorby's testimony was adduced by deposition to perpetuate testimony (Def. Ex. 24; PCR 599-606; 631). Wanda and Ernie divorced in Sept. 1958 when Olen was 8 years old (Def. Ex. 17, Tab 13). Ernie was granted custody of Olen in Oct. 1963 when Olen was 13 years old and had been found delinquent and placed on juvenile probation (Def. Ex. 17, Tab 14). Trial counsel had listed Ernie Gorby as a witness but neither presented him nor procured evidence from him for consideration by defense experts Goff or Warriner.

They'd be at Bessie's[12] and [Wanda'd] be gone. Several times. Then I'd find her some place in a beer joint, usually" (Def. Ex. 24 at 6). Ernie explained that Wanda had an "awful temper" and would get "madder than the dickens" when he found her. Her treatment made him feel "like taking her alongside of the head a few times" and they had some "awful, pretty rough arguments" (Def. Ex. 24 at 7). Wanda was not happy to see Ernie home because she "just wanted to get out and run too much." "If she had a good bit to drink, she wouldn't come" home when he found her. Id.

Ernie tried not to fight in front of the children. When he and his wife did fight, Wanda would throw things. Ernie described a few incidents as follows:

> A. Well, once when I came in, I seen a car out in the driveway, and I figured what was going on, so I went in, and that was, I guess, eight or nine o'clock at night. She's taken a ball bat and drove nails all around, clear around it, all over it rather, and took a file and filed them off so they'd be sharp on the end. I didn't walk into that. I knew she'd hit me because she didn't have no sense when it come to that. She was gonna strike me with that bat full of nails, of course, naturally, I backed off. And finally here come her boyfriend out of the cellar part of the house, and he stood behind her, though, all the time and made sure that, to be away from me.
>
> Q. You were saying you saw a car and you knew what was happening. You mean you knew he was there?
>
> A. Yeah. Then the cop of Littleton took after the car. And, oh, I forgot what all. Well, he run out of gas, I guess. The guy got away, anyway, and went home. And never no more about it, said about it.
>
> Q. You said that you backed off because -- I'm not sure exactly how you put it -- she's
>
> A. I backed off because I know she would have hit me.
>
> Q. Something like she didn't have a lot of control, or what were you trying to explain there? Why did you know she was going to hit you?

[12]Wanda's mother, Bessie Stottlemire.

> A. Because she didn't want me catching her with that guy in the house, I imagine. I tell you, you think when somebody's got a ball bat with sharp nails sticking out of it.
>
> The reason I knew she'd hit me because the one time she told me she was gonna shoot me, when I was hung up some place late, when I got home. I left with the truck and couldn't make it home till late. She got a shotgun and told me she was gonna shoot me. Well, she told me that before then, she knew where I kept the gun in the press. Well, I just happened to go upstairs and I took the shell out of the gun. She come up, she was still raising the dickens, said, "I'm gonna shoot you." Well, I said, "Go Ahead." She grabbed that old twelve-gauge shotgun, grabbed the gun out of the press. And I really didn't think she'd do it. She pulled the trigger back and snapped it, right at me. That did not kick up a little rumpus, I did take her alongside of the head then.

(Def. Ex. 24 at 9-10).

Before they were divorced, Ernie caught 3 different boyfriends in the house; one even moved in and stayed at the house. From what Ernie knew and/or was told, Wanda cheated on him the whole time he worked in Weirton (Def. Ex. 24 at 10-12). When he came home, she would fight him until he left the house. The children would be upstairs with Bessie and he would go get them. This continued until he sought a divorce (Def. Ex. 24 at 13).

Ernie testified that before Olen's car accident, Wanda moved herself and her children away from Bessie's home and into an apartment above the VFW in downtown Littleton. They were living there when Olen was hit by the car (Def. Ex. 24 at 14).

Regarding Wanda's drinking, Ernie learned that Wanda went to drink at the VFW 4 or 5 days a week and spent the money left after he paid the bills on slot machines and drinking. Wanda drank any time she could, wherever she could, including in front of her children and in bars where she took her children in or left them

to sit in the car (Def. Ex. 24 at 14-18). Ernie knew all of Wanda's boyfriends personally and was aware that they were also heavy drinkers (Def. Ex. 24 at 19). Wanda never stopped drinking during her pregnancies and was never cared for by a physician during her pregnancies (Def. Ex. 24 at 19-20). Wanda gave birth to Garnet after a particularly hard night of drinking.

Ernie explained Wanda's feelings for her children:

> A. Sometimes she didn't want [her children] around. They wasn't too old, she's holler all the time when I'd come home to take them out of there. Well, I didn't have time to run down and get them from Weirton. I had my cousin come down several times and pick them up and bring them up. Then later on, she called me, told me to come down and -- Well, she called them pretty bad names. She said to come and get them before she took them by the feet and knocked their brains out on the side of the house.

(Def. Ex. 24 at 22)(emphasis added). She called them "little sons of bitches" (Def. Ex. 24 at 22).

Ernie explained that he was living in Weirton when Olen was hit by the car (Def. Ex. 24 at 23)[13]. Garnet called him and he drove home as fast as he could. Olen remained in bed apparently unconscious for 2-3 days and from the time he revived "just never seemed right after that" (Def. Ex. 24 at 25-27). Ernie testified that Olen was "more messed up" and regularly had what Ernie called "contrary spells" (Def. Ex. 24 at 27; 32).

By age 4, Olen had started running around town (Def. Ex. 24 at 33). Olen had asthma and eventually had his tonsils out (Def. Ex. 17 at tab 21; Def. Ex. 24 at 29; see also Def. Ex. 20-21) and

[13]It was Sept. 22, 1953 at which time Olen was 3 years old (Def. Ex. 17, Tab 16).

it was soon thereafter that the doctor in Wheeling who treated Olen for asthma referred Olen to a psychiatrist. Ernie was disappointed and felt the doctor did little more than ask Olen if he was out in the woods how would he find his way back (Def. Ex. 24 at 29).

Ernie believed Wanda started supplying Olen beer when he was 6 or 7 (Def. Ex. 24 at 46). Ernie was also aware that Olen drank in town and tried to intervene, but "it didn't do any good. Them older fellows would go get him beer, just to have fun with him, I guess, devil him. I guess they had a time with him because they'd have him throwing bottles at cars and everything else, when they'd get him to drink enough of it" (Def. Ex. 24 at 34). The older fellows first sent Olen behind the building to drink but "then later on, he got to drinking, I guess, right on the street with the rest of them" (Def. Ex. 24 at 35). Another alcoholic adult, Wanda's uncle Clifford Haynes, frequently stayed with her and was left to watch Olen (Def. Ex. 24 at 44-45).

Ernie filed for divorce Aug. 1, 1958 (Def. Ex. 24 at tab 13; Final Decree). The divorce was granted Sept. 29, 1958. Custody was granted to Wanda with child support of $70 every 2 weeks ordered to be paid by Ernie. Id. The court granted Ernie night and weekend visitation and 6 weeks each summer. Id.[14] In addition to court-permitted visitation, there were times when

[14]Additional documents reveal that Wanda hired a lawyer and considered filing for divorce. Id. Those documents contain allegations by Wanda that Ernie abandoned Wanda and the family, was part owner of a bar in Weirton, had a violent temper and had threatened to do Wanda bodily harm. Id.

Wanda called Ernie to "come take the kids" (Def. Ex. 24 at 38). In Aug. 1963, when Olen was 14 years old, the Court placed him in Ernie's custody[15]. Ernie said he wanted to take custody because Olen was "just out in the street, doing what he pleased" (Def. Ex. 24 at 41). Ernie was worried however that it was too late to help Olen because "[i]t started when he was real young." Id.

9. Garnet Butcher

Collateral counsel presented Garnet, Olen's 1/2 sister 8 years older.[16] When Wanda moved from Bessie's house[17] with the other children, Garnet refused to go. "My mother was rather on the mean side. No affection. She just left me with the impression that she had an I-don't-care-for-you-attitude" (Def. Ex. 23 at 5-6). Garnet gave an example of Wanda's treatment:

> Q. Do you remember anything specific about her treatment of you, Garnett? Did she ever hurt you?
> A. She has. I have the scars. I was so young, I don't remember exactly when it happened at the time, but my grandmother has told me. The scar I have on my leg, on my ankle, was from her putting a pair of shoes on me, apparently, that was too big. And I walked in them and they rubbed my ankle to the bone. When she came in, the blood was all over everything, and I was crying, and my mother was not paying any attention to me. So my grandmother took care of the leg.

(Def. Ex. 23 at 7).

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[15]Def. Ex. 17, Tab 14.

[16]Her testimony was also adduced by deposition to perpetuate testimony (PCR 618-24; 630; Def. Ex. 23).

[17]Ernie remembered that Wanda moved to above the VFW before Olen's accident which occurred when he was 3. Garnet believed that Wanda and the children lived downstairs from Bessie until 1960 when Olen was 10 (Def. Ex. 23 at 9). They most likely moved in and out of the apartment downstairs from Bessie on different occasions.

Garnet believed Wanda disliked being a mother when the children were young and that Olen "pretty much had free rein to go and come as he pleased" downtown on the streets of Littleton (Def. Ex. 23 at 10). Garnet testified that Olen was hyperactive and got his nickname "Bucky" because it described his behavior. As a child, Olen always "carried on a little more" than other children, was a bully and cried if he did not get his way (Def. Ex. 23 at 2-4). She recalled that Olen suffered from severe asthma and had choking fits[18] (Def. Ex. 23 at 4-5).

Garnet explained that it was Wanda who told Olen he had a plate in his head because Wanda "just dramatizes and exaggerates when she gets started telling something, and it kind of gets out of hand" (Def. Ex. 23 at 22). Garnet stated that if Olen thought he had a plate in his head, it was because Wanda had told him that "from the time he was hit with that car." Id.

Ernie was never affectionate and there was a lot of fighting in the house (Def. Ex. 23 at 11-12). Wanda "would always threaten to send [the children] to their dad's if they didn't mind" her (Def. Ex. 23 at 14). Later when Ernie would pick up the children to take them to Weirton "[s]he'd tell them not to get in the car with him, he was gonna wreck and kill them. He drove too fast. It was always something. And I know that the kids were scared, they'd cry. They were afraid of their dad," "because of the things she told them" (Def. Ex. 23 at 23).

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[18]Olen's 1956 medical records from the Ohio Valley General Hospital confirm this diagnosis and that Olen frequently awoke from sleep in an asthma attack (Def. Ex. 17, Tab 21).

Garnet clearly recalled the boyfriends Wanda had after the divorce (Def. Ex. 23 at 10). Five regular male visitors drank and lingered there, "some of them overnight and some for two or three months at a time" (Def. Ex. 23 at 11).

While in grade school, Olen was "uncontrollable" and "always wanted aspirins and complained of a headache" (Def. Ex. 23 at 12-13). His teacher was concerned about his behavior. Id.

In addition to Bessie, the children were left in the care of their Uncle Clifford Haynes, who had a mean streak, or with their aunt Mildred or another woman named Mrs. Garrison. Mildred had mental problems, was suicidal and institutionalized for a year on one occasion (Def. Ex. 23 at 14).[19]

Garnet recalled that when Olen went to live with Ernie when he was about 11 or 12 years old[20], she felt he was not accustomed to discipline and that "[t]hen, his dad was strict on him. And I think kind of collided a few times there" (Def. Ex. 23 at 15).

Garnet met Olen's trial attorney in W. Virginia. Her sisters Mary Jane and Wilma, her mother Wanda, and an uncle were present. "He asked me a few questions. And that was about it. It was a very short session. I couldn't say too much because my mother was, the family was sitting there, so you just don't say too much in front of them" (Def. Ex. 23 at 19). Garnet believed her mother

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[19]Ernie was displeased to hear Wanda ever left Olen and the children with Mildred because "[Mildred] had epileptic fits all the time" (Def. Ex. 24 at 55).

[20]According to court records it was in Oct. 1963 that Ernie was granted custody of the 13 year old Olen.

would have become "too mad" and would have said she was lying had she disclosed any family information. Once Garnet arrived, the attorney stayed only another 5-10 minutes and the meeting was over. Had she been able to speak with him privately, she would have given him the same information she provided to collateral counsel (Def. Ex. 23 at 20). Moreover, she would have testified about the details (Def. Ex. 23 at 22).

Trial counsel asked Garnet to come to Florida to plead for Olen's life. She did. "In the motel, he came to the motel room just as soon as we got there. We were all three in the same motel room, again. Mary Jane, Wanda and I" (Def. Ex. 23 at 21). She was told to come to his office. She went and waited for him for 2-3 hours but was never interviewed further. Id.

10. Mary Jane Cain

Collateral counsel presented Mary Jane Cain, Olen's sister 1 1/2 years older (PCR 1099). Mary Jane now lives in New Jersey and has worked as a sales associate for Wal-Mart since 1992.[21] Mary Jane Cain testified to meeting trial counsel when he came to W. Virginia for a short visit and talked to them all together. She explained: "[t]here's a lot of things that happened in our childhood that we don't, each or the other doesn't know and so we really didn't have much to say" in front of each other (PCR 1078-79). The kinds of things she was unable to tell trial counsel in front of her family included things about "just the way that our mother was":

[21]Having never worked previously (PCR 1096).

> A lot of people I guess in the town knew how she was but a lot things we didn't know, but things that you find out through the years that were things that happened to us personally that you don't want the other one to know so we just never talked about it. And exactly the way my mother was with men, she brought men in the home, would sleep with them. And we knew that. And I had a friend in high school and my mother went with her uncle and she would come to school and say, well, you know, I can't come home with you to spend the night because my mother won't allow it because your mother sleeps, you know, stays with my uncle, he lives at your house. Things like that. And it was a lot of different episodes that I remember when we were small with men. Do you want me to elaborate or just in general or --
>
> Q. If you have any, another specific memory you can share with the court that would be helpful, but, go ahead.
>
> A. Things that we remember about our childhood. First thing I remember in my life was my mother beating me because she was getting ready to go out and I took the comb and was running through the house and she beat the blood out of me. And I remember my grandmother coming to the house and telling her, my God, why did you beat the blood out of this child. And she held me and doctored me and took care of me. My grandmother was like the core of our family, she took care of us most of the time. But I can remember my mother bringing guys home.

(PCR 1079-80). Mary Jane specifically remembered that Wanda brought men home to drink (PCR 1085) when Olen was small and still lived with his mother (PCR 1093-94). The only incident she referred to which occurred later in life was Wanda's tryst with Mary Jane's first husband (PCR 1080-81; 1101).

Mary Jane testified that everyone in her family drank. She and her siblings were looked after by their mentally disturbed aunt Mildred and their great uncle Haynes who was mentally handicapped, drank, and had once attempted to molest her (PCR 1081-82) and once badly beaten Olen (PCR 1083). Another adult in their lives was a drinking friend of her mother's named Geraldine,

who Mary Jane remembered once tried to drag Wilma over a heater and once also brought a man to their house (PCR 1089).

Mary Jane said her parents "didn't know anything about schooling at all," their mother "never saw a report card" and most of the time Olen "was usually out running around" (PCR 1083-84). At school there was a teacher who showed special concern for Olen and his abnormal daily headaches (PCR 1083-84). Mary Cain was present when Olen was hit by the car and she remembers her mother's story that Olen had a "plate in his head" (PCR 1085).

Their step-mother, Angie, also "drank quite a bit" (PCR 1085). Mary Jane explained:

> Q. Did you go with Olen ever to Weirton to visit your father?
> A. When we were small we would go there to visit. Him and my stepmother lived together and she drank quite a bit also. One episode that I remember very vividly when we first went there my father was really strict because he didn't, about that because he didn't want the drinking done around us. But when he would go to work that would be the first thing that she would start doing is drinking. I can remember they were probably even too little, him and my sister were probably even too small to remember, I don't know, but she started drinking one day and there was this elderly lady that she had lived with before her and daddy met, apparently. And she was so drunk she couldn't walk and we walked her from the house to this lady's house along the highway and we held her up as well as we could. She was that drunk. And that I could never forget.

(PCR 1085-86). Though Angie did not strike the children, she was belligerent and verbally abusive. Mary Jane recalled one incident:

> [O]ne night I was in bed, she wanted me to come watch T.V. with her and I said, no, I just wanted to sleep. And she said, oh, come on, let's go out in the road and fight, you lazy bitch, or something like that, let's go out and fight. I said no, Angie, I don't want to do

> that. Just things that you can remember that happened."

(PCR 1087). Angie was left to care for the children while Ernie worked. She passed the time drinking. "Sometimes he would [work] days, afternoons or over nights and it was always when he would leave, she would drink" (PCR 1086) (emphasis added). When Ernie was home, he could be physically abusive:

> A. He beat me once, my father did. I don't remember why, probably because we got into a fight, brothers and sisters always do. He beat the blood out of my legs one time. I don't know what happened, you know, between Olen and daddy but he did beat me once with a stick.

(PCR 1086-87) (emphasis added).

In addition to physical abuse and neglect by her father and step-mother, neither parent showed the children the warmth of parental affection (PCR 1088). Holidays and birthdays were not celebrated. The children's meager accomplishments, such as Olen's success in basketball at school in Weirton, were ignored (PCR 1088; 1090). Mary Jane explained that although Bessie took care of them "while our mother wasn't there, there's things in childhood that she can't take away, the memories of what had, the things that happened" (PCR 1095).

When Mary Jane came to Florida to testify at trial, she had not been privately interviewed by trial counsel (PCR 1087-88). Once in Florida, "they called us all in one room together, all of us and talked to us what, you know, some questions that we would be expected to answer, things like that. But not as individuals, no" (PCR 1088).

On cross-examination at the evidentiary hearing the State asked Mary Jane why she had not told the jury at penalty phase the things she had revealed to collateral counsel (PCR 1092-93). She replied that she "didn't know that [she] could tell them all of this" (PCR 1096). On re-direct, Mary Jane explained she had no knowledge of the law in Florida about how a jury decides between life and death (PCR 1097). Once collateral attorneys and investigators came and there "was nobody [else] there", Mary Jane explained, painful private things that she had blocked out came "flooding back" (PCR 1098-99).

11. Wilma Morris

Wilma Morris, Olen's sister 2 years younger, also testified. She recalled that her father was rarely there (PCR 1177) and before her parents divorced her mother brought men home to the house, and there was drinking and fighting. Wilma testified that Olen slept with his mother "in a hallway with a half bed," a bed in which she had also slept with her mother (PCR 1165-66). Wilma explained that their mother brought men home and Olen had to share the small bed with her mother and her mother's lovers (PCR 1166). Wilma was certain that her mother had sex with her boyfriends with Olen in the same bed because it had happened to her on the occasions she had slept with her mother in that bed (PCR 1177-78).

Wilma remembered that her mother left them with their aunt Mildred who tried to commit suicide by hanging herself and once deliberately burned herself on the arm with an iron. According to Wilma, Mildred suffered from epilepsy as well as mental problems

(PCR 1168). Another adult left to care for them was a cruel drinking comrade of Wanda's named Geraldine (PCR 1172).

Their father Ernie and their stepmother Angie drank and stopped frequently at bars while driving the children from Littleton to Wheeling for visits (PCR 1169). Once in Weirton, the atmosphere was fearful and the children were not permitted to do much: "we were afraid of our dad" and "he always had a stick sitting in the corner" (PCR 1170). The children were frequently left in the care of their stepmother Angie who used threats and intimidation to control them. Id.

Olen's trial counsel never interviewed Wilma in a private setting and the meeting he did have with her, her mother and her sisters together was less than an hour long (PCR 1173). She recalls that he asked what she remembered about Olen and that she was uncomfortable in front of the other family members because no one in the family had ever communicated about the things that had happened in their childhood (PCR 1174). Trial counsel never asked her for the help she had offered[22] but rather inquired broadly about what she remembered in front of everyone and asked nothing more (PCR 1179). Wilma testified that had she been privately interviewed in 1991 she would have been more forthcoming, would have testified to greater detail and would have assisted by providing the names and locations of other potential witnesses (PCR 1175). During cross-examination, she repeatedly emphasized

[22]See trial counsel secretary's memo to file regarding telephone conversation with Wilma (Def. Ex. 13).

that she was unable to tell trial counsel anything in front of the rest of the family; that she did not know she was supposed to contact counsel on her own[23]; and that counsel never explained anything about the penalty phase or what kind of evidence was important for the jury (PCR 1182).

12. Dr. Clell Warriner/Dr. Harry McClaren

Trial counsel presented no mental health mitigation in the penalty phase. However, trial counsel had retained a psychologist for penalty phase purposes. Collateral counsel presented trial counsel's confidential penalty phase psychologist Dr. Clell Warriner, who explained what happened:

> Q. What did you do in the Gorby case at that time?
> A. At the time Mr. Komarek had me appointed to report directly to him. And I went to the jail, I talked to Mr. Gorby, I gave him a few tests and I reported back to Mr. Komarek.
> Q. Did you --, what did you review in addition? Did you review any materials?
> A. I had very little material at the time. What I had was just a brief comment from Mr. Komarek with what Mr. Gorby was charged with and I had some historical records about his prior criminal history.[24] That's basically what I had at that time when I did the evaluation.

(PCR 1105-06) (emphasis added).

When asked whether his opinion or advice to trial counsel would have been different had he been provided the "rather

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[23]She had after all offered help in advance of his arrival which he showed no interest in when he arrived.

[24]Warriner had received some information from Annis, Texas DOC records, and some medical records (PCR 1137-38; see also State Ex. 1 at 7; State Ex. 3 at 90).

enormous quantity of records" that post-conviction counsel provided, his answer was emphatically yes (PCR 1109; 1113):

> Q. How would it have changed your opinion?
> A. It would have changed my opinion in terms of particularly, especially in the sentencing phase. It would seem to me that there is a bunch of, an extremely high number of him, bits of information in there that would have been pertinent in terms of aggravating, mitigating circumstances and all that stuff that has to be decided during the sentencing phase that I was not aware of and far as I know no one was aware of during the first trial.
> Q. Assuming that everything you reviewed is true have you formed an opinion about the mental state of the individual who committed the murder of Mr. Rayborn?
> A. Yes.
> Q. What is your opinion?
> A. It is my opinion that who ever committed the murder did it in an extremely violent manner. It was in all likelihood done in an impulsive way. It is my opinion that it was done with repeated blows to the head which were dealt in a very violent and --, it was certainly an issue that I would call overkill. It was done in a situation by an individual who, in my experience and everything that I've been able to read and talk about with other individuals who do this business occasionally, it is an individual who was out of control in terms of his or her approach to the incident, that they were emotionally dysfunctional, if you will and out of control. Everything that I've read seems, read or seen in the pictures it would seem to indicate that.

(PCR 1114-15)(emphasis added).

Warriner reviewed the crime scene photographs[25], the trial transcript, an affidavit from collateral counsel's forensic scene expert Stuart James[26], police reports and witness statements,[27]

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[25]Def. Ex. 29.

[26]Def. Ex. 22.

[27]Def. Ex. 28.

documents regarding Gorby's parents' divorce[28], Olen's birth certificate[29]and a document regarding Olen's auto accident[30] and explained that the information:

> fills in the blanks about the individual development from a variety of different people's points of view. It is not really on one individual's view of the situation of Mr. Gorby's view of the situation but it has, it is like instead of just reading every third chapter in a book you get to read the whole book. And it was very helpful in that regard because Mr. Gorby's life pattern appears to be much clearer now to anybody who reads all that than they would have been just by doing a competency evaluation. Whatever the individual can tell you, what you can get from testing, you get an enormous amount of book value, if you will, out of that you don't get just from seeing and talking to the client.

(PCR 1120).

Warriner reviewed medical[31] and psychiatric records[32] and found them all useful and supportive of his opinion. Of particular importance was a July 1962 psychiatric assessment of Gorby and subsequent interview of Wanda Gorby, by David H. Smith, M.D. which he had not seen or been provided before trial (PCR 1120-25). The report reveals that after Ernie's remarriage, Ernie

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[28]Def. Ex. 17, Tab 13 & 14. Trial counsel had obtained these records but not provided them to Warriner (State Ex. 1 at 24-38).

[29]Def. Ex. 17, Tab 15. Trial counsel had obtained this document but not provided it to Warriner (State Ex. 1 at 55).

[30]Def. Ex. 17, Tab 16.

[31]Def. Ex. 17, Tab 15.

[32]Def. Ex. 17, Tab 20. Trial counsel received these records June 12. In his request he explained he had not learned of their existence until his trip to W. Virginia June 8-10 (State's Ex. 1 at 10-19). Trial counsel obtained these records but never provided them to Warriner.

took Olen to see a psychiatrist during the summer before Olen turned 13. The report contains the following about Olen and his condition:

> The Patient is a 12-year-old boy. He was born on November 27, 1949. He has two sisters, ages 10 and 14. He has no brothers. His father is divorced and remarried. The patient's father and mother separated about a year ago. The patient lives with his father during the summer vacation and lives with his mother when school is in session.
>
> Olen was hit by a car when he was three or four years of age and the father says he had a fractured skull. He was unconscious on and off for several days. He has been in the hospital on two different occasions for asthma. He has had a tonsillectomy and adenoidectomy.
>
> When he goes back to school in September he will be repeating grade six. He also repeated grade three. Even when he did pass from one grade into another in one year his marks were very poor and the parents think that possibly the teachers just push him on because he was too much trouble. His conduct at school has been very poor. The teacher told the father that they can't do a thing with him, that he comes to school in the morning with a chip on his shoulder and he becomes very surly and angry if the teachers ask him to do anything.
>
> His behavior at home is very poor. The father can't seem to do anything with him. He will not listen to what his father and step-mother say. He stays out very late at night[33] and even though he is whipped he still continues to disobey. He does not get along well with other children. He quarrels with them and ends up fighting with them. He uses a lot of profanity[34] and the neighbors complain to his father about it. He steals money from his home and he steals other articles from the neighbors. He lies very often. Punishment for any of these offenses does not seem to help.
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> The father says that when he is staying with his mother she has neglected him. He says that very often she is not at home and Olen just wanders around town. The

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[33]As he was accustomed to being permitted in Littleton.

[34]As he was taught by the men in whose care he was frequently left in Littleton.

father doesn't think that the environment in the home with his mother is good but the mother won't let the boy stay in the father's home unless the father agrees to continue to pay for support for the boy. The father doesn't think that this is fair and for this reason won't go along with the arrangement.

Olen is obviously a very unhappy boy. He does not give one the impression that he is mentally retarded in any way. In fact, he seems to be a rather bright boy. He is very unhappy with the present arrangement of spending sometime with his mother and sometime with his father. He says he prefers staying at his mother's place. He said he would like to do better in school but can't get anybody to help him. He has the feeling that the teacher and the other children pick on him.[35]

I asked the patient's father if it would be possible to have the mother come in to see me. I think if this boy is to be helped that most of the therapeutic efforts must be aimed at the mother and father **especially the mother**. **Certainly the boy is lacking in a feeling of security and needs someone to take an interest in him and help him with his schoolwork and help him in his relations with other children and adults.** Until I see the boy and/or his mother again I have given him a prescription for Librium, 10 mgs., t.i.d.,p.c.

Final diagnosis: Primary behavior disorder. (Def. Ex. 17, Tab 20).

The report also contains this notation about Wanda:

The patient's mother came in today. She is divorced from the patient's father. She was very perturbed about her husband saying that she did not look after her boy properly. Apparently the money that he gives his ex-wife is not enough for her to maintain the home and she has to go out to work. She says there are times when Olen is alone but this is impossible to prevent because of her work. However, she feels that she does provide a good home for him. She says that she does go out occasionally but when she does her mother is there to look after the children. She said she realizes he has been having difficulty in school but she does not know the reason for it except that her ex-husband was not very bright nor were any of the family. She thinks its probably a hereditary disorder.

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[35]As did the men in whose care he was frequently left in Littleton.

> She says she does have difficulty at times in managing Olen. At times he is disobedient and she tries her best to discipline him but this isn't always possible. She said he much prefers living with her than with her ex-husband and his wife. She doesn't feel that he needs any psychiatric help and is very much against him coming to see me. Her family doctor is Dr. Markus and she is going to discuss the matter with him and ask him to get in touch with me.

(Def. Ex. 17, Tab 20) (emphasis added).

The medical records from Gorby's 1979 admission for a shotgun wound to the Washington Hospital in Washington, Pennsylvania (Def. Ex. 17, Tab 22) were also reviewed by Warriner. Those records indicate heavy alcohol and drug consumption and reveal that Gorby reported he was in an auto accident at age 7 and had a "plate in head." The medical records from Gorby's 1989 admission to the Texas Department of Corrections [DOC] show low back pain secondary to an old gun shot wound and "post craniotomy with small metal plate by history," however, the Texas DOC skull x-ray failed to reveal the presence of a metal plate (Def. Ex. 17, Tab 28).[36]

Warriner reviewed affidavits[37] and statements[38] from family and friends which painted parts of the picture. The information included the observations of: 1) an aunt by marriage, Garnet Gorby, that "it was not uncommon to see Wanda in a bar almost every night," and that Wanda "did not want Olen because he interfered with her drinking and partying" (Def. Ex. 19); 2) an

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[36]Trial counsel had obtained these records, including the report of a prior skull x-ray showing no "plate," and provided them to Warriner but did not provide them to Goff.

[37]Def. Ex. 19, 20, 21.

[38]Def. Ex. 25, 26, 27.

uncle by marriage, Ralph W. Taylor, Sr., who reported the heavy drinking by Ernie Gorby and Angie Gorby (Def. Ex. 20); and 3) Leona Carmen, wife of the mayor of Littleton and long-time grocery store clerk of the small town who said:

> 3. I distinctly remember the Gorby family. The Gorby family was very noticeable within the community because of Wanda Gorby's behavior. To the best of my knowledge, Ernie Gorbie [sic] moved north to Weirton, West Virginia, and left Wanda and the kids in Littleton.
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> 4. My first memory of Olin [sic] Gorby was when he was hit by a car. He was playing in the road and a car ran him over. Wanda couldn't dress Olin's head wounds. It appeared as if Olen's head had been hit by the front bumper of the car. I volunteered to dress Olin's head wound so that the odor and risk of infection could be curtailed. I had to dress Olin's head wounds three times.
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> 5. Wanda was not much of a mother. Wanda spent the majority of her time in the local town tavern and walking the road looking for men. I do not know who was taking care of Olen during this time. I remember when Olin was seven years old, he would be in the street without any supervision.
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> 6. During the same time, if Wanda did not have anyone to watch Olin, she would bring him to the bars and allow him to drink alcohol. By the time Olin was eight years old, he was abusing alcohol. Many of the town men found it humorous to watch little Olin get drunk. Wanda never curtailed the young boys drinking. In fact, she continued to bring him to bars.
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> 7. Wanda's maternal side of the family, the Stottlemires, had a history of alcohol abuse. The whole family drank excessively, to the point of being alcoholics. In addition to alcoholism, there was a history of mental illness. Mildred Stottlemire, who was married to Wanda's brother, Homer, had attempted suicide several times. All of Mildred's siblings had committed suicide. When Wanda would go drinking, she often left Olin in the deficient and inept care of Mildred.
>
> 8. Wanda would walk the road all hours of the night. She resembled what we would call a "roaming girl." Everyone knew she was very promiscuous.
>
> 9. While Wanda would take up with different men in town, Ernie would come to Littleton to pay her grocery bill. Ernie always appeared to try to make sure the kids were fed, but Ernie liked to drink alcohol as well.

10. Around the same time Wanda was dragging Olin around to the town bars, Olin began developing extreme behavior. Olin would do anything anybody told him. Oftentimes in the town the older boys and even men would get a kick out of telling Olin to say cuss words or spit on people. Olin always did as they asked and relished any attention they would give him.

11. No one dared approach Wanda about her behavior of how she raised her children. Wanda was very confrontational and would cuss you out or threaten to beat you up in the streets. Most of the town ladies ignored her. The town ladies and I wanted to say something to Wanda about how she was raising Olin but feared she would take it out on the boy. I regret having not said something.

12. The town women did feel very sorry for Bessie Stottlemire, Wanda's mother. Bessie was often left to care for Olin and the other children when Wanda would be out drinking or taking up with other men. Bessie was well revered in the town of Littleton. In fact, most of the town felt sorry for her because Wanda was such an embarrassment.

13. I always wondered how poor Olin would fare in this world with that type of upbringing.

(Def. Ex. 21).

Also included were the observations of close childhood friends of Olen that: 1) Olen was easily influenced; 2) his behavior changed after he returned from reform school and it was always suspected that he was raped while in the care of the school; 3) his father neglected him; 4) he did crazy things when drunk or on drugs; 5) he shot up many types of drugs; and 6) he just wanted to be loved (Def. Ex. 32; see also Def. Ex. 26). Additionally, in a brief interview provided to Warriner, Mildred Stottlemire acknowledged that 3 of her brothers committed suicide and that she has been hospitalized for her mental illness (Def. Ex. 25).

Warriner described his impressions:

A. The picture that comes to me is this. That Olen up to the point of his head injury was a nice,

polite kind of quiet introverted boy. After the point of the head injury and after his recovery there from he became much more belligerent on a regular occasion. He was basically a neglected child, that his mother and father after the divorce, that the mother basically left him largely in the care of the grandmother who lived upstairs when she was gone and that he, from the age of 9, 10, 11 was a regular drinker at the local bars. He wandered the streets of the small town. He was sort of the town clown as I picture it. The older guys would sit on the street, drink their beer, send him in to get a beer, have him drink it, have him spit at cars, throw bottles, cuss people just for their entertainment. It was during that time that his school performance became abysmal. In the 6th and 7th grade his school record reflects that he hardly did anything. By all people's standards he was a significant alcoholic by the time he was 12 and that he accompanied his mother to bars on a regular basis and particularly after the divorce it is questionable as to when this happened, the mother had a variety of lovers that she picked up at the bars or other local places that periodically came to live from one night to three weeks in the family home. Some of them were okay. All of them drank. And it was basically that type of dysfunctional household. He had no, no consistent discipline that I can see, no control. It is reported by a bunch of people that mama appeared not to care what happened to her boy. Now, all of that makes the picture of a child who was raised in not what we would consider to be fantastically self developmental standards. It even seems to be below the standards that the, you sent me a copy of the West Virginia study of poverty in West Virginia and it seems to be slightly below average in even West Virginia which they say is absolutely abominable in the terms of welfare patients and number of people out of work and living a somewhat we would consider a dysfunctional lifestyle. This is even lower than that. Nobody doubts that the grandma who lived upstairs was a positive influence. No one doubts that the father, Ernie, helped try to support the children and would visit with them and try to be a halfway decent father. But he was a distant father except for that brief period of time when the boy was sent to live with him because he was out of control and been in trouble with the juvenile authorities. So it is just a question of spiraling downward in a combination of drugs later on, alcohol to start with, misbehavior, asocial activity and a violent, and a very difficult everybody describes that the boy had a very difficult time once he got upset, once he got confronted, once he got out of control that he went on and on and on and on and on out of control and nobody

> could do anything with him until he cooled down. That's repeatedly and that is one of the things that I find very significant. I can't imagine anybody wouldn't find that significant in terms of an early brain injury and/or any other psychiatric disorder that might be an intermittent explosive disorder or whatever they want to call it now. But all of that is important. All of it is consistent throughout the, you know, slight variations from the different relatives, a completely different story that is told by the mother and, you know, I understand that she has to defend her own particular stand. However, it is said in at least two of the depositions that we always thought we ought to go and try to do something about it but we were afraid of the mother. The mother would cuss, raise hell and confront us if we said anything about the way she was doing her children and looking back on it I wish we had. Well, they didn't. All of that is just, makes such a crystal clear picture I cannot imagine that there is any lack of clarity in that, thanks to all the documents and the information that you sent me and the effort that you've put into really researching what the boy's original history was. All of that I think in answer to your original question should be pertinent and should be mentioned I think in particularly in the penalty phase of any court hearing that is being held in terms of when there is a capital offense involved. I can't imagine why anybody would think it shouldn't be. But, you know, I'm just a psychologist.

(PCR 1126-29) (emphasis added).

Warriner testified that Olen suffered regular and severe emotional abuse (PCR 1130). He testified that Olen grew up in an alcoholic home, with a neglectful mother and stepmother; an alcoholic, verbally abusive and unavailable father; early alcohol dependency before puberty; organic brain damage; severe headaches; poor school performance; substance abuse; and poverty (PCR 1132).

Warriner testified that he was never asked by trial counsel to render an opinion on the existence of the statutory mitigating factors relating to mental condition. At the evidentiary hearing, he testified emphatically that both statutory mental health

mitigators applied. With respect to "extreme mental or emotional disturbance at the time of the offense," Warriner testified:

> A. It is my opinion that the evidence that, my evaluation of the evidence and what I know shows that this was an extremely violent impulsive act that was done only by an individual who was in a condition of non normality which I think would be called mental disturbance.
>
> Q. And is your opinion that the person who committed the capital felony that this is consistent, the language that the person would have been under the influence of extreme mental or emotional disturbance?
>
> A. It sounds to me like it is extremely true.

(PCR 1135) (emphasis added).

With respect to "capacity of the defendant to appreciate the criminality of his conduct or conform his behavior to the requirements of the law," Warriner testified:

> A. The evidence that was supplied by the forensic experts, the view of the scene, the testimony, the background, the history of head injury, all of that in combination would indicate to me that this was done by an individual who was out of control and who provided overkill to this whole situation in a way that was over and over and over and over unnecessarily. So if it was to just produce the killing it appears to me that it was an emotional reaction that was out of control. Now, whether that means that the individual could comport himself societally seems to me likely that was not the issue at that moment. It was like trying to step in the middle of a dog fight. Nobody knows except the outside people why or where or how that occurs but it was an awful scene.
>
> Q. So, do you have an opinion that the, now I'm talking hypothetically, I want to now ask you, Mr. Gorby was convicted of this crime, he did not acknowledge that crime to you in the interview, I understand. Based on his history and the crime scene, assuming that Mr. Gorby committed these, these, this offense for which he was convicted, is it your opinion that these two statutory mitigating factors apply to Mr. Gorby as you now know him having reviewed all of this information?

A. I cannot imagine anybody who would not think so.

(PCR 1134-36)(emphasis added). Warriner testified that if he had seen the information provided by post-conviction counsel at the time of trial, he would have "[a]t the very least [] advised [] [trial counsel] to have either me or some other psychologist review the information that I have today and to present themselves on call at least for the sentencing phase of the trial" (PCR 1159).

Regarding the existence of the heinous, atrocious and cruel aggravating factor, Warriner testified that to him it was "crystal clear" that the murder was not committed with an intent to torture (PCR 1159).

Warriner was emphatic on cross-examination that he was able to testify in the collateral proceedings to the existence of statutory and non-statutory mitigating factors because he now knew a great deal more about Olen's alcoholism and his dysfunctional upbringing. He explained:

> Q. So we understand that the information about alcoholism or the fact that he slept with his mother or the fact that she had boyfriends over, those are the things that make a difference to you now that you said you didn't know about then?
>
> A. I have face to face witnesses who watched his upbringing throughout his developmental years. All of that contributes to my knowledge of his upbringing and document some difficulties with emotional and behavioral control, yes.
>
> Q. Is it the testimony of his father regarding at what age the defendant began to drink, is there anything else other than that you are aware of when he began to drink?

A. About 6 or 7 different affidavits in there from community members and sisters and other people that talks about when he started to drink, Mr. Meadows.

(PCR 1144-45) (emphasis added).

Based on his relationship with Komarek, Warriner was confident counsel would have provided him the information if he had obtained it his own investigation:

Q. Now, if, in fact, Mr. Komarek had investigated all of that activity up there do you have any reason to think that had his investigation produced the information which you're disclosing here today that he would not have disclosed it to you at the time?

THE COURT: Do you understand the question?

Q. (Mr. Meadows continuing) Do you have any reason to believe that he would be hiding information that his investigation revealed?

A. Oh, no, no, he's an honorable man, [Komarek] would have given me everything he had.

Q. You feel he was open and forthright with you during the course of this investigation about the material he assembled?

A. As much as he could possibly be, yes, sir.

(PCR 1144-48) (emphasis added).

Regarding the issue of counsel's group interview of Gorby's sisters in the presence of their mother Wanda, Warriner testified that each individual should have been interviewed alone and only together thereafter if counsel had wanted to see whether it changed their testimony. Because "individuals are influenced by the presence of other people to shade or change or admit testimony or to exaggerate testimony depending on family members or friends or acquaintances who are present in the investigatory room," it is

imperative to conduct private interviews when a family background investigation is being conducted (PCR 1157-58).

In rebuttal, the State presented Dr. Harry McClaren who testified that he agreed that Gorby suffered a degree of brain damage, alcohol dependency and drug abuse but that he did not have an opinion "one way or another about [statutory mitigating factors] because the defendant denies having engaged in the homicidal behavior" (PCR 1331). McClaren agreed that consumption of alcohol and/or use of narcotics and the duration of substance and alcohol abuse aggravates organic brain dysfunction (PCR 1335).

State expert McClaren agreed that despite Gorby's average intelligence, his poor grades in school could be the result of his underlying brain injury and the hyperactivity and inability to pay attention it caused (PCR 1336).

McClaren acknowledged he had no doubt about the head injury reported (PCR 1337).

McClaren admitted that the crime scene might be consistent with having been committed by a person experiencing some level of organic brain dysfunction, alcohol intoxication, impulsivity and difficulty controlling actions and emotions (PCR 1337) and that the scene, including the actions apparently taken by the killer at the scene after the killing, was consistent with the hypothesis that the murder was a rage killing (PCR 1338).

McClaren had no psychological explanation for why the victim was dragged into the bathroom, why the ligatures were placed on the victim's neck or why a cord was looped through a drawer in the bathroom (PCR 1338).

Although McClaren testified that actions taken after the death of the victim by the killer appeared purposeful, he agreed that much evidence from the scene was consistent with the hypothesis that the person was acting less than purposefully. That evidence was that the killer did not take a firearm from the bed of the master bedroom, the victim's VCR, television, microwave, or other valuables, including $17 cash, readily accessible in the victim's pocket.

Because there was no evidence of when the note was placed on the door, State expert McClaren agreed that it had no relevance to the killer's psychological state at the time of the crime (PCR 1340). McClaren agreed that at the competency hearing he recommended more testing and more investigation of mental state issues for penalty phase (PCR 1341-42).

McClaren agreed that if Jerry Wyche's testimony that Olen Gorby did not like homosexuals was true, it might be consistent with Olen having committed a rage killing.

McClaren agreed that it was possible the murder was committed by someone having an episodic psychotic episode (PCR 1343).

McClaren agreed that a brain injury would possibly contribute to and have a causative connection to the commission of a murder (PCR 1345).

13. Dr. Barry Crown

Collateral counsel also presented the testimony of an independent neuro-psychologist, Dr. Barry Crown[39], who testified

[39]Dr. Crown's curriculum vitae was admitted (Def. Ex. B).

to the existence of statutory mental health mitigation. Crown administered a number of neuro-psychological tests designed to address the functional capacity of Gorby's brain. Crown conducted a clinical interview and a personality profile of Gorby. Additionally Crown reviewed reports and testimony of Drs. Annis, McClaren, Goff and Warriner, school and medical records, police and investigative reports, testimony, information and statements about the cause of death and crime scene, and video and photographs of the crime scene (PCR 1433-34). Based on his evaluation of Gorby, the information reviewed about Gorby and the crime he was convicted of committing and assuming Gorby committed the crime, Crown was of the opinion that both statutory mental health mitigating factors were present (PCR 1434-35). Crown explained:

> I saw Mr. Gorby in his totality, having reviewed the records of his life, statements from his family, knowledge that he has sustained a significant head injury, head trauma as a youngster below the age of 5, that he had emerged from a dysfunctional family as being even dysfunctional within that family, which led the family to call him Bucky because of his impulsiveness and general misdirection. I then reviewed his history in terms of not being able to control himself, being out of control at times, having a great deal of difficulty maintaining control. I read and reviewed and considered affidavits and statements that he had been involved with alcohol and substance abuse before the age of 10, that he was a regular consumer and continued to consume alcohol up until the time of this trial or at least the time of his arrest. I also reviewed records that indicated that he was a substance abuser beyond the use of alcohol, including the smoking of cocaine in various forms. I became aware that Mr. Gorby through various statements that I saw had a tendency to attach himself to other people, that he was thrown into a predicament here in the Panama City area where he was were another person and then disengaged from that person. He had little resources, he had little means, he was under a great

deal of stress and was coping through the use of substances.

(PCR 1435-36) (emphasis added).

Crown explained that his conclusions were supported by the observations of people who saw Gorby in the hours prior to the murder:

> In the hours prior to the offense a number of witnesses did testify and gave statements that they had seen Mr. Gorby in disarray, they had seen him being fidgety, unable to control himself, they had seen him drinking, they had seen him walking in and out of bars having additional drinks, the bartender at one place, La Royale, didn't want anything to do with him. He thought that he was intoxicated at one point. Various other people saw him buying beer, drinking beer, and that seemed to be a pattern, that he was disheveled, he was in disarray, he was grungy, and he was also extremely fidgety during that time period.

(PCR 1436-37) (emphasis added).

Crown testified that his conclusions were further supported by the findings of several doctors who had examined Gorby previously:

> A. Doctor McClaren, Doctor Annis, Dr. Warriner, suggested that there was a strong likelihood that Mr. Gorby had organic brain damage. Ultimately Doctor Goff, a neuropsychologist, examined Mr. Gorby and concluded that Mr. Gorby did have organic brain damage. My own examination confirms that. So my examination several steps removed confirmed Doctor McClaren's suspicions, Doctor Annis' suspicions, Doctor Warriner's suspicions, and Doctor Goff's findings and I would agree that indeed there were suspicions and indeed there are neuropsychological deficits, impairments, and damage to Mr. Gorby's brain.

(PCR 1437-38).

Crown testified his findings were corroborated by school and psychiatric records dating to 1962. He noted that even as a

child, Gorby was functioning at a level below 90 to 95 percent of his peers (PCR 1439-40).

Crown also found it significant that Gorby's father took him to a psychiatrist at age 12 and that Gorby had been prescribed librium:

> I had been surprised that the family who was dysfunctional in and of itself had noticed that even within that dysfunctional environment Mr. Gorby was far different and that they needed some outside help. They saw Doctor Smith at that time and didn't continue to follow up, but certainly they knew that Olen Gorby was far different and unusual even within their circumstances.

(PCR 1441).

Crown's findings were also supported by the condition of the crime scene:

> A. It was important in looking at the crime scene through the video and the photographs because I noticed independently but also Stewart James, the forensic scientist that looked at things also stated in his affidavit that there were firearms, there were knives that were left behind, there were small appliances, VCR, television, so on, that were left behind. There was money available. There were many things that were left behind or were not taken. In addition, the presentation itself appears to be disorganized. The victim was tied, apparently after the offense was committed the body was moved. And the entire production as I viewed it is certainly suggestive of an impulsive response.

(PCR 1440) (emphasis added).

Crown summarized his conclusions as follows:

> First, my opinion that his reasoning and judgment were impaired; secondly, that his ability to self-assess was impaired, and Mr. Gorby historically has had a great difficulty with self-assessment and has relied on defense process of simply denying things, denying things in the face of others presenting information and drug use denial. That denial seems to increase as the substance use increases. In addition, he demonstrates a great deal of impulsivity, a great deal of inability

> to control his behavior, to modify his behavior, and to regulate his behavior through self-monitoring and assessment. In addition, because of his reasoning and judgment problems and his impulsivity he has a tendency to work and live for the moment rather than to consider the consequences of his conduct. In that respect his neuro development is extremely limited.

(PCR 1439).

With respect to Gorby's brain damage, Crown stated:

> I concurred with Doctor Goff that indeed there was an organic personality syndrome. I would have expanded that based on being able to look at this historical view and would have also called it a frontal lobe syndrome.

(PCR 1441).

Crown added that for a brain-damaged individual such as Gorby, consuming alcohol caused greater impairment than it would for a normal individual:

> A. Okay. Given that, we have an impaired brain, a smaller amount of substance has a greater effect on a damaged brain. So even though the amounts may have been small, although certainly from the materials that I reviewed, the amount wasn't small, the smaller amount would have a greater effect but to the extent that he did consume greater amounts that would have even a greater effect on his capacity to exercise judgment and reasoning and exercise various other neuropsychological processes.

(PCR 1438).

14. Paul Komarek

In a nutshell, trial counsel's testimony regarding his penalty phase preparation was that he needed "[a]nother six months and investigator to help" investigate the case "the way it should have been done" (PCR 1062-63). Thus counsel testified he had no strategic reason for the way in which he conducted his penalty phase investigation. Trial counsel further testified he had no

strategic reason for not giving information he had to Dr. Clell Warriner, his penalty phase expert (PCR 1012; 1065; 1362). Trial counsel was unsurprised by the outcome of the guilt phase and knew the penalty phase was crucial (PCR 966; 977; 981; 983). Trial counsel believed the Raborn murder was an impulsive act which utilized a weapon of opportunity (PCR 1015). Trial counsel had never previously conducted a penalty phase (PCR 1000).

Before he was appointed, Gorby was represented by attorney Michael J. Stone of the Office of the Public Defender (R 1840). Though trial was set for Nov. 26, 1990, the Public Defender certified a conflict on Nov. 5, 1990 (R 1878). On Nov. 19, trial counsel was appointed (R 1883) and sought a continuance (R 1884-85). On Dec. 11, 1990, trial counsel requested a penalty phase expert (R 1940-41). On Dec. 20, 1999, trial counsel requested funds for investigative help (R 1945-46). The court granted the request Jan. 18, 1991 and later issued an order appointing Gene Roye as investigator and Dr. Lee Norton as penalty phase investigator (R 1985-87; 1998-99) directing that, "[t]he work of the investigators shall not be duplicitous (sic)."

On Jan. 18, 1991 the court granted trial counsel's request for a confidential penalty phase expert and on Jan. 30, 1991 appointed psychologist Warriner (R 1985-87; 1998).[40]

On Feb. 21, in response to trial counsel's suggestion that Gorby may have been insane at the time of the offense and may be

[40]Dr. Warriner did not testify at trial or penalty phase but did later testify at the post-conviction evidentiary hearing (PCR 1104-63).

incompetent to stand trial (R 2063-65), the Court scheduled a competency hearing and appointed Drs. Lawrence Annis and Harry McClaren to evaluate competency and sanity (R 2068-71).

On March 18, trial counsel wrote Warriner enclosing the court's order and informing Warriner of the court's appointment of Norton as the penalty phase investigator (State Ex. 9). On April 5, 1991, trial counsel forwarded Gorby's Texas prison medical records and some educational records to Warriner (State Ex. 10).

On April 8, trial counsel had a brief telephone conference with Warriner. On April 8[41], Norton sent Komarek a list of the records which should be obtained, avenues of investigation which required pursuit, and her assessment that it would not be possible to locate and analyze records, travel to various locations to interview people and collect information for the expert witnesses, have Gorby evaluated, and identify and develop relevant mitigation in time for a June trial date or anytime before the fall of that year (Def. Ex. 16). Norton said if trial counsel obtained a continuance, she would have time to do a competent job (Def. Ex. 16). On April 11, 1991, trial counsel requested Annis produce his test results to Warriner (State Ex. 3). On April 26, 1991, trial counsel forwarded Annis' report to Warriner (State Ex. 3).

At the April 19, 1991 competency hearing, Annis testified that Gorby was competent and sane but certainly brain damaged. Annis recommended neuro-psychological assessment (Def. Ex. 17, Tab 3 at 5-12). McClaren testified that Gorby was competent, but he

[41]2 1/2 months before trial.

also could not rule out brain damage. McClaren found no indication that Gorby exaggerated his symptoms. The symptoms included significant anxiety and depression. McClaren testified that brain damage could affect Gorby's behavior, but that further investigation was warranted and a neuro-psychologist would be helpful in that regard. Based on the testimony and reports of McClaren and Annis, on April 24, trial counsel requested a neuro-psychologist (R 2181-82). That request was granted May 15, 1991 (R 2217-18).

On May 2, 1991, with trial scheduled for June 24, 1991, trial counsel requested a continuance (R 2193-95). As grounds counsel cited his recent request for a neuro-psychologist; insufficient time to receive lab tests, conduct depositions, or retain independent experts; and insufficient time to complete the necessary penalty phase investigation. The trial court denied the request (R 2219). On May 15, 1991, the court granted trial counsel's request for a neuro-psychologist (R 2217-18). On May 15, 1991, trial counsel requested permission to go to West Virginia and argued his motions for continuance and a handwriting expert[42] (R 2216). His motion for continuance was denied (R 2219). On May 20, 1991, trial counsel had a telephone conversation with Warriner about possible neuro-psychological experts (State Ex. 3). On May 21, trial counsel listed Olen's mother, 3 sisters, daughter and step-mother as witnesses (R. 2227). On May 23, 1991, Warriner called trial counsel with

[42]See R 2209.

additional suggestions for possible neuro-psychological experts (State Ex. 3). On May 31, trial counsel's secretary wrote him a memo about Olen's sister Wilma Morris (Def. Ex. 13). Wilma suggested they speak with a woman who saw the auto accident.[43]

On June 4, 1991, trial counsel filed an Amended Motion for Continuance citing his need to re-request a handwriting expert, the State's late disclosure of reports of testing performed in March as well as FBI laboratory reports and thus insufficient time to conduct further discovery. Trial counsel also cited the incompleteness of the penalty phase investigation and unavailability of Norton, the investigator appointed to assist him with the penalty phase (R 2351-56). Trial counsel explained, "[t]he assistance of this expert [Norton] is necessary to assimilate and follow up on information received from the undersigned visits with family members, hospitals and schools in West Virginia" (R 2153-54). The motion stated further that trial counsel had finally scheduled a trip to West Virginia for June 8-10[44], to talk with Gorby's family members and conduct an investigation for the purpose of the penalty phase. Counsel represented that this was the first available time he could arrange to travel to West Virginia prior to the scheduled trial. Trial counsel argued there would not be sufficient time prior to

[43]Leona Carmen, who collateral counsel interviewed but trial counsel did not (compare Def. Ex. 21 with PCR 1022).

[44]2 months from learning of Norton's unavailability.

trial to develop any leads or investigation of information subsequent to this trip (R 2354).

On June 8, trial counsel's neuro-psychologist Dr. John R. Goff performed an evaluation of Gorby and provided trial counsel with a confidential report (PCR 1191; Def. Ex. 31).[45]

On June 13, the trial court denied Gorby's Amended Motion for Continuance (R 2394). On June 13, trial counsel listed Ernie Gorby as a witness (R 2373). On June 19, trial counsel listed Goff as a witness (R 2420).

On June 21, Warriner called trial counsel's office and spoke to his secretary about whether to be listed as a witness. The secretary's memo to the file reflects that Warriner felt he had no testimony to add to Goff's (State Ex. 3). On June 24, trial counsel withdrew the suggestion of insanity (R 2456) and filed a Second Amended Motion for Continuance based on the incomplete penalty phase investigation and the need for background information to corroborate the brain damage findings (R 2459-62). The motion was denied and trial commenced June 24, 1991.[46]

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[45]On June 15, because Goff found temporal lobe damage but wanted a skull X-ray and EEG, trial counsel requested funds for the tests (R 2296). On June 17, because Goff detected a possible epileptic disorder, and wanted a CAT Scan, trial counsel requested funds for this test (R 2398). The trial court granted these requests (R 2400-03).

[46]In denying the claim that the trial court abused its discretion, this Court stated:

> The public defender's office originally represented Gorby, but, when it sought permission to withdraw, the court appointed a private attorney to represent him. The day after being appointed, that attorney asked

Trial counsel's opening statement at the guilt phase was that Gorby was under influence of alcohol at the time of the murder and had a substantial childhood head injury and poor judgment (R 531-38).[47] On Monday, July 1, 1991, after the State had concluded its case in chief, trial counsel presented: 1) Wanda Garrison, Olen

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> for and received a continuance. Seven months later, on the day trial began, counsel moved for another continuance because one of his two penalty phase investigators had not had time to work on the case, two witnesses in Texas could not be located, and the neuropsychologist needed more time to "confirm" his findings. After hearing both sides on this motion, the court denied the continuance, and trial commenced. Gorby now argues that the court committed reversible error by denying the continuance. We disagree.
>
> Granting a continuance is within a trial court's discretion, and the court's ruling on a motion for continuance will be reversed only when an abuse of discretion is shown. Bouie v. State, 559 So.2d 1113 (Fla.1990). As pointed out by the state, counsel had two investigators and also personally travelled to West Virginia to investigate Gorby's background, the mental health expert had more than adequate time to prepare for trial, and counsel did not allege that the Texas witnesses would ever be available. Gorby has not demonstrated that the court abused its discretion in refusing to continue the trial.

Gorby v. State, 630 So. 2d 544, 546 (Fla. 1993).

[47]The State's opening statement was that Gorby had: 1) been in Panama City with Robert Jackson but separated with him after a fight; 2) checked into and later checked out of a Panama City rescue mission at 7:00 p.m.; 3) later committed an "unimaginably brutal" murder of an elderly victim with whom he had been seen earlier that day; 4) stolen the victim's car; 5) sold the victim's car to Cleo Calloway in Texas; and 6) confessed to a deaf mute in Texas and various inmates of the Bay County Jail (R 515-31).

Gorby's mother, to testify that when he was 3 or 4, he was dragged 45 feet by a car (R 1404-18); 2) Michael Wesley Krall, a bartender at the La Royale, who testified that Gorby was in the La Royale on May 6 between 7 p.m. and 8 p.m. and was fairly drunk (R 1419-24); 3) Goff, who testified he examined Gorby on June 8th and diagnosed him as suffering from organic personality disorder & alcohol dependence (R 1425-1506); 4) Tyrone E. Lane, II, who knew Raborn, saw Raborn on May 6 at 2:30-3:30 looking for plumber to fix a toilet seat, and knew Raborn to pick up hitchhikers for the night (R 1507-13); and 5) inmate witnesses and jailers regarding the habits of informants in the CCA jail, specifically Jerry Wyche (R 1517-31).

On Tues. July 2, 1991, trial counsel gave a closing argument that the State had failed to show premeditation, the crime was spontaneous and that defense witness Krall was in a better position to observe drunkenness than the State witness Broadway. Trial counsel argued that murder was committed in haste, Gorby was brain damaged, voluntary intoxicated, and lacked specific intent to commit other felonies. Trial counsel noted that Jackson was more likely guilty than Gorby, and that Perez, Brown, Wyche and Calloway were either unreliable or lying State witnesses. Trial counsel suggested that if Gorby was guilty, it was likely a crime of passion made in response to the victim's sexual overtures (R

1587-1659).[48] The jury guilty verdict came in at 9:20 p.m. (R 1722; 2495-96).

After a break for July 4, the jury penalty phase occurred on July 5. Trial counsel presented: 1) Olen's mother Wanda, who testified she had 4 children and was from a small poor town in West Virginia; that Olen was different after the car accident, that Olen's father was short tempered and drank a lot; that they divorced when Olen was 6 or 7; that when Ernie went to live with Olen, he would beat Olen; that Olen had an ex-wife and 2 children and was himself an alcoholic; and that when Olen's sisters Mary and Wilma were the accidental victims of a police shooting, Olen was hysterical; 2) Olen's sister Garnet Butcher, who testified that when her husband had heart surgery, Olen was a huge help to her and he loves his family; and 3) Olen's sister Mary Jane Cain, who described the shooting incident she experienced and how the bullet went first through her sister Wilma and then into her lung; that Olen was upset at the police over the shooting; that Olen's children love him; and that Olen was very upset that his children's mother was on drugs and had mistreated his son Billy by burning him with cigarettes. At 1:42 p.m. that day, the jury was sent to deliberate Gorby's sentence. At 3:45 p.m., the jury returned a 9-3 death recommendation (R 2546).

At Gorby's post-conviction evidentiary hearing, trial counsel explained he "was only one lawyer and there were witnesses spread

[48]In the State's final argument, they noted the inconsistencies in the defense case (R 1546-87; 1659-87).

all over the place in this case and a lot of evidence in this case. And some of it wasn't forthcoming like a diary[49]. Sometimes things I would ask for[50] and they wouldn't be there, important pieces of information were missing" (PCR 981). Trial counsel testified to doing some preparation for the penalty phase but also to spending "a lot of time on the guilt phase." He stated he felt "you have to dedicate your efforts somewhere and I just devoted most of my effort towards preparation for the guilt phase" (PCR 981-82). Trial counsel explained he requested both an investigator and a mitigation specialist because "[t]he investigator that I had at that time that I was working with is Gene Roy and he was an ex-policeman and I just don't think policemen necessarily make the kind of individuals that can go ferret out and follow up for mitigating information. That's just not the way they've been trained to think" (PCR 985). Counsel explained that "Ms. Norton, who professed to be an expert in that area, would be somebody who have would be better for us. And given what I could see in this case coming, I certainly wanted somebody as good as I could get to do as much as I could get them to do" (PCR 985). Trial counsel added, however, that Norton "couldn't devote the attention to this case that I would have liked her to. As a matter of fact I'm not even sure she billed, she might have put down a little bit, because she felt sorry for

[49]Referring to the victim's diary that was not readily disclosed by the State Attorney.

[50]From the Office of the State Attorney.

me, I don't know. But she gave me some guidance, I had some documents that are in the file, and I tried to do what I could do since I couldn't use her. She apparently was in such demand that she's spread too thin, she was spread too thin, and she had several other trials, if I remember correctly, and she just couldn't devote any time to Mr. Gorby" (PCR 985-6). Regarding the effect of Norton's unavailability, trial counsel stated he "had hoped to be able to develop much more information, or witnesses I should say, for the penalty phase. But I had to devote so much time to the guilt phase, I mean I can't -- I can't go find a witness that's going to say that Mr. Gorby was a good child and not take the deposition of a critical state witness. If I've got to pick, I've got to pick to use my time more effectively focused on the guilt phase. So that's what I did" (PCR 987).

About his June trip to W. Virginia (PCR 987-8), trial counsel explained he had been in contact with Gorby's mother, and spent several hours in W. Virginia talking with her, after which she gathered the rest of the family together (PCR 989). The next day, he spoke to Olen's father on the phone (PCR 988-900).

Gorby had told trial counsel early on that he had been in a very serious car accident when he was very young and that the severe damage he sustained was a turning point in his life (PCR 990-91). Trial counsel indicated that he was interested in the head injury because Gorby may have had "such trauma or mental problems" that if he could prove brain damage he could use the evidence in the guilt and penalty phases (PCR 992-93). Trial counsel explained he did not think Warriner "could get him where

[he] wanted to go" on the brain damage issue and so he asked for Goff in the hopes he could testify to severe brain damage (PCR 995).[51]

Trial counsel explained that he would only have been interested in Gorby's alcohol and substance abuse if his defense was Gorby did it but was incompetent or insane but because he claimed his defense was that Gorby did not do it at all, he was not interested (PCR 996). Regarding penalty phase, he testified that he might have been interested in alcohol and drugs only if he was going to try to show Gorby "couldn't help himself or he had compounded the earlier [brain] damage with excessive drug use, then that might be something to go into." Id. Trial counsel admitted he never discussed mental health mitigation with Goff (PCR 996-97). Trial counsel said he hoped the family who came would tell the jury about what kind of childhood Gorby had, but he did not share with Warriner or Goff anything about Gorby's childhood "other than the car accident" (PCR 999). He said he had wanted Norton to help him "humanize" Gorby for the jury and wanted as much childhood detail as possible (PCR 1000). He simply felt he did not have any information other than the car accident (PCR 1001). However, trial counsel admitted he knew that Gorby began drinking at age 8 or 10 but did not tell Warriner or Goff because he was unaware that it would be important (PCR 1002-04).

[51]Goff did testify to severe brain damage in the guilt phase.

Trial counsel testified that: 1) he did not present Goff at penalty phase because his testimony would have been duplicative (PCR 1006); 2) he presented Michael Krall to show that Gorby was drunk at the time of the crime and to show diminished mental state (PCR 1007); and 3) he presented Gorby's sisters to try to gain sympathy for Gorby and humanize him as "somebody's little boy" and "somebody's brother" (PCR 1008). Trial counsel testified he wanted to show that Gorby's sisters were traumatized by circumstances beyond their control when they were the innocent victims of a shooting incident in West Virginia (PCR 1009). Trial counsel explained that his investigation was limited by his decision to use Gorby's mother to gain "the cooperation of the rest of the family" (PCR 1011). Trial counsel testified he was interested in whether Olen was abused or traumatized and would have wanted the jury to consider that information (PCR 1011). Trial counsel explained he hired Warriner as a confidential psychologist and made the decision not to call him to testify based on the advice given by Warriner at the time (PCR 1028). Trial counsel admitted he relied very heavily on Olen's mother (PCR 1048).

15. Tim Warner

Collateral counsel presented Tim Warner[52], an expert in criminal defense, to testify about how a capital penalty phase investigation should be investigated. Warner testified that a

[52]An attorney with the Panama City law firm of Burke and Blue.

defense attorney in a capital case should "try to gather as much information as you could on all areas of a person's life starting from prenatal through present and you would do that by talking to family members, to teachers, doctors, nurses, mental health people, social service workers, clergy, anyone who may have had contact." He continued:

> In addition you would check records and these records would include court records, health records, mental health records, social service records, school records, death certificates of family members determining cause of death, example, cirrhosis of the liver or violent trauma that they may have experienced. Basically you try to gather as much documentation as you can to help confirm or disprove matters that you're talking to family members and friends and teachers and all those other folks about, to help corroborate or disprove information that you're receiving.

(PCR 1224-25). Warner explained that counsel would need to try to obtain a history of what has happened in the family, not just the individual defendant's generation but several generations, in order to develop a picture of the client. When other resources are unavailable, Warner explained, counsel must go out and conduct an adequate investigation personally. To do so he explained, counsel must conduct private interviews of relevant people (PCR 1226). Specifically, Warner explained that private, separate and possibly repeated interviews with family members are particularly necessary because:

- "you may have an abuser sitting in the same room with an abused person and that information never comes to light"
- "your first contact with them is more introductory and you're trying to develop some trust that they would come out and be forthcoming with you about a lot of the history of the family"
- "a lot of what has happened in the [client's] life happened in their [the family member's] lives" so

> repeated interviews are necessary to be sure the investigation is thorough.

(PCR 1226). Warner also explained how counsel should assist experts retained in a capital penalty phase (PCR 1227). Having reviewed the Gorby case, Warner agreed that neither Goff nor any other psychological expert ever linked Gorby's life or mental conditions to either statutory or non-statutory mitigation. Moreover, Warner testified that it was unreasonable for Komarek's primary focus in penalty phase to simply be "humanization" to the exclusion of non-statutory and statutory mitigation (PCR 1238-39). In cases such as Gorby's, where 2 confidential mental health experts were available, 1 presented in the guilt phase and 1 otherwise available to testify for the first time in the penalty phase, the available statutory and non-statutory mitigation should have been presented through the available expert (PCR 1239-41).

16. Dr. John Goff

Finally, collateral counsel called Dr. Goff to testify regarding his participation in the Gorby trial. Goff recalled reviewing the Wheeling, W. Virginia clinic report [53] and interviewing Wanda Garrison over the phone (PCR 1191). Goff recalled not having the Texas DOC medical records (PCR 1197).[54]

Goff's recollection was that trial counsel never asked him to prepare for the penalty phase or to consider the applicability of

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[53]Trial counsel apparently provided this report to Goff but not to Warriner (State Ex. 1 at 9).

[54]Trial counsel apparently provided these records to Warriner but not to Goff (Def. Ex. 17, Tab 28).

his findings to penalty phase issues (PCR 1192; 1213). Goff believed that while his testimony in the guilt phase regarding testing procedures and diagnosis would not have been different (PCR 1210), his testimony would nevertheless have been more effective in penalty phase (PCR 1194), because he could have testified that Gorby's substantial mental defect would have influenced his conduct and ability to conform his behavior to the dictates of the law (PCR 1194-95). Goff testified that he could have given an opinion, had he been called to testify in the penalty phase, that both mental health statutory mitigating factors applied (PCR 1196). Moreover, Goff would not have recommended another skull X-ray had he been provided the report of the X-ray performed by Texas DOC (PCR 1197). Goff found the information provided in post-conviction by Gorby's father to be particularly helpful, corroborative of Gorby's history and condition, and more detailed than the information provided by Wanda Garrison (PCR 1199; 1206).

SUMMARY OF THE ARGUMENT

1. The trial court erred in denying Gorby's ineffective assistance of penalty phase counsel claim. Gorby has been denied a full adversarial testing and his rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution and corresponding Florida law. Counsel conducted an unreasonable investigation. Counsel delayed his investigation until too late before trial. Counsel unreasonably interviewed Gorby's family in a group. Counsel unreasonably never interviewed Gorby's father. Counsel

thus had no information to provide his penalty phase expert Clell Warriner or a brain damage expert. If the jury had heard from Warriner and a fully informed brain injury expert, the jury would have considered important statutory and non-statutory mitigation and there is a reasonable probability of a different outcome.

2. Gorby did not receive competent assistance from a mental health expert as he was entitled to under Ake v. Oklahoma in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Counsel's failure to ensure that Gorby received such mental health assistance from a fully-informed qualified expert was prejudicial deficient performance.

3. The trial court erred in denying Gorby's claims that counsel rendered ineffective assistance or the State violated Brady v. Maryland and/or Giglio v. United states. The trial court failed to conduct a cumulative analysis of Gorby's Brady and ineffective assistance of counsel claims. Gorby was denied an adversarial testing and his rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution and corresponding Florida law. Because of unreasonable counsel performance or state non-disclosure, State witnesses Jackson was not impeached with evidence he threatened not to testify unless the State met his demands, Callaway was not impeached with evidence he was psychotic, Sybers was not impeached with evidence he was under investigation by the State for the murder of his wife, and Johnson was not impeached with evidence she was trained in blood spatter interpretation by a fraud. As to State witnesses Allen Brown and

Marissa Brown, Gorby was denied counsel and the right to cross-examine.

4. The lower court erred in summarily denying meritorious ineffective assistance of counsel claims and as a result, Gorby has been denied his rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution and corresponding Florida law.

5. Gorby was denied a full and fair evidentiary hearing, his rights to due process and equal protection under the Fourteenth Amendment and his rights under the Fifth, Sixth and Eighth Amendments and corresponding Florida law. This State action impeded Gorby's ability to fully develop the facts supporting his claims for relief.

6. Gorby was denied access to public records and thereby denied his rights under Fl. Stat. ch. 119 and 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. This State action impeded Gorby's ability to fully develop the facts supporting his claims for relief.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING GORBY'S INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL CLAIM. GORBY 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.

Strickland v. Washington, 466 U.S. 668 (1984), states counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688. Strickland requires a defendant to demonstrate: 1)

unreasonable attorney performance and 2) prejudice. In the penalty phase of a capital trial, "[T]he basic concerns of counsel . . . are to neutralize the aggravating circumstances advanced by the state, and to present mitigating evidence." Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994). In Gorby's case, counsel failed to undertake the necessary investigation and preparation to do either. This claim was denied after an evidentiary hearing. In denying this claim, the circuit court made the following findings:

> 9. As to claim XVI, defendant alleges that counsel failed to provide the sentencing jury with information on the defendant's childhood, early developmental environment or with psychological testimony in mitigation that considered these factors. The record clearly refutes this allegation. (See Trial Transcript, pp. 1762-1788). Counsel testified that he travelled to West Virginia in search of defendant's relatives however, defendant's father was uncooperative and as a trial tactic, counsel determined not to present the defendant's father's testimony. However, defendant's mother and both adult sisters did testify at trial about his childhood and background. The defendant complains that his attorney should not have interviewed his family members as a group. One sister testified at the evidentiary hearing about their mother's promiscuity, which occurred after the defendant had moved from the home and about which he was ignorant or could have informed his attorney. The attorney left his business cards with family members who could have contacted him if they had wished to do so. Moreover, the record shows that Dr. Goff, who testified for the defense, was given the opportunity to familiarize himself with the defendant's childhood, background and history in West Virginia prior to trial. (See Trial Transcript, p. 1433).

(PCR 676)(emphasis added). This Court must perform an independent de novo review of the mixed questions of law and fact presented in Gorby's ineffective assistance of counsel claims giving deference only to factual findings supported by competent substantial

evidence. Stephens v. State, 24 Fla. L. Weekly S554 (Nov. 24, 1999). This Court stated:

> Ineffectiveness is not a question of "basic, primary, or historical fact." Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact.

Id. As will be discussed below, the findings are either of exceptionally limited relevance and therefore do not provide a basis for denying relief or are not supported by competent substantial evidence.

A. COUNSEL'S FAILURE TO CONDUCT A REASONABLE INVESTIGATION.

"An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994). Failure to interview family members is indicative of ineffective assistance of counsel. See, e.g., Williams v. Head, 185 F. 3d 1223, 1247 (11th Cir. 1999)(J. Barkett dissenting)(noting that besides the client, the family is the most important source to look for relevant information); Baxter v. Thomas, 45 F.3d 1501, 1513 (11th Cir. 1995); Blanco v. Singletary, 943 F.2d 1477, 1501-02 (11th Cir. 1991); Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989); Elledge v. Dugger, 823 F.2d 1439, 1445 (11th Cir. 1987)(finding counsel's investigation unreasonable where counsel was aware of defendant's difficult childhood, but "did not even interrogate [the defendant's] family members to ascertain the veracity of the account or their willingness to testify"). Counsel must reasonably inquire and followup on the information counsel already

has. Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir. 1995)(finding investigation into mitigating evidence unreasonable where counsel "had a small amount of mitigating evidence regarding [the defendant's] history, but ... inexplicably failed to follow up with further interviews or investigation"); Cunningham v. Zant, 928 F.2d 1006, 1018 (11th Cir. 1991); Middleton v. Dugger, 849 F.2d 491, 493-94 (11th Cir. 1988). Failure to investigate and present mitigating evidence cannot possibly be tactical where counsel is unaware of the evidence. The case of having the information and deciding not to present it is different from neglecting to gather relevant information in the first place. See, Williams, 185 F.3d at 1249; Jackson, 42 F.3d at 1368 ("[A] legal decision to forgo a mitigation presentation cannot be reasonable if it is unsupported by sufficient investigation.").

Justice Barkett further explained in Williams that:

> If the decision was a tactical one, it will usually be upheld, since counsel's tactical choice to introduce less than all available mitigating evidence is presumed effective. See Jackson v. Herring, 42 F.3d 1350, 1366 (11th Cir. 1995). "Nonetheless, the mere incantation of 'strategy' does not insulate attorney behavior from review; an attorney must have chosen not to present mitigating evidence after having investigated the defendant's background, and that choice must have been reasonable under the circumstances." Stevens v. Zant, 968 F.2d 1076, 1083 (11th Cir. 1992); see also Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991) ("[O]ur case law 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.").

Williams, 185 F.3d at 1249 fn 13. Moreover, no tactical motive can be ascribed to omissions based on lack of knowledge, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to

properly investigate and prepare. Kimmelman v. Morrison, 477 U.S. 365 (1986).

The circuit court found that "counsel testified that he travelled to West Virginia in search of defendant's relatives," and that while Gorby alleges that counsel should not have interviewed his family as a group, counsel "left his business cards with family members who could have contacted him if they had wished to do so." These findings are neither meaningfully relevant to the claim nor supported by competent substantial evidence. Counsel was appointed in Nov. of 1990 (R 1883) and the record reflects that he learned as early as April 8 that the investigator appointed to assist him in the penalty phase would be unable to conduct any investigation in time for trial (Def. Ex. 16). Counsel did not request co-counsel or obtain the assistance of an alternative investigator, and failed to take the rudimentary step of interviewing Olen's family until the month of trial. When he finally met the family, he failed to observe reasonable investigative procedure by interviewing them as a group.

The record reflects that in a private phone conversation with counsel's secretary, Wilma offered additional information: She said Olen had severe childhood headaches, there were ladies in town with relevant information counsel could talk to, and that she would try to think about other people counsel "might want to talk to" (Def. Ex. 13). Counsel had no tactic for failing to take Wilma up on her offer or provide the headache evidence to either of his experts. No tactic would have been reasonable under the circumstances. The circuit court's finding that the family could

have contacted counsel if they wanted to is irrelevant and avoids the issue: it is counsel's duty to investigate mitigation. It is not reasonable for counsel to rely on family members to know what information is mitigating and to volunteer to divulge often traumatic, painful memories without the guiding hand of counsel.

The family, trial counsel's own confidential penalty phase expert, and a reputable criminal law expert all testified that it was unworkable, inappropriate and/or unreasonable for counsel to conduct a group interview of Olen's family. Each sister testified that they were ill at ease with the meeting and censored themselves to keep the peace. Counsel failed to perform his independent obligation to conduct a reasonable investigation.

The circuit court found that Gorby's father was "uncooperative and as a trial tactic, counsel determined not to present the defendant's father's testimony" (PCR 676). These findings are neither dispositive of, nor material to, Gorby's ineffective assistance of counsel claim. Moreover, the findings are not supported by competent substantial evidence.

Trial counsel testified that he spoke to Olen's father on the telephone (PCR 998-900) and from that glimpse "made a tactical, strategic decision," that he "did not feel [Ernie] would be a good witness," and an assessment that Ernie did not want to be helpful (PCR 1032). Ernie candidly did not remember meeting Komarek. What he remembered was that CCR investigator Rick Hayes came to his home (Def. Ex. 24 at 48). The record is unrebutted that: 1) Ernie never spoke to any defense expert but would have if asked, and 2) if counsel had come to his house to see him, Ernie would

have shared what he later shared with CCR investigator Rick Hayes and collateral counsel (id. at 54). The circuit court's finding that Ernie was uncooperative with trial counsel is not supported by the record. Moreover to the extent that trial counsel learned nothing about what cooperation Ernie was willing to provide, trial counsel acted unreasonably. A brief telephonic interview with a hearing-impaired parent of a brain damaged defendant facing a capital crime is not reasonable investigation. Counsel was in W. Virginia but did meet his client's father. Counsel failed to discover Ernie's substantial hearing loss and thus failed to take measures to overcome this communication barrier. Various means were available to trial counsel to communicate with Ernie Gorby and obtain the valuable information he was willing to provide. Such is the job of counsel. In post-conviction, after thorough interviews and with the assistance of a high-volume telephone, the State was able to attend Ernie Gorby's deposition and ask questions while collateral counsel sat in Ernie Gorby's home sitting immediately beside him to ensure he heard (PCS 72). Available to trial counsel to accommodate Ernie's hearing loss was the option of facilitating a high-volume telephone interview of Ernie by Drs. Warriner and Goff, of obtaining his testimony by perpetuation as collateral counsel did, or of simply obtaining a declaration or sworn affidavit for consideration by Warriner and Goff and the sentencing court. None of these options occurred to trial counsel because counsel had failed to conduct a reasonable interview and thus was ignorant of what his client's father had to offer. It could not have been a "trial tactic ... not to present

the defendant's father's testimony," (PCR 676) because trial counsel never determined what the defendant's father's testimony would have been.

The circuit court's finding that "Dr. Goff, who testified for the defense, was given the opportunity to familiarize himself with the defendant's childhood, background and history in West Virginia prior to trial," is also neither material nor supported by competent substantial evidence (PCR 676). Trial counsel's own recollection was that the only information he had and shared with Goff and Warriner was that Olen had been in the automobile accident (PCR 999). Goff added that he would not have wasted counsel's time recommending a skull X-ray to look for a "plate" in Olen's head had he been provided the Texas DOC reports (PCR 1197). The record is unrebutted that Goff was provided only psychiatric records, some other documents, and an opportunity to speak on the telephone with Wanda about the automobile accident (PCR 1433).

Of profound importance, yet also completely overlooked by the circuit court, is the unrebutted evidence that trial counsel never discussed mental health mitigation or penalty phase issues with Goff or Warriner (PCR 996-97; 1192; 1213).

The record is unrebutted that the information provided by Gorby's father would have been particularly helpful to Goff because it corroborated Gorby's history and condition and provided important details that Wanda failed to disclose (PCR 1199; 1206).

Counsel's admission that his investigation was inadequate is also unrebutted. Trial counsel testified he needed "[a]nother six months and investigator" to investigate the case "the way it

should have been done" (PCR 1062-63). Thus counsel had no strategic reason for the way in which he conducted his penalty phase investigation, no strategic reason for not giving information he did have to Warriner[55], his penalty phase expert (PCR 1012; 1065), and no strategic reason for giving Goff documents he failed to give Warriner and Warriner documents he failed to give Goff. The trial court completely disregarded Warriner's unrebutted testimony that he was never provided the 1962 psychiatric report or family background information.

When viewed in light of counsel's testimony that he felt the outcome of the guilt phase was a foregone conclusion (PCR 966; 977; 981; 983), believed the murder was an impulsive act that utilized a weapon of opportunity (PCR 1015), and had never previously conducted a penalty phase (PCR 1000), it is clear that counsel acted unreasonably. Given his assessment of the strength of the State's case, his own lack of prior experience, the court's repeated denials of his requests for continuance, and the unavailability of his court-appointed investigator, it was incumbent upon him to conduct an adequate investigation. In the alternative, counsel was rendered ineffective by the court's denial of his requests for continuance.[56]

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[55]For example, trial counsel testified he knew Gorby began drinking at age 8 or 10 but did not tell Warriner or Goff (PCR 1002-04).

[56]The Court should note that the facts in this record were unavailable on direct appeal when the Court held that Judge Sirmons' denial of the continuance motions was not an abuse of discretion.

The issue of whether counsel rendered deficient performance is a mixed issue of law and fact to be reviewed de novo by this court. Because the circuit court's factual findings are either irrelevant, not dispositive, or not supported by the record, the findings are entitled to little weight and/or deference in this Court's review.

B. REASONABLE PROBABILITY OF A DIFFERENT OUTCOME.

Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or that the deficiencies substantially impair confidence in the outcome of the proceedings. Strickland, 466 U.S. at 695. Had counsel discovered and presented the available mitigating circumstances, there is more than a reasonable probability that 3 additional jurors would have voted for life and that the balance of aggravating and mitigating circumstances would have been different. Gorby has shown that "[the] death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687.

At the penalty phase trial counsel presented: 1) Olen's mother Wanda, who testified she had 4 children and was from a small poor town in West Virginia, that Olen was different after the car accident, that Olen's father was hot tempered and drank a lot; that they divorced when Olen was 6 or 7; that when Olen went to live with Ernie, he would beat Olen; that Olen had an ex-wife and 2 children and was himself an alcoholic; and that when Olen's sisters were the accidental victims of a police shooting, Olen was

hysterical; 2) Olen's sister Garnet Butcher, who testified that when her husband had heart surgery, Olen was a huge help to her and he loves his family; and 3) Olen's sister Mary Jane Cain, who described the shooting incident she experienced and how the bullet went first through her sister Wilma and then into her lung; that Olen was upset over the shooting; that Olen's children love him; and that Olen was very upset that his children's mother was on drugs and had mistreated his son Billy by burning him with cigarettes (R 1764-91).

At the evidentiary hearing, collateral counsel presented unrebutted evidence of statutory mitigation and substantial non-statutory mitigation which was never considered by the jury. Three mental health experts, Drs. Crown, Warriner and Goff testified that Gorby: 1) lacked the capacity to appreciate the criminality of his conduct, and 2) acted under the influence of extreme mental or emotional disturbance. In sentencing Gorby to death, the trial court specifically found that these mitigators were not established because counsel had failed to present evidence to support them (R 2625-26).

Through family and expert witnesses, collateral counsel also presented abundant evidence of non-statutory mitigation:

1) extreme neglect and abandonment
2) verbal and emotional abuse, extreme derision and manipulation by parents and other adults
3) prior psychiatric treatment
4) extremely early onset alcohol abuse by parental encouragement

5) substance abuse

6) exposure to inappropriate sexual behavior

7) exposure to aggression, violence and physical abuse

8) exposure to multiple care-givers who were actively alcoholic

9) exposure to care-givers who were unstable, mentally ill, or cruel

10) exposure in utero to alcohol

11) brain damage and detailed accounts of impaired behavior

12) poverty

13) possible sexual molestation and/or rape

14) substantial assistance to the State of Pennsylvania resulting in a conviction[57].

The circuit court's only factual finding was that Gorby's "mother's promiscuity, [] occurred after [he] moved from the home and about which he was ignorant." This finding is wholly unsupported by the record and not material to the claim.

ARGUMENT II

GORBY DID NOT RECEIVE COMPETENT ASSISTANCE FROM A MENTAL HEALTH EXPERT AS HE WAS ENTITLED TO UNDER AKE V. OKLAHOMA IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

A criminal defendant is entitled to expert psychiatric assistance when his mental state is relevant to guilt or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). There exists a "particularly critical interrelation between expert psychiatric

[57](See PCR 1365).

assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976). Counsel has a duty to conduct proper investigation into a client's mental health background and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). "The failure of defense counsel to seek such assistance when the need is apparent deprives an accused of adequate representation in violation of his sixth amendment right to counsel." Proffitt v. United States, 582 U.S. 854, 857 (4th Cir. 1978). Trial counsel's failure to ensure the assistance of a competent qualified mental health expert to assist in establishing mitigating circumstances and rebutting aggravation deprived the jury and sentencing judge of an accurate account of Olen's background and mental impairments, denied Gorby the adversarial testing to which he was entitled, and constituted deficient performance.

Both statutory and nonstatutory mitigation was available based on Gorby's mental condition. Gorby was not provided with assistance from a fully-informed confidential mental health expert. Without such assistance, critical information was not presented to the judge and jury. Counsel's failure to ensure that Gorby received such mental health assistance from a fully-informed qualified expert was prejudicial deficient performance.

This claim was denied after an evidentiary hearing. In denying this claim, the circuit court found that Drs. Annis and McClaren were provided to assist the defense (PCR 676-77). This

finding is clearly erroneous. Annis and McClaren were court-appointed competency experts, not confidential defense experts. Counsel never requested a defense expert for competency, but did request an expert to assist with penalty phase. In part as a result of the findings of the court-appointed competency experts, counsel then requested an expert to assist with the issue of brain damage. Thus Annis and McClaren were not provided "to assist the defense."

The circuit court found that Goff and Crown "would offer the same diagnosis which was presented to the jury and the judge in 1991." This finding is also clearly erroneous and irrelevant. No expert at trial ever explained how the brain damage and substance abuse diagnosis constituted statutory mitigation. Trial counsel never sought assistance with statutory mitigation. Thus Gorby was not provided an adequate mental health evaluation for penalty phase issues.

The circuit court further found that "[e]ven though Dr. Goff did not testify during the penalty phase, counsel asserted that Dr. Goff's testimony in the guilt phase did establish mitigation. Therefore, even if Dr. Goff had testified during the penalty phase that testimony would have resulted in the same findings thus, there is no reasonable probability of a different result." This finding is also clearly erroneous, not supported by the record and irrelevant.

Finally, the circuit court found that "the defense experts opined that due to the defendant's brain damage, he would have acted impulsively yet, the evidence shows that he thought out and

took the time to write a note which was meant to divert anyone from discovering the victim's body. The Court finds that such behavior was not impulsive but rather intentional." This finding is clearly erroneous, not supported by the record and irrelevant. There is no evidence regarding when the note was written. Assuming the note was written after the homicide, it cannot rebut the evidence presented of Gorby's impaired mental state at the time of the homicide and therefore has no relevance to issues of penalty phase statutory mitigation. Moreover, even the State's mental health expert testified that the note had no psychological relevance because there is no evidence when it was written (PCR 1340).

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING GORBY'S CLAIMS THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE OR THE STATE VIOLATED BRADY v. MARYLAND AND/OR GIGLIO V. UNITED STATES. THE TRIAL COURT FAILED TO CONDUCT A CUMULATIVE ANALYSIS OF GORBY'S BRADY AND INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS. GORBY WAS DENIED AN ADVERSARIAL TESTING AND HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

In order to ensure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense counsel. United States v. Bagley, 473 U.S. 667, 674 (1985)(quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)); Strickland v. Washington, 466 U.S. 668, 688 (1984). The Strickland formulation for determination of whether deficient counsel performance is prejudicial is the same as the Brady/Bagley formulation for determination of whether state non-disclosure of

exculpatory information is material. Bagley, 473 U.S. at 682. The materiality/prejudice aspect is determined by asking whether there is a reasonable possibility, defined as a probability sufficient to undermine confidence in the outcome, that the outcome of the proceedings would have been different in the absence of either counsel incompetence or prosecutorial failure to disclose. Id. As explained in Kyles v. Whitley, 514 U. S. 415 (1995), courts are required to evaluate materiality cumulatively and collectively, not item by item. Kyles, 514 U. S. 415, 436; Young v. State, 739 So. 2d 553 (Fla. 1999). Thus, where relevant evidence does not reach the jury either as a result of the State's failure to disclose or defense counsel's failure to discover, relief is warranted where cumulative consideration of all of the evidence which did not reach the jury undermines confidence in the result of the trial. Moreover, in a capital case, sentencing relief may be warranted where confidence is undermined in the result of the sentencing proceedings, even if confidence remains as to the guilt determination. Young v. State, 738 So. 2d 553 (Fla. 1999); Garcia v. State, 622 So. 2d 1325 (Fla. 1993). The trial court erred in denying these claims and in failing to conduct the cumulative analysis required by Kyles.

A. THE JURY NEVER KNEW KEY STATE WITNESS, ROBERT JACKSON, THREATENED NOT TO TESTIFY UNLESS THE STATE MET DEMANDS.

Jackson's threat was communicated in a letter he wrote Asst. State Attorney Meadows over a week before trial:

> Mr. Meadows:
>
> After talking with the Calhoun County Sheriff Roy Snead concerning my distrust of the Bay County

> Sheriff's department - he had advised me to write to you on several matters.
>
> Because I am the lone trustee here who is allowed to live apart from all others & go where I wish - plus the fact that I've only 68 days left to do, I am asking for respect from your office on this matter.
>
> I'll be forced - against my belief - to testify at the trial - but if I am chained in <u>any manner</u> I will certainly become an <u>unwanted witness</u>. I'm coming of my own free will so please - no chains - cuffs of the like.
>
> Also, Sheriff Snead suggested that I ask - for my safely - to be housed away from Bay County and any CCA jail or annex in that county.
>
> That I be allowed to have with me all items I have here and feel that I need with me while there such as books, pens, pencils, glasses - paper.
>
> That at no time shall I appear in any form of clothing other that (sic) civilian.
>
> Very Respectfully
> Robert

(Def. Ex. 4)(emphasis in original).

The State violated Gorby's due process rights when it suppressed information that a key witness, Robert Jackson, threatened that the State would be unhappy with his testimony if it ignored his demands. The State was obligated to disclose this critical impeachment evidence.

This claim was denied after an evidentiary hearing. In denying this claim, the circuit court made the following findings:

> 4. Claim VIII(c) involves a letter received by the State from Robert Jackson. <u>The defendant alleges that Mr. Jackson surreptitiously tried to make a deal with the State to not alter his testimony if certain "conditions" were met.</u> In a letter to the State, Mr. Jackson requested that he not be chained or be presented wearing jail clothes in front of the jury, that he be held safely in the Bay County Jail for his protection and that he be allowed to bring his personal items with him. <u>The Court finds that these requests are not extraordinary and do not evidence that a deal was made.</u> Therefore, this allegation is without merit.

(PCR 676). These findings are neither material nor supported by competent substantial evidence. Gorby's allegation was that

Jackson told the State he was willing to alter his testimony and this information should have been disclosed. That the letter was from Robert Jackson to the State and was received pre-trial and never disclosed was established and unrebutted. Defense counsel would have used the letter to impeach Jackson[58] (PCR 955). Gorby's allegation that the State knew Jackson was ready and willing to change his testimony when they put him on the stand was also established. Thus, Gorby established his Brady and Giglio allegations.

The circuit court's perception that Gorby was alleging "Jackson surreptitiously tried to make a deal with the State to not alter his testimony if certain 'conditions' were met" is erroneous[59]. Thus the circuit court's finding that Jackson's requests "do not evidence that a deal was made," is irrelevant to the claim presented. Further, the circuit court's finding that Jackson's "requests were not extraordinary" is clearly erroneous. No evidence was presented on this issue and the finding is wholly unsupported by the record. Given Jackson's prejudicial testimony, particularly his testimony that Gorby attacked him, at a minimum penalty phase relief is warranted.

B. THE JURY WAS NEVER INFORMED THAT A KEY STATE WITNESS, CLEO CALLOWAY, WAS PSYCHOTIC.

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[58]Collateral counsel presented evidence that Jackson himself could not be located.

[59]Gorby does not concede that a deal was not made, but has never been able to locate Robert Jackson, never ascertained from Jackson whether an undisclosed deal was made, or made that allegation.

Gorby was denied an adversarial testing because the jury never knew Calloway was a psychotic inmate of a Texas prison for the mentally ill who was undiagnosed and untreated at the time he was subjected to the admittedly unnecessarily suggestive line-up and at the time he allegedly purchased Raborn's car from Gorby.

In Calloway's 1990-91 Texas DOC Clinic Notes[60] the evidence of his condition is abundant:

- hearing voices (1/15/91)
- voices tell him what he should and should not do (1/27/91).
- increasing difficulty due in part to auditory hallucinations, referred to psychiatrist (2/15/91).
- prescribed Haldol for voices (2/21/91).
- prescribed Haldol and Cogentin because apparently not previously given as ordered (3/1/91).
- increase Haldol (3/11/91).
- still complaining of voices and taking commands from voices (3/18/91).
- not responding to treatment (4/1/91).
- increase meds, follow-up 3 months (4/8/91).
- medication renewed (5/6/91).
- Haldol at 30 mg.; Cogentin increased to 2 mg. (5/16/91).
- finally reports fewer hallucinations (5/17/91).
- meds renewed (6/4/91).
- return to Texas (7/30/91).

Calloway testified that before he was arrested in Houston he had never seen a doctor for his auditory and visual hallucinations, which he had experienced since age 17 (Def. Ex. B at 5). Before his arrest, he used drugs and alcohol to "treat" his hallucinations. He thought he was on Thorazine, Mellaril, Cogentin and Haldol when Meadows and Komarek deposed him at Ellis Unit Two in Huntsville, Texas. Id. at 6-7. He admitted to still having mental problems at the time of trial. Id. at 9.

[60]Def. Ex. 1.

Trial counsel testified that the information in Calloway's medical records, including that he reported having brain damage and abusing drugs, would have been valuable (PCR 974).

Trial counsel admitted he conducted no background investigation of Cleo Calloway (PCR 978). Counsel should have discovered that Calloway was an inmate of a Texas prison for the mentally ill when he went to depose Calloway. Counsel should have asked Calloway about his mental status[61]. Counsel should have requested to see Calloway's records from Ellis Unit Two and Bay County Jail records[62].

This claim was denied after an evidentiary hearing. In denying this claim, the circuit court made the following findings:

> 6. As to claim VIII(e), the record reflects that Mr. Callaway (sic) testified under oath that he understood the questions that were presented to him and furthermore, he stated that he testified truthfully. (See Deposition of Cleo Callaway).

(PCR 676). These findings are neither relevant to the claim nor supported by competent substantial evidence. Gorby's allegation was that the jury did not hear this material impeachment evidence because either counsel was ineffective for failing to discover it or the State suppressed it. The jury was denied the opportunity to judge Calloway's credibility in light of his mental state and medical status. Thus the circuit court's fact finding that Calloway stated he told the truth is irrelevant to the issue of

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[61]Calloway would have revealed the information if asked (Def. Ex. B at 11).

[62]The jail in Panama City was aware of Calloway's condition because he told them to get his medication (Def. Ex. at 10-11).

whether the jury had all the information necessary to evaluate his testimony. Given Calloway's prejudicial testimony, at a minimum penalty phase relief is warranted.

C. THE JURY WAS NEVER INFORMED THAT JAN JOHNSON'S BLOOD SPATTER EXPERTISE WAS PREDICATED UPON BOGUS TRAINING. THE STATE KNOWINGLY BOLSTERED JOHNSON BY VOUCHING FOR JUDITH BUNKER'S EXPERTISE AND CREDIBILITY.

Johnson told Gorby's jury that her training consisted of Judith Bunker's Bloodstain Pattern School and "the FDLE training program which consisted of over a thousand hours of research and independent study within our department" (R 1285).[63] Unknown to the jury was that Bunker was actually classified as a secretary at the Medical Examiner's Office from Nov. 30, 1970 through June 2, 1974; never had any occasion to perform any crime scene investigations or develop any expertise in performing blood stain pattern analysis except through a State Attorney-sponsored general homicide investigation seminar; was classified as a "Medical Examiner's Assistant" from July 14, 1974-Sept. 27, 1981 but only from Dec. 6, 1981-April 30, 1982 was actually a "Technical Specialist;" and then only part-time. The jury never knew Bunker never graduated from high school, but swore on her employment application represented otherwise. The jury never knew Bunker has made a habit of bolstering her credentials as an expert through falsehoods by making false statements on her curriculum vitae such as she was Herbert L. MacDonnel assistant and had attended a week

[63]The "over a thousand hours" Johnson claimed refer to the general FDLE training program for crime scene analysts, not over a thousand hours of training in bloodstain analysis alone.

course conducted by MacDonnel. Bunker has she ever been McDonnel's assistant in any capacity. The course spanned 3 days, not a week, and did not render Bunker an "expert." Bunker's curriculum vitae is replete with more false statements and misrepresentations than reliable ones (Def. Ex. 3). Several State Attorney Offices across the State of Florida have never consulted Bunker for any reason (Def. Ex. 3). Similarly, most medical examiners in the state report that they have never utilized Bunker's services (Def. Ex. 3). It is Bunker, whose history is one of falsehoods and exaggeration regarding her qualifications, who trained Jan Johnson in bloodstain pattern analysis. The jury never heard the truth about Bunker.[64] Moreover, counsel was ineffective in failing to investigate and adequately voir dire Johnson's qualifications.

Like Bunker, Johnson was not qualified to give "expert" opinions regarding the position of the victim and his attacker based on blood spatter evidence. Like Bunker, Johnson does not have a college degree in any subject, let alone a scientific field of study. Prior to coming to FDLE in 1979, Johnson was a

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[64]In 1974, the Ninth Circuit Medical Examiner's office paid Bunker to attend a brief workshop on bloodstain pattern analysis given by Herbert MacDonnel in Birmingham, Alabama, a workshop which offered only four hours of continuing education credit for attendance. Upon her return to Orlando, Bunker was promoted to Medical Examiner's Assistant. With only minimal experience, Bunker immediately began instructing local law enforcement personnel on the interpretation of bloodstain pattern evidence. This instruction was sponsored by the Medical Examiner's Office and within the scope of Bunker's employment. With the imprimatur of the Medical Examiner's Office, Bunker transformed herself from a secretary into the Medical Examiner's leading authority and expert on bloodstain pattern evidence.

fingerprint examiner for the Federal Bureau of Investigation (FBI) (Def. Ex. 5). Johnson's duties for the FBI did not include blood spatter analysis. Johnson began her career with FDLE as a fingerprint identification technician. Her performance appraisals, listing the training courses she has attended while with FDLE, list everything from a Psychological Profiling Seminar to Collection and Preservation of Computer Evidence class, but nothing regarding blood spatter analysis. Johnson's FDLE personnel file does not reflect what, if any, specialized training Johnson has had in blood spatter analysis. Yet Johnson's testimony "contributed significantly" to the conviction of Gorby.[65]

By association with Bunker's suspect methods, Johnson's credibility is substantially diminished. By the time of Gorby's trial, the State knew Bunker's credentials and qualifications were false, misleading, and unreliable. The State suppressed and/or failed to correct the fact that its paid witness and agent, Johnson, misled the jury regarding her qualifications. By telling the jury that Johnson was trained by "the mother of bloodstain pattern analysis," the State vouched for Johnson's credibility and credentials. Johnson's testimony went not only to trial issues but also to establish the aggravating circumstance of heinous, atrocious or cruel. Thus the State was left with Sybers and

[65]"I can assure you that your professional demeanor and expertise contributed significantly in the favorable results the State was ultimately able to achieve at trial." Letter from Assistant State Attorney Steven D. Meadows to Jan Johnson, dated October 21, 1991.

Johnson as their expert witnesses in support of the heinous, atrocious or cruel aggravating circumstance.

To the extent that this impeachment evidence was available, trial counsel's failure to discover and present it constituted deficient performance. This deficient performance prejudiced Gorby in that Johnson's testimony for the State went unrebutted. In Correll, the Court held that the evidence that Bunker was not properly qualified as a bloodstain analyst, and correspondingly that she was not qualified to train FDLE agents like Johnson, was not newly discovered evidence because it was discoverable at the time of his 1986 trial. Id. at 524.

This claim was denied after an evidentiary hearing. In denying this claim, the circuit court made the following findings:

> 8. As to Claim XIII, defendant alleges a Brady violation with regard to Jan Johnson. The record shows that another FDLE agent testified that Ms. Johnson's findings were independently verified by him. The Court finds no presentation of false evidence by the State.

(PCR 676). This factual finding is immaterial to the claim - that the jury and judge were denied critical information necessary to evaluate Johnson's testimony. Trial counsel would have impeached Johnson with this evidence had he discovered it. Gorby was denied a full adversarial testing of Johnson's testimony.

D. THE JURY WAS NEVER INFORMED THAT THE STATE'S MEDICAL EXAMINER, DR. SYBERS, WAS UNDER INVESTIGATION FOR THE MURDER OF HIS WIFE AT THE TIME OF TRIAL.

Gorby has shown, with the limited information available, that the State had knowledge of the investigation into Sybers' involvement in his wife's death and failed to disclose that information to defense counsel. The State called Sybers as its

witness, implicitly vouching for his credibility, while Sybers was under investigation for a capital felony, in violation of Giglio. As a result, Sybers' conclusions stood unrebutted and unimpeached. Confidence in the outcome is undermined.

The State knew that Sybers was under suspicion for the murder of his wife. Mrs. Sybers died on May 30, 1991, just weeks before Sybers testified. Defense counsel was entitled to cross-examine Sybers regarding the ongoing investigation of him by the State to demonstrate his bias, prejudice, and motive for supplying testimony helpful to the State. To the extent that trial counsel knew or should have discovered and used this information, counsel was ineffective. This claim was denied after an evidentiary hearing. In denying this claim, the circuit court made the following findings:

> 3. As to claim VIII(b), defendant alleges that counsel failed to impeach Dr. Sybers, the medical examiner. During the evidentiary hearing, trial counsel testified that in his opinion, not all of the testimony of Dr. Sybers was harmful. He further testified that he used portions of Dr. Sybers' testimony during his closing argument in the penalty phase. There was no evidence presented during the evidentiary hearing to materially contradict Dr. Sybers' trial testimony. An attorney's trial tactics do not equate to ineffective assistance of counsel. Ferguson v. State, 593 So. 2d 508 (Fla. 1992).

(PCR 675).

Counsel's failure to discover Sybers' substandard techniques allowed Sybers' testimony to stand, unchallenged.[66] Moreover,

[66]To the extent that the State had knowledge of these facts, the State violated Brady, Bagley and Giglio and Gorby is entitled to a new trial and sentencing.

counsel failed to either object to or exploit on cross-examination the fact: 1) that Sybers had failed to go to the crime scene yet testified about it; 2) that Sybers reached his conclusions about brain injuries to the victim without appropriate, thorough testing; and that Sybers was not qualified to testify about blood stain pattern interpretation. Because of counsel's failures in this regard, the jury was left free to believe Sybers' testimony.

Trial counsel testified that if he had understood that death occurred in 1-5 seconds, that loss of consciousness was within an even shorter period of time, and that the victim could not have felt pain once unconscious, such information would have been extremely useful in the penalty phase (PCR 1369). Trial counsel offered no strategic reason for his failure to request the assistance of an independent medical examiner and agreed "it would have been useful to have somebody else say something different in penalty phase" (PCR 1370; 1372).

E. THE JURY WAS NEVER ALLOWED TO CONSIDER THE CREDIBILITY OF ALLEN AND MARISSA BROWN BECAUSE TRIAL COUNSEL AND THE COURT FAILED TO PROVIDE FOR A MEANINGFUL CROSS-EXAMINATION. GORBY WAS DENIED THE RIGHT TO COUNSEL.

Despite the obvious problems that could be foreseen in preparing to cross-examine deaf witnesses, trial counsel failed to adequately prepare. Thus his cross-examination was extremely difficult for the interpreter to interpret. Gorby was denied effective cross-examination, and the right to counsel at trial. United States v. Cronic, 466 U.S. 648 (1984).

F. CONCLUSION

For the reasons outlined above, confidence in the outcome of Gorby's trial is undermined. Counsel's performance and failure to adequately investigate was unreasonable under Strickland v. Washington. There was no strategic reason for defense counsel's actions. Counsel's performance was unreasonable and prejudicial. Confidence in the outcome is undermined. To the extent that the State's actions, inactions, and nondisclosures were the cause of the jury not hearing critical impeachment evidence, confidence in the outcome is also undermined. Gorby's jury was not provided the information that was necessary to ensure a reliable adversarial testing. This Court must consider the cumulative effect of all errors in Gorby's trial and penalty proceedings. Kyles v. Whitley, 115 S. Ct. 1555 (1995); State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Ellis v. State, 622 So. 2d 991 (Fla. 1993); Taylor v. State, 640 So. 2d 1127 (1st DCA 1994). Trial counsel's description of the cumulative effect of the Brady evidence was on point when he explained that it would have shown "what kind of shabby evidence" the State was bringing in: "mentally ill people, people who claimed expertise when they trained by somebody who doesn't know what they're doing, witnesses from jail who basically are receiving favors or special treatment," all of which would have had a "psychological effect" on the jury and which he could have used to turn the State's case against them (PCR 975-76). Gorby should be granted a new trial. At a minimum, Gorby should be granted penalty phase relief.

ARGUMENT IV

THE LOWER COURT ERRED IN SUMMARILY DENYING MERITORIOUS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AND AS A RESULT, GORBY HAS BEEN DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

The lower court erroneously summarily denied several claims. Gorby is entitled to an evidentiary hearing on each claim 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). The files and records in this case do not conclusively refute Gorby's allegations. Many of the summarily denied claims allege ineffective assistance of counsel, but were denied as procedurally barred. These claims are properly raised under Rule 3.850. Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987).

A. GORBY'S COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE GENERAL JURY QUALIFICATION PROCEDURE EMPLOYED BY BAY COUNTY.

Bay County's general jury qualification procedure is unconstitutional: it is held outside the presence of both the defendant and his attorney; the State participates in the proceeding; and the proceeding is unrecorded. While it is true that this Court has held that general jury qualification is not a critical stage of the proceedings requiring presence of the defendant,[67] that holding is not dispositive here due to the unique circumstances of Gorby's case.[68] Three facts distinguish

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[67]Wright v. State, 688 So. 2d 298 (Fla. 1996); Bates v. State, 24 Fla. L. Weekly S471 (Fla. 1999).

[68]Because no record was made and all documentation relating to the jury pool was destroyed before Mr. Gorby's conviction

Mr. Gorby's case from each of the cases holding that the defendant's presence is not required at general jury qualification: (1) Neither Gorby **nor his attorney** was present during the proceeding; (2) An assistant state attorney **was** present, objecting to the release of various venirepersons and not objecting to others; and (3) **No transcript exists** from which it can be ascertained whether the State's participation in the proceeding prejudiced Gorby. Gorby is entitled to an evidentiary hearing.[69]

In every case in which this Court has held that the defendant's presence is not required during general jury qualification, the defendant's attorney was present to safeguard his client's rights and/or a transcript was made. Bates v. State, 24 Fla. L. Weekly S471 (1999); Wright v. State, 688 So. 2d 298, 300 (Fla. 1996); Robinson v. State, 520 So. 2d 1, 3 (Fla. 1988); Remeta v. State, 522 So. 2d 825, 827 (Fla. 1988). In Gorby's case, his attorney was not present during the proceeding, nor was the proceeding transcribed. At the start of the week that Gorby's

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became final, precise details of the general jury qualification proceeding cannot be known until an evidentiary hearing is conducted. However, in Bates v. State, supra, the State Attorney for the Fourteenth Judicial Circuit admitted that the Circuit Court in Bay County has long engaged in the practice of allowing a state attorney to participate in general jury qualification without defense counsel present.

[69]Gorby pled additional legal argument in support of this claim in his simultaneously filed State Habeas Petition. The argument cannot be presented here given the page limitations now arbitrarily applied by this Court to capital post-conviction collateral defendants. Gorby incorporates the arguments in Claim I of his State Habeas Petition by specific reference.

trial occurred, prospective jurors for 3 trials were assembled. They were then voir dired by a Bay County judge **outside the presence of Mr. Gorby and his counsel.** Certain prospective jurors were excused, and the remainder were dispatched to 3 courtrooms in which jury trials were scheduled. The presiding judge had unbridled latitude as to whom to excuse altogether, and as to which panel members were to be sent to which trial. Most troubling is the fact that **an assistant state attorney was present.** Neither Gorby's counsel nor Gorby was present. This proceeding was ostensibly for "jury qualification" purposes. Prospective jurors were asked if they had a "hardship" that would interfere with their ability to serve. Based on the individual response, the assistant state attorney would object to disqualification for some venirepersons and not object to the release of others. The court would then decide if the venireperson should be disqualified after considering that individual's response and the State's position.

This ex parte system is an invitation for abuse by the State. The State might object to the release of persons perceived as friendly to the State, while not objecting to the release of persons likely to be sympathetic to the defense. The State might object to the release of white venirepersons, while acquiescing in the release of minorities. Or perhaps the state attorney objects to the release of individuals suspected to be conservative Republicans, while not objecting to the release of persons known to be liberal community activists. The result of this practice is that **the panel from which jurors are subsequently drawn is**

ideologically slanted in favor of the prosecution, before voir dire even begins.

B. GORBY'S COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE JURY INSTRUCTION REGARDING EXPERT WITNESSES.

The decision of whether a particular witness is qualified as an expert to present opinion testimony on the subject at issue is to be made by the trial judge alone. Ramirez v. State, 651 So. 2d 1164 (Fla. 1995) (citing Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882 (1981)). Yet, here, the trial court instructed the jury on expert witnesses as follows:

> Expert witnesses are like other witnesses with one exception. The law permits an expert witness to give an opinion. However, an expert's opinion is only reliable when given on a subject about which you believe him to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

(R 1709) (emphasis added). The instruction allows the jury to accept or reject an expert's qualification in a field, a question reserved for the court. Trial counsel's failure to object and offer an alternative instruction correctly limiting the jury's discretion regarding expert witnesses was prejudicial.

C. GORBY'S COUNSEL WAS INEFFECTIVE FOR CONCEDING AND FAILING TO OBJECT TO VAGUE AGGRAVATING FACTORS AND INSTRUCTIONS.

The "pecuniary gain" aggravating factor applies only where pecuniary gain is shown to have been the primary motive for the murder. Peek v. State, 395 So. 2d 492, 499 (Fla. 1981); Small v. State, 533 So. 2d 1137, 1142 (Fla. 1988). Without this limitation, the statute setting forth the "pecuniary gain" aggravating factor is facially vague and overbroad. The jury in Gorby's case was instructed to consider this factor (R 1825).

Counsel conceded this factor and failed to object to either the vague statutory language or vague jury instruction.

The weight and gravity of the "under sentence of imprisonment" aggravator is diminished if the defendant "did not break out of prison but merely walked away from a work-release job." Songer v. State, 544 So. 2d 1010 (Fla. 1989). Gorby's jury was instructed it could consider this factor (R 2536). The jury was not told that the weight of this aggravator was less if the defendant had not committed the homicide after escaping from confinement. Counsel conceded this factor and failed to object to either the vague statutory language or vague jury instruction. Moreover, counsel failed to object to either the vague statutory language or vague jury instruction regarding "heinous atrocious or cruel." See Maynard v. Cartwright, 486 U.S. 356 (1988).

D. GORBY'S COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY OBJECT TO THE CONSIDERATION OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES AND PROSECUTORIAL MISCONDUCT.

Consideration of non-statutory aggravating factors violates the Eighth and Fourteenth Amendments and prevents the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S.Ct. 1130 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988). "[C]losing argument must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." Taylor v. State, 640 So. 2d 1127, 1134 (1st DCA 1994)(citing King v. State, 623 So. 2d 486, 488 (Fla. 1993)). Here, the State argued in opening statement and closing argument at the guilt phase that Gorby had shown no remorse (R 526; 1582).

Trial counsel failed to move for a mistrial or request a curative instruction. Further, trial counsel failed to object, move for a mistrial, or request a curative instruction when the prosecutor swung the hammer used in the murder wildly around the courtroom and used it to repeatedly strike the table during closing. In Taylor, the court chided similar conduct as "designed to evoke an emotional response to the crimes or to the defendant." Taylor, 640 So. 2d at 1135. Counsel failed to ensure that this conduct appeared in the record.

E. GORBY'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO INSTRUCTIONS DILUTING THE JURY'S SENSE OF RESPONSIBILITY.

Great weight is given the jury's recommendation. Tedder v. State, 322 So. 2d 908 (Fla. 1975). Diminution of the jury's sense of responsibility violates the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985). See Pait v. State, 112 So. 2d 380 (Fla. 1959). Gorby's jury was repeatedly and unconstitutionally instructed by the trial court that its role was merely "advisory." (See, e.g., R. 1726, 1824, 1825, 1826, 1827). Counsel failed to object.

F. GORBY'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO UNCONSTITUTIONAL BURDEN SHIFTING.

> [T]he state must establish the existence of one or more aggravating circumstances before the death penalty [can] be imposed . . .
>
> [S]uch a sentence could be given if the State showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). The burden to prove that mitigating circumstances outweigh aggravating circumstances must not be shifted to the defense. Mullaney v.

Wilbur, 421 U.S. 684 (1975). A shifting instruction injects misleading and irrelevant factors into the sentencing determination. Caldwell v. Mississippi, 472 U.S. 320 (1985); Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright, 486 U.S. 356 (1988). The State argued that death was required unless Gorby not only produced mitigation, but also established that the mitigation outweighed the aggravating circumstances (R 1792-93). The trial court then employed the same standard in sentencing Gorby to death. See Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988), cert. denied, 112 S. Ct. 390 (1991)(trial court is presumed to apply the law in accord with manner in which jury was instructed).

G. GORBY'S RIGHTS TO DUE PROCESS WERE VIOLATED BY THE BAY COUNTY STATE ATTORNEY'S PATTERN AND PRACTICE OF UTILIZING JAILHOUSE INMATE INFORMANTS.

On June 17, 1991, the State listed CCA inmate Eric Calvin Mace as a witness and supplied trial counsel with his statement (R 2404-10). After the trial, the State Attorney's office received an undated letter from Eric Mace (Def. Ex. 38). Mace was under a sentence of imprisonment at the time of Gorby's trial. In the letter, Mace refers to his forthcoming controlled release review, and asks the State Attorney's office to intervene on his behalf. Assistant State Attorney Steve Meadows then promptly wrote E. Guy Bevel of the Parole Commission on Mace's behalf. The letter noted that Mace came forward with certain admissions allegedly made by Gorby. While Mace ultimately did not testify at trial, the letter is nevertheless indicative of a modus operandi on the part of the State Attorney's office in the prosecution of Gorby.

In postconviction, collateral counsel discovered a letter written by Bay County Assistant State Attorney Barbara M. Finch to the Clerk of Court for Bay County in Gorby's CCA jail file. The letter, which announced the State's Nolle Prosequi of Gorby on attempted escape charges, included a statement that the State had come into evidence "indicat[ing] that the credibility and motives of state witnesses Rogers and Crowder may be questionable" (Def. Ex. 6). Collateral counsel attempted to introduce this letter at the evidentiary hearing but the Court refused to consider it (PCR 1410-13). The circuit court refused to transport Crowder or consider his testimony regarding the State's efforts to obtain his testimony (PCR 625-29).

ARGUMENT V

GORBY WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING, HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT AND HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS AND CORRESPONDING FLORIDA LAW.

Post conviction litigation is governed by principles of due process which were violated by the proceedings[70] in this case. Teffeteller v. Dugger, 676 So. 2d 369 (Fla. 1996); Holland v. State, 503 So. 2d 1250 (Fla. 1987).

A. GORBY WAS PRECLUDED FROM DEVELOPING FACTS TO SUPPORT HIS BRADY AND GIGLIO CLAIMS BY THE STATE'S REFUSAL TO GRANT IMMUNITY FROM PROSECUTION FOR PERJURY TO JERRY WYCHE.

Gorby was precluded from developing facts to support his claim that the State withheld material exculpatory evidence and

[70]Moreover, the proceedings impeded Gorby's ability to develop facts to support his claims for relief.

presented false evidence because the State refused to grant immunity from prosecution for perjury to Jerry Wyche. Thus state-action impeded Gorby from developing facts supporting a constitutional claim for relief. The circuit court specifically found, after refusing to consider Wyche's affidavit recanting his trial testimony, that Gorby failed to "provide adequate evidence to support this claim."

B. GORBY WAS DENIED EFFECTIVE REPRESENTATION DUE TO UNDERFUNDING AND UNDERSTAFFING OF THE OFFICE OF THE CAPITAL COLLATERAL COUNSEL AND RULE 3.851.

Gorby has, through no fault attributable to him, been denied adequate funding and adequate time to prove his innocence of the convictions and/or sentences in this cause. During the critical investigative phases of the postconviction process, the former CCR was underfunded, understaffed, and over-worked to the point that effective legal representation was denied Gorby due to State action. Moreover, Rule 3.851, which sets out this time requirement, is unconstitutional on its face and in its application since it denies Gorby due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution. Rule 3.851's time requirement also violates Article I, §§ 2, 13 and 21 of the Florida Constitution.

C. THE RULE PROHIBITING GORBY'S COUNSEL FROM INTERVIEWING JURORS IS UNCONSTITUTIONAL AND PRECLUDES GORBY FROM DEVELOPING CLAIMS FOR RELIEF.

Florida Rule of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial. This rule is an unconstitutional prior restraint on

association and speech. The prohibition violates equal protection. Other persons and death sentenced inmates in other states are not precluded from communicating with jurors to determine if cause exists to prove juror misconduct and have been granted relief after determining error existed.

This prohibition restricts Gorby's access to the courts and ability to allege and litigate constitutional claims which may very well ensure he is not executed based on an unconstitutional verdict of guilt and/or sentence of death.

ARGUMENT VI

GORBY WAS DENIED ACCESS TO PUBLIC RECORDS AND THEREBY DENIED HIS RIGHTS UNDER CHAPTER 119 AND 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.

A prisoner whose conviction and sentence of death has become final on direct review is entitled to public records. See, e.g., Ventura v. State, 673 So. 2d 479 (Fla. 1996); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). Without full disclosure, Gorby is impeded from fully developing facts in support of his claims for relief. Effective legal representation has been denied Gorby because the State has withheld public records related to its investigation of Sybers for his wife's murder. The lower court held that Gorby is foreclosed from seeking public records regarding the Sybers investigation because it is an ongoing criminal investigation and thus exempt from disclosure under the Public Records Act. §119.07(3)(b) (1995).

This is a state-created impediment to the development of facts necessary to present constitutional claims to the state courts. Moreover, state agencies have withheld information needed to investigate jury misconduct. This is a state-created impediment to the development of facts necessary to present constitutional claims to the state courts.

CONCLUSION

Based on the foregoing argument and authority, this Court must conclude that Gorby is entitled to relief or at a minimum a remand for further evidentiary development.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first-class postage prepaid, to Richard Martell, Chief, Capital Appeals, Department of Legal Affairs, The Capitol - PL01 Tallahassee, Florida 32399-1050, on February 28, 2000.

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