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IN THE

SUPREME COURT OF FLORIDA

ROBERT J. BAILEY Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO.: SC 12-1041 Lower Case No.: 05-1093-CFMA

INTIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

In this brief, the appellant, Robert Bailey, is referred to by name, Appellant or as the defendant. The appellee is referred to as the State, Appellee, or the prosecutor. Citations to the post-conviction record on appeal (12 Volumes) are made by reference to the Volume number followed by the appropriate page numbers. For example, (Vol. III, pgs. 522-540) refers to pages 522-540 found within Volume III of the record.

Citations to the original record on appeal are made by reference to the original document number or the page numbers from the trial transcripts or jury selection that are not a part of the post-conviction record. For example, (R 252) refers to document number 252 and (R 4112-20) refers to pages 4112 through 4120 from the original record on appeal.

STATEMENT OF THE CASE AND FACTS

Course of Proceedings

Appellant Robert Bailey was tried and convicted of capital murder and resisting an officer with violence in Bay County. The jury, by a vote of eleven to one, recommended death and the judge sentenced him to death. (Vol. III, pgs. 522-540) This Court affirmed his judgment and sentence. (Vol. I, pgs. 6-30) Thereafter, Bailey filed a motion for post-conviction relief (Vol. I, pgs. 55-81) and later amended the motion to include additional claims of ineffective assistance of counsel. (Vol. II, pgs. 246-289) The Circuit Court denied the motion after an evidentiary hearing. (Vol. III, pgs. 497-546; Vol. IV-V; and Vol. VI, pgs. 931-1013) Bailey filed a timely notice of appeal (Vol. VI, pg. 1014) and this brief follows.

Factual Summary of the Crime

This Court summarized the facts in its opinion affirming the sentence, as follows:

> Robert J. Bailey was indicted for resisting a police officer with violence and first-degree murder in the shooting death of Sergeant Kevin Scott Kight, which occurred after Sergeant Kight stopped Bailey for a traffic infraction.
>
> On March 26, 2005, Robert Bailey, John Braz, and D'Tori Crawford drove from Chicago to Florida to look for women during spring break. For the trip, Bailey used a white Dodge Durango that his grandfather rented for him. The three men drank beer and smoked marijuana on the way, driving all through the night. Crawford saw

that both Braz and Bailey had handguns with them. The men arrived in Pensacola on March 27, but once they arrived, they learned that a recent hurricane had damaged the beaches in Pensacola significantly. After eating lunch at a restaurant, they drove to Panama City and checked into the Sugar Sands Motel. They met a few men from Kentucky, drank some more, and went to a nearby bar called "Sweet Dreams" with a few of the men from Kentucky.

After some time had passed, Bailey and Crawford left the bar in the white Durango to pick up some girls. Traffic was bumper-to-bumper and was moving very slowly. While they were driving, Bailey and Crawford paused to talk to some girls walking down the road, exchanging their phone numbers and hotel room numbers. Bailey and Crawford did not notice that traffic had begun to move until a police officer, Sergeant Kight, pulled them over. Sergeant Kight requested Bailey's driver's license, and after Bailey gave him identification, the officer left, saying that he would be right back. At that point, Bailey started to panic and told Crawford that he did not have a valid license and had a parole violation. He asked Crawford what he thought would happen. Bailey's hand was shaking so badly that he asked Crawford to call his girlfriend for him. Crawford heard Bailey tell his girlfriend that he was being pulled over by a cop and was going to need her to pick him up because Bailey would "pop this cop" if the officer tried to arrest him. Bailey then reached under the driver's seat to retrieve a handgun, placing it under his right leg. Bailey's face was red, and he had tears in his eyes. Crawford tried to calm Bailey down, but Bailey told Crawford that he was not going back to jail again. Crawford refused to be a part of the plan, and when he noticed that the officer was looking down, Crawford got out of the vehicle, blending in with a crowd of people who were walking by. Crawford barely knew Bailey and did not warn the police officer because he was afraid that if he approached the officer, Bailey would shoot him too.

While Bailey was being pulled over, a number of people in other vehicles were watching the events, particularly since traffic was barely moving. As Hillary Chaffer drove by, she noticed that Bailey tried to pull forward while the officer was looking down. Sergeant Kight approached Bailey's vehicle again, removing his handcuffs from his belt. Bailey stuck his gun out the window and fired it three times at the officer. Two of the bullets hit the officer, and the other bullet hit a passing van and lodged in the door of the van. Bailey sped off in his

vehicle, while Sergeant Kight radioed dispatch that he had been shot. Many other officers were close by at the time of the shooting. The first responding officers arrived in less than a minute and tried to administer first aid, but Sergeant Kight was unresponsive and never regained consciousness. He was declared dead at the hospital.

Meanwhile, Bailey drove his vehicle onto a dead-end road that ended at the beach. He abandoned the Durango near some condominiums at the beach and walked back to the road, jumping into the bed of a passing truck. Corey Lawson was one of the people already riding in the back of the truck when Bailey jumped into it. Bailey told Lawson that he had just "popped a cop" and lifted up his shirt so the gun in his waistband was visible. Bailey told them that he needed to get off the street and, after talking to a person on his cell phone, told Lawson to take him to the Sweet Dreams bar. Lawson thought Bailey was acting like a "loose cannon" and was afraid that if he did not follow directions, he would be risking his friends' lives. Lawson told the driver where Bailey wanted to go and let her know that Bailey had a gun. While they were driving to the bar, Bailey told Lawson that he shot the officer because he was wanted and would go to jail for life if he was caught. Bailey said that the only way the police were going to catch him is if they killed him. As soon as they dropped Bailey off at the bar, Lawson and his friends contacted the police and told them that they had been carjacked.

Crawford also caught a ride back to the bar. When he arrived, he found Braz and Bailey already there, arguing. Crawford, Braz, and Bailey went back to the Sugar Sands Motel together, and while at the hotel, Crawford tried calling his family. While he was on the telephone, he heard Braz and Bailey on the patio arguing about getting rid of the guns and bullets. Bailey came back into the room, emptied a box of bullets into his pocket, and left. Braz and Crawford decided not to leave; they knew the police would be coming so they waited for the police to arrive.

When the police arrived, they took Braz and Crawford into custody for questioning. The officers then proceeded to search the area surrounding the hotel. Deputy Donna Land was searching a building west of the motel, and Deputy Jim Jenkins went around the back side of the same building. After walking around a corner, Deputy Jenkins saw Bailey peeking around the far corner of the building, watching Deputy Land, who was walking up the stairs. Bailey was

doing something with his hand around his waistline, which Deputy Jenkins could not see clearly. Deputy Jenkins drew his weapon and ordered Bailey to put his hands in the air. Bailey refused to comply, however, and was jerking something with his right hand. Deputy Jenkins became quite anxious and yelled very loudly for Bailey to raise his hands. Other officers arrived, and Bailey finally complied. The officers patted down Bailey and found a fully loaded gun in his waistband. Bailey also had a pocket full of ammunition and a key with a rental car tag on it for a Dodge Durango. After he was arrested, Bailey inquired as to the status of the officer he shot.

During the trial, the State presented the testimony of Crawford, who testified about the trip and the circumstances before and after the shooting. Crawford, however, was not present when the police officer was shot. The State presented two eyewitnesses to the shooting: Hillary Chaffer and Jarrod Schalk. Both witnesses were driving past Bailey when he shot Sergeant Kight, and both identified Bailey as the person who shot the officer. Hillary Chaffer testified that when she passed the white Durango that was pulled over, she saw only Bailey in the vehicle, and he looked very pale and very scared. When she first heard the gunshots, she was facing forward but quickly turned around and saw Bailey with a gun in his hand before he drove away. Jarrod Schalk was the other eyewitness who testified at trial. He was riding in a van as a passenger and began to watch the officer who pulled over a white Durango. He also testified that he saw only Bailey inside the vehicle. As the officer approached Bailey with handcuffs in his hand, Schalk told his friends they were about to see somebody get arrested. Schalk noticed that Bailey's face looked really mean and upset. Bailey suddenly pointed a gun, and Schalk saw the fire from the gun before he ducked. One of the bullets hit the van in which Schalk was riding. Lawson testified for the State and detailed how Bailey jumped in the back of his truck after the shooting, admitted that he had "popped a cop," showed them the gun, and instructed the occupants to take him to a particular bar named Sweet Dreams.

Numerous officers and investigators also testified about the evidence found during the investigation. Officer Clayton Jordon testified that Bailey's identification was found still clipped to Sergeant Kight's citation book holder when they arrived at the scene. Joseph Hall, who worked for the Florida Department of Law Enforcement (FDLE), testified that the two projectiles obtained from the victim

were fired from the gun that Bailey possessed when he was arrested. Dr. Charles Siebert, the medical examiner, testified that the stippling pattern on Sergeant Kight's face showed that the weapon was fired approximately eighteen inches away from the victim. The two bullets that struck the officer went through the top portion of the officer's bullet-proof vest and, based on a downward trajectory, hit his heart, liver, and kidney. Both of the wounds were fatal, and Sergeant Kight would have quickly lost consciousness within about a minute.

The State also called Catherine Hanson, who was the dispatcher on the evening of the crime. Sergeant Kight called dispatch when he first stopped Bailey; he requested a license check at 10:25 p.m.; and at 10:30 p.m., he reported that he had been shot. The State called a company representative from Bailey's cellular company to establish that on the night of the murder, two calls[1] were made from Bailey's cellular phone at 10:26 p.m., confirming Crawford's testimony that Bailey talked to his girlfriend shortly before the murder. Finally, the State called Randy Squire, who monitored Bailey while he was incarcerated and reviewed all of his incoming and outgoing mail. Squire found a poem in Bailey's cell room which was written in Bailey's handwriting and described the shooting. The jury found Bailey guilty of murder in the first degree with a firearm and guilty of resisting an officer with violence. (Vol. I, pgs. 7-14)

Penalty Phase

The State sought to prove two aggravating circumstances under § 921.141(5) Fla. Stat. (2005): (a) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation; and (e) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (Vol. IV, pgs. 619, 622-623) The State introduced evidence that Bailey

[1] One call lasted for one second, and the second call lasted for a little under two minutes.

was on parole in Wisconsin at the time of the crime and his parole agent later sought a warrant for his arrest. (Vol. I, pg. 14; Vol. IV, pgs. 628-631)

Bailey's attorneys argued that two statutory mitigators applied: 1) substantial impairment of capacity to appreciate criminality and conform conduct; and 2) crime committed while under the influence of an extreme emotional disturbance. (Vol. V, pgs. 808-810) They called only one witness in support, Dr. Larry Kubiak, a licensed psychologist. (Vol. IV, pg. 632) Dr. Kubiak met with Bailey at the jail and administered a series of psychological examinations over four and a half hours. (Vol. IV, pgs. 633-634, 684) He believed that Bailey was trying his best and was not malingering. (Vol. IV, pgs. 634-635, 658, 660) He also opined that the test results were consistent with the information reported in the records he reviewed. (Vol. IV, pg. 663)

Dr. Kubiak reviewed Bailey's psychological records, which included records from the Department of Health and Human Services Behavioral Health Division of Milwaukee County. (Vol. IV, pgs. 636, Vol. X, pg. 1263) Those records dated as far back as 1993 and showed that he was diagnosed with attention deficit hyperactivity disorder (ADHD) when he was twelve years old. (Vol. IV, pgs. 637, 638, Vol. X, pg. 1266) Dr. Kubiak explained ADHD to the jury:

> Well ADHD is considered to be a neurological condition that occurs from birth and there are four various components: Primarily the inattentive type; the hyperactive impulsive type; the combined type; and then not otherwise specified, NOS; and basically it is a diagnosis,

> um, that is given when there are problems with a person's attention or with hyperactivity to the point it interferes with their day-to-day functioning. Oftentimes, depending upon the type and severity, it can interfere with school performance, um, it can interfere with relationships with peers, um, relationships with authority figures and sometimes, you know, many times children who has such diagnosis are referred for evaluation and treatment, um, and it is one of the more common psychiatric diagnoses among children and certainly one of the most treatable ones, if caught and treated appropriately and early on. (Vol. IV, pgs. 637-638)

Dr. Kubiak reviewed reports from Dr. Jill Rowan, which consisted of two IQ tests: one for Bailey and one for his mother. (Vol. IV, pg. 639, Vol. X, pgs. 1276-1279) He reported that Bailey scored "a verbal IQ of 71; a performance IQ of 64; and a full scale IQ of 65; which would be consistent with a mild mental retardation range." (Vol. IV, pg. 640, Vol. X, pg. 1277) However, her report also stated, "In order to determine if Mr. Bailey is mentally retarded, an assessment of his adaptive functioning ought to be conducted. Additionally, it would be helpful to obtain school records, including psychological testing." (Vol. X, pg. 1277) Dr. Kubiak was aware of Rowan's caveat, yet still considered her report in making his diagnosis. (Vol. IV, pg. 640, 686)

Dr. Kubiak reviewed records from Lad Lake, Inc., a Wisconsin treatment facility "for individuals who have had problems with delinquent behavior and provides a therapeutic environment in hopes of making changes in that behavior, helping to produce more appropriate pro-social behavior." (Vol. IV, pg. 641)

Bailey was treated at the facility in 1998. (Vol. IV, pg. 640) Dr. Kubiak read the following from his treatment summary:

> When confronted regarding mistakes or acts of wrongdoing he would continue to use denial as his first defense. Um, it was noted we had seen significant change in the past month, to month and a half, and it was suggested this might have been due to the fact that he was placed on Ritalin on 3-19-98. It was noted further that Robert had been encouraged to try using medication early in his residence but refused and he accepted the idea only after seeing other residents who entered at the same time that he did leave, at which time he accepted the possibility that he might need medication to help him control his impulsiveness. (Vol. IV, pgs. 641-642)

Dr. Kubiak noted that Bailey's treatment from Lad Lake was consistent with his ADHD diagnosis and that his behavior improved when he received Ritalin, an amphetamine used for treating ADHD. (Vol. IV, pgs. 642, 643, Vol. X, pg. 1282)

Dr. Kubiak also reviewed Bailey's health records from Wisconsin's Department of Corrections where Bailey was treated from 2002 to 2004. (Vol. IV, pgs. 644-645, Vol. X, pgs. 1293-1421) The records indicated that Bailey was diagnosed with ADHD and possibly suffered from bipolar disorder. (Vol. IV, pg. 645) When asked to tell the jury his findings from his review of the records, he stated:

> He had seen a therapist, a psychologist, and psychiatrist. He had been evaluated for possible medication. They had given him a diagnosis of again attention deficit hyperactivity disorderly [sic] by history and also they had given him a diagnosis of ruling out bipolar disorder, so basically by saying rule out, they mean there seems to be some possibility of that as a psychiatric diagnosis for him but they needed further information to [sic] before they could make a final decision, so

> that was certainly one of the diagnoses that they were considering in regard to his treatment. (Vol. IV, pgs. 644-645)

Dr. Kubiak reviewed Bailey's school records dating back to 1999 as well. (Vol. IV, pg. 646, Vol. XI, pgs. 1423-1447) Dr. Kubiak reported that Bailey was able to obtain his general equivalency diploma, or GED. (Vol. IV, pg. 647) Dr. Kubiak considered his school records and all of the other documents presented to him before rendering a diagnosis. (Vol. IV, pg. 647)

Dr. Kubiak administered a Competency Screening "to give me some information about his competency related to the, you know, the charges in question." (Vol. IV, pg. 648) The Delis Kaplan neuropsychological testing was given to measure his executive functioning skills. (Vol. IV, pg. 648) Dr. Kubiak reported that Bailey's test "tells me something about, um, impulsivity, of cognitive flexibility, um, decision making, higher level cognitive processing, and certainly deficits in that area are very significant." (Vol. IV, pg. 653) He also stated,

> Well, basically, you know, the majority of the tests that I was giving were looking at significant brain damage and this would be very consistent with significant brain damage. Um, and they would, I do a lot of assessments with people with Alzheimer's and they would score similar to people we see with Alzheimer's, dementia, the Alzheimer's. (Vol. IV, pg. 655)

Dr. Kubiak administered the Kaplan Baycrest Neurocognitive Assessment, a neuropsychological evaluation that looked at "a variety of things, including memory, verbal fluency, and a number of skills that are very important in

neuropsychological assessment." (Vol. IV, pg. 648) Bailey's test results were "very consistent with that history of ADHD." (Vol. IV, pg. 655) The test also suggested it would be difficult for Bailey to consider options and other possibilities because 99% of people performed better on that section of the test. (Vol. IV, pg. 656) The test results did not indicate "significant deficits" in his verbal skills. (Vol. IV, pg. 656) Several other subtests indicated some deficits in areas and average performance in others. (Vol. IV, pg. 657) In short, the test "just confirms what we were seeing with the Delis Kaplan that there are some very significant neurocognitive deficits that would be consistent with significant brain damage." (Vol. IV, pg. 658)

Dr. Kubiak administered the Mallon Clinical Multiaxial Inventory (III), which provided information regarding personality functioning and personality disorders. (Vol. IV, pgs. 648, 659) Bailey's performance revealed "elevations on a number of the personality styles related to depressive, dependent, antisocial, passive-aggressive, or negativistic, schizotypal borderline, so all of those had at least mild evaluations [sic]. And then on the clinical syndromes he had elevations on anxiety, bipolar manic, dysthymia, alcohol dependence, drug dependence, post-traumatic stress disorder, major depression, and delusional disorder." (Vol. IV, pg. 659) When asked what the test demonstrated, he responded:

> Well, they showed me that this is an individual who has a wide variety of psychiatric problems. I saw no evidence for schizophrenia, but I

> certainly saw a lot of evidence for post-traumatic stress disorder, certainly a lot of evidence for alcohol and drug abuse, which his history substantiates, certainly a lot of evidence for depression, some evidence for bipolar manic, and certainly that was one of the diagnoses rule outs that had been identified earlier on, and also a number of personality styles, um, and disorders. Personality disorders are things that are generally with persons, individuals, and do not change overnight. They are, they are ways they look at the world and they relate to people and he had several different styles, as I said, depressive, so it's almost like person who always see the glass as half empty instead of half full, the dependent, the person who may tend to be very clingy, in relationships, the anti-social personality disorder, the person who always looks to themselves first and does not really care about society's rules and so on. The passive-aggressive or negativistic style, the person who, um, really resents any demands that they function in any way other than they want to, person who may tend to be their own worse enemy, a person who feels very put upon, very cheated, very unappreciated, misunderstood, those kinds of things.
>
> Then in terms of severe personality pathology, schizotypal borderline, the schizotypal personality, someone who has a very pervasive pattern of social and inner personal deficits. They have real difficulty forming close relationships, forming any true bonds, give and take in relationships and so on. They oftentimes have a lot of cognitive distortions in terms of how they see other people and may misinterpret what people say and do. And then the borderline personality which represents a wide vacillation in a number of areas. A person who sometimes feels like they are, sometimes feels like on top of the world, other times feel like they are, you know, at the bottom of the pit and can't see the light at the top. The person who feels like they are God's gift to mankind and then the next minute may feel like they are lower than dirt. The person who can't get people too close to them and then the next minute can't keep them far enough away, and a tremendous amount of vacillations in those dimensions, so those were the things that we were seeing in terms of the personality disorders. (Vol. IV, pgs. 660-662)

Dr. Kubiak administered the Rorschach, or inkblot test, which provided a "wide range of information regarding coping ability, possible schizophrenia,

depression, ability to see things in an accurate way, self-esteem, and so on." (Vol. IV, pgs. 648-649) Dr. Kubiak summarized Bailey's performance:

> Some of the things I found with the Rorschach is he did have an impairment in his reality testing, that is, he misperceives situations. Now obviously this is a continuum. I am not in any way saying he's schizophrenia, out of touch with reality, or anything along those lines, but there's a continuum there and it does suggest that he significantly misperceives situations, um, and may interpret them one way when they really represent something totally different. May see two people talking, assume they are talking about him, and they may be talking about the weather. And that type of style suggests that he's likely to engage in very poor judgment and does not make an adequate connection between his actions and consequences in what would be appropriate behavior.
>
> He also has difficulty in thinking logically and coherently and the testing suggests he's less capable than most people of coming to reasonable conclusions about the relationships between events and what their logical consequences are. He also has, he also lacks a consistent and well defined coping style. Sometimes he will try to think things through, sometimes he will try to act first and think later but his style is marked by a great deal of inconsistency and unpredictability.
>
> Also there was some kind of contradictory indications, which on the one hand it suggests that he has very narcissistic like traits, almost sees himself as better than others, a sense of entitlement, and it also suggest a kind of external, a tendency to externalize blame and responsibility. Things are not my fault, it's someone else who has done this and so on. While on the other hand, he also has, there's a suggestion that, um, he has some rather negative views of himself, as well, so there's kind of a competing estimation of his perceptions of himself and, and, if I may, that would be very consistent with that borderline personality disorder style, as I said the vacillation in terms of self-perceptions is very consistent with that particular personality style. Also it suggests that he has a limited ability to identify with real people in his life. He's more likely to identify with imaginary figures and so on and model himself after them rather then any real positive role models in his life and so on. Also suggests he has difficulties

> getting really close to other people. Um, that he's more likely to kind of keep them at arms' length and in his very likely to have very ineffective and maladaptive interpersonal relationships, so those were the main things that I was seeing with the Rorschach. (Vol. IV, pgs. 663-665)

The test of Memory Malingering suggested if Bailey was faking certain tests. (Vol. IV, pg. 649) Dr. Kubiak opined that Bailey's score[2] indicated that he was either intentionally underperforming or that he had a very significantly impaired memory. (Vol. IV, pg. 667) To determine if Bailey's memory was impaired, Dr. Kubiak administered the Wechsler Memory Scale (III), which provided a wide range of information about his memory functioning. (Vol. IV, pgs. 649, 667) Bailey's performance suggested to Dr. Kubiak "that he does have very significant memory problems that would suggest again cognitive impairment or in an older population would be consistent with, say, Alzheimer's." (Vol. IV, pg. 671) Dr. Kubiak attributed Bailey's low Memory Malingering test scores to Bailey's memory problems and brain damage, and not to any intentional underperforming on the tests. (Vol. IV, pg. 704)

The Trauma Symptom Inventory "is probably one of our best instruments to identify any possible post-traumatic stress disorder." (Vol. IV, pgs. 649, 671) Two of Bailey's three validity indicators were normal, but the third was elevated and consistent with an individual with a traumatic childhood. (Vol. IV, pg. 672) Dr.

[2] Bailey scored 30, 35, and 30 during three trials. Generally, scores less than 45 suggest malingering. (Vol. IV, pg. 704)

Kubiak explained that Bailey's test scores were consistent with someone suffering from post-traumatic stress syndrome:

> He had significant elevations in terms of anxious arousal, depression, anger, irritability, intrusive experiences, defensive avoidance, dissociations, impaired self-reference, and attention reduction behavior. And some of those were extremely high, for instance, the attention reduction behavior was at T-score of 91 so four standard deviations above the mean. And this is found in people who tend to externalize distress through things like suicide attempts, through aggression, through inappropriate sexual behavior, through cutting themselves, and other activities that are usually meant to deal with abandonment or aloneness, and it's, a high score suggests someone trying to act out, if you will, negative emotions. (Vol. IV, pg. 673)

The Woodcock Johnson Psychoeducational Battery (II) was administered to determine his reading ability. (Vol. IV, pg. 649) The test showed Bailey was able to read and sound out words at an 11.8 grade level, but only a 2.7 grade level for passage comprehension. (Vol. IV, pg. 674) These findings did not suggest that Bailey would have been incapable of writing letters or poetry. (Vol. IV, pgs. 675-676)

He also found several facts from Bailey's social history important in making his diagnosis:

> Well, in looking at the history, there was several things that, that were significant. One, he was born to a very young mother. There was some problems, my understanding with the delivery portion, and that he needed to [sic] additional medical care. He drank gasoline at the age of two; he fell out of a two-story building and struck his head had severe head trauma. He started using alcohol and drugs at a very early age, including Estacy, [sic] which research indicates does have significant impact in terms of creating brain damage. He also spoke

> to me about, I think when he was around 16 getting drunk and falling out, backward out of a window, um, but drunk enough he didn't really seek any medical attention, so there has just been kind of accumulation of trauma to the brain over the years that I think has created the kinds of scores and so on that we are seeing at this point. (Vol. IV, pg. 676)

Ultimately, Dr. Kubiak diagnosed Bailey on Axis-I (clinical syndromes that could be chronic or short-lived) with significant brain damage, but did not specify the cause of the brain damage. (Vol. IV, pgs. 677, 681, Vol. XI, pg. 1464) He also diagnosed Bailey with post-traumatic stress disorder because "the Trauma Symptom Inventory clearly indicated there was evidence of that and certainly his history would suggest that as well." (Vol. IV, pg. 677, Vol. XI, pg. 1464) He also diagnosed him with alcohol abuse, cannabis abuse, and bipolar disorder by history, although he stated, "the records suggests a rule out of bipolar and I don't recall seeing that as a formal diagnosis prior to my seeing him, although I understand that that has been given to him, subsequently." (Vol. IV, pgs. 677-678, Vol. XI, pg. 1464)

He also diagnosed him with paranoid delusional disorder on Axis-I, which suggested a very specific paranoid delusion, as opposed to paranoia about everything and everybody. (Vol. IV, pg. 678, Vol. XI, pg. 1464) When asked to explain further, Dr. Kubiak explained:

> Well, that would manifest in believing, well, depends on who the authority figure – it may be all authority figures, may be certain, it could be judges, it could be law enforcement, it could be teachers, but

> the belief that they are out to get me, that I can't trust them, that I better never turn my back on them, and that there's no way that's going to change. And those can be extremely well-entrenched and very, very difficult to treat through any kind of therapy. (Vol. IV, pg. 678)

Dr. Kubiak explained that Axis-II represented more chronic conditions that result from retardation at birth or "times when under certain circumstances that can be more of an acquired, based on certain traumas and damage and so on, and then the personality disorders are really more chronic and enduring ways of looking at life and dealing with people." (Vol. IV, pg. 679) On Axis-II, Dr. Kubiak diagnosed Bailey with depressive personality disorder with anti-social features, dependent personality disorder with negativistic features, and borderline personality disorder with schizotypal features. (Vol. IV, pgs. 679, 682, Vol. XI, pg. 1465)

Axis-III represented medical conditions or circumstances that may be contributing to a person's problems. (Vol. IV, pg. 680) Dr. Kubiak diagnosed severe alcohol and substance abuse, as well as numerous head traumas. (Vol. IV, pg. 680, Vol. XI, pg. 1465) On Axis-IV (psycho-social stressors), Dr. Kubiak identified the pending trial and isolation from his family as active stressors at the time of the assessment. (Vol. IV, pg. 680, Vol. XI, pg. 1465)

On Axis-V (global assessment functioning), Bailey scored a 20, which was below a score of a typical patient at a psychiatric hospital (with scores between 30

to 45) and that of an ordinary person (who should score between 70 to 80). (Vol. IV, pg. 680) Dr. Kubiak believed Bailey's score was "very consistent with the level of head injury and the variety of psychiatric Axis-I and II diagnosis that I gave him." (Vol. IV, pg. 680, Vol. XI, pg. 1465)

Dr. Kubiak concluded his direct testimony by stating that Bailey "undoubtedly has very severe brain damage and very severe psychiatric problems of longstanding duration that certainly impacted his decision making a that time." (Vol. IV, pg. 681) He also opined that Bailey was incapable of fully appreciating the nature and consequences of his actions at the time of the shooting. (Vol. IV, pg. 681) His report was submitted as evidence. (Vol. IV, pg. 682)

During cross-examination, Dr. Kubiak acknowledged that he did not know when the crime took place, where it took place, the identity of the victim, or who accompanied Bailey just before the shooting. (Vol. IV, pg. 683) He never spoke with any witnesses, reviewed any police reports, or asked Bailey what he remembered about the case because he was not asked to do so. (Vol. IV, pg. 684) Dr. Kubiak explained that witness interviews are not necessary for his evaluations. (Vol. IV, pg. 711)

Dr. Kubiak acknowledged that Bailey had never been diagnosed as mentally retarded despite the reference in Dr. Rowan's report. (Vol. IV, pg. 688) He also acknowledged that Bailey had elevated scores of malingering on two tests, but not

enough to invalidate them. (Vol. IV, pgs. 691, 694) He also could not find any documentation from the records that indicated Bailey was diagnosed and treated for bipolar disorder. (Vol. IV, pg. 703) The State had Dr. Kubiak highlight scores from the Memory Malingering test where Bailey scored a 30, 35, and 30, all less than 45, which suggested malingering. (Vol. IV, pg. 704)

Regarding his post-traumatic stress disorder diagnosis, Dr. Kubiak acknowledged that the stressful event causing the diagnosis could have been the shooting itself. (Vol. IV, pg. 706) Overall, Dr. Kubiak could not specify a time each of Bailey's disorders manifested, but could only opine that they existed when he evaluated him in October 2005. (Vol. IV, pg. 707)

When confronted with the recorded phone conversation in which Bailey discussed a retardation defense, Dr. Kubiak did not waver and stated that the recording did not change any of his opinions. (Vol. IV, pg. 709) Nor did writings taken from Bailey's cell after his evaluation change his opinion. (Vol. IV, pgs. 710-711)

State's Rebuttal to Mitigation Evidence

The State called Nancy Huttelmaier, a schoolteacher who met Bailey through an educational program for incarcerated juveniles. (Vol. IV, pgs. 716-717) Bailey entered the program in 1999 and completed an initial assessment of his basic skills. (Vol. IV, pg. 718) She testified that he was reading at 12.9-grade level

and was at the 7.1 grade level for math. (Vol. IV, pg. 719) She saw him on a daily basis for five or six months. (Vol. IV, pg. 730) She noted that Bailey obtained Wisconsin's high school equivalency diploma. (Vol. IV, pgs. 721, 725) She also testified that his school records suggested that his grades were generally in the 'B' and 'C' range when his attendance was good; but worse when his attendance was poor. (Vol. IV, pg. 729) She did not observe any indications that Bailey was mentally retarded and was unaware of any mentally retarded person that passed the high school equivalency test. (Vol. IV, pg. 735)

The State called Dr. Greg Prichard, a clinical psychologist, who testified as an expert in the field of forensic pathology. (Vol. V, pg. 741) Dr. Prichard opined that Bailey was not mentally retarded and could have performed better on his IQ test. (Vol. V, pg. 742) Dr. Prichard was influenced by the recorded phone conversation in which Bailey discussed retardation with Jason Braz. (Vol. V, pg. 749) He diagnosed Bailey with polysubstance abuse and anti-social personality disorder. (Vol. V, pg. 743) In Dr. Prichard's opinion, Bailey did not qualify for any statutory mitigators. (Vol. V, pgs. 751-752) Dr. Prichard took issue with Dr. Kubiak global assessment of functioning score of 20, which in his opinion would only be assigned to a person who is unable to function independently. (Vol. V, pg. 759) When Dr. Prichard saw Bailey, he determined his score was 78, which indicated he did not have any serious symptoms. (Vol. V, pgs. 758-759)

Dr. Harry McClaren testified for the State as an expert in forensic psychology. (Vol. V, pgs. 761, 764) He met with Bailey on four separate occasions and administered several psychological tests, including an IQ test. (Vol. V, pg. 762) Like Dr. Prichard, he did not believe Bailey qualified for any statutory mitigation. (Vol. V, pg. 764) He found that the recorded phone conversation between Bailey and Braz supported his opinion that Bailey was "not extremely emotionally disturbed at the time," and "that his ability to appreciate the criminality of his behavior was not substantially impaired." (Vol. V, pg. 767)

During cross-examination, Dr. McClaren admitted that he did not give Bailey the same tests that were administered by Dr. Kubiak. (Vol. V, pg. 768) He suggested Bailey's IQ was near 80 and dismissed any lower scores because "you can't make yourself smarter," but you can get a lower score "by not trying too hard." (Vol. V, pg. 770)

Dr. McClaren opined that Bailey suffered from a brain dysfunction, polysubstance dependence, and "probably" depression. (Vol. V, pg. 771) He also diagnosed him with anti-social personality disorder and noted Bailey had some borderline personality disorder traits. (Vol. V, pg. 771)

The State's last witness, Randy Squire, introduced the recorded conversation between Bailey and Braz. (Vol. V, pg. 779) The relevant portions of the recording are as follows:

VOICE 1: You ain't heard nothing about what's going on with me though?

VOICE 2: A little bit.

VOICE 1: A little bit?

VOICE 2: What comes off the internet I read.

VOICE 1: They are saying I'm mildly retarded and that I might be crazy.

VOICE 2: Yeah.

VOICE 1: Yeah. They're talking about sending me to the nut house.

VOICE 2: That's positive.

VOICE 1: Yeah, I know it, brother, I'm working on it.

VOICE 2: The problem is they will evaluate you.

VOICE 1: Yeah, they got another psychiatrist coming to see me again, you know, it's all good though. So if you start getting some letters and stuff that sound kind of weird, don't mind them. I was talking about how I was from the further and shit in one of my letters?

VOICE 2: Yeah. (Vol. V, pgs. 785-786)

VOICE 1: I said, well, he said, if you go to the nut house, you ain't gonna have to worry about it any way or if they find you mildly retarded then ain't gonna have to worry about it anyway, because they can't, they can't try me if they find me mildly retarded or crazy.

VOICE 2: Yeah, but the problem is you go to the nut house for the rest of your life, man.

VOICE 1: Nah, brother, you ain't understanding. You go to go to the nut house for five years, brother, and if they don't find you competent within five years, after five years they find you, they legally find you not guilty by reason of insanity and then you stay in the nut house and if you ever get better after that fives they let you go home, boy.

VOICE 2: For real?

VOICE 1: Yeah. I ain't no rookie when it comes to this here shit, brother. I'm playing all my little cards, brother, don't even trip, I'm trying to make sure that happens, man. I hope you, you know, you need to do something, too, brother start talking to walls.

VOICE 2: Huh?

VOICE 1: Start talking to the walls and shit, brother.

VOICE 2: That ain't gonna help me, nigga.

VOICE 1: Yeah, it will. (Vol. V, pgs. 790-791)

During closing argument, the prosecutor highlighted Dr. Kubiak's failure to review the police report and other facts specific to the crime. (Vol. V, pg. 794) He belittled Dr. Kubiak's analysis as "hocus pocus science," and argued that he "pulled a rabbit from his hat." (Vol. V, pg. 794) He challenged Dr. Kubiak's comparison of Bailey with a person inflicted with Alzheimer's disease. (Vol. V, pgs. 794, 796) He urged the jury to disregard the "fancy words" used by the defense expert and the science behind it:

> Ladies and gentlemen, the stakes before you are too high for fancy words. They're too high for having somebody with a bunch of letters after their name, Ph.D. MED, whatever the heck it is, that can opine in four and a half hours that this man is worse than an Alzheimer's patient. Let us, at this day, at this hour, be real. Let us wipe away all of the pretense, all of the flash, all of the show, and let's talk about what is real. Let us in the next hour or two get to the heart of the matter and figuratively to the heart of this man. (Vol. V, pgs. 795-96)

In Bailey's defense, his lawyer argued that Dr. Kubiak's opinion, Bailey's history of mental health problems, and witness descriptions of Bailey just before the murder proved that he "was under extreme mental influence" and could not

appreciate the criminality of his conduct. (Vol. V, pg. 808, 809) The only reference he made to Bailey's childhood and upbringing was, as follows:

> All these factors are for you to consider, all these pieces of evidence, this whole picture, life history, his school records, um, his school teacher. They kind of brushed over the fact that when he was a little middle school kid he was flunking everything and somehow he got to high school. They didn't want to focus on that too much. He had, wasn't doing well in school all the way through. Somehow he managed to barely squeak by and make it on, get a GED. I don't know what it's like up in Wisconsin but, you know, he had all these Ds or Us and a couple of Bs and he was in the top third of his high school class, I mean, you know, so he wasn't doing good in school. His mother apparently had him tested. He was having problems as a little kid and they ADHD. You have these records to look at. All these things are mitigation. You can consider anything else that you consider mitigation I haven't mentioned in the trial phase or penalty phase. You are the jurors, that's your job, and I ask you to do it and I know you will do it. (Vol. V, pgs. 809-810)

Without calling the jury's attention to any other mitigation evidence, he instructed the jury that they would be following the law by recommending life after they weighed the aggravation and mitigation. (Vol. V, pg. 811) He closed his argument by stating, "[i]f you come back with a life sentence for Robert Bailey, that would in no way diminish the life or death of Officer Kevin Kight." (Vol. V, pg. 811)

By a vote of eleven to one, the jury recommended that the death penalty be imposed. (Vol. V, pgs. 817-819) Defense counsel did not present any additional mitigation during the Spencer hearing. (R 4764-88)

Death Penalty Order

The court found that the two aggravating circumstances offered by the State outweighed the mitigating circumstances. (Vol. III, pg. 539) First, the court determined that the capital felony was committed by person previously convicted of a felony and placed on community control based upon a written stipulation and testimony from Bailey's parole officer from Wisconsin. (Vol. III, pgs. 523-524) The court gave great weight to this aggravator. (Vol. III, pg. 524)

Second, the court found Bailey committed the capital felony for the purpose of preventing a lawful arrest. (Vol. III, pg. 524) The court cited Crawford's testimony, which alleged that just before the shooting Bailey told him that he did not have a valid driver license, he had violated his parole, and asserted that he would not go back to prison. (Vol. III, pg. 524) The court also cited Bailey's phone call to his girlfriend in which he stated he was going to "pop this cop" and a later statement to others that he "just popped a cop." (Vol. III, pgs. 524-525) Finally, the court found Bailey's actions prevented his arrest until the following day. (Vol. III, pgs. 525-526) The court gave this aggravating circumstance great weight. (Vol. III, pg. 526)

The court rejected counsel's argument for a mitigating circumstance based upon Bailey's substantially impaired capacity to appreciate the criminality of his conduct and found that it was not established by the evidence. (Vol. III, pg. 533) It

rejected Dr. Kubiak's opinion that Bailey was akin to someone that suffers from Alzheimer disease or dementia and concluded his opinion was unreliable. (Vol. III, pgs. 527-529, 531) Further, the court found that his conclusions lacked "little, if any validity" since it was almost entirely based upon diagnostic testing without any factual basis to support a causal link to the crime. (Vol. III, pg. 533)

The court was persuaded by the records indicating Bailey was of average intellect. (Vol. III, pgs. 529-530) It found his actions after the shooting were not those "of a person who qualifies to be institutionalized for dementia," but were those "of a person who had the capacity to carefully and deliberately contemplate and weigh each of his actions as well as the consequences associated therewith." (Vol. III, pg. 531)

Likewise, the court found the evidence did not suggest that Bailey was under the influence of an extreme mental or emotional disturbance. (Vol. III, pg. 535) Instead the court found the evidence suggested that Bailey demonstrated behavior that was consistent with the normal human experience. (Vol. III, pg. 535)

The court did find that the evidence reasonably established nine other mitigators. (Vol. III, pgs. 535-539) It gave very little weight to his young age at the time of the offense. (Vol. III, pg. 536) It gave little weight to Bailey's low I.Q. score, history of mental health problems, mental health improvement while on medication, state of intoxication during the crime, impoverished childhood, poor

performance at school, concern for Officer Kight's well-being, and respectful courtroom behavior. (Vol. III, pgs. 536-539)

Grounds Raised in Appellant's Post-Conviction Motions

Bailey's original motion for post-conviction relief raised the following six (6) claims: (I) ineffective assistance during voir dire for failing to strike biased jurors; (II) denial of due process and ineffective assistance during voir dire for failing to conduct a meaningful inquiry of the venire's exposure to pretrial publicity; (III) ineffective assistance during the guilt phase of trial for failing to present a defense theory; (IV) ineffective assistance during the penalty phase for failing to attack one of the State's statutory aggravators; (V) ineffective assistance during the penalty phase for failing to present additional mitigation evidence; and (VI) Florida's lethal injection procedures were unconstitutional. (Vol. I, pgs. 55-81) An amended motion raised two (2) additional claims of ineffective assistance of penalty phase counsel: (VII) for failing to call additional experts; and (VIII) for failing to present additional evidence to support the defense expert. (Vol. II, pgs. 246-289)

Bailey's claims of ineffective assistance of counsel during the penalty phase alleged a failure to present evidence to support the two statutory mitigators and a failure to present evidence to support several non-statutory mitigators. In other words, the claims alleged that counsel was ineffective for relying on one expert

and should have presented additional witnesses and documents in support of mitigation. (Vol. II, pgs. 265-270, 272-274)

Summary of Voir Dire

After excusing some members of the panel for hardships, the court asked those who knew nothing about the case to identify themselves. (R 3877) From the first panel, only eight members of the venire had no knowledge of the case. (R 3878, 3881) From those without knowledge of the case, only one (Linda Lepak) served on Bailey's jury. (R 4548)

After conducting voir dire for the few without knowledge, the court turned to those that had some knowledge of the case. The court began with a panel of five (Ray, Hannah, Martin, McGhee, and Johnson) to "death qualify" them and learn the extent of their knowledge. (R 3909-3912) After the prosecutor elicited their opinions regarding the death penalty, he asked the very first prospective juror, James Ray, what he knew about the case:

> Q: Mr. Ray, let's start with you, tell us what it is that you know about this case?
>
> A: Well, I know that what I read in the paper. There were three of them in the car, officer stopped them. From what I understand or remember they didn't know why they stopped him, checked his driver's license, invalid and if I remember right it seemed like one of them got out of the car at the time and one of the things I had read that he said that if he comes back he's going to, made a comment he was going to kill him. And he walked up and shot three times but I think two of them hit him, he had on a vest but it didn't stop it. And then he called, said he had

> been shot and then they fled and caught him several hours later out at the beach at a motel somewhere in the bushes or something, I'm not sure. (R 3918)

Concerned that the other four heard veniremen were exposed to Ray's recitation of media reports, Bailey's attorney requested a side-bar conference. (R 3918-3919) At side-bar, Bailey's lawyers expressed concern that every time a juror described their knowledge of the case other jurors would become tainted. (R 3919-3920) The prosecutor suggested an individual voir dire regarding pretrial publicity and acknowledged the importance of the inquiry. "[I]t is difficult for us to determine whether they have an opinion that they can't get rid of if we don't know what the basis of that opinion maybe [sic]." (R 3920) After the discussion, an agreement was reached to examine the venire regarding pretrial publicity in groups of two instead of five, with an exception for the first group, which had already commenced. (R 3922) Then, after consulting with Bailey, defense counsel requested individual voir dire of the panel regarding pretrial publicity. (R 3939)

Of the first five exposed to pretrial publicity, all five had formed an opinion regarding Bailey's innocence, but all claimed to disregard the media reports and would determine guilt only based upon the evidence presented in court. (R 3922-3929, 3930-3933) When the prosecutor asked Linda Martin what she learned from the media, she responded, as follows:

> Basically I've read in the newspapers, on t.v. the same things that he said but also the part about where supposedly when he was in jail his

> conversations were recorded and he was going to play the crazy card and I suppose part of it was over why don't we see whether or not he was, had an I.Q. high enough to stand trial but he passed his GED. Read all of that too. (R 3925)

Connie McGhee told the prosecutor that she heard that the police officer had stopped Bailey and that Bailey said he wasn't going back to jail, and he shot the officer. (R 3927) Roger Johnson told the prosecutor that he followed the story "day by day on t.v. and what the paper said." (R 3928)

The second group, consisting of fourteen (14) prospective jurors, (Matthews, Wright, Givens, Wynne, Briard, Ballone, Dever, Dowdy, Burch, Adams, Good, Sherrod, Roy, and Gillman) were questioned collectively about their views toward the death penalty. (Vol. IV, pgs. 549-552; R 3941-44) Linda Good, Prospective Juror #53, expressed her opinion of the death penalty as follows:

> A: My belief is that the death penalty should be used if the case presents itself or the evidence shows that there was, that the person was guilty and they were in their right mind, knew what they were doing. I think the death penalty should be used, I think it should be as the gentlemen said more an eye for an eye. In my personal belief I don't think it is used enough. If it was used more there would be less crime. But if the situation presents itself I could vote life based on the evidence after guilty.
>
> Q: So I'm hearing you will weigh the aggravation?
>
> A: Yes, sir.
>
> Q: That the state presents and also be open to the mitigation?
>
> A: Yes, sir.
>
> Q: And weigh each of those and which ever outweighs the other that would be your recommendation?

A: Yes, sir. (Vol. IV, pgs. 562-63; R 3954-55)

After hearing that Good believed in an "eye for an eye" and that the death penalty was not "used enough," Defense counsel inquired further:

Q: Ms. Good, when you were talking about what your position was and because you've given it some thought, I'm sure since you got your jury summons to come here today, if I were to -- I think you said if I were to hear the evidence and I was convinced that the evidence showed that the person was convicted of, for instance, murder, that the death penalty is not used enough. Is that a fair characterization of what you believe?

A: Yes, sir.

Q: Then in the event we were at the penalty phase then would it be fair to say that you would be predisposed at that point to vote for the death penalty, is that a fair statement?

A: Before the evidence was presented? I mean, after found guilty.

Q: Okay, after that person is found guilty of premeditate murder, for instance, I had understood you to say if they are convicted of that then you believe the death penalty is not used enough.

A: Right.

Q: I'm not trying to trick you.

A: From the outside looking in, not in the jury room, that's my opinion. But as a jury member after hearing the evidence if I find that the person was not mentally stable, you know, other circumstances, I could vote for life. But outside looking in, it was my opinion that the death penalty is not used enough.

Q: You're willing to listen to the aggravating circumstances, for instance, that the state attorney would wish to present and yet reserve making a decision in your mind until you hear the mitigating circumstances?

A: Exactly.

Q: You're willing to do that, aren't you?

A: Yes, sir. (Vol. IV, pgs. 567-568: R 3958-59)

Defense counsel then asked the panel "[d]oes anyone disagree that in the event someone is convicted of a premeditated murder that life in prison can be a fair sentence?" (Vol. IV, pg. 571; R 3963) Two jurors disagreed that a life sentence was appropriate, and counsel posed the question to Good. (Vol. IV, pg. 573; R 3965) She responded, as follows:

> A: If a person knows what they're doing when they're talking [sic] a life that person is taking either a father, a mother, a child, a husband, they're taking that person who is loved by someone away from them, they should deserve to die.
>
> Q: So from your perspective in the event, and Mr. Bailey is charged in this case with premeditated murder, that's why we're here and asking these questions, kind of invading your private thoughts, in the event during the guilty phase of the trial the state were to convince you beyond a reasonable doubt that he were guilty of premeditated murder, that would be all, from what you've told me, that is, you've heard enough then?
>
> A: Right, exactly. (Vol. IV, pg. 573; R 3695)

After this response, the State once again attempted to rehabilitate Good.

> STATE: Mr. Givens, Ms. Good, when I talked before about aggravating factors and mitigation, that it is up to you to decide what weight to attach to any particular thing and that the state is limited in what we can present to you in aggravation, things that you can consider, and what I just heard a moment ago, it seemed to me, things that you thought were circumstances about a murder that made it more aggravated than just a normal first-degree murder is that what – I need an answer from you.
>
> GIVENS: Yes.
>
> STATE: Now, there may be other things. For example, there is no evidence in this case that this was some kind of contract killing. Okay? But that could be one of the aggravating factors, for example, and that you would say, well, a

contract killer, that is something that is, boy, those people, they really deserve the death penalty, that can be an aggravating factor that you think, I'm telling you now, that doesn't have anything to do with this case, I'm just using it as an example, that that's something that, in your mind, aggravates this case to where it would warrant a death penalty and you attach great weight to that. Just like you did talking about heightened premeditation, premeditation where somebody plans it out. And there is nothing wrong with that. The question is can you evaluate any mitigation –

GOOD: Absolutely.

STATE: -- that the defense may present that could outweigh the weight that you're attaching to that aggravation? Do you understand my question?

GIVENS: Yeah, I understand.

STATE: Ms. Good?

GOOD: I understand.

STATE: Can you consider the mitigating evidence and apply a weighing process? I'm not telling you which one outweighs the other at this point because that rests within our heart.

GOOD: Right.

STATE: But what we need to know is can you give both sides the opportunity to present that type of evidence and give it whatever weight, consider it?

GOOD: Right.

STATE: All anyone is asking is can you consider it, give it the weight that you determine to be appropriate?

GOOD: Yes, sir. (Vol. IV, pgs. 573-75; R 3965-67)

Defense counsel moved to strike Good for cause based upon her responses. (Vol. IV, pg. 579; R 3971) The court denied the motion based upon the State's rehabilitation questions. (Vol. IV, pg. 579; R 3971)

The second group, reduced to only eleven (11) "death qualified" jurors, (including Good) was questioned individually about their exposure to pretrial publicity.[3] The prosecutor asked what Wright she had heard, and she stated, "[Her stepmom] told me that Mr. Bailey had, I think she said, shot a deputy." (R 3973) Aside from the first group of five and Ms. Wright, none of the remaining veniremen were asked to divulge the specific information they learned about the case from the media or other sources.

When Good was asked about her understanding of the presumption of innocence and whether she could presume that Bailey was innocent, she responded, "I would like to think so, yes. From what I've heard of the case itself, to my knowledge, just from the news that I heard, Mr. Bailey pled guilty so it would be hard for me if he's already pled guilty to come back and say he's innocent. But it may not be true." (Vol. IV, pg. 610; R 4002) After the prosecutor told her Bailey did not plead guilty, she claimed to be capable of presuming his innocence. (Vol. IV, pg. 611; R 4003)

Defense counsel asked additional questions regarding the impact of the pretrial publicity on her opinion:

> Q: You've read or heard somewhere, I'm guessing, that Mr. Bailey pled guilty?
>
> A: Right.

[3] Matthews, Ballone, and Roy were excused before the pretrial publicity inquiry. (R 3972)

Q: So you presume that to be true based on having heard or read that? I'm asking?

A: Right, umm -- I would listen, if your question is what, would I be fair in my opinion?

Q: My question is now that you know he pled not guilty to that which he is charged with, then given that you've heard other things in the past, are you willing and able to do away with all you've heard?

A: To put those aside.

Q: You can do that?

A: Yes, sir.

Q: And you can consider what is presented here and here alone in making up your mind?

A: Yes, sir.

Q: You wouldn't be affected, for instance, if you hear something in court that is different than what you've read?

A: Right.

Q: Or heard?

A: Right.

Q: You can set that aside, what you've hard outside the courtroom?

A: Yes.

Q: No question in your mind?

A: No question.

Q: You can do that?

A: Yes, sir. (Vol. IV, pgs. 612-613; R 4004-05)

Of the eleven (11) from the second group, seven (7) had a preformed opinion of the case and the rest did not. (R 3973, 3986, 3993, 4000, 4007, 4009) Ms. Dever acknowledged that she had a preformed opinion, and stated, "honestly, you know, if you live in Bay County you've probably heard it, that he is guilty of

murder." (R 3987, 3990) She still claimed to be able to set her opinion aside, but would only do so if the defense convinced her. (R 3989-3991) Dowdy, Adams, Sherrod, and Gillman also required Bailey to prove his innocence and were ultimately stricken for cause. (R 3993, 3996, 4000, 4007, 4012)

In the afternoon, the court questioned another panel whether any of them had knowledge of the case. (R 4023) Only three (Gasper, Cromer, and Huff) lacked any knowledge of the case. (R 4024) They along with eleven (11) others (Lewis, Mills, Hering, Fontaine, Hetzel, Lawrence, Adkinson, Moon, Obesso, Thompson, and Thomas) became the third group to be questioned. (R 4025) Four (Huff, Lewis, Adkinson, and Thomas) were not "death qualified" and excused. (R 4054)

Before beginning the pretrial publicity examination and during a sidebar conference, the court and defense counsel stated:

> Q: All right, gentlemen, same procedure unless you want to change. I notice the, in the pretrial part of this thing none of you are asking any questions about individual facts but if you want to proceed like we have been doing we will.
>
> A: I am okay with how we have been doing it. (R 4054)

Of the group of eight (8) exposed to pretrial publicity, only two (Moon and Obesso) had a preformed opinion of the case and the others had not. (R 4068, 4070)

Maria Obesso reluctantly admitted that she had formed an opinion that Bailey was guilty based upon pretrial publicity. (R 4070) When the prosecutor asked if she could still presume Bailey's innocence, she responded as follows:

A: That would have to be, according to what we have heard, now the media is not always a hundred percent truthful.

Q: Very true.

A: But according to what I know from the media, um, the facts are very clear that he is guilty.

Q: Can you set aside what the media has said though and render a decision not based on anything you have heard from the media but solely what's here in the courtroom?

A: Probably so, yes. (R 4070)

After the prosecutor questioned whether it would be difficult for her to presume his innocence, defense counsel attempted to rehabilitate her:

OBESSO: It's a very tough question.

STATE: Yes, ma'am.

OBESSO: And it is tough because from the very beginning I might have thought that, you know, who knows the circumstances, but because of what happened in jail and because of the talks and all that, it would be very hard. I mean, not that I am set but it would be very hard for me to change my mind.

STATE: Okay, thank you, Ms. Obesso, thank you.

DEFENSE: If I may, Judge. Ms. Obesso, if the Court tells you that you are to follow the law and base your verdict on the evidence that you hear in the courtroom, can you do that?

OBESSO: Yes, I can.

DEFENSE: You can be fair to both sides in doing that, can't you?

OBESSO: I believe I could.

STATE: Thank you, those are my questions. (R 4071)

In a side-bar that followed, the State moved to strike her for cause, but defense counsel wanted to keep her:

> STATE: The state moves for cause. I think that Ms. Obesso was probably as candid as any juror we have seen here today, you know, she gave a very detailed, you know, when the events first happened, maybe she thought there was other things may be present, other factors to be considered, but based upon the Defendant's conduct in jail, what his statements were in jail that she has a much more firm conviction of his guilt. I, I think that she has displayed a very detailed knowledge of not only his guilt but also why she comes to that conclusion based upon his conduct. She indicates she has followed this case in great detail.
>
> DEFENSE: I agree with his assessment with respect to here candor in the fact she was followed the case but she says she could follow this Court's order, she could be fair to both sides, she's willing to do that and follow the law and we believe that, we believe that, we believe her when she tells me that and so we oppose the State's motion to strike her for cause.
>
> COURT: I tell you what, I will give you an opportunity to ask her some additional questions and couch the last question that you put to her which was follow the Court's law and put it in the context of some of the statements that she's made here, that is, will you follow the Court's law, set aside all your opinions, everything you have learned, and I want to hear her answer to that. (R 4072-73)

Whereupon, defense counsel asked the following:

> Q: Ms. Obesso, if I might have a few other questions. Earlier you were very open and honest and candid with us when you said you have followed very closely in the newspaper this case for a period of time, is that true?
>
> A: It is.

Q: And that you had formed some opinions based on what you had read with respect to some things that Mr. Bailey had done?

A: Yes, sir.

Q: And some information that was in the paper and on the news about what he had done, is that right?

A: That's correct.

Q: And you had formed some of your opinions that you have told us about here today based on what you had read?

A: Yes, sir.

Q: Okay. And that's a lot of material that you have read, isn't it?

A: Well, pretty much, yes.

Q: Okay, many articles in the newspaper?

A: Yes.

Q: And the more you read the more you formed an opinion, would that be a fair statement also?

A: Correct.

Q: Okay. Earlier I asked you that given all that information that you have read and digested and read with respect to Mr. Bailey's conduct with things he's alleged, I asked you could you follow this Courts' directions on how to render a verdict, that is, only based on what you hear in this courtroom, can you do that?

A: I said yes. Um, now I honestly think I it would be very hard to put your mind on blank and only hear what you hear and not what you already heard.

Q: Right.

A: But to be fair, I, I would try very hard to be fair.

Q: Okay, yes, ma'am. And I will tell you everyone here believes you would try to be fair. The question that we are having to deal with is we are all human and if you hear something in this courtroom that's different than that from what you have read, are you doing to be able to separate the two, do you think you can do that?

A: Let me say, um, I consider myself a person who is very, I pay a lot of attention, so I would try to say, yes, hopefully yes. And then I say hopefully because really I have never been in this situation.

Q: Yes, ma'am. Thank you.

COURT: All right, any additional argument that I need to hear from either side?

DEFENSE: Nothing additional, Your Honor.

COURT: Motion will be granted. (R 4073-4075)

The fourth group consisted of fourteen prospective jurors (Grayson, Dennery, Snyder, Miller, Foreman, Adams, Woodruff, Cuzzupoli, Keller, Stebbins, Stemphoski, Aulis, Moghtaderi, Baxley)[4]. (R 4077) Of the eight "death qualified" jurors, five (Denery, Foreman, Adams, Woodruff, and Stemphoski) of them did not have a fixed, preformed opinion regarding Bailey's guilt. (R 4110, 4112, 4114, 4115, 4127) Two (Miller and Aulis) had a fixed opinion, could not presume Bailey's innocence and were stricken for cause. (R 4111, 4129)

The fifth group consisted of fourteen prospective jurors (Gilmore, Owens, Paris, Register, Baumgartner, Luty, Griffin, Hill, Reynolds, Larry, Glenn, Cutchin, Wilson, Whaley)[5]. (R 4130) Of the twelve "death qualified" jurors, nine (Gilmore, Owens, Paris, Luty, Hill, Larry, Glenn, Cutchin, and Wilson) of them did not have a fixed, preformed opinion regarding Bailey's guilt. (R 4155, 4157, 4158, 4164,

[4] Grayson, Snyder, Keller, Stebbins, Moghtaderi, and Baxley were not "death qualified" and excused before an inquiry regarding pretrial publicity. (R 4108)

[5] Register and Whaley were not "death qualified" and excused before an inquiry regarding pretrial publicity. (R 4149)

4172, 4177, 4178, 4180, 4182) Only one (Baumgartner) had a fixed opinion, could not presume Bailey's innocence, and was stricken for cause. (R 4163) Griffin had formed an opinion that Bailey was guilty and agreed to set it aside, however, she was stricken by stipulation. (R 4168, 4171) Reynolds had formed an opinion that Bailey was innocent, but agreed to set it aside. (R 4174-75)

The sixth group consisted eighteen prospective jurors (Peel, Smith, Crawley, Blevins, Newman, McBride, Nichols, Norman, Anderson, Burlon, Taylor, Danley, Monaghan, Scanlan, Hardee, Nazaruk, Barnes, and Reed)[6]. (R 4183) None of the five "death qualified" jurors (Anderson, Taylor, Danley, Monaghan, and Reid) had a fixed, preformed opinion regarding Bailey's guilt. (R 4225, 4226, 4228, 4229, 4230)

Jury selection continued the following morning and the seventh group consisted of twenty-three prospective jurors (Swearingen, Miner, Martin, McMahon, Addison, Holt, Williams, Hagans, Arthur, Barlup, Autry, Corley, Dickey, Mitchell, McCroan, Pressly, Artman, Rhodes, Ramsey, Hallett, Anastasi, Ashley, Goodman)[7]. (R 4237) Of the thirteen "death qualified" jurors, nine (Miner, McMahon, Williams, Arthur, Barlup, Mitchell, Ramsey, Hallett, and

[6] Smith, Crawley, Blevins, Newman, McBride, Burlon, Hardee, Barnes, Norman, Peel, Nichols, Scanlan, and Nazaruk were not "death qualified" and excused before an inquiry regarding pretrial publicity. (R 4209, 4221)

[7] Swearingen, Addison, Holt, Autry, Dickey, Rhodes, Anastasi, Goodman, and Hagans were not "death qualified" and excused before an inquiry regarding pretrial publicity. (R 4287)

Ashley) of them did not have a fixed, preformed opinion regarding Bailey's guilt. (R 4289, 4292, 4293, 4295, 4298, 4300, 4311, 4314, 4315) Pressly first admitted he had a fixed, preformed opinion of Bailey's guilt, but later said he would disregard it. (R 4304) Three (Martin, Corley, McCroan) had a fixed opinion, could not presume Bailey's innocence, and were stricken for cause. (R 4291, 4299, 4302)

For a second time, Bailey's attorney attempted to rehabilitate a juror that could not presume his innocence. Linda Artman told the prosecutor, "My inclination is that it would probably be that he has to prove innocence," but defense counsel tried to rehabilitate her. (R 4308) After learning she traveled for work, the following exchange ensued:

> Q: Can you be fair to both sides?
>
> A: I think I can. I would certainly set that as my goal, I would intend that.
>
> Q: Okay. You have never potentially sat on a jury in a case like this before, have you?
>
> A: Not like this. I have been on jury duty before but not on –
>
> Q: In those cases when you looked in the mirror were you fair to both sides?
>
> A: I think I was. We didn't end up having to – there was a plea bargain before we got to that stage but I think I was.
>
> Q: Do you feel like if you were on this jury you could look yourself in the mirror and say I was fair to both sides, to the best of my ability?
>
> A: Yes.

Q: Knowing you have read quite a bit in the media, seen it on TV, you could do that?

A: I think so, yeah.

Q: Okay, thank you. No motions, Your Honor, no questions. No further questions. (R 4309)

Despite defense counsel's representation, the court requested a side-bar conference:

COURT: Side-bar?

STATE: You know, Judge, I would have to be [sic] state on the record we have established on the record we have a juror that says that she is going to require the defendant to come in and prove his innocence based on what she seen and heard. That's my recollection of the facts and based upon that it's incumbent upon the State to move for cause.

COURT: Are you into burden shifting? She may perceive it's fair to shift the burden to you, that's the problem. She's announced on the record she thinks you have to pony up some evidence.

DEFENSE: We might be able to overcome that.

COURT: Have you got anything else you want to throw in this?

DEFENSE: Nothing else that needs to be thrown in that the Court has not heard.

COURT: Motion granted. I am going to excuse you, Ms. Artman. (R 4309-4310)

A final group of twenty-one prospective jurors (Childers, James Johnson, Planey, Abare, Hendrickson, Humphreys, Horne, Judith Johnson, Mears, Gilmore, Anderson, Little, Jordan, Bland, Berger, Thompson, Wigley, Schoonover, Brown,

Karr, Kaminski)[8]. (R 4316) Of the fourteen "death qualified" jurors, nine (Childers, Hendrickson, Humphreys, Gilmore, Little, Bland, Brown, Karr and Kaminski) of them had no preformed opinion regarding Bailey's guilt. (R 4355, 4356, 4359, 4370, 4374, 4375, 4383, 4384, 4386) Anderson initially stated she had a preformed opinion, but clarified she agreed it was the State's job to prove his guilt. (R 4372) Three (Berger, Thompson, Schoonover) had a fixed opinion, could not presume Bailey's innocence, and were stricken for cause. (R 4378, 4380, 4382)

And once again, Bailey's attorneys attempted to rehabilitate a juror that could not presume his innocence. After James Horne told the prosecutor, "I believe he's guilty of it," and agreed that Bailey would have to present evidence to overcome his opinion, defense counsel still tried to rehabilitate him. (R 4363)

> Q: So you could follow the law even given the fact you have the opinion that's already formed. Any questions that you, you could not follow the law? You can do it, can't you?
>
> A: Yes, sir, I can do it, based on that, yes.
>
> Q: It's hard to do though, isn't it?
>
> A: Yes, sir.
>
> Q: Even though it's hard to do you can follow the law that this Court instructs you, is that right?
>
> A: Based on the evidence and everything, yes, sir. (R 4365)

[8] James Johnson, Planey, Abare, Johnson, Jordan, Mears, and Wigley were not "death qualified" and excused before an inquiry regarding pretrial publicity. (R 4353)

The prosecutor then sought to clarify the apparent inconsistency with his earlier comments:

> Q: Okay. So whenever I first spoke to you a moment ago, you had pretty much a fixed opinion that he was guilty, is that right?
>
> A: Based on what I heard.
>
> Q: Based on what you heard?
>
> A: Yes.
>
> Q: And that you were going to require him to come forth with evidence to show what you believed to be the truth is not true, is that right?
>
> A: Yes, sir.
>
> Q: Has anything changed about that opinion on your behalf?
>
> A: No, sir. (R 4366)

The court intervened, stated that his answers were confusing, and allowed further questioning by defense counsel because "I heard a burden shifting conflict." (R 4367)

> Q: And if the Court were, for instance, to instruct the jury that the State has the burden of proof and they must prove beyond a reasonable doubt that's he's guilty, he does not have to affirmatively prove he's innocent, you will follow that law?
>
> A: No sir.
>
> Q: Okay. You are going to make him prove he's innocent?
>
> A: Based on what information I am getting I know he's not innocent on that, yes.
>
> Q: Okay. Okay, you can't set that aside and listen to what is brought forth in the courtroom, only vote on what you hear in the courtroom. If you can, we need to know it. If you can't, that's fine, too, there's not a wrong answer, as Mr. Meadows pointed out earlier.

A: Based on the information I am getting, given, the plaintiff is guilty, so I understand that. (R 4367-4368)

As before, the State moved to strike him for cause and defense counsel argued to keep him because "he can still follow the law and base a decision on the evidence." (R 4369) The court agreed with State and struck Horne for cause. (R 4369)

Summary of testimony from the evidentiary hearing

Walter Smith, Bailey's first attorney, testified that he was focused on the penalty phase based upon his belief that Bailey would be convicted and a jury would likely recommend death. (Vol. V., pgs. 888, 890) As such, his initial investigation examined whether Bailey was mentally retarded. (Vol. V, pg. 891) Smith retained Dr. Rowan and she indicated his I.Q. was lower than he expected. (Vol. V, pg. 914) He then retained Dr. Kubiak to administer tests to determine if Bailey suffered from brain damage. (Vol. V, pgs. 893, 912)

In addition to presenting evidence of Bailey's mental retardation, Smith intended to call Bailey's mother, grandfather, brother, and cousin from Colorado "just to show that he's a human being, he's got, you know, he has some redeeming qualities about him." (Vol. V, pgs. 898-899, 921-922) According to Smith, a defendant's family can provide information that no one else can even though family members' testimony can be risky because "I've had them blow up on the witness stand, you know, they say things that you've never heard before." (Vol. V,

pgs. 899, 922) Despite this, he concluded "But, you know, you got to do it, you got to take the chance." (Vol. V, pg. 922)

He recalled that Bailey's mother "seemed like she wanted to help in any way that she could." (Vol. V, pg. 906) He planned to call her to establish Bailey's troubled and impoverished childhood. (Vol. V, pgs. 927-928) His strategy during the penalty phase would have been to present witnesses that could describe his childhood, show he suffered brain damage, and demonstrate that he had an inability to exercise good judgment. (Vol. V, pg. 908)

Smith addressed the telephone recording between Bailey and Braz and denied that he ever suggested that Bailey could feign mental illness. (Vol. V, pg. 895) However, the implication led him to conclude that he could become a potential witness in the case and eventually filed a motion to withdraw as a result. (Vol. V, pgs. 894-95) After he withdrew, Michael Flowers and John Gontarek replaced him. (Vol. V, pg. 895)

Now a circuit judge, Michael A. Flowers, became Bailey's lead counsel and had prior experience with death penalty cases. (Vol. VI, pgs. 1002-03) Flowers was in charge of the guilt phase and John Jay Gontarek was in charge of the penalty phase. (Vol. VI, pgs. 1004-05) He explained his defense theory and the type of jurors he wished to sit for the trial:

> There was more than one strategy, it was a two-fold approach. One was that it was not really, from a standpoint of murder, a premeditated

> murder case. We wanted to portray what Mr. Bailey did as almost reactive, without an opportunity to think, without the intention of, an intention to kill. And so that's what we were seeking to show is that it was not what he actually was charged with that even the state's best case could show. Of course, the other thing, given the nature of the victim in the case, we wanted jurors who would listen to, if we got to that point, of mitigation in that we thought Mr. Bailey was from a standpoint of emotion, ability to think clearly, a troubled past. He had some significant emotional problems that we wanted jurors who were willing to listen to that type of thing in mitigation and give it some weight. (Vol. VI, pg. 1004)

With regard to jury selection and the decision to keep Linda Good on the jury, Flowers stated:

> A: Well, when she was initially questioned with respect to her views on the death penalty, her answer, if I'm not mistaken was that she didn't think that it was used enough. However, Ms. Good had a brother who had been incarcerated, had been in the system, had not been treated well while incarcerated. We thought she might be sympathetic to the plight of those who are incarcerated. She also stated that she would give consideration to emotional, mental, psychological testimony if presented, or psychological evidence and would pay attention to that. We discussed this, her answers, with Mr. Bailey. He wanted to keep Ms. Good on the jury and I did not disagree with his assessment.
>
> Q: So is that how she ended up being on the jury, sir?
>
> A: Yes. She worked and had kids, if I'm not mistaken, and our client liked her, Mr. Bailey did. (Vol. VI, pgs. 1005-1006)

Flowers agreed that he would not have moved to strike Good for cause without Bailey's consent. (Vol. VI, pg. 1009) When asked to explain why he did not use a peremptory challenge after his cause challenge was denied by the court, he stated:

> Mr. Meadows talked to her later, if I'm not mistaken, and based on my observations of her, based on Mr. Gontarek's, we discussed it with our client, our client liked her very much and -- because we would have, I mean, I could have peremptorily struck her, we discussed it, I told him we could and he wanted her to stay. And given the fact that he wanted to keep her, given the fact that her brother had served time, and given the fact that she did say she had an open mind, didn't have a fixed opinion, would listen to mitigating circumstances, and given the fact that our client liked her, we did not strike her. (Vol. VI, pgs. 1010-1011)

Flowers claimed that he and Gontarek were "absolutely hopeful that the jury would find in the penalty phase that he was not stable and there was, from our perspective, a very sound belief that that's what they could find." (Vol. VI, pg. 1011)

John Jay Gontarek testified that he has been a lawyer for thirty-one years and he primarily practiced criminal defense law. (Vol. V, pgs. 828-829) The court appointed Gontarek as co-counsel to Mike Flowers and his primary role was to prepare mitigation for the penalty phase. (Vol. V, pg. 829) When Flowers and Gontarek replaced Walter Smith, they met with Smith and discussed Bailey's background. (Vol. V, pg. 832) Smith provided him with a box of documents that he had prepared in Bailey's defense and suggested that Bailey's mental retardation was an issue. (Vol. V, pg. 833)

Gontarek did not recall if Smith suggested that he could be a defense witness due to problems he perceived with Dr. McClaren's testing procedure. (Vol. V, pg. 834) Nor did he recall that Smith advised that Bailey terminated the examination

before Dr. McClaren could test his IQ. (Vol. V, pg. 835) Gontarek was aware that mental retardation was an issue that needed to be explored, but based upon the court's pretrial ruling he "felt like we lost the battle on mental retardation before the trial." (Vol. V, pg. 835) As a result, he abandoned the strategy for the penalty phase. (Vol. V, pg. 838)

When Gontarek was asked what he did to produce witnesses that could humanize Bailey, he stated that he spoke with Bailey's mother and grandfather over the telephone. (Vol. V, pg. 841) He was not aware that Bailey's mother, Debra Gilchrist, had previously traveled to Panama City to visit with Smith and advised that she was willing to assist in any way possible. (Vol. V, pg. 842) He did not recall receiving a letter from Ms. Gilchrist, but acknowledged that he received it after it was shown to him. (Vol. V, pg. 844)

Gontarek spoke with Ms. Gilchrist several times and testified to the following:

> Q: And did you ever call Ms. Gilchrist to the trial to testify?
>
> A: I asked her to come testify and she would not do it.
>
> Q: And when did you ask her to come testify?
>
> A: Sometime before the trial. I asked her would she please come down and testify, and his grandfather, and she wouldn't do it.
>
> Q: So she said, no, I won't come down?
>
> A: No, but I had had his background information with Dr. Kubiak so I was going to get it in that way. (Vol. V, pg. 846)

Gontarek went on to explain that he preferred a psychologist instead of a family member in an effort to humanize the client:

> Q: In your experience, do you prefer a parent or a psychologist reading a report about one of your clients facing the death penalty?
>
> A: One hundred percent psychologist.
>
> Q: So you don't like parents or family to testify?
>
> A: No.
>
> Q: So you don't want to humanize --
>
> A: I mean, I've used them but I don't like it.
>
> Q: Why don't you like it?
>
> A: Because I think the jury anticipates they're naturally going to say good things about their relative.
>
> Q: And so saying good things about a relative is not good in the penalty phase of a death case?
>
> A: I don't think it is as believable as if a professional has talked to the relatives and found out that, it adds credibility, in my opinion, that he's done a professional investigation of the client's background, met with family members and what they say is true in his opinion. (Vol. V, pg. 847)

Gontarek believed that Dr. Kubiak was a better witness than Bailey's mother to explain Bailey's background and how he was raised. (Vol. V, pg. 848) However, he admitted that Gilchrist was the best witness to testify about how she raised her child. (Vol. V, pgs. 848-849) He could not recall whether he discussed her drug use with her. (Vol. V, pg. 849)

Later, he clarified that he wanted Ms. Gilchrist to testify and always invites a defendant's family members to testify:

Q: And so at some point in time it is your testimony you decided you did not want to use the mother. What about the grandfather, you talked to him?

A: Well, I wanted to use the mom but she didn't want to come testify.

Q: So you wanted to use her. Okay.

A: I always tell the family everybody that wants to come testify, contact me and we will make arrangements. (Vol. V, pg. 849)

Regarding jury selection, Gontarek testified that his notes reflected that Good's brother went to prison and she was "probably okay." (Vol. V, pgs. 854-855) He explained that "we would always try to use a challenge for cause on everybody that we possibly could," but whether he and his co-counsel would use a peremptory strike on that same person depended on other factors. (Vol. V, pg. 857) He also testified that Bailey specifically approved Good to serve on his jury. (Vol. V, pg. 863)

Gontarek explained the reason he did not want to call Walter Smith as a witness was because he was concerned about the allegation that Smith told Bailey to fake being retarded. (Vol. V, pg. 864) However, Gontarek never attempted to contact Smith to discuss his concern. (Vol. V, pg. 883) He did not want to call Dr. Rowan because he did not believe she would make a good witness and her testimony was cumulative. (Vol. V, pg. 871) He was concerned about the recording between Bailey and Braz and a poem written by Bailey. (Vol. V, pgs.

876-877) Gontarek did not recall that Dr. Rowan had tested Ms. Gilchrist to determine her IQ. (Vol. V, pg. 842)

Bailey's brother, Joshua Gilchrist, testified that he was bipolar and formerly received Social Security Income. (Vol. VI, pg. 934) He suffered from lead poisoning and a learning disability, and he dropped out of school in the ninth grade. (Vol. VI, pg. 934) He and Bailey were alone frequently growing up because his mom was usually working and their alcoholic step-father was intoxicated and unconcious most of the time. (Vol. VI, pg. 935) He testified that he would have come down to testify for his brother if he were asked. (Vol. VI, pg. 935) Mr. Gilchrist is a convicted felon. (Vol. VI, pg. 936)

Robert Bailey, Sr., Appellant's biological father (hereinafter referred to as 'Mr. Bailey'), testified that he was available and willing to testify for his son at his trial, but was never contacted by anyone from Bailey's defense team. (Vol. VI, pgs. 940-941) He was living in Wisconsin at the time and learned about the charges when he read it in the local newspaper. (Vol. VI, pg. 939-40) Mr. Bailey and his younger brother, Mike, both suffered from bipolar disorder. (Vol. VI, pg. 938) His brother's mental illness drove him to murder his wife and take his own life:

> A: My younger brother, Mike, had bipolar and he was married, got married one day and then he got a divorce and they had got back together. They had bought a house on a lake, they tried to work things out and he found out that she was seeing somebody

else and one day he just snapped and killed her and took his own life.

Q: So your one brother who suffered from bipolar disorder --

A: Yes.

Q: -- killed his estranged wife, the wife he was having trouble with, and killed himself, is that correct?

A: Yes. (Vol. VI, pg. 938)

Mr. Bailey's father was very abusive. (Vol. VI, pg. 939) Mr. Bailey raised Appellant until he was five or six years of age. (Vol. VI, pg. 937, 939) He acknowledged that he was a convicted felon. (Vol. VI, pg. 941)

Debra Gilchrist, Bailey's mother, testified about the complications she experienced delivering Bailey. (Vol. VI, pg. 944) Bailey had to be placed in an incubator immediately after his birth. (Vol. VI, pg. 944) Ms. Gilchrist abused crack cocaine when Bailey was young. (Vol. VI, pgs. 944-45) When she was asked if other people frequently visited her home, she replied, "A lot of parties, yes. I was a very young mother and a lot of partying." (Vol. VI, pg. 945) She admitted that cocaine use could affect her memory. (Vol. VI, pg. 955)

She described a horrible, traumatic event when Bailey set fire to their home causing second and third degree burns to eighty percent of her body. (Vol. VI, pg. 945) The fire left her permanently scarred and injured her younger son, Joshua, who testified earlier. (Vol. VI, pg. 945-46) She described the trauma suffered by her and her family, as follows:

A: [Joshua] had some burns but he was pretty much brain dead. He was in a coma for quite awhile and when he came out he had to start, they had to start all over and teach him everything all over again. (Crying)

Q: So he had brain damage as a result of the fire, is that correct?

A: Yes.

Q: Did this create problems for you, as a mother, trying to have feelings for your son, Robert Junior?

A: Yes, because I didn't want him any more. I told my parents not to bring him to the hospital. I wanted to give him up at that time. (Crying)

Q: Take your time. You wanted to give him up, you didn't want to have anything to do with him?

A: I couldn't see him, I couldn't even look at him. I couldn't. I just didn't want him anymore. I just felt like he the [sic]blame. He was only five but I just, I don't know, I just, I was, I don't know, I just didn't want him.

Q: Be a fair statement you shoved him away from you and out of your life?

A: Yes, sir, I did.

Q: Was he verbally abused by you in conjunction with your feelings?

A: Yes, he was.

Q: During this time, after the fire, is this when the drug use began?

A: Pretty much so, right after, yeah. (Vol. VI, pgs. 946-947)

She also recounted Bailey's head injury that resulted from a fall from a second story window:

Q: During the time that Robert Junior was growing up did he have problems of his own, aside from your situation with the fire, for example, some head injuries?

A: He fell out of a house, apartment, a two-story building. They said he wasn't hurt but I don't know that because my cousin,

> Adam, was watching him while I was at work because I worked quite a bit. So I'm not sure what kind of damages he had. (Vol. VI, pgs. 947)

Gilchrist recounted an incident when Bailey drank gasoline when he was only eighteen months old. (Vol. VI, pg. 955) She described it, as follows:

> Q: There was an incident in your letter, ma'am, where you talk about your son had drank some gas?
>
> A: Yes.
>
> Q: When he was about one and-a-half?
>
> A: Yes.
>
> Q: You apparently --
>
> A: My parents had him, right.
>
> Q: He was out in the garage, they were cleaning out the garage --
>
> A: Right and I was working.
>
> Q: You were working. And they took him to the hospital?
>
> A: Right.
>
> Q: He had to stay overnight?
>
> A: Yes.
>
> Q: But they released him the next day?
>
> A: Yes.
>
> Q: He seemed to be all right after that, right?
>
> A: Yes.
>
> Q: That's what you write in the letter?
>
> A: Yes.
>
> Q: That's where I'm getting this from. You didn't notice any change in his behavior at that point, did you?
>
> A: No. (Vol. VI, pgs. 955-956)

When she learned of her son's arrest, she drove from Wisconsin to Florida to see him. (Vol. VI, pg. 948) She also visited with his lawyer at the time, Walter Smith. (Vol. VI, pg. 948) In an effort to help her son, she submitted to testing by Dr. Jill Rowan. (Vol. VI, pg. 949)

When she learned that Bailey had a new lawyer, she wrote him a letter. (Vol. VI, pg. 949) She was asked why she wrote the letter:

> Q: And why would you write that letter and try to explain everything that you knew about your son and you and everything else?
>
> A: Because I wanted somebody to help him (Crying)
>
> Q: As a result of writing that letter did you ever hear anything back from the lawyer?
>
> A: No, sir. I talked to that John guy twice on the phone. I called him after this but I didn't hear anything else. And when they called me this last time I asked him, I said, are you guys public defenders or are you real lawyers because nobody wanted to help him, nobody was doing anything for him. (Crying)
>
> Q: Did either Mr. John, the lawyer that you wrote to, or his, the other lawyer working the case, did either of them call you and ask you to come down to testify?
>
> A: No, no, they did not.
>
> Q: Had you been asked to come down and testify for your son would you have done that in this case?
>
> A: Yes, I would have. (Vol. VI, pg. 950)

She confirmed that she was available to testify and would have testified if she were asked. (Vol. VI, pg. 951) When the prosecutor suggested that defense counsel initiated contact with her, she responded:

A: No, I called him.

Q: That's the way you remember it?

A: Yes. It wasn't the way I remembered it, it was the way it was. My father even called him because I gave the number to my dad. My dad even called. (Vol. VI, pgs. 954-955)

Ms. Gilchrist did not recall if Bailey suffered from lead poisoning, but specifically recalled that her other son did even though she did not detect any behavioral changes. (Vol. VI, pgs. 956-57) She did not recall if Bailey was diagnosed with bipolar disorder before he came to Florida. (Vol. VI, pg. 957)

Dr. McClaren testified again at the evidentiary hearing. He explained that a neuropsychologist, like Dr. Kubiak, seeks to locate brain damage and determine its effects on behavior. (Vol. VI, pgs. 959-60) He did not believe Bailey had ever been diagnosed as mentally retarded or bipolar before his arrest. (Vol. VI, pg. 960-61) In his opinion, Bailey was not mentally retarded or severely brain damaged, and did not qualify for any statutory mitigation related to his mental status. (Vol. VI, pgs. 963-65, 980)

When Dr. McClaren gave Bailey the IQ test, he scored "in the 50s," a score he considered invalid. (Vol. VI, pg. 968) He became suspicious of the results after administering a malingering test that suggested Bailey's was not giving his best effort. (Vol. VI, pgs. 968-70) According to Dr. McClaren, when he went back to conduct additional testing, Bailey was not cooperative. (Vol. VI, pgs. 970, 972)

Dr. McClaren admitted that brain damage was a factor that could contribute to mental retardation. (Vol. VI, pg. 972) He admitted that drinking gasoline at a young age could affect a person's IQ. (Vol. VI, pgs. 972-73) He also admitted that bipolar disorder "has a genetic component" and can be hereditary. (Vol. VI, pg. 974)

Dr. Greg Pritchard also testified at the evidentiary hearing. (Vol. VI, pg. 982) He did not believe that Bailey was diagnosed as mentally retarded or with bipolar disorder before he came to Florida. (Vol. VI, pg. 983) Nor did he think Bailey was mentally retarded based upon his school performance, the fact that he obtained a high school equivalency diploma, and his reported performance on the Test of Adult Basic Education test. (Vol. VI, pg. 985-87) He did not believe that Bailey suffered from a major mental illness. (Vol. VI, pg. 989)

Drs. McClaren and Pritchard were both given an opportunity to review a letter written by Bailey and addressed to his lawyers. (Vol. VI, pgs. 996-1001) Both doctors concluded that a mentally retarded person would be incapable of drafting such a letter. (Vol. VI, pgs. 996, 1000) In addition, both doctors agreed that a mentally retarded person would be incapable of reading the books found in his cell. (Vol. VI, pgs. 998, 1001)

Summary of order denying motion

The trial court denied all of Bailey's claims of ineffective assistance during voir dire (Grounds I and II). Part of Ground I (failure to strike jurors Larry, Glenn, and Cutcheon) was denied for failing to allege sufficient facts establishing that these jurors were biased or any other biased juror served on the jury. (Vol. III, pg. 499) In addition, the court denied the claim based upon the lack of evidence presented at the hearing establishing that these jurors were biased or any other biased juror served on the jury. (Vol. III, pg. 499) The court found Good was impartial and not predisposed to vote for the death and denied the remaining part of Ground I. (Vol. III, pg. 500) Furthermore, the court found that counsel's decision to keep Good on the jury was a reasonable trial strategy. (Vol. III, pg. 501)

The court denied Ground II (inadequate voir dire) as procedurally barred and speculative. (Vol. III, pg. 502) The court also found counsel was not ineffective for accepting the prospective jurors' answers as truthful, including their assurance of impartiality. (Vol. III, pg. 502)

Ground III was withdrawn by counsel and the court determined it lacked the requisite specificity required by Strickland v. Washington, 466 U.S. 668 (1984). (Vol. III, pg. 503)

Ground IV (failure to challenge statutory aggravator) was denied based upon a failure to specify counsel's alleged deficient performance and resulting prejudice, as well as Bailey's approval of his attorney's decision to not challenge the aggravator. (Vol. III, pg. 503) Furthermore, the court found the evidence presented suggested counsel's attempt to challenge the aggravator would have been futile, and thus no deficient performance. (Vol. III, pgs. 503-504)

Ground V (failure to present additional mitigation evidence) was denied for several reasons. Initially, the court noted that any portion of the claim alleging that a "better" expert should have been retained was conclusory. (Vol. III, pg. 505) Further, the court found counsel was not defective for relying on Dr. Kubiak and that no evidence established any resulting prejudice. (Vol. III, pg. 505) Similarly, the court rejected any claim suggesting that counsel should have investigated the State experts' testing procedures for failing to prove prejudice. (Vol. III, pg. 506)

The court denied any claim alleging that additional evidence should have been presented to prove non-statutory mitigators because it was refuted by the record – primarily by Dr. Kubiak's testimony. (Vol. III, pg. 508) Furthermore, the court concluded that the claim was meritless since Bailey did not present any additional evidence in the form of school records or expert testimony at his evidentiary hearing. (Vol. III, pg. 508)

The court brushed aside the testimony from Bailey's brother, Joshua Gilchrist. (Vol. III, pg. 509) The court acknowledged that he suffered from a learning disability, bipolar disorder, and lead poisoning from eating paint chips as a child. The court acknowledged that he and Bailey were usually supervised by their alcoholic step-father who was passed out most of the time, and that he dropped out of school in the ninth grade. However the court determined that "[t]hese facts may establish mitigation if Joshua was being charged with a crime, but do not establish any significant mitigation directly concerning the Defendant." (Vol. III, pg. 509)

The court was also unimpressed with the testimony from Robert Bailey, Sr., and found that he "did not provide any pertinent testimony that supports the allegations raised in this motion." (Vol. III, pg. 509) The court conceded that Mr. Bailey's testimony may have established a family history of bipolar disorder (since he and his brother were bipolar); however, the court pointed out that Dr. Kubiak diagnosed Bailey with bipolar disorder and so stated during the penalty phase. (Vol. III, pg. 509) Furthermore, the court noted that Mr. Bailey was a convicted felon (a fact that undermined his credibility) and concluded that he was unable to provide non-statutory mitigation. (Vol. III, pg. 509)

Bailey's mother, Debra Gilchrist, was also unable to persuade the court that she could have provided non-statutory mitigation even though she "arguably

provided the most compelling testimony of the defense witnesses." (Vol. III, pgs. 509-510) However, the court determined that her testimony was cumulative to Dr. Kubiak's testimony, with the exception of the house fire incident. (Vol. III, pg. 510) That testimony, the court concluded, would not have outweighed the aggravating circumstances and likely just reinforced the State's evidence regarding Bailey's "history of antisocial and sociopathic behavior." (Vol. III, pg. 510)

The court also questioned whether Ms. Gilchrist would have been available at trial. (Vol. III, pg. 510) The court noted that Gilchrist was addicted to crack cocaine when she spoke with Gontarek and that she conceded the drugs affected her memory. (Vol. III, pg. 509) The court found that Gontarek's claim that Gilchrist declined his invitation to testify was credible and his decision to rely on Dr. Kubiak in lieu of family members was a reasonable strategic decision. (Vol. III, pg. 510)

The court denied any claim suggesting more evidence of Bailey's brain damage should have been presented as a result of head injuries because it was refuted by the record (Dr. Kubiak's testimony referred to Bailey's head injuries and opined that he suffered brain damage) and for failing to prove prejudice. (Vol. III, pg. 506)

The court denied any claim suggesting more evidence of Bailey's substance abuse should have been presented for failing to specify what evidence would have

made a difference. (Vol. III, pg. 507) In addition, since the court found Bailey's intoxication during the crime qualified as a non-statutory mitigating circumstance, the court did not find any resulting harm. (Vol. III, pg. 507)

The court denied any claim alleging that counsel should have argued that a finding of insanity was not required to find either statutory mitigator for failing to explain how the argument would have made a difference. (Vol. III, pg. 507)

The court denied any claim alleging ineffectiveness for failing to investigate Bailey's medical records as conclusory. (Vol. III, pg. 507) Further, the court found Bailey's failure to introduce any of the medical records rendered the argument meritless. (Vol. III, pg. 507) It also rejected any claim alleging a failure to conduct an adequate investigation of Bailey's "abject fear" of prison for lack of evidence supporting the claim at the hearing. (Vol. III, pg. 506)

The Court denied Ground VI challenging the constitutionality of lethal injections summarily as it was previously rejected by this Court. (Vol. III, pg. 511)

Ground VII (failure to retain expert to rebut State's expert) and Ground VIII (failure to call a qualified expert in mitigation) were denied for failing to allege or prove prejudice. (Vol. III, pgs. 511-513)

SUMMARY OF ARGUMENT

Bailey was deprived of his right to due process and a fair trial as the result of defense counsel's failure to strike Linda Good, an actually biased juror. Good expressed her strong support for the death penalty and was predisposed to recommend death in the case of a premeditated murder. Despite her self-proclaimed willingness to be "open to mitigation," she only conceded that she would consider recommending a life sentence if Bailey was insane. Furthermore, she was under the impression that Bailey had admitted the crime and pled guilty before she reported for jury duty.

Counsel should have recognized that Good was predisposed to recommend death and would not consider other mitigation the law required her to consider. Counsel's claim that it was a strategic decision to keep her is contradicted by the fact that he moved to strike her for cause and it was otherwise unreasonable to conclude she would be sympathetic to inmates because a relative was imprisoned.

Bailey was deprived of his right to due process and a fair trial as the result of defense counsel's failure to conduct a meaningful voir dire that did not reveal the extent of bias caused by pretrial publicity. The vast majority of the venire was exposed to some form of pretrial publicity that provided details of the crime and included reports that Bailey was creating an insanity defense. Defense counsel

failed to discover the specific details that each prospective juror learned before the trial and prevented them from exposing impartial jurors.

Counsel was satisfied with the potential juror's assurance that they could set aside everything they knew about the case and be fair. Counsel did not question many of the jurors at all regarding this issue and otherwise left the inquiry to the State. Counsel even attempted to rehabilitate several prospective jurors that demonstrated their inability to presume Bailey's innocence. In fact, the State successfully struck several impartial jurors over counsel's objection because they could not be fair. Defense counsel's actions demonstrated a fundamental misunderstanding of the importance of Bailey's right to be presumed innocent and failed to ensure an impartial jury would determine if he lived or died.

And finally, Bailey's attorney's provided ineffective assistance of counsel by failing to humanize Bailey before the jury. His mother was available to provide compelling testimony about his tragic childhood filled with drug abuse, head injuries, and her rejection of him. She would have provided dramatic testimony that could not have been adequately conveyed through an expert that briefly recounted some of those incidents. For example, she would have been able to show the jury the burns over eighty percent of her body that she suffered after Bailey set their house on fire.

His attorneys were also ineffective for failing to present his brother and father during the penalty phase. His father would have been able to inform the jury that his family has a history of bipolar disorder and that Bailey's uncle murdered his wife and committed suicide as a result. Bailey's brother would have testified that he suffered lead poisoning and was left brain dead as a result of the fire Bailey started.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Defense counsel's failure to exclude a biased juror that refused to consider mitigation in a case of premeditated murder deprived Bailey of his right to effective assistance of counsel.

Standard of Review

The standard of review for an order denying a motion for post-conviction relief is mixed: (1) this Court must defer to the circuit court's factual findings so long as competent, substantial evidence supports them; but (2) must review *de novo* the circuit court's legal conclusions. Walker v. State, 88 So. 3d 128, 134 (Fla. 2012) (citing Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004). This claim challenges the legal conclusions of the lower court, and as such, should be reviewed *de novo*.

Defective Performance

It is well-established that to successfully prove a claim of ineffective assistance of counsel, a defendant must satisfy both prongs of Strickland v. Washington, 466 U.S. 668 (1984):

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Simmons v. State, 105 So. 3d 475, 487 (Fla. 2012).

The purpose of the right to the effective assistance of counsel is to "ensure a fair trial." Strickland, 466 U.S. at 686. A fair trial is defined as "one in which evidence subject to adversarial testing is presented to an *impartial tribunal* for resolution of issues defined in advance of the proceeding." *Id*. at 685. Thus, Bailey's attorneys were required to ensure that an impartial juror did not serve on the jury.

Since Bailey faced the death penalty, his attorneys were also responsible to ensure that jurors were impartial as to Bailey's guilt and impartial toward the appropriate penalty. Jurors who initially express views pertaining to the death penalty are permitted to serve if they clearly indicate an ability to abide by the trial court's instructions. Dufour v. State, 905 So. 2d 42, 53 (Fla. 2005). Thus, Bailey's attorneys were responsible for striking any jurors that *could not clearly indicate* an ability to follow the law.

Bailey's attorneys failed to uphold this responsibility when they failed to exercise a peremptory challenge for Linda Good. Good should have never sat on Bailey's jury because she was predisposed to vote for death and she did not clearly indicate that she would follow the law requiring that she consider any mitigating circumstances.

At the first opportunity, Good expressed her strong support for the death penalty, and stated:

> My belief is that the death penalty should be used if the case presents itself or the evidence shows that there was, that the person was guilty and they were in their right mind, knew what they were doing. I think the death penalty should be used, I think it should be as the gentlemen said more an eye for an eye. In my personal belief I don't think it is used enough. If it was used more there would be less crime. But if the situation presents itself I could vote life based on the evidence after guilty. (Vol. IV, pgs. 562-63)

Her belief that the death penalty is not "used enough" and to state her belief when given the first opportunity spoke volumes about her predisposition. (Vol. IV, pg. 562) Furthermore, on three separate occasions thereafter, she repeated her belief that more people should be executed. (Vol. IV, pgs. 567-568)

Her strong support of the death penalty was not limitless, however, because she qualified her response and stated, "*if the case presents itself or the evidence shows* that there was, that the person was guilty and *they were in their right mind*, *knew what they were doing*." (Vol. IV, pg. 562) She continued to say, "But if the situation presents itself I *could* vote life based on the evidence after guilty." (Vol. IV, pgs. 562-63) Based upon her initial response, Good appeared predisposed to vote for death if the person was not insane and could vote for life, but the circumstances for which she could vote for life were left unclear.

The prosecutor immediately clarified that Good would "weigh the aggravation," be "open to mitigation," and recommend whichever outweighed the other:

Q: So I'm hearing you will weigh the aggravation?

A: Yes, sir.

Q: That the state presents and also be open to the mitigation?

A: Yes, sir.

Q: And weigh each of those and which ever outweighs the other that would be your recommendation?

A: Yes, sir. (Vol. IV, pgs. 562-63; R 3954-55)

This exchange did not remove her predisposition to recommend death if Bailey were found sane, and it did not clarify the circumstances that would prompt her to recommend life. Her answers merely restated her strong belief: she would recommend death unless the defense proved insanity. However, apparently satisfied with her response, the prosecutor did not ask her any further questions.

Mr. Flowers, presumably detecting her bias, attempted to clarify her position:

Q: Ms. Good, when you were talking about what your position was and because you've given it some thought, I'm sure since you got your jury summons to come here today, if I were to -- I think you said if I were to hear the evidence and I was convinced that the evidence showed that the person was convicted of, for instance, murder, that the death penalty is not used enough. Is that a fair characterization of what you believe?

A: Yes, sir.

Q: Then in the event we were at the penalty phase then would it be fair to say that you would be predisposed at that point to vote for the death penalty, is that a fair statement?

A: Before the evidence was presented? I mean, after found guilty.

Q: Okay, after that person is found guilty of premeditate [sic] murder, for instance, I had understood you to say if they are

convicted of that then you believe the death penalty is not used enough.

A: Right.

Q: I'm not trying to trick you.

A: From the outside looking in, not in the jury room, that's my opinion. But as a jury member after hearing the evidence *if I find that the person was not mentally stable, you know, other circumstances, I could vote for life*. But outside looking in, it was my opinion that the death penalty is not used enough.

Q: You're willing to listen to the aggravating circumstances, for instance, that the state attorney would wish to present and yet reserve making a decision in your mind until you hear the mitigating circumstances?

A: Exactly.

Q: You're willing to do that, aren't you?

A: Yes, sir. (Vol. IV, pgs. 567-568: R 3958-59)(*Emphasis* added.)

This exchange verified her belief the death penalty was not used enough and invited her to dispel any notion that she was predisposed to recommend death. However, her response "if I find that the person was not mentally stable, you know other circumstances, I could vote for life" merely restated what she had previously revealed. That being, if Bailey proved he was insane then she would consider a life sentence.

After two other jurors disagreed that a life sentence could be a fair sentence for someone convicted of premeditated murder, Flowers posed the same question to Good. (Vol. IV, pgs. 571, 573; R 3963, 3965) She responded as follows:

A: If a person *knows what they're doing* when they're talking [sic] a life that person is taking either a father, a mother, a child, a

husband, they're taking that person who is loved by someone away from them, *they should deserve to die*.

Q: So from your perspective in the event, and Mr. Bailey is charged in this case with premeditated murder, that's why we're here and asking these questions, kind of invading your private thoughts, *in the event* during the guilty phase of the trial the *state were to convince you beyond a reasonable doubt that he were guilty of premeditated murder, that would be all*, from what you've told me, that is, *you've heard enough then*?

A: Right, exactly. (Vol. IV, pg. 573; R 3695)(*Emphasis* added.)

Her confirmation that she would have "heard enough" eliminated any uncertainty regarding her predisposition to vote for death. It also confirmed that the only exception she would make is if Bailey were found insane because if he "knew what he was doing" then he "deserves to die." The prosecutor was aware that her beliefs limited her ability to follow the law, and he attempted to rehabilitate Good:

STATE: Mr. Givens, Ms. Good, when I talked before about aggravating factors and mitigation, that it is up to you to decide what weight to attach to any particular thing and that the state is limited in what we can present to you in aggravation, things that you can consider, and what I just heard a moment ago, it seemed to me, things that you thought were circumstances about a murder that made it more aggravated than just a normal first-degree murder is that what – I need an answer from you.

GIVENS: Yes.

STATE: Now, there may be other things. For example, there is no evidence in this case that this was some kind of contract killing. Okay? But that could be one of the aggravating factors, for example, and that you would say, well, a contract killer, that is something that is, boy, those people, they really deserve the death penalty, that can be

an aggravating factor that you think, I'm telling you now, that doesn't have anything to do with this case, I'm just using it as an example, that that's something that, in your mind, aggravates this case to where it would warrant a death penalty and you attach great weight to that. Just like you did talking about heightened premeditation, premeditation where somebody plans it out. And there is nothing wrong with that. The question is can you evaluate any mitigation –

GOOD: Absolutely.

STATE: -- that the defense may present that could outweigh the weight that you're attaching to that aggravation? Do you understand my question?

GIVENS: Yeah, I understand.

STATE: Ms. Good?

GOOD: I understand.

STATE: *Can you consider the mitigating evidence and apply a weighing process*? I'm not telling you which one outweighs the other at this point because that rests within our heart.

GOOD: Right.

STATE: *But what we need to know is can you give both sides the opportunity to present that type of evidence and give it whatever weight, consider it*?

GOOD: Right.

STATE: *All anyone is asking is can you consider it, give it the weight that you determine to be appropriate*?

GOOD: Yes, sir. (Vol. IV, pgs. 573-75; R 3965-67) (*Emphasis* added.)

Despite the prosecutor's effort, this exchange did not clarify the circumstances in which Good would consider a life sentence. It merely confirmed that she would consider mitigation, but the problem is that she would only consider

mitigation to challenged Bailey's sanity. Thus, Good's responses indicated an inability to follow the law.

Good's predisposition was rooted her belief that the death penalty serves as a strong deterrent against crime and it's biblical origins. She explained, "If it was used more there would be less crime." (Vol. IV, pg. 562) She also made a biblical reference and stated, "I think the death penalty should be used, I think it should be as the gentlemen said more an eye for an eye." (Vol. IV, pg. 562)

Without question, Bailey's attorneys were aware of Good's bias when Flowers moved to strike her for cause. (Vol. IV, pg. 579) The trial court denied the challenge based upon the State's rehabilitation questions. (Vol. IV, pg. 579) The order on appeal determined that "the prosecutor rehabilitated Ms. Good by confirming that she could listen to both sides and weigh both aggravating and mitigating evidence." (Vol. IV, pg. 500)

The problem with the court's determination is that it assumed Good would consider all types of mitigation in addition to mental instability or insanity. However, her responses do not support that assumption. On multiple occasions, she expressed her strong support for the death penalty, and repeated her limited exception for a mentally unstable person that did not know what he was doing. Good never specified any other mitigating circumstance that she would consider.

Later during jury selection, Good demonstrated her impartiality for a different reason. Good revealed that she was exposed to pretrial publicity and understood that Bailey had admitted his guilt and pled guilty. She said, "to my knowledge, just from the news that I heard, Mr. Bailey pled guilty so it would be hard for me if he's already pled guilty to come back and say he's innocent. But it may not be true." (Vol. IV, pg. 610) Upon learning Bailey did not, in fact plead guilty, she agreed to disregard what she heard. (Vol. IV, pgs. 611, 612-613) While this comment does not demonstrate impartiality by itself, it was another reason she should have been stricken peremptorily.

Despite Good's demonstrated bias, defense counsel did not use a peremptory strike to remove her. The decision to keep Good after failing to remove her for cause was an unreasonable and costly strategy. Gontarek claimed that since Good's brother went to prison she was "probably okay." (Vol. V., pgs. 854-855) Flowers also claimed that her brother's incarceration would maker her sympathetic to inmates. However, any sympathy she may have had toward inmates did not cure her predisposition for the death penalty.

Flowers suggested that another reason to keep Good was because she was willing to consider evidence of Bailey's instability. However, a careful review of Good's responses did not suggest she would consider *any* mental deficiency. As previously argued, the totality of her responses show she would only consider

insanity. Both attorneys knew they did not have any evidence suggesting Bailey was insane. Furthermore, their attempt to remove her for cause contradicted any suggestion that it was a strategic decision to keep her for this purpose.

At best, Good did not clearly indicate the type of mitigation she would consider. However, it was defense counsel's duty to strike any jurors that could not clearly indicate an ability to follow the law and consider mitigation. As such, defense counsel's failure to strike Good was deficient performance.

Prejudice

A defendant must demonstrate that a juror was "actually biased" to satisfy the prejudice prong under Strickland. Carratelli v. State, 961 So. 2d 312, 324 (Fla. 2007). Linda Good was actually biased because she was predisposed to recommend the death sentence for anyone convicted of premeditated murder and her unwillingness to consider mitigation.

Good's own responses demonstrated her bias. At the outset, she expressed her strong support for the death penalty, belief that it deterred crime, and morally justified it as "an eye for an eye." She claimed she could vote for life "if the situation presents itself," and later identified a suitable situation was "if I find that person was not mentally stable." However, when all of her responses are considered, it is clear that "not mentally stable" meant that the person did "not

know what they're doing." Her answers describe how a lay person would define 'insanity.'

Good's claim to be "open to mitigation" and that she "could" vote for life does cast doubt on her bias because the only mitigation she "open to" was proof that Bailey was crazy. Her claim was refuted by her own testimony when she agreed with other prospective jurors who could not vote for life if the murder was premeditated. None of the questions from either counsel clarified that she would consider *other types* of mitigation beside mental instability.

Good declared that someone "deserves to die" if they "know what they're doing" when they committed the murder. As soon as Bailey was convicted as charged, Good intended to vote for death. Defense counsel's inaction deprived him of due process and right to be tried by a fair and impartial jury in violation of the Sixth and Fourteenth Amendments of the U.S. Constitution and Article I, Section 16 of the Florida Constitution.

II. Defense counsel's failure to conduct a meaningful voir dire regarding pretrial publicity deprived Bailey of his right to due process, a fair trial, and the effective assistance of counsel.

Standard of Review

The standard of review for an order denying a motion for post-conviction relief is mixed: (1) this Court must defer to the circuit court's factual findings so

long as competent, substantial evidence supports them; but (2) must review *de novo* the circuit court's legal conclusions. Walker, 88 So. 3d at 134.

Inherently prejudicial pretrial publicity

"The theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Patterson v. Colorado ex rel. Attorney General of Colo., 205 U.S. 454, 462, (1907) (opinion for the Court by Holmes, J.).

In Rideau v. Louisiana, 373 U.S. 723 (1963), the United States Supreme Court presumed prejudice resulted from extensive pretrial publicity of a defendant's confession. On three occasions before trial, a local television station broadcast Rideau's confession to audiences ranging from 24,000 to 53,000 individuals. The Court concluded that the broadcast of the confession effectively served as his trial for the watching public and violated due process. *Id*., at 725-727. See also, Estes v. Texas, 381 U.S. 532, 538 (1965); and Sheppard v. Maxwell, 384 U.S. 333 (1966)(both concluding that the media coverage manifestly tainted the prosecution.)

In Murphy v. Florida, 421 U.S. 794, 798-799 (1975) the Supreme Court rejected the proposition that "juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process." See also, Irvin v.

Dowd, 366 U.S. 717, 722 (1961)(finding jurors are not required to be "totally ignorant of the facts and issues involved.") "The mere fact that jurors were exposed to pretrial publicity is not enough to raise the presumption of unfairness." Castro v. State, 644 So. 2d 987, 990 (Fla. 1994). As stated in Sheppard, "[a] presumption of prejudice…attends only the extreme case." Sheppard, 384 U.S. at 335. The facts before this Court present such an extreme case.

Officer Kight's murder prompted significant pretrial publicity. More than 90 percent (120 out of 131) of the venire was exposed to the pretrial publicity or had knowledge of the case. Of those 120 with knowledge of the case, 76 were "death qualified" and examined further about the impact of their knowledge. Of the 76 examined, more than a third (29) had a preformed opinion regarding Bailey's guilt, and more than half (17) of them were excused for cause because either they could not presume Bailey's innocence or could not set aside what they learned before the trial. In other words, one out of every five jurors questioned about pretrial publicity could not remain impartial based upon their knowledge.

Deficient Performance

Claims based on ineffective assistance of counsel for failing to conduct a meaningful voir dire implicate the defendant's Sixth Amendment constitutional right to have his case tried before a fair and impartial jury. Solorzano v. State, 25 So. 3d 19, 23-24 (Fla. 2d DCA 2009). "Without an adequate voir dire the trial

judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts." Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (citations omitted)

To remove impartial jurors, "[d]uring voir dire, counsel must question prospective jurors so that counsel can reasonably conclude that 'the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court.' " Mansfield v. State, 911 So. 2d 1160, 1172 (Fla. 2005) (quoting Spencer v. State, 842 So. 2d 52, 68 (Fla. 2003)).

In Derrick v. State, 581 So. 2d 31 (Fla. 1991), this Court approved a two-step process to apply when there is a claim that the jury has been improperly exposed to media coverage that has the potential for prejudice. First, the court should inquire of the jurors as to whether any of them read the material in question. If any of the jurors indicate they have read the material, they must be questioned to determine the effect of the publicity, that is, whether they can disregard what they read and render an impartial verdict based solely on the evidence at trial. Derrick, 581 So. 2d at 35.

The fact that almost all of the prospective jurors had some knowledge of the case from pretrial publicity was of no surprise to Bailey's lawyers given the relatively small size of Bay County. And as voir dire developed, it became evident that the media coverage had already influenced the venire. As potential juror Dever put it, "honestly, you know, if you live in Bay County you've probably heard it, that he is guilty of murder." (R 3987) Counsel seemed aware of the problem when he requested a different procedure after the first juror disclosed specific details of the allegation as reported in the news. (R 3918-19)

Yet defense counsel only questioned a fraction of those jurors regarding pretrial publicity. Of the few counsel did question, counsel merely sought an assurance that they could remain fair despite anything they already knew. Counsel did not attempt to determine the potential for prejudice by asking them for the details of their knowledge. As such, counsel did not assure compliance with the required process as set forth in Derrick. *Id.* This cursory questioning provided little insight to whether they could in fact remain impartial. To this day, no one knows exactly what the jury was exposed to or how it affected the deliberations because only six prospective jurors were asked sufficient questions. (R 3922-29, 3973) It is this failure that Bailey contends was defective performance under Strickland.

The prosecutor apparently knew the importance of this type of inquiry and asked the first six jurors appropriate questions. He also stated, "it is difficult for us to determine whether they have an opinion that they can't get rid of if we don't know what the basis of that opinion maybe[sic]." (R 3920) After the first six, the prosecutor stopped asking those questions and left it to defense counsel to inquire. However, defense counsel failed to assume the duty and never asked the basis of the jurors' opinions.

The court was also cognizant of this inquiry and seemed to question the lawyers if they intended to ignore the inquiry or simply overlooked it. "I notice the, in the pretrial part of this thing none of you are asking any questions about individual facts but if you want to proceed like we have been doing we will." (R 4054) The court observed that the lawyers agreed to change the procedure to an individual voir dire so that each juror's knowledge of the case would not taint the others, but since neither side inquired as to their individual knowledge after the change in procedure, the court was questioning the necessity for individual voir dire.

The only ones that failed to recognize the potential danger of pretrial publicity were Bailey's lawyers. They never attempted to discover any bias, and even tried to keep jurors that could not presume Bailey's innocence. Defense counsel objected to the State's cause challenge for prospective juror Obesso after

she said, "the facts are very clear that he is guilty," and "it would be very hard for me to change my mind." (R 4070-73) He also objected to a cause challenge for prospective juror Artman who stated her inclination was for Bailey "to prove innocence." (R 4308-4010) Inexplicably, defense counsel claimed, "We might be able to overcome that." (R 4310) This comment proved counsel was not asserting Bailey's constitutional rights.

Counsel objected a third time after prospective juror Horne asserted his belief in Bailey's guilt, affirmed that Bailey had to prove his innocence, and explicitly stated he could not follow the law imposing the burden on the State. (R 4363-4367) Horne's presumption of guilt somehow led counsel to claim "he can still follow the law and base a decision on the evidence." (R 4369) Somehow, counsel overlooked the fact that an inability to presume an accused person's innocence precludes an "ability to follow the law."

Any assurance of impartiality from the venire did not eliminate the concern created by the extensive publicity. See Price v. State, 538 So. 2d 486, 489 (Fla. 3d DCA 1989)("A juror's assurance that he or she is able to remove any opinion, bias, or prejudice from his or her mind, and decide the case based solely on the evidence adduced at trial, is not determinative of whether that juror should have been excused for cause.") First, any person would have some reluctance to admit a bias in public. Second, most potential jurors would want to appear as willing to fulfill

their civic duty, even if in their mind they are biased. See Price, 538 So. 2d at 489 ("We have no doubt but that a juror who is being asked leading questions is more likely to 'please' the judge and give the rather obvious answers indicated by the leading questions, and as such these responses alone must never be determinative of a juror's capacity to impartially decide the cause to be presented"). Third, and most important, they may have assumed that everything heard from the news will be introduced at trial.

Counsel should have asked every potential juror to identify the source of his or her knowledge and for the details revealed by each source. In addition, counsel should have asked, "Have you expressed any opinion about this case to anyone? If so, what opinion, and to whom?" The inaction of defense counsel left them in the dark and constituted deficient performance under Strickland.

Prejudice

The failure to question a juror during voir dire may be considered deficient performance under Strickland, and in such case, prejudice would be inherent in the denial of the defendant's constitutional right to be assured of a fair trial before an impartial jury. Solorzano v. State, 25 So. 3d 19, 24 (Fla. 2d DCA 2009) In Solorzano, the court found it important that neither the State nor the judge questioned the suspect juror either. *Id*. But see, Mansfield, 911 So. 2d at 1172; and Martinez v. State, 655 So. 2d 166, 168 (Fla. 3d DCA 1995)(finding such a

claim could be conclusively refuted by the record if the record shows that the trial court or the prosecutor otherwise asked sufficient questions of the venire.)

Prejudice is inherent in this case due to counsel's failure to find out the nature of each juror's exposure to the publicity. It is impossible to prove that an actually biased served on the jury as a result of the limited questions that were asked. The impact of the pretrial publicity cannot be understated. It likely inflamed the reader with a sense of anger and disgust toward Bailey and evaporated the presumption of innocence Bailey was entitled to.

According to prospective jurors Ray and Martin, the local media inaccurately reported that there were three individuals in Bailey's car just before the shooting. Juror Good also thought Bailey had already pled guilty to the crime. (Vol. IV, pg. 610; R 4002) In addition, the newspaper provided the following details: Bailey's statements immediately before the shooting, Bailey's license was invalid, officer Kight wore a bulletproof vest, the number of shots fired, and Bailey's actions after the shooting. (R 3918, 3925)

Martin added, "when he was in jail his conversations were recorded and he was going to play the crazy card and I suppose part of it was over why don't we see whether or not he was, had an I.Q. high enough to stand trial but he passed his GED." (R 3925) These disclosures by the only six that were asked for details

demonstrate that the media reported extensive details and had other jurors been questioned, more details would have been discovered.

These details were difficult, if not impossible, to ignore when deciding Bailey's fate. Prospective Juror Obesso spoke frankly, "[b]ut according to what I know from the media, um, the facts are very clear that he is guilty." (R 4070) She further testified to the prejudicial effect of the reports alleging Bailey played the "crazy card" and stated, "because of what happened in jail and because of the talks and all that, it would be very hard." (R 4071) She doubted her ability to presume his innocence and confessed, "I mean, not that I am set but it would be very hard for me to change my mind." (R 4071)

A potential juror would have no way of knowing that the information broadcast in the media would not become evidence presented during the trial. A juror would likely expect to hear that Officer Kight was shot, he died from his wounds, the shooting occurred during a traffic stop, and other observable, objective facts. A juror could expect to hear from a medical examiner, a crime scene technician, eyewitnesses, and other law enforcement personnel. However, a juror would not naturally expect that a defendant would not testify, just as Bailey elected.

Due process demands more in a death case. Prejudice is inherent and also shown in the record from the minimal questioning concerning pretrial publicity.

As a result of counsel's failure to conduct a meaningful voir dire, Bailey was deprived of his Sixth Amendment right to a fair trial and the Due Process Clause of the Fourteenth Amendment, and Article I, Section 16 of the Florida Constitution.

III. Penalty phase counsel's failure to humanize Bailey before the jury and present testimony describing his family history of mental illness and horrific childhood filled with drug abuse, head injuries, and rejection by his mother deprived Bailey of his right to the effective assistance of counsel.

Standard of Review

The standard of review for an order denying a motion for post-conviction relief is mixed: (1) this Court must defer to the circuit court's factual findings so long as competent, substantial evidence supports them; but (2) must review *de novo* the circuit court's legal conclusions. Walker v. State, 88 So. 3d at 134.

Deficient Presentation

In the context of preparation for the penalty phase in a capital case, counsel's duties are the same as they would be for an ordinary trial. *Strickland*, 466 U.S. at 687. A claim based on a failure to investigate or present mitigating evidence during the penalty phase must demonstrate that the deficient performance deprived the defendant of a reliable penalty phase proceeding. Simmons, 105 So. 3d at 503.

"Among the topics that counsel should consider presenting in mitigation are the defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience,

and religious and cultural influences." Parker v. State, 3 So. 3d 974, 985 (Fla. 2009). In Armstrong v. Dugger, 833 F.2d 1430, (11th Cir. 1987), the court stated, "[t]he major requirement of the penalty phase of a trial is that the sentence be *individualized by focusing on the particularized characteristics of the individual*." *Id.* at 1433. (*Emphasis* added.)

Strategic decisions will not constitute ineffective assistance of counsel if alternative courses have been considered and rejected, and the strategy was reasonable under the prevailing norms. See Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). It may be reasonable to reject a mitigation strategy in favor of another. Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998)(finding it was a reasonable strategic decision to reject possible mental mitigation testimony from an expert and instead to focus on the "humanization" of the defendant through lay testimony.) However, in this case, the rejection of lay testimony "humanizing" Bailey was not reasonable as there was no reason to exclude it, it bolstered the expert testimony, and it provided additional mitigation not provided by the expert.

In Porter v. McCollum, 130 S. Ct. 447 (U.S. 2009), the United States Supreme Court found counsel ineffective because the judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability. *Id.* at 454. Porter's jury only learned about his turbulent relationship with the victim, his criminal history, and

almost nothing else. *Id*. The Court found that had Porter's counsel been effective, "they would have heard about (1) Porter's heroic military service in two of the most critical--and horrific--battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling." *Id*. As in Porter, counsel was ineffective during Bailey's penalty phase for failing to present evidence of his childhood and relationships with his family.

Gontarek, Bailey's penalty phase counsel, should have called Bailey's family to testify to the jury. Bailey's mother, brother, and father provided compelling testimony at the evidentiary hearing that the jury should been able to consider. While portions of their testimony was briefly mentioned by Dr. Kubiak, their testimony would have conjured sympathy for Bailey that no expert could provide. Furthermore, their testimony would have bolstered Dr. Kubiak's testimony by corroborating Bailey's self-report and given a deeper understanding of the events from his childhood.

Bailey's mother, Debra Gilchrist, was the best witness that should have testified. Gontarek had spoken with her before the trial and had a letter from her that detailed her potential testimony. (Vol. V, pgs. 841, 844) He also knew that she would be the best person to testify about her relationship with her son. (Vol. V., pgs. 848-849) He recalled that she declined his invitation to testify, but he was

not concerned because he believed Dr. Kubiak could present the same testimony. (Vol. V, pg. 846)

Gontarek claimed to prefer Dr. Kubiak because in his opinion Dr. Kubiak would have been better able to explain Bailey's background and how he was raised. (Vol. V., pg. 848) In his opinion, a professional was more believable than a family member because jurors expect family members to say positive things about the defendant. (Vol. V., pg. 847)

Gontarek's stated "preference" is questionable given the fact that Dr. Kubiak barely mentioned facts from Bailey's childhood during his testimony. Any references to his childhood were brief and non-descriptive. He made passing references to Bailey's ADHD diagnosis, his treatment at a juvenile facility, and receipt of his GED when he testified about his psychological testing, and he provided the following narrative of his childhood:

> Well, in looking at the history, there was several things that, that were significant. One, he was born to a very young mother. There was some problems, my understanding with the delivery portion, and that he needed to [sic] additional medical care. He drank gasoline at the age of two; he fell out of a two-story building and struck his head had severe head trauma. He started using alcohol and drugs at a very early age, including Estacy, [sic] which research indicates does have significant impact in terms of creating brain damage. He also spoke to me about, I think when he was around 16 getting drunk and falling out, backward out of a window, um, but drunk enough he didn't really seek any medical attention, so there has just been kind of accumulation of trauma to the brain over the years that I think has created the kinds of scores and so on that we are seeing at this point. (Vol. IV, pg. 676)

Furthermore, it is clear that Dr. Kubiak was presented to demonstrate that Bailey had cognitive deficits that qualified for statutory mitigation. He was not called to give a detailed description of Bailey's childhood. His brief summary paled in comparison to the dramatic testimony provided by Bailey's family at the evidentiary hearing.

In fact, Dr. Kubiak was incapable of providing a sufficient narration of Bailey's childhood because that was not his job. Walter Smith retained Dr. Kubiak to determine if Bailey suffered brain damage. (Vol. V, pgs. 893, 912) Dr. Kubiak met with him for four and a half hours to administer a series of psychological tests, not to compile an extended social history. (Vol. IV, pgs. 633-34, 684) It was unreasonable for Gontarek to expect that Dr. Kubiak was equipped to testify about Bailey's childhood regardless of his stated 100% preference for a psychologist.

Furthermore, his family would not have been called only to say "positive things" about Bailey. His mother testified about his complications during birth and placement in an incubator. (Vol. VI, pg. 944) She admitted to abusing crack cocaine when he was a young boy. (Vol. VI, pgs. 944-45) She was a "young mother" who enjoyed hosting "lots of parties" that undoubtedly exposed Bailey to drugs at a young age. (Vol. VI, pg. 945) This testimony would have shown why Bailey abused drugs: he was surrounded by drugs growing up, his mother abused

drugs, other people abused drugs, and he was taught to believe that drug use was acceptable and commonplace.

She also described other childhood traumas that Bailey experienced. When he was only eighteen months old, Bailey drank gasoline. (Vol. VI, pg. 955) Around the same time, he fell from a second story window and injured his head. (Vol. VI, pgs. 947) Gilchrist could have also testified that her other son, Joshua, suffered from lead poisoning from eating paint chips. (Vol. VI, pgs. 956-57) Although she did not recall Bailey suffering the same fate, this was more evidence of the dangers that Bailey was exposed to as a child. This testimony could have corroborated Bailey's self-report to Dr. Kubiak and supported Dr. Kubiak's opinion that he suffered from brain dysfunction and brain damage.

Most importantly, she could have described how she did not show love for her son and even rejected him after he caused a fire. She suffered second and third degree burns over eighty percent of her body. (Vol. VI, pg. 945) Not only was she permanently scarred for life, but her younger son, Joshua, suffered brain damage. (Vol. VI, pg. 945-46) She described the trauma suffered by her and her family, as follows:

> A: [Joshua] had some burns but he was pretty much brain dead. He was in a coma for quite awhile and when he came out he had to start, they had to start all over and teach him everything all over again. (Crying)
>
> Q: So he had brain damage as a result of the fire, is that correct?

A: Yes.

Q: Did this create problems for you, as a mother, trying to have feelings for your son, Robert Junior?

A: Yes, because I didn't want him any more. I told my parents not to bring him to the hospital. I wanted to give him up at that time. (Crying)

Q: Take your time. You wanted to give him up, you didn't want to have anything to do with him?

A: I couldn't see him, I couldn't even look at him. I couldn't. I just didn't want him anymore. I just felt like he was the blame. He was only five but I just, I don't know, I just, I was, I don't know, I just didn't want him.

Q: Be a fair statement you shoved him away from you and out of your life?

A: Yes, sir, I did.

Q: Was he verbally abused by you in conjunction with your feelings?

A: Yes, he was.

Q: During this time, after the fire, is this when the drug use began?

A: Pretty much so, right after, yeah. (Vol. VI, pgs. 946-947)

There is no question Ms. Gilchrist's testimony would have had a powerful impact on the jury. She testified that she did not want him anymore. One can only imagine the devastating effect this had on Bailey and his psyche. But the jury could not imagine this because they never heard it. The failure of counsel to secure Gilchrist's presence and elicit this testimony before the jury was inexcusable.

Likewise, it was inexcusable to fail to secure Bailey's brother, Joshua Gilchrist, to testify. He could have provided significant mitigation through his

testimony. He testified that he was bipolar and formerly received Social Security Income. (Vol. VI, pg. 934) He suffered from lead poisoning and a learning disability, and he dropped out of school in the ninth grade. (Vol. VI, pg. 934) He and Bailey were alone frequently growing up because his mom was working and their alcoholic step-father was passed out drunk most of the time. (Vol. VI, pg. 935) The jury's ability to witness first-hand Gilchrist's physical and mental deficiencies, brought about through either environmental and genealogical conditions, could have been imputed to Bailey and considered as mitigation.

Robert Bailey, Sr., Appellant's biological father, was also available to testify, but was never contacted by anyone from Bailey's defense team. (Vol. VI, pgs. 940-941) Mr. Bailey could have testified that both he and his younger brother suffer from bipolar disorder. (Vol. VI, pg. 938) This would have established a history of bipolar disorder in Bailey's family and supported that Bailey was bipolar himself. Furthermore, his uncle's mental illness was so severe that it drove him to murder his wife and take his own life. (Vol. VI, pg. 938)

In addition to claiming that it was a strategic decision to present Dr. Kubiak instead of lay testimony, counsel claimed to have invited the family to testify. While this invitation was a nice gesture, counsel did not advise them how critical their testimony could be, nor did counsel consider their testimony important. Gilchrist was available to testify as she reported at the evidentiary hearing. (Vol.

VI, pgs. 950, 951) Her actions after Bailey's arrest support her contention that she was available to testify. After his arrest, she drove from Wisconsin to Florida to see him and met with his first lawyer, Walter Smith. (Vol. VI, pg. 948) She also submitted to testing by Dr. Jill Rowan at Smith's request. (Vol. VI, pg. 949) When she learned that Bailey had a new lawyer, she wrote him a letter because she wanted someone to help him. (Vol. VI, pg. 949) Gilchrist would have testified had counsel told her that her testimony was critical. She demonstrated a willingness to help before, and she would have again at trial.

Prejudice

A defendant must show that but for counsel's deficiency, there is a reasonable probability the sentence would have been different, to satisfy the prejudice prong under Strickland. Walker, 88 So. 3d at 138. To assess that probability, this Court must consider the totality of all the available mitigation evidence (presented at trial and during the evidentiary hearing) and reweigh it against the aggravating evidence. *Id*. (citing Porter, and Williams v. Taylor, 529 U.S. 362 (2000)). "A reasonable probability is a 'probability sufficient to undermine confidence in the outcome.'" Henry v. State, 948 So. 2d 609, 617 (2006) (quoting Strickland, 466 U.S. at 694.) The nature of the mental mitigation that a post-conviction litigant claims should have been presented is important to

determine whether the failure to present such testimony deprived the defendant of a reliable penalty phase proceeding. See Rutherford, 727 So. 2d at 223.

The lay testimony would have proven that Bailey suffered from bipolar disorder. Dr. Kubiak testified that "they had given him a diagnosis of ruling out bipolar disorder, so basically by saying rule out, they mean there seems to be some possibility of that as a psychiatric diagnosis for him but they needed further information to before they could make a final decision." (Vol. IV, pgs. 644-645) Mr. Bailey's testimony regarding his diagnosis and his brother's diagnosis would have eliminated any question regarding Bailey's diagnosis.

In addition, his family's testimony would have presented additional mitigators for the jury to consider: his mother abused drugs, drugs were commonplace in his childhood home, exposure to lead poisoning, rejection by his mother, inadequate supervision as a child, growing up impoverished, and abandonment by his father.

The "humanizing" effect that his family's testimony provided cannot be understated. They would have added a personal and emotional element that is irreplaceable. Having had the opportunity to see his family with their own eyes and witnessed his troubled childhood would have evoked sympathy that would have provided the moral justification to recommend a life sentence.

As a result of counsel's decision to reject his family's testimony and proceed only with an expert, Bailey was deprived of his Sixth Amendment right to a fair trial and the Due Process Clause of the Fourteenth Amendment, and Article I, Section 16 of the Florida Constitution.

CONCLUSION

For all the reasons discussed herein, Bailey respectfully urges this Honorable Court to reverse the circuit court's order denying a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been electronically furnished to Assistant Attorney General Stephen R. White, Steve.White@myfloridalegal.com, and to:

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By U.S. mail delivery this 1st day of April 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Initial Brief of the Petitioner complies with the type-font limitation.

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