IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 10-31

JOHN M. BUZIA

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Buzia's motion for post conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Citations shall be as follows: The record on appeal from Mr. Buzia's trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. The post conviction record on appeal shall be referred to as "ROA" followed by the appropriate volume and page numbers. The supplemental post conviction record on appeal shall be referred to as "SUPP ROA" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

John Buzia has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved. John Buzia, through counsel, respectfully requests this Court grant oral argument.

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Procedural History

Mr. Buzia was convicted of one count of first degree murder, one count of attempted first degree murder, one count of armed burglary of a dwelling with an assault or battery, and one count of robbery with a deadly weapon following a jury trial in March of 2003. The penalty phase began on April 1, 2003 and continued through April 3, 2003. The jury recommended death by a vote of 8-4. The Spencer Hearing took place on August 18, 2003. On March 11, 2004, the trial court sentenced Mr. Buzia to death.

On direct appeal, this Court affirmed Mr. Buzia's convictions and sentence of death. Buzia v. State, 926 So. 2d 1203 (2006). The United States Supreme Court denied certiorari on October 2, 2006. Buzia v. Florida, 127 S.Ct. 184, 166 L.Ed 2d 129(2006).

Mr. Buzia filed a Motion to Vacate Judgments of Conviction and Sentence on August 30, 2007. The lower court granted an evidentiary hearing on some claims and summarily denied others.

The lower court conducted the evidentiary hearing on June 23, 2008 through June 27, 2008, and August 27, 2008 through August 29, 2008. The lower court took judicial notice of the entire court file including the Record on Appeal. The

lower court denied Mr. Buzia's 3.851 Motion on September 30, 2009, and his Motion for Rehearing on December 7, 2009. This timely appeal follows.

STATEMENT OF FACTS

Assistant public defenders Tim Caudill and James Figgatt represented Mr. Buzia, with Mr. Caudill as lead attorney. Mr. Caudill handled the bulk of the investigation and preparation of Mr. Buzia's case throughout the three years it was pending trial. ROA Vol. 14, p. 15. Mr. Figgatt did not participate in the mitigation investigation or preparation of Mr. Buzia's case. Id. Doug Harris, the investigator initially assigned to the Buzia case, was removed from the case because of allegations that he was drinking on the job. ROA Vol. 14, p.25; ROA Vol. 15, p. 237-238. During the time Mr. Buzia was pending trial, Mr. Caudill was handling thirty to forty other cases, some capital and some noncapital. ROA Vol. 14, p. 17. Mr. Caudill could recall at least seven or eight capital cases that he was working on during that time frame. Id. at 17-20.

Mr. Caudill went to see Mr. Buzia within a few days of his arrest. Id. at 22. He did not do anything to document the visit, but stated that Mr. Buzia was "a basket case." Id. at 23. He was "tearful," "extremely despondent," "extremely remorseful," and "not very coherent." Id. Mr. Caudill did not bring a video camera to that first meeting nor did he have Mr. Buzia see a psychologist or psychiatrist within those first few days after his arrest to accurately document his

mental state. Id. at 32. Mr. Caudill testified that in one of the death penalty seminars that he attended prior to Mr. Buzia's arrest "there had been a discussion about videotaping first meetings with clients in capital cases because it was *useful in preserving their mental state or emotional state or remorse or things like that* that would have been mitigating, so I was aware of the concept." Id. at 31(emphasis added).

Mr. Caudill did not travel anywhere out of state to interview any mitigation witnesses, despite the fact that Mr. Buzia grew up in the Midwest. Id. at 29. He did not visit the house in Winter Park where Mr. Buzia lived with his stepmother Gail, which was his last permanent residence before the crime. The only mitigation witnesses he spoke to in person were Mr. Buzia's mother, Patty Breslin, his two sisters Mary Perez and Cathy Selje, his brother Jack Buzia, a couple of people at the Mayflower retirement center whose names he could not recall, and Mr. Phillips, who was a friend of the victim. Id. at 30. Mr. Caudill received a list of 140 potential mitigation witnesses from Mr. Buzia. Id. at 35. Mr. Caudill attempted to contact only 36 of those people via a form letter. ROA Vol. 20, p. 1279. If he did not receive a response, he testified that he might send another form letter or try to verify an address through an office database. ROA Vol. 14, p.51. However, neither he nor his investigator went to the actual addresses to follow up on people who did not respond to the letters. Id. at 50-52. At least one of the

letters had typographical errors and was addressed to a nonexistent person. ROA Vol. 20, p.1281. Also, there was at least one occasion where Mr. Buzia was able to locate the telephone number of a witness from a phone book at the Seminole County Jail, when trial counsel had informed him he had been unable to locate that person. ROA Vol. 14, p. 35.

Mr. Caudill stated that the overall theme of the mitigation case was the family substance abuse and how the substance abuse affected John and the rest of the family. Id. at 50. Despite this theme, Mr. Caudill failed to investigate or explain the death of Mr. Buzia's sister, Cathy Selje. Trial counsel failed to locate or introduce the accident and autopsy report of Cathy Selje, which established she was killed by a car while crossing the street carrying a 12 pack of beer. Her blood alcohol level was a .44. Id. at 49. She had been hospitalized with an alcohol delirium less than a month prior to her death. ROA Vol. 16, p. 457. Mr. Caudill also failed to locate or introduce the medical records of Mr. Buzia's brother Jack, who, as a result of falling out of a truck while drinking, hit his head, and remained in a coma for thirty days. ROA Vol. 14, p.50. The hospital records show that Jack was under the influence of drugs at the time. ROA Vol. 8, p. 1400. Mr. Caudill agreed that both of those things would have supported his theory of the devastating effects of addiction on the Buzia family. ROA Vol. 14, p.49-50.

Mr. Caudill did not remember having a face to face conversation with the witnesses who testified at trial prior to their testimony. He admitted he communicated with Bill Bennett, Gary Selje, and Jon Hicks only through letters or telephone calls. Id. at 52-54. As far as Mr. Buzia's niece, Amber Buzia, Mr. Caudill admitted he "never had a conversation with Amber prior to trial." Id. at 53. Ms. Buzia came to court during the trial and, as he described, "I spoke with her then outside the courtroom and learned information from her that she was definitely someone that I needed to use as a witness." Id. at 53. He knew of her because Mr. Buzia had been carrying a sonogram picture of her unborn child at the time of his arrest. Id.

Mr. Caudill received 20-35 letters from friends and family of Mr. Buzia prior to the penalty phase. Id. at 54-55. He had separated out a packet of "good letters" and intended on introducing them into evidence during the penalty phase before the jury. Id. at 55; ROA Vol. 5, p. 924-932. Mr. Caudill had no strategic reason not to introduce the letters in the penalty phase. In fact, when he learned that he had not introduced the letters, "I was surprised because it was part of the plan." ROA Vol. 14, p.61. He testified that it must have been an "oversight." Id.

When Mr. Caudill first met Mr. Buzia he was aware that Mr. Buzia was under the influence of crack cocaine at the time of the crime. Id. at 62. Mr. Caudill filed a motion for preservation of blood and hair samples on March 20,

2000. Id. at 64. The court held a hearing on the motion on March 29, 2000. Id. Prior to the hearing, Mr. Caudill contacted ASA Carter. Id. ASA Carter assured Mr. Caudill that the blood would be preserved and tested for the presence of drugs or alcohol. At the hearing, ASA Carter told the Court that he had directed law enforcement to draw blood from Mr. Buzia on the day of his arrest to test for the presence of drugs and alcohol. ROA Vol. 5, p. 844.

Despite this assurance, the State never tested Mr. Buzia's blood for the presence of drugs or alcohol. ROA Vol. 14, p.66-67. Mr. Caudill relied on the representation of ASA Carter and did not take any independent steps to secure any blood testing until after he received the DNA report in June of 2001 and noticed there were no toxicology results. Id. at 69. Several months after he learned this information, Mr. Caudill filed a second motion for preservation and independent testing in October of 2001. Id. at 72. No one from the defense team ever visited the Sheriff's Office to determine how the blood was preserved. Id. at 71. In November, 2001, the court granted the motion for independent testing. Id. at 73. The blood was sent to Weustoff Laboratories and was tested on December 5, 2001. Id. at 76. Dr. Barbieri explained at the evidentiary hearing, that after 21 months, the cocaine metabolites had broken down, producing a negative result for cocaine. ROA Vol. 16, p.531; ROA Vol. 14, p. 76. Mr. Caudill did concede that "having

actual scientific testing or physical evidence of [Mr. Buzia's] intoxication or drug usage at the time would have been crucial." ROA Vol. 14, p.84.

With respect to failing to file the motion to suppress, Mr. Caudill acknowledged that he never consulted with an expert in toxicology or psychology to try to explain the relationship between Mr. Buzia's drug abuse and his susceptibility to coercive tactics or the effect on his ability to knowingly waive his constitutional rights. Id. at 85. In fact, he conceded that "[b]y the time that we spoke to an expert in toxicology it was too late." Id. (referring to Dr. Buffington).

At trial, the state introduced Mr. Buzia's videotaped statement and played it for the jury. However, the last twenty minutes of Mr. Buzia's videotaped statement were not published to the jury. Id. at 88-89.[1] The last twenty minutes were presented at the evidentiary hearing. Id. at 89-99. In the video, Mr. Buzia was visibly upset and crying, putting his head down and his head in his hands. He also expressed extreme remorse for his actions. Id. at 99, 102.

Mr. Caudill conceded there was no strategic decision not to show it and he could only recall a brief conversation with co-counsel on the matter. Id. at 101. Mr. Caudill recalled when the State referenced the last twenty minutes of the tape and told the jury that portion was in evidence. Mr. Caudill objected, but did not

[1] The complete, unredacted videotape was State's Identification EE at trial and is part of the court file. Id. at 88.

ask for a curative instruction because "I don't believe in curative instructions. I don't think that they do any good." Id. at 103. He testified that he did not know why he did not ask for a mistrial and had no reason not to do so. Id.

With respect to mental health mitigation, Mr. Caudill stated that the defense had hired Dr. Bernstein. Dr. Bernstein saw Mr. Buzia several times, gave him numerous tests, and recommended further testing to "rule out neurological disorders." Id. at 105. Mr. Caudill could not recall whether Dr. Bernstein opined that Mr. Buzia met both statutory mental health mitigators, but conceded that if he did, he would have wanted to present that to the jury. Id. at 106. Mr. Caudill testified that an MRI was done that revealed a venous angioma, a disorder associated with seizures. Id. at 108. After obtaining an MRI, Mr. Caudill contacted Dr. Hall, whom he thought was a neurologist.[2] Dr. Hall recommended further testing, including a PET Scan. Id. at 110. Mr. Caudill sought and obtained permission from Mr. Russo, the elected public defender, to secure a PET Scan for Mr. Buzia in order to "show cerebral damage from long-term cocaine use." Id. at 110; ROA Vol. 5, p. 853-854. Mr. Caudill conducted research about PET Scans and went as far as to try to schedule one. ROA Vol. 14, p.111, ROA Vol. 5, p. 885-923. However, Mr. Caudill ultimately did not pursue the PET Scan after talking with psychologist Dr. William Riebsame, who told him "he didn't think

[2] Dr. Hall is actually a psychiatrist, which Mr. Caudill did not learn until his testimony at the evidentiary hearing. ROA Vol. 20, p.1293.

that a PET Scan would provide us with very much additional information. ROA Vol. 14, p. 113-114.

Mr. Caudill agreed that there was no downside to obtaining a confidential neuropsychological workup, and he conceded that what Dr. Riebsame administered was only a *screening* for brain damage. Id. at 115-116. Despite indications from Dr. Bernstein of the possibility of brain damage, and despite a recommendation from Dr. Hall for further imaging of Mr. Buzia's brain, trial counsel did not pursue any additional neurological or neuropsychological testing. Id. Mr. Caudill acknowledged that a complete neuropsychological workup could have established the existence of brain damage, and he conceded that if the results for brain damage were negative, he could have kept that information from the State. Id. at 118.

Mr. Figgatt served as second chair and was responsible for the direct examination of five lay witnesses at the penalty phase. ROA Vol. 15, p.290. He has no recollection of sitting down with any of them prior to them taking the stand to go over their testimony. Id. at 290-292.

Mr. Figgatt was asked if there was a downside of obtaining a confidential neuropsychological workup in Mr. Buzia's case. Mr. Figgatt responded:

> A: There would have been absolutely none. If it revealed cognitive deficits, then it would have been the springboard to justify further medical testing of Mr. Buzia to determine whether or not there was brain damage. If it revealed nothing, it went no further.

> Q: You would have been able to keep it confidential, correct?
>
> A: I see no downside.

Id. at 302. Mr. Figgatt could not recall any conversations with Dr. Riebsame regarding recommendations about additional testing. Id. at 304. Mr. Figgatt conceded that Dr. Bernstein had written a report that said he suspected Mr. Buzia of having brain damage, yet neither he nor Mr. Caudill did anything to obtain neuropsychological testing to ascertain whether or not Mr. Buzia did in fact have brain damage. Id. at 311.

Mr. Figgatt testified that Dr. Buffington, a toxicologist, was not contacted until after the penalty phase. Id. at 304. He did not have Dr. Buffington talk to any of Mr. Buzia's family members. Id. at 306. He noted, "we didn't have any strategic discussion that said let's hold back Dr. Buffington for the Spencer Hearing. We persuaded one third of that group of twelve that my client should live without him, so I think that we could have gotten two more with him." Id.

Testimony from lay witnesses who testified at the original trial:

William Bennett is an attorney who attended Florida State University with Mr. Buzia. His testimony at trial was interrupted 4 separate times by a live video feed for a defense witness who was supposed to testify after Mr. Bennett. TR Vol. 14, p. 1691-1731. Mr. Bennett's testimony at trial was limited to the fact that he had gone to college with John, that he had some knowledge of his drinking and his

cocaine use, and that he was stunned when he found out Mr. Buzia had committed this crime. The trial court also repeatedly interrupted Mr. Bennett's testimony and told trial counsel to "control your witness" when the court felt that Mr. Bennett was not responding to trial counsel's questions. TR Vol. 14, p. 1717-1719.

At the evidentiary hearing, Mr. Bennett testified that he only had two phone calls with Mr. Buzia's trial attorneys prior to his testimony. ROA Vol. 16, p.414. He was never told anything specific about what they expected his testimony to be. Id. at 415. Mr. Bennett described the day that he arrived at court to testify. He was told that he was not going to testify until the afternoon, but he had arrived early in the morning so that he might be able to speak to the trial attorneys over the lunch break to prepare for his testimony. Id. at 418. When he arrived, Mr. Caudill found him in the hallway and told him he had to go on the stand right then. Id. at 419. He explained:

> I told [him] that I didn't think that I should testify to [sic] the afternoon. We hadn't talked about anything and I didn't know what I was going to be testifying for. I was scared.
>
> And, again, because I do have some knowledge of legal issues in this area, I was concerned about whether or not I would say something that I shouldn't say. He told me that they didn't have any witnesses available at that time so they brought me in to the courtroom and when they did, they were doing something with the satellite thing up or a video link-up.
>
> *****
>
> I was completely unprepared. I didn't know what questions would be asked. I had information that I thought would help John's case but I didn't know what they told the jurors. I didn't

> know how they prepared them and distinct issues regarding his testimony that I believed could have hurt him - - I believe I could have hurt him if they went in a different direction with their case.

Id. at 419, 421. Mr. Bennett would have testified that went to see Mr. Buzia at the Seminole County Jail shortly after his arrest. Mr. Buzia was a "zombie," he looked terrible, he was not responding to the questions Mr. Bennett asked him, and he seemed like he was in some sort of a fog. Id. at 430-31.

Amber Buzia is Mr. Buzia's niece, the daughter of Mr. Buzia's sister Mary Perez. Her testimony at the original trial was limited to describing how she was related to Mr. Buzia and she testified generally that there were problems with substance abuse in her family. TR Vol. 13, p. 1629-1639.

At the evidentiary hearing, Ms. Buzia testified about the extensive substance abuse in the Buzia family. She indicated that everyone in Mr. Buzia's immediate family had a substance abuse problem including his mother Patty Breslin, his father John Buzia, Sr., his brother Jack, and his sisters Mary Perez and Cathy Selje. ROA Vol. 16, p.452.

Ms. Buzia described her mother Mary drinking and driving on many occasions with her in the car. Id. She explained:

> There were instances where she didn't know what kind of car she drove. She would be in the parking lot and walking to random cars and just swerving all over the road at times on a pretty - - fairly regular basis.

Id. at 453.[3] Marijuana use and drinking were frequent and permitted in her house while she was growing up. Id. at 456.

Amber described her aunt Cathy's death. Id. Before her death, Cathy was hospitalized for over a month, suffering from alcohol delirium. Id. at 457. When she was released from the hospital, Patty went to the liquor store to buy her more alcohol to drink because "she didn't know what else to do." Id. at 457-58. Shortly after her release from the hospital, Cathy was intoxicated and walking across Colonial Drive carrying a twelve pack of beer. Id. at 545. She walked into traffic and was struck by an oncoming car. Id. at 546. Her blood alcohol level was a .44. Id. Amber also described that when Jack was hospitalized after his fall out of a truck while intoxicated, Patty was again the one who continued to enable his drinking and drug use. Id. at 458.

Amber was never contacted by Mr. Buzia's attorneys until the day she was put on the stand. Id. at 450. The trial attorneys never sat down with her, never explained what questions they were going to be asking, and never let her know what type of information they would be eliciting. Id. Amber was very nervous and emotional, having never testified in court before. Id. at 451. Had she been

[3] Ms. Perez was unable to be called as a witness at the evidentiary hearing because she arrived to court intoxicated. She returned the next day, only to be arrested for DUI in the parking lot of the courthouse after sideswiping a deputy's car. ROA Vol. 17, p.655.

asked, she would have testified to the same things at trial that she testified at the evidentiary hearing. Id. at 460.

Robert Smart testified at Mr. Buzia's initial trial. TR Vol. 13, p. 1640-1645. His trial testimony takes up five pages in the transcript and was limited to general testimony about how he met Mr. Buzia, how he used to play outside with him when they were children, and how saddened he was when he learned that Mr. Buzia was arrested for this crime. Id. at 1645.

At the evidentiary hearing, he explained that he had very little contact with the trial attorneys before he testified. ROA Vol. 17, p. 759. The only meeting he could recall was a brief meeting inside the courthouse. Id. at 760. Mr. Smart testified that his earliest memory of John was the first day they met. Id. at 753. They had been playing football in the yard and they went inside to Mr. Buzia's house where there was a refrigerator with a tap on it. Id. at 754. John walked right up to the keg and poured some beer in a Dixie cup and drank it. Id. Mr. Smart remembered this incident because even at his young age, he was struck by the fact that John had such easy access to alcohol. Id. Mr. Smart and John would frequently smoke marijuana together in junior high school. Id. Mr. Smart also experimented once with hard drugs with John. Id. at 756. Mr. Smart lost touch with John after 1981, but tried to get back in touch with him around 1993. Id. at

758. He contacted Patty and tried to get information about John's whereabouts, but Patty was not forthcoming with details about John's life. Id.

Gary Selje was married to Cathy, Mr. Buzia's sister. His testimony at the original trial was limited to a general description of his wife Cathy's drinking and the fact that he and John and Cathy would occasionally use powder cocaine together in the early 1990s. TR Vol. 13, p. 1606-1623.

At the evidentiary hearing, Mr. Selje described his first meeting with Patty. They went to a fourth of July party in Ogden Dunes when Cathy was about twenty-one years old. When they arrived at Patty's house, "Cathy reached down into her purse and pulled out a marijuana joint and lit it up right there in front of her mother." ROA Vol. 16, p.510. Mr. Selje stated that Patty had no reaction to it, and that "[i]t was like something that went on all the time." Id. at 511.

Mr. Selje described Cathy's increasing alcoholism, her deterioration, and the effect it had on their marriage. Their marriage fell apart when Cathy took in a homeless man who had been living under a bridge and developed a romantic relationship with him. Id. at 512. Mr. Selje said that he, Cathy, John, and the other siblings were constantly drinking, and using marijuana and cocaine. Id. There came a point where Patty called Mr. Selje's parents and let them know about the excessive drinking, partying and drug use. Id. Mr. Selje commented that he

thought it was odd that Patty recognized the problem in him, but wondered why she didn't do something about it with her own children. Id.

Mr. Selje described John as the protector in the family, especially over his younger brother Jack. Id. at 515. John would step in and physically stop Jack from getting into fights or other trouble. Id. The last time he had contact with John before the crime was in September of 1998 and John and Jack had come to the house to bring Mr. Selje some boxes. Id. at 516. When Mr. Selje opened the door, he was shocked at John's appearance. He was unshaven with bloodshot eyes and was wearing tattered clothing. Id. He looked like he had lost a lot of weight. Id. at 517. He also appeared to be under the influence of cocaine and alcohol. Id. John's behavior was so noticeable that Mr. Selje's wife Donna, who had never met them before, was very disturbed by their behavior. Id. at 518.

John Hicks testified at Mr. Buzia's original trial. His testimony takes up six pages of the transcript and is limited to describing a soccer trip to England the boys had taken when they were teenagers and how shocked he was when he learned John had been convicted of this crime. TR Vol. 13, p. 1623-1629.

At the evidentiary hearing, Mr. Hicks testified that he had very little contact with trial counsel prior to his testimony. ROA Vol. 15, p.256. He never sat down with them or had a long phone conversation where they explained what his testimony would be about. Id. at 257. He had to guess that he was basically being

called as a character witness for John. Id. When he got on the stand he had no idea what kind of information they would be trying to elicit. Id.

At the evidentiary hearing, Mr. Hicks testified that cocaine and marijuana were prevalent at La Lumiere. There was easy access to those substances if you wanted them. Id. at 258. John was in a crowd that partied a lot. Id. at 259. Even though Mr. Hicks testified about the soccer trip at the original trial, he was not asked any details about whether there was drinking on the trip. At the evidentiary hearing, he described how the boys began drinking as soon as they arrived. Id. at 260. When their coach found out, he was furious and wanted to cancel the trip and send them home. Id. But Patty defended them and said they were just young boys and needed a break. Id. According to Mr. Hicks, this was a common theme with Patty. Mr. Hicks described the second house in Odgen Dunes as a frat house. "It seemed that whether you [were] there during the afternoons or in the evening time access to alcohol and marijuana was very easy. Always available." Id. at 262. Patty was aware of all of this and would be partying alongside the children. Id. He relayed a story where he and John were smoking marijuana in John's room and Patty just came in and sat down and started talking to them like it was no big deal. Id. Patty's house was the "safe house for drug use and partying." Id. at 263.

Mr. Hicks lost contact with John after the summer of 1978. Id. About a month before John's arrest in 2000, out of nowhere Mr. Hicks received a phone

call from John at 11:00 p.m. eastern time. Id. at 263-265. Mr. Hicks was surprised to hear John's voice after all those years. Id. John was very emotional, upset, crying, and incoherent. Id. He reminisced about their past, but in an unhealthy way. Id. Mr. Hicks could tell that there was something very wrong with John. Id. Mr. Hicks later learned that John had made similar phone calls that same night to some of their other mutual friends. Id. at 265.

Testimony from lay witnesses did not testify at the trial:

Roxanne and Charles Heller are the aunt and uncle of Mr. Buzia. ROA Vol. 17, p.617. Roxanne and Patty are sisters. Id. The Hellers owned a food service distribution company in Cape Cod. John worked for them on two separate occasions, once in the late 1970s and again in the mid to late 1980s. Roxanne Heller described her sister Patty as an alcoholic. Id. at 619-620. She also noted that John Buzia, Sr. was an alcoholic. Id. at 620. She also explained that she knew that John had gotten into fights while he was on the Cape and had gotten arrested for drinking related offenses. Id. at 624. She felt this information would be detrimental to John's case and conveyed this to John's trial attorneys, but they never asked what the detrimental information was. Id. at 630. She would have been willing to testify at the original trial, she was just concerned about the impact of what she perceived was detrimental information. Id. at 625.

Mr. Heller recalled when Patty lived with them on the Cape, she was intoxicated every day. Id. at 635. He also observed Jack's substance abuse problem and saw him drinking rum straight out of the bottle right after he had spent six or seven weeks in the hospital in a coma. Mr. Heller noted that John was a great employee most of the time, but as the years progressed, his drinking escalated. He began to miss work, get into fights, and was arrested on one occasion. Id. at 639. He explained that John was dating a girl named Jennifer and when she broke up with him, he "went into a real depression," his drinking increased, and he "didn't care about much anymore." Id. at 640. Mr. Heller would have testified on John's behalf. Id. at 641.

Jean McIntosh and her husband Don lived across the street from Gail and John Buzia, Sr. for approximately thirty years. Id. at 658. Gail drank a lot and it was not uncommon for her to be intoxicated by late afternoon. Id. at 659. Gail had a son Richard Stover who was approximately 10 years old when they moved into the house. Id. Later in his life, Mrs. McIntosh described Richard as an alcoholic, "drinking beer almost constantly." Id. at 660. She noted, "In the last ten years he was very much an alcoholic. He drank all of the time. Every time I saw him I could smell it." Id. Richard ultimately became homeless and was found

dead behind a Publix Supermarket.[4] John lived in and out of that house for several years, and it was his last permanent residence before his arrest. Mrs. McIntosh explained that John Sr. was drunk quite often and there would always be cursing and shouting coming from the house. Id. at 661. The police were called to the house frequently. Id. at 664. Mrs. McIntosh described the Buzia family as the most dysfunctional family she had ever seen. Id. at 665.

The McIntosh's were contacted by Mr. Buzia's trial attorneys. Id. at 668. They were hesitant to come to trial and testify on John's behalf because they felt that they had detrimental information about him that might hurt his case. Id. They relayed that to the lawyers, but the lawyers never followed up and asked them what that detrimental information might be. Id. The particular incident Mrs. McIntosh was worried about was that she had learned that John had gotten angry at Gail because she would not let him use her car to go buy drugs. Id. at 670. He ripped a toilet and some carpet out of the floor and wall and threw it in the front yard. Id. at 669. The second incident that she felt might be damaging occurred in the fall of 1999, just a few months before the crime. Her and her husband were patching their lawn and John saw them laying sod and he came over to ask them if they needed help. Id. at 671. Upon closer observation, Mrs. McIntosh noticed:

[4] Richard was sharing a hotel room with Mr. Buzia's sister Cathy, when she was killed while crossing the street in an intoxicated state.

> He was slinging sod like crazy and perspiring profusely[.] I noticed that and he was talking very fast. I did not smell any alcohol or beer on his breath. We were pretty close talking and so forth but I felt to myself I thought *he's on something*.

Id. (emphasis added). Mrs. McIntosh noted that it was odd that he was sweating so much because it was dusk and it was not very warm out. Id.

After learning of John's arrest for murder, Mrs. McIntosh was shocked and felt that it was "unbelievable" and "out of character." She and her husband corresponded and visited John at the jail while he was pending trial. Id. at 667. The McIntosh's are committed to their faith and because of their spirituality, they were able to develop that type of relationship with John. Id. In part because of their relationship, John became a spiritual person and came to accept Christ. Id.

Mrs. McIntosh stated that if an attorney had explained to her that "bad is good" and that revealing these details about the Buzia family and John might be helpful, both her and her husband would have testified at his trial. Id. at 671.

Jack Buzia is John's younger brother. Jack testified that everyone in the immediate Buzia family had substance abuse problems, including himself. Id. at 676. He knew John to use crack cocaine, and Jack had smoked it with him "[a]s much as possible." Id. The last time he saw John was three and a half weeks before the murder, and John was using crack cocaine at that time. Id. at 677.

Catherine Stimpert worked as a forensic caseworker in the Seminole County Jail at the time of Mr. Buzia's arrest. Id. at 679. She held a bachelors degree in

psychology and was responsible for individual and group counseling, as well as placing people on suicide watch. Id. Ms. Stimpert saw John on the first day he came to the jail. Id. at 680. She described him as "unkept, disheveled" and in a daze. Id. at 681. She noted that he was not able to communicate effectively, and that it seemed like he was physically there but not emotionally there. Id. Ms. Stimpert saw John a couple of times a week in the month following his arrest and continued meeting with him until December of 2002. Id. at 683,685. In those meetings, John would be very remorseful, crying and emotional, and he seemed to have a sense of disbelief that he could not believe he had committed this crime. Id.

As part of her duties, Ms. Stimpert had an opportunity to interact with John's family. Id. at 684. Usually when Patty and Jack came to the jail they were intoxicated. Id. at 685. She could not understand how the family could continue to drink after they had witnessed the devastating effects the drug and alcohol abuse had on John. Id.

Ms. Stimpert was a drill instructor for Operation Right Track[5]. John was a presenter and would tell students about his life and how drugs got him to where he was, in jail and facing a capital murder charge. Id. at 687. John participated in this program nearly every weekend while he was at the jail awaiting trial. Id. at 688. John made an impact on the kids and they really seemed to respond to him. Id.

[5] This program was also referred to as a "scared straight" program. Trial counsel presented evidence of Mr. Buzia's involvement at the Spencer Hearing only.

Peter McCray lived with John and his family in Cape Cod for about a year and a half in the late 1970s or early 1980s when John would have been nineteen or twenty. Id. at 741. Mr. McCray was the same age as John. Id. at 743. Mr. McCray lived in the house with John, Jack, Patty, and Patty's mother. Id. at 742. The house was "a very loose situation. Basically anything went. A lot of kids coming over. Alcohol, pot smoking." Id. Patty would be present when the kids were drinking and smoking. Id. In the morning, Mr. McCray observed Patty putting alcohol in her coffee. Ultimately, Patty approached Mr. McCray and the two had a sexual relationship for a while. Id. at 743. The rent was often late because Patty spent all the money John earned on alcohol. Id. Mr. McCray was aware that twice during that time period Patty attempted suicide. Id. at 747.

Mr. McCray explained that John was supporting the family financially and emotionally during that time. Id. He was going to community college and working at night. Id. On several occasions, Mr. McCray observed John coming home after a full day of work and school and he would break down crying. John would say, "I just can't take it anymore." Id. at 746.

Expert Witness Testimony:

Attorney Robert Norgard has been working on capital cases in Florida since 1982. ROA Vol. 15, p.333. He has tried over 200 criminal trials, including 30 capital cases. Id. at 334-335. He has offered numerous lectures and published

several articles on the prevailing norms in representing capital defendants in Florida. Id. at 336-337. Mr. Norgard was accepted as an expert on prevailing norms among Florida capital defense attorneys from 1992 to 2004. Id. at 338.

Mr. Norgard testified that prevailing norms require an attorney to document and preserve evidence of a client's condition immediately after the crime. Id. at 343. Counsel should make reasonable efforts to obtain blood, urine, or hair samples. Id. Counsel should have a third party present to observe and document the client's mental condition and behavior as soon as possible after the arrest. Id. Mr. Norgard explained that as far back as the mid 1980s, defense counsel were taught that "bad things" in a client's background, such as drug and alcohol abuse, psychological abuse or neglect, can be considered mitigating. Id. at 345. This concept is known as "bad is good." Id. at 353.

Mr. Norgard explained that a properly conducted mitigation investigation should take hundreds of hours. Id. at 348. It is important to look at a client's entire life. Id. Mr. Norgard also explained the difficulty in dealing with mitigation witnesses in a capital case. A lot of times the witnesses will not be forthcoming and will want to minimize or hide what they perceive to be negative things about the client and/or his family. Id. at 349. It is in these types of situations where it becomes more important to get the witnesses to trust you and open up to you. Id.

at 355. Building this type of rapport does not happen through letters or over the phone. Id. at 357. It takes time and needs to be done in person. Id. at 357.

Mr. Norgard testified that the importance of brain damage as a mitigating factor was taught as early as the mid 1980s. Id. at 361. Attorneys were taught the difference between types of experts, including the difference between a psychologist and a neuropsychologist. Id. Furthermore, capital defense attorneys are expected to be reasonably familiar with the types of tests that an expert might use and what those tests might be expected to show. Id. at 362. Attorneys were taught that extensive drug use and head injuries can cause brain damage. Those types of things are "red flags" for counsel to look for so that they could obtain the appropriate expert. Id. at 366. Capital defense attorneys were taught that brain damage is something that can be easily missed or ignored absent a complete neuropsychological evaluation. Id. at 368. Mr. Norgard agreed that "in a case where a client has a history of severe drug and alcohol abuse and a documented history of head trauma that it would be necessary to consult with more than just a psychologist." Id. at 370.

Jan Vogelsang was accepted by the lower court as an expert in mitigation investigation, clinical social work, and conducting bio-psychosocial assessments. ROA Vol. 16, p.477-478. As part of her work on Mr. Buzia's case, Ms. Vogelsang

interviewed 38 people, reviewed numerous records, and traveled to several areas around the country where Mr. Buzia and/or his family had lived. Id. at 479,487.

Ms. Vogelsang explained how the Buzia family was an enmeshed family system. Id. at 493. One characteristic of an enmeshed family is that the "families simply cannot separate from each other. If you watch them, they keep looping back to each other over time, over distance, over geography. They keep coming back to each other emotionally, mentally, and physically. They have a very difficult time figuring out where they end and the other members of the family begin or where they end and the family system begins." Id. at 494. The "looping" in the Buzia family was "so pervasive and so intertwined" that Ms. Vogelsang had a difficult time sorting through all of the addresses and locations where the Buzia family members lived over the years. Id. at 495.

Ms. Vogelsang described the substance abuse problems in the Buzia family from a clinical social work perspective. Mr. Buzia's parents demonstrated a lack of parental judgment or insight by keeping a beer keg in the basement and allowing young children access to the keg. Id. at 524. The parents demonstrated "a classic kind of a missocialization of children." Id. Mr. Buzia and the other kids "were free to open it up and drink from it and over time that did occur starting at the age of five or six for John." Id.

John's mother Patty grew up in an alcoholic family.[6] Id. at 539. Both of her parents as well as her uncles were alcoholics. Id. Her parents took her to the Officer's Club when she was a child and sat her at the bar. Id. Patty's father's drinking increased over the years and he ultimately shot himself to death. Id. She also had an alcoholic uncle who shot himself to death. Id.

Even though Patty portrayed herself as a "June Cleaver" type mother, the reality was that she was very immature and self absorbed. Id. at 540. She wanted to be buddies with her children and their friends. Id. As her daughters got older she competed with them for their boyfriends. Id. She slept with one of John's nineteen year old friends. Id. at 541. As Ms. Vogelsang noted, "Patty really was never able to become completely independent or to live on her own, to behave or act like an adult or a parent. She really expected others to take care of her and was highly irresponsible." Id. If the children tried to gain some independence from her, "she would find ways to sabotage that and to get them back close to where she was or to where they could provide for her." Id.

Patty's life deteriorated so much because of the alcohol and substance abuse, that in the mid to late 1990s, she was living in a car with Jack. Id. at 543. They would park the car outside the house where John Sr. lived with Gail (and John, Cathy, Jack, and Richard at times). Ms. Vogelsang confronted Patty with the

[6] Patty died of pancreatic cancer a few months before the evidentiary hearing. ROA Vol. 16, p.538.

tragedies of her children, the death of her daughter Cathy, Jack's accident and subsequent coma, and John's conviction and sentence of death. Id. at 545. She asked Patty how, as a mother, she could explain what happened to her children and Patty's response was "I just don't understand why kids can't drink and have fun like we used to." Id.

Ms. Vogelsang described La Lumiere, the private boarding school that was discussed at Mr. Buzia's original trial. La Lumiere was a diversified setting with easy access to drugs. Id. While John attended La Lumiere, he would go home on the weekends to Ogden Dunes, where his house had become the party house. Id. at 555. There was easy access to marijuana and alcohol. Id.

After graduating from La Lumiere, John had no place to return home to. Id. at 557. His mother and Jack had moved to Cape Cod and his father was not around. Id. All of his friends had applied to college. Id. John had no plans, but wanted one last summer in Ogden Dunes, so he stayed in the basement of a friend of Patty's. Id. at 558. At summer's end, he moved to Cape Cod to work for his aunt and uncle. Id. at 560.

In Cape Cod, John worked two jobs and attended Cape Cod Community College. Id. at 561. He was supporting his mother and Jack, and they spent most of his money on drugs or alcohol. Id. He was nineteen years old and felt trapped. Id. at 562. When his father called and asked him to move to Florida, John saw a

way out. Id. He did not know that the house that John Sr. and Gail lived in had the same problems of substance abuse that he had experienced on Cape Cod. Id.

John was in and out of his father's house in Winter Park for several years. ROA Vol. 16, p.565. John Sr. and Gail were both alcoholics. Id. at 566. The police were frequently called. Id. at 564. Neighbors moved away because of the activities that went on there. Id. at 566. The house was so destroyed that it ultimately had to be torn down. Id. While at his father's house, John was working and attending community college, where he was able to get an Associate's Degree. Id. He ultimately applied and was accepted to Florida State University. Id. at 567. The school records from Florida State indicate that John attended one semester and was then placed on academic probation. Id. The records indicate that John never attended for another semester. Id. John spent a couple years in Tallahassee working at the Governor's Inn and socializing with his friends, who were attending classes and moving towards graduation. Id. at 568. It was at Florida State that the partying, drinking, and drug use increased. Id. at 569. Much like at La Lumiere, once John's friends graduated from Florida State, he was at loose ends again. Id.

John then moved back to Cape Cod to work for the Hellers. Id. He was working and drinking heavily. Id. at 570. He met a girl and fell in love, but she ultimately ended their relationship because she could not deal with the family dysfunction and the drug use. Id. It was at this point in his life where he started to

show signs of aggression and began getting into fights. The substance abuse was taking over his life. Ms. Vogelsang explained, "He is trying to break away and he's being totally unsuccessful and he's becoming more agitated and more aggressive." Id.

He left Cape Cod in the early 1990s and moved back to Florida. Id. at 571. Over the next ten years, the Buzia family was moving around and living in various places with each other. Id. John was working at Universal. Id. at 572. It was at this time where he started having legal problems. Id. He was arrested for traffic offenses, DUI, possession of drug paraphernalia, and similar offenses. Id. Universal ultimately asked him to leave because the police kept coming to his job looking for him. Id. Ms. Vogelsang explained the significance of this:

> I think that when John left Universal it was the early beginning of the end. He was thirty-three years old. He was not working. He did not have school or a job to go to. I think that he had a sense of just going nowhere, of not having any plans and to me when I look at the family history, this is where John finally sort of succumbed to the family system where he gave up and he gave in.

Id. at 572-573. After Universal, for the next several years until his arrest, John was working just to support his drug habit. Id. at 573. He worked at a bakery distribution center called Myers Bakery, where he was introduced to crack cocaine. Id. John was living at Gail's house during this time period. After he left Myers Bakery, John went to work at the Mayflower, which was very close to Gail's

house. Id. at 575. He had a reputation for being a hard worker, but at this point in his life, he was just working for money to buy crack. Id. at 573. Gail had enough of the behavior and kicked him out, so John began living in a tent behind Gail's house. Id. at 576. One of his coworkers at the Mayflower would go check on him and would often see him "wrapped around a crack pipe." Id. After he left the Mayflower, he began to work for Bob Garcia, who ultimately introduced him to Mr. and Mrs. Kersch. Id. at 577. In the days leading up to the crime, John was sleeping in cardboard boxes and living on the street. Id.

Ms. Vogelsang explained how Patty enabled this behavior in John and the rest of her children. Id. She would give them money to buy drugs and alcohol. Id. at 578. She justified their drinking problems because of "stress." Id. She made excuses for them and "tried to shield them from the reality of their life." Id. Ms. Vogelsang opined that John was neglected and missocialized as a child. Id. at 579. The Buzia family "was a high risk family system that did not deal with any of the consequences of substance abuse. They did not recognize the problem or ask or seek any intervention at a time when it could have been long-term and meaningful and significant in that family." Id. at 579-580. Ms. Vogelsang stated that in her over thirty years of practice, "the Buzia family was one of the most deeply affected and devastated [by alcohol and substance abuse] that I have had in any experience." ROA Vol. 17, p.616.

Dr. Mark Cunningham is a board certified clinical and forensic psychologist, licensed in fifteen states, with thirty years of experience in capital cases. Id. at 768. He has authored over thirty publications in peer reviewed journals, edited text, and professional periodicals. Id. at 773. He has "written extensively about capital sentencing evaluations" and the "psycholegal issues that underly those capital sentencing issues." Id. at 774. He has testified in capital cases approximately 130 times, in both state and federal court. Id. at 777. He was accepted as an expert in clinical and forensic psychology. Id. at 779.

Dr. Cunningham interviewed Mr. Buzia for seven hours. Id. He reviewed extensive records, including "records of neuropsychological assessment, MRI records, PET [S]can records of Dr. Wu, depositions that had been performed in the prior hearing, testimony of the prior sentencing phase, employment records, educational records, medical records, psychological records, [and] medical records regarding members of Mr. Buzia's family." Id. at 780.

Dr. Cunningham opined that while the murder reflected some degree of planning, most characteristics of the murder reflected "extraordinary judgment impairments." Id. at 792. Dr. Cunningham explained the nexus between brain impairment and criminal violence as well as the nexus between alcohol or cocaine abuse and criminal violence.

> It is to say that the presence of a brain impairment or a neurologically significant history puts somebody at additional

> risk for violent misconduct and often that brain impairment is one piece that we might call the algebra of violence that includes the brain impairment, substance abuse and a particular context that they are in and the psychosocial history that this person comes out of. It's out of that combined matrix of factors that the violence emerges.
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> ****
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> These drugs, particularly heavy chronic cocaine abuse, [have] such a destabilizing effect on the individual's psychological equilibrium and acting without thinking and aggressive reactions and overaggressive behaviors, that it's tilting the angle that the choices are made on. It's putting this person at additional risk.

Id. at 795, 817.

Dr. Cunningham testified about the hereditary nature of alcoholism and how that relates to the Buzia family. If a person has a first degree relative that is alcohol or drug dependent, they are three to five times more likely to end up alcoholic or drug dependent. Id. at 823. He explained:

> Now this metabolic reaction is a critical element for a jury to understand or for individuals to understand if they are to regard alcoholism or drug dependence as mitigating rather than aggravating in somebody's background. That this is not a function of simple willpower or character, it's largely a function of metabolism.

Id. at 823-824. In other words, for someone who has this alcoholic metabolism, "when they drink a beer, it makes them want to drink fifteen beers." Id. at 824.

Dr. Cunningham explained how family behavior patterns and effects are multigenerational. Id. at 835. He stated that "scripts are the unwritten story of how your life is supposed to be." Id. For example, in his life, it never occurred to

him not to finish high school, go to college and finish college. Id. at 836. This is all part of the family system that he grew up in. Id. "John grew up in a very different story about what you do with your life." Id. The alcoholism of John's parents robbed John of "the critically important structure and predictability that is needed to develop internal controls, impulse control, and self-control." Id. at 839. Because of Patty and John Sr.'s alcoholism, John was deprived "of essential psychological building blocks" of his childhood. Id. at 841.

Similarly, Patty's condoning of drinking and participating in drinking and drug use with her children is considered a type of neglect. Id. at 846. This neglect led to somewhat of a role reversal with John as he got older with "him having to be more responsible [because] she's drinking and is sexually involved with a young man in the household while [John] is going to community college and working and trying to provide support for this household." Id. at 849.

In support of his finding that the crime was committed while Mr. Buzia was under the influence of an extreme emotional disturbance, Dr. Cunningham explained, "The more disorganized and haphazard this offense in the way that it's carried out, the greater the implications for the extent of the emotional disturbance that is present." Id. at 860. The lower court questioned Dr. Cunningham on this issue during the State's cross examination. Id. at 916. The lower court asked whether the disorganization evidenced at the crime scene was just simply a result

of it being Mr. Buzia's first murder, and not a result of impairment or disturbance. Id. at 917. Dr. Cunningham explained:

> My position would be that you can't have it both ways. You can't have him be coolly, calculated, and predatory over here but then disorganized in the way he carries it out, set himself up to be caught, not take things of value. Those two circuits are very different in nature so I am looking for how to integrate an understanding of this based on all of the information.
>
> At the scene, he is behaving like someone who is stimulus overloaded. Again, that is inconsistent with having thought about it in advance for two hours. It is consistent with somebody that… [is] doing improvisation as they go [and] is overloaded by trying to figure it out especially with the combined drug and neuropsychological impairments that are there.

Id. at 925, 960.

Dr. Cunningham opined that Mr. Buzia met both statutory mental health mitigators. Mr. Buzia's drug addiction interacted with his disorganized life status, sleep deprivation, lack of attention to hygiene, potential dehydration, malnutrition, social history, and psychosocial history and caused an extreme mental or emotional disturbance. Id. at 818. In applying the second statutory mental health mitigator, capacity to appreciate the criminality and conform his conduct to the requirements of the law, Dr. Cunningham stated that Mr. Buzia's addiction to crack cocaine corrosively undermined his appreciation of the criminality. Id. at 820. The substantial impairment of his ability to conform his conduct to the requirements of the law is evidenced by the extreme disorganization at the crime scene. Id. The

impulse control eroding effects of addiction also lend support to this statutory mitigator. Id. Dr. Cunningham noted that there was no expert testimony at trial that Mr. Buzia met the statutory mental health mitigators. Id. at 855.

Dr. William Alexander Morton is a psychopharmocologist board certified in psychiatric pharmacy practice. Id. at 983. He has published forty-six peer reviewed articles including several in the area of cocaine and psychiatric complications, treatment of addictions, and alcoholism. Id. at 987. He has testified in over forty capital cases. Id. Dr. Morton was accepted as an expert in the area of psychopharmacology, addictions, and psycho pharmacy practice. Id. at 988.

Dr. Morton reviewed extensive records including medical records, mental health records, depositions and testimony, and the videotaped confession. Id. at 991. He interviewed Mr. Buzia on two separate occasions for a total of three and a quarter hours. Id. at 992. He also interviewed Patty, Mary, Jack, and Ken Pickens, a coworker of Mr. Buzia's at the Mayflower. Id.

Dr. Morton explained the time line of Mr. Buzia's drug and alcohol use in the days leading up to the crime. Id. at 994; ROA Vol. 9, p. 1546. He arrived at this timeline through interviews with Mr. Buzia, records and transcripts from Dr. Danziger, penalty phase testimony, and the videotaped confession. Id. at 998.

Mr. Kersch paid John 400 to 500 dollars on the Saturday before the crime for the previous week's work. Id. at 995. As soon as he got off work, he bought

and smoked crack cocaine the rest of the day and night. Id. He spent 10 hours working on Sunday at the Kersch's house putting in an attic floor. Id. He went to Target on Monday to buy some clothes because he had been wearing the same clothes for ten days. Id. at 995-96. He spent the rest of his money on crack cocaine. Id. at 996. He ran out of money and then returned the clothes to Target on Tuesday morning, the day of the murder, to get more money to buy and smoke more crack. Id. He was supposed to be at the Kersch's for work that Tuesday morning, but he never showed up because he was using crack. Id. In the afternoon, however, he made his way there. Id. He stopped at a McDonald's on the way and smoked a small rock in the bathroom. Id. His intention was to ask the Kersch's for an advance in pay since he had already put in a 10 hour day on Sunday. Id. They had given him advances before. Id. As he got closer to the Kersch house, he stopped and smoked crack at a Mobil Gas Station, then proceeded to the Kersch house. Id. The amount of time he waited at the Kersch house is unclear, but at some point, Mrs. Kersch came home and the crime began shortly thereafter. Id. at 997. He got approximately 180 dollars and spent it all on crack and some beer. He smoked and drank his way through the night. Id. He was arrested the next morning trying to cash a check at the bank. Id.

Dr. Morton also prepared a timeline of John's substance abuse history. ROA Vol. 9, p. 1547. He started drinking sips of beer from the keg at five or six

years old. ROA Vol. 18, p.998. At age twelve, he began drinking a significant amount of beer on a regular basis. Id. at 999. In junior high he began smoking marijuana. Id. He tried powder cocaine in junior high, but did not use it on a regular basis until he came to Florida and attended Florida State. ROA Vol. 19, p.1011-1012. The powder cocaine use increased over those years and then he made the conversion to crack cocaine. Id. at 1012. Crack cocaine "really did catch John's brain where he became obsessed with using and that was his main goal was to satisfy this need that the brain basically said I have to have. He lost almost every job that he had by not showing up because he would rather use cocaine than show up for work." Id. at 1013.

Dr. Morton explained the science behind addiction. He stated, "[a]ddiction is not a logical process and it doesn't make sense." Id. at 1015. Several things contributed to John's addiction including genetics, early drug use, the permissive environment he lived in, and his neurological deficits. Id. at 1018-1019. Dr. Morton explained how drug use shifts from voluntary to involuntary and compulsive use. Id. at 1019. To illustrate this, Dr. Morton described a study where after a monkey pressed a bar and got a dose of cocaine, the urge for the drug was so strong, that even after the cocaine was turned off, the monkeys continued pressing the bar up to 12,800 times. Id. at 1021. The animals would press the bar for cocaine instead of eat. Id. The males would ignore a receptive female in favor

of cocaine. Id. They would endure an electric shock for a larger dose of cocaine in favor of no electric shock with a smaller dose of cocaine. Id. These animal cravings take place in absence of personality disorders or situational stresses. Id. Dr. Morton continued:

> The highly rewarding properties of cocaine can make obsessive users of the most mature and well integrated amongst us. So, it's an incredibly powerful drug. It overrides the brain's ability to think.

Id. at 1022.

Dr. Morton explained the relationship between the reward pathway and dopamine. Id. at 1025. In order to sustain the human race there are things that people need to do such as drink fluids, eat food, reproduce, and nurture their young. Id. When we do those things, we are rewarded with a small amount of dopamine so that it becomes something pleasurable and we want to keep doing it. Id. Cocaine causes such a massive amount of dopamine to be released and it is so pleasurable, that it essentially takes the brain hostage and tricks it into thinking that it must have cocaine in order to survive. Id. at 1026-27. Cocaine affects other neurotransmitters and neurochemicals as well and that causes paranoia, agitation, and delusional and abnormal thoughts. Id. at 1028-1029.

Dr. Morton explained the effect that crack cocaine had on John, especially in the later years of his addiction. Id. at 1034. He spoke with Ken Pickens, a coworker of John's at the Mayflower. Id. Mr. Pickens reported that John was

impulsive and agitated. Id. He had a very quick temper and would "snap" in a heartbeat. Id. Mr. Pickens had reportedly seen John in a tent in the back yard curled up with his crack pipe. Id. Mr. Pickens noted how John was always absent after payday and sometimes would be out for several days after he was paid. Id. at 1035. John ultimately quit his job at the Mayflower in order to get a two week advance that had been withheld from the beginning of his employment. Id.

Dr. Morton opined that Mr. Buzia met both statutory mental health mitigators. Id. at 1037. He noted that John "had no ability to activate that part of his brain to think clearly to logically assess what was going on." Id. John's crack cocaine use had "switched" from voluntary to compulsive long before March 14, 2000. Id. at 1038.

Dr. Joseph Sesta is a forensic neuropsychologist who is board certified in the specialty of neuropsychology and subspecialty certified in forensic neuropsychology. Id. at 1137-38. Dr. Sesta is an examiner for the American Board of Professional Neuropsychology and has published several articles involving brain injury. Id. at 1139. He has testified as an expert for the Court, Defense, and State over 130 times. Id. at 1139-40. Dr. Sesta was accepted as an expert in the area of forensic neuropsychology. Id. at 1141.

Dr. Sesta reviewed several documents, including transcripts of Mr. Buzia's trial, the videotaped confession, Dr. Bernstein's raw data, and the 1994 medical

records detailing a head injury. Id. at 1141-42. Dr. Sesta also met with Mr. Buzia and administered psychological and neuropsychological testing. Id. at 1142. The testing was valid and revealed no evidence of malingering. Id. at 1145.

Dr. Sesta's testing showed impairment in the left cerebral hemisphere in the region of the temporal lobe. Id. at 1147,1153. Mr. Buzia also has some right hemisphere impairment, but the left temporal lobe was the predominant impairment. Id. at 1147. Mr. Buzia had a Verbal IQ and Performance IQ split of 24, which is clinically abnormal, statistically significant, and indicative of brain damage. Id. at 1144-45. A split of that magnitude occurs in less than five percent of the population. ROA Vol. 22, p. 1715. Dr. Sesta also explained that Mr. Buzia has no sense of smell, or microsmia. ROA Vol. 19, p.1150. This is considered a pathoneumonic sign, which means "it shouldn't occur in the normal population and when it does, it may name a disease or illness." Id.

Dr. Sesta wanted to refer Mr. Buzia's case to a neurologist to confirm and verify his findings. Id. It is especially important in a forensic setting to obtain a convergence of data. Id. Also, if the neurologist agrees with the hypothesis, then the neurologist could order neuroimaging studies, which can further show whether there is "clinical correlation or convergence of our clinical exam with imaging studies." Id. at 1150-51. Both Dr. Tanner's evaluation and the PET Scan completed by Dr. Wu were extremely helpful to Dr. Sesta in reaching his

diagnosis. Id. at 1151. Dr. Sesta diagnosed Mr. Buzia with Cognitive Disorder, Not Otherwise Specified. Id. at 1152.

Mr. Buzia's temporal lobe deficits cause "memory impairment," "problems with mood," "lability with explosiveness," and "feelings of paranoia." Id. at 1154. Impairments in the temporal lobe affect other parts of the brain. Id. at 1156. Dr. Sesta opined that Mr. Buzia's brain damage existed prior to March of 2000 for several reasons. First, Mr. Buzia suffered a documented head injury in 1994. Id. at 1156. Second, Mr. Buzia's drug and alcohol addiction was peaking at the time of the crime, and he had an extensive history of drug and alcohol abuse throughout his life. Id. Prolonged cocaine and alcohol abuse can cause brain dysfunction and ultimately brain damage. Id. at 1157. Finally, the raw data created by trial expert Dr. Bernstein, which was generated about a year after the crime, "indicated that there was an abnormal neuropsychological screening." Id. Dr. Sesta explained that the abnormal MRI, Dr. Bernstein's results, Dr. Tanner's neurological assessment, the PET Scan, and Dr. Sesta's own neuropsychological testing showed a convergence of data. Id.

Dr. Sesta explained how the stressors in Mr. Buzia's life leading up to the crime, i.e. his homelessness, sleep deprivation, and crack cocaine addiction, interact with the fact that he has brain damage. Id. at 1160. He explained, "The damaged brain is much less likely to be able to cope with psychosocial stressors."

Id. Dr. Sesta opined that Mr. Buzia met the statutory mental health mitigator of being unable to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. Id. He stated, "Individuals that are as brain impaired as Mr. Buzia is [,] by definition[,] have a substantial impairment in conforming their behavior to the rules and regulations of the law." Id. at 1161.

Dr. John Tanner is a board certified neurologist with a focus on traumatic or acquired brain injury. Id. at 1064. He has previously testified as an expert in neurology and neuroimaging. Id. at 1065. He was tendered and accepted as an expert in neurology. Id. at 1066. He conducted a neurological examination of Mr. Buzia after reviewing the abnormal MRI Scans obtained by trial counsel as well as the abnormal neuropsychological testing results by Dr. Sesta. Id. Dr. Tanner also reviewed medical records from 1994 where Mr. Buzia was struck in the head with a lead pipe and suffered facial fractures. Id. at 1090; ROA Vol. 9, p. 1527-1535. According to Dr. Tanner, the report documenting this incident is indicative that Mr. Buzia suffered a clinically significant traumatic brain injury at that time. ROA Vol. 19, p.1091, 1097.

Dr. Tanner's neurological exam consisted of several different tests, all of which he explained to the lower court. Id. at 1073-1082. Mr. Buzia had abnormalities in three tests: memory, praxis, and the cranial nerve exam. Id. at 1082. These abnormalities indicate dysfunction in the left temporal lobe. Id. at

1097. Based on these abnormalities, Dr. Tanner felt it was important to obtain a PET Scan for Mr. Buzia. Id. at 1084. He opined that a PET Scan "would help to determine if there's correlation with what I found and what the neuropsychological testing found." Id. at 1085.

Based on his review of Mr. Buzia and the relevant documentation, Dr. Tanner diagnosed Mr. Buzia with a mild cognitive impairment. Id. at 1097. Mild means that it is "not severe in a global sense" but "it is significant because…it affects his life." Id. at 1098. Mr. Buzia's temporal lobe deficits cause increased aggressive behavior and paranoia. Id. at 1101. The brain damage coupled with extensive drug use decreased Mr. Buzia's ability to control his behavior. Id. at 1103.

Dr. Joseph Wu was accepted as an expert in PET Scan imaging and psychiatry. ROA Vol. 20, p.1314. He joined the Brain Imaging Center at the University of California Irvine College of Medicine in 1988 and has been the head of the Center for the last 10 years. Id. at 1312-13. He has published over 50 peer reviewed articles on the use of PET Scan in the areas of neuropsychiatric disorders, traumatic brain injury, cocaine addiction, and several other areas. Id. at 1314. He has reviewed between 4,000 and 5,000 PET Scans of the brain. Id. at 1316.

Dr. Wu explained that a PET Scan is a corroborative tool that can be used in conjunction with neurological or neuropsychological testing. Id. at 1330-1332. If

a doctor uses more than one modality, they will have greater confidence in their assessment. Id. at 1331. Dr. Wu stated that Mr. Buzia's PET Scan images show a clinically significant asymmetry in the left ventral temporal cortex. Id. at 1344-1345; ROA Vol. 12, p. 2082-2084. The scan is abnormal. ROA Vol. 20, p.1345.

Dr. Wu explained the clinical correlation of this asymmetry. The abnormality in the temporal lobe is in the exact same region where Mr. Buzia was struck in the head with the lead pipe resulting in multiple skull fractures in 1994. Id. at 1347. Injuries to the temporal lobe can result in impaired judgment and impaired impulse control. Id. at 1349. People who suffer traumatic brain injury are also at a higher risk for developing addictions. Id. Dr. Wu discussed the significance of the convergence of data in this case:

> [I]n this case you have an ER record which shows a physical blow to the left side of the head and scull [sic] fractures and you have neuropsychological testing which shows dominant hemisphere function verbal functions being severely affected and you are showing a metabolic abnormality or asymmetry in the left temporal lobe compared to the right and you are seeing the behavior. You are seeing a behavior which shows a significant deterioration in impulse regulation after the brain injury and you are looking at family history, all of these would increase a doctor's confidence that there are brain abnormalities that affect things such as impulse control.

Id. at 1354-1355.

Dr. Bernstein is a forensic psychologist who was hired by trial counsel to assess Mr. Buzia in February of 2001. ROA Vol. 17, p.699. He was hired to

"examine factors related to mental status at the time of the offense and examine factors that could be used if convicted for mitigation." Id. at 701. Dr. Bernstein met with Mr. Buzia on at least 5 occasions and conducted extensive testing. He was concerned about the existence of brain damage based in part on the 1994 head injury, the drug dependence, and his neuropsychological screening, which showed impairments in various areas. Id. at 705, 709,710. He stated, "Clearly issues related to brain function needed further complete expert examination." Id. at 711. He expressed his concerns to trial counsel and recommended a full neuropsychological workup on Mr. Buzia on more than one occasion. Id. at 719. That kind of testing was critical for a death penalty case. Id. He was not called to testify at trial. Id. Had he testified, Dr. Bernstein would have opined that Mr. Buzia met both statutory mental health mitigators. Id. at 720-721 .

Dr. Buffington is a clinical pharmacologist who was contacted by trial counsel on May 5, 2003, over a month after the jury had returned an 8-4 recommendation for death. ROA Vol. 18, p.962-63. He reviewed transcripts, but did not speak to any family members of Mr. Buzia. Id. at 964. He did not learn about the lab report that showed no cocaine in Mr. Buzia's system until just before he took the stand. Id. at 965. Had he had more time to review the lab report, "he might have been able to give a more definitive answer as to why that negative result might not necessarily mean that Mr. Buzia had [not] been using cocaine."

Id. at 967. Dr. Buffington opined that knowing the extensive family history of substance abuse and knowing that Mr. Buzia had brain damage would have bolstered his testimony. Id. at 969. He also opined Mr. Buzia meets both statutory mental health mitigators. Id. at 973. He was never asked about them in his testimony at the Spencer Hearing. Id. at 972.

The State presented the testimony of Drs. Danziger and Riebsame. Dr. Danziger is a psychiatrist who was hired by the State and testified at the original trial. ROA Vol. 21, p.1526. At trial and the evidentiary hearing, he opined that Mr. Buzia suffered from cocaine and alcohol dependence. Id. at 1528. Dr. Danziger believed Mr. Buzia was honest and forthright and not malingering. Id. He did not do any standardized objective testing to rule in or rule out the existence of brain damage in Mr. Buzia's case conceded that he cannot rule it out. Id. at 1541.

Dr. Riebsame was hired by the defense and testified on behalf of Mr. Buzia at the penalty phase. At the evidentiary hearing, Dr. Riebsame testified that in a capital case "in order to do a good job an expert must look at the client's life span and get as much information as possible about them from a variety of sources." Id. at 1578. Yet, in preparation for his trial testimony, he only spoke to four lay witnesses by telephone. Id. at 1579. He never made inquires or received records about Jack and Cathy's alcohol related injury or death.

Dr. Riebsame conducted a brief neuropsychological screening of Mr. Buzia that took between 10 and 30 minutes. ROA Vol. 22, p.1636. Based on that brief screening, he opined that Mr. Buzia did not have brain damage. Id. at 1622. On the aphasia screening that he administered, he conceded that there were two mild pathoneumonic signs, but that he "wouldn't make much of it." Id. at 1635-36.

Dr. Riebsame was contacted by CCRC by telephone in March of 2007 and initially agreed to be hired. Shortly thereafter, he declined and wrote CCRC stating "it would be best that I am sure of my objectivity by not assuming another role in this matter." Id. at 1646-1647. Yet, Dr. Riebsame subsequently agreed to assist the State. He consulted with the assistant state attorney in the cross-examination of Dr. Sesta and attempted to identify problems with the Defense case in post conviction. Id. at 1643-44. He spoke with the State on five to ten occasions prior to the evidentiary hearing. Id. at 1644. Prior to his testimony at the hearing, he had billed the State for sixteen hours of time. Id. at 1647.

Drs. Helen Mayberg and Eric Cotton testified for the State regarding the PET Scan. During her deposition, Dr. Mayberg testified that she had no criticisms of the technical aspect of the PET Scan. ROA Vol. 21, p.1476. Yet, at the evidentiary hearing, she testified that there was a tilt in the coronal views that could account for the asymmetry that Dr. Wu noted was clinically significant. Id. at 1465. Dr. Mayberg did not review Dr. Sesta's raw data, nor did she speak to Dr.

Sesta, Dr. Tanner, or Dr. Wu. Id. at 1475. She never met or examined Mr. Buzia. Id. She has testified for the state or federal government 100 percent of the time. Id. at 1493. She has authored several articles that caution courts against the acceptance of PET Scans in criminal cases. Id. at 1493-1494.

Dr. Mayberg merely testified that the scan was normal. Id. at 1490. She admitted that she was not saying that Mr. Buzia did not have neurological deficits. Id. Dr. Mayberg conceded that the temporal lobe is involved in aspects of emotional processing, and that someone with temporal lobe deficits may be more likely to have deficits in memory. Id. at 1478.

Dr. Eric Cotton is a radiologist, and is the director of the facility that scanned Mr. Buzia's brain. Id. at 1499. He contradicted Dr. Mayberg's interpretation of the tilt, stating that while there may be a slight tilt of the PET Scan images, "it wasn't really mentionable because the scan is of adequate quality. A large percentage of these brain scans have a slight tilt." Id. at 1507. Of the numerous scans that Dr. Cotton reviews at his facility, only two percent of those scans are of the brain. Id. at 1516. Dr. Cotton testified at the evidentiary hearing that while there was some asymmetry in Mr. Buzia's scan, it wasn't clinically significant. Id. at 1520. Yet, he conceded that what he said in his deposition was that there was no asymmetry at all. Id. at 1521. He conceded that he has no opinion on whether or not Mr. Buzia has brain damage. Id. at 1511.

SUMMARY OF ARGUMENT

The lower court erred in failing to grant relief for the following reasons. First, the court erred in finding counsel effective with respect to the investigation and presentation of mitigation. Counsel ignored clear signs that Mr. Buzia had brain damage, including an abnormal MRI and a report from a psychologist stating the need for a complete neuropsychological workup. Counsel also failed to present the extensive and devastating effects of Mr. Buzia's addiction to crack cocaine. He was homeless at the time of the crime and living in a cardboard box. Counsel also failed to present how Mr. Buzia's drug use interacted with his brain damage. Counsel failed to present a persuasive narrative of Mr. Buzia's life.

Second, the lower court erred in finding Mr. Buzia's attorneys effective despite their failure to file a motion to suppress Mr. Buzia's confession on the ground that the waiver of his constitutional rights was not knowing and voluntary due to his intoxication and/or withdrawal from drugs or alcohol.

Third, the lower court erred in finding Mr. Buzia's attorneys effective despite their failure to ensure the judge and the jury saw the last twenty minutes of the taped confession, wherein Mr. Buzia was visibly upset, remorseful, and crying. Prejudice was compounded when the state argued that Mr. Buzia was not remorseful or concerned about the victim. Counsel had no explanation for his failure to ensure the jury and the judge saw the entire tape.

Fourth, the lower court erred in failing to find counsel ineffective in the guilt phase. Counsel failed to preserve and test Mr. Buzia's blood samples in a timely fashion to corroborate that he was under the influence of crack cocaine at the time of the offense. Counsel failed to discover and present evidence of brain damage, which would have negated a finding of premeditation. Counsel failed to challenge the state's case or offer alternative theories of guilt during closing argument.

Fifth, the lower court erred in summarily denying several of Mr. Buzia's claims. Summarily denying these claims deprived Mr. Buzia of a full and fair evidentiary hearing and violated his due process rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Sixth, the lower court erred in denying Mr. Buzia's claims as they related to the false testimony given by latent fingerprint examiner Donna Birks. The lower court failed to address Mr. Buzia's arguments as to how he was prejudiced by this testimony and the lower court also failed to articulate the proper standard for assessing a claim under newly discovered evidence.

Seventh, the lower court erred when it denied Mr. Buzia's Brady claim that the state had falsely assured defense counsel that it would test Mr. Buzia's blood for the presence of drugs at the time of the crime. Mr. Buzia was prejudiced by the state's false promise because the state argued that there was no evidence that Mr. Buzia had been using crack cocaine shortly before the crime.

Finally, the combination of procedural and substantive errors deprived Mr. Buzia of a fundamentally fair trial guaranteed under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments and rendered his convictions and sentence of death unreliable.

STANDARD OF REVIEW

The standard of review is *de novo*. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 2000). Under *Strickland*, ineffective assistance of counsel claims are a mixed question of law and fact; with the lower court's legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. Sochor v.State, 883 So.2d 766, 772 (Fla. 2004).

ARGUMENT I

MR. BUZIA'S ATTORNEYS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE BY FAILING TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATION. THE LOWER COURT'S RULING IS AN UNREASONABLE APPLICATION OF THE LAW TO THE FACTS.

Trial counsel was ineffective in failing to investigate and present mitigation during the penalty phase in three separate areas: failure to develop and present evidence of brain damage, failure to develop and present Mr. Buzia's genetic predisposition to substance abuse, and failure to develop and present a persuasive narrative of Mr. Buzia's life and bio-psychosocial history.

The lower court's ruling is an unreasonable application of the law to the facts. The lower court failed to address the bulk of the mitigation that was presented, including the extensive testimony of Jan Vogelsang and Drs. Cunningham and Morton. The lower court failed to articulate the prejudice standard it was applying. The lower court misapprehended the testimony regarding brain damage and its significance under clearly established federal law and the law of this Court.

This Court has recognized that "failure to investigate and present available mitigation can be prejudicial, *especially with such a close jury recommendation vote*." Sliney v. State, 944 So.2d 270 (Fla. 2006)(emphasis added)(citing Phillips v. State, 608 So.2d 778). The United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Specifically, counsel has a duty to investigate in order to make the adversarial testing process work in the particular case. Id. at 690. There are two prongs to an ineffective assistance of counsel claim.

> First, a petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, whose result is reliable.

Id. at 687. In addition, to establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id. At 688.

In Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 80 L.Ed. 2d 674(2003), the Supreme Court held "Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy." Id. at 2538.

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness.

Wiggins at 2535.

In making this assessment, the Court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 2538. In finding that counsel's investigation and presentation "fell short of the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which we have long referred as 'guides to determining what is reasonable,'" the

Court held the ABA Guidelines set the standards for counsel in investigating mitigating evidence. Id. at 2537 (internal citations omitted).

In Williams v. Taylor, trial counsel was held to be ineffective when they only considered a narrow set of sources and did not attempt to introduce evidence of Williams' borderline intellectual functioning, prison records showing commendations, and testimony from prison guards that Williams would not likely be a danger in prison. Williams v. Taylor, 529 U.S. 362,396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Citing the commentary to the ABA Guidelines, the Court found that counsel's failures and omissions "clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." Id. at 397.

In Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), the United States Supreme Court held that "even when a capital defendant's family members and the defendant himself have suggested that no mitigation evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." Id. at 2460. The Court, in finding that counsel rendered deficient performance, cited counsel's failure to review Rompilla's prior conviction, failure to obtain school records, failure to obtain records of Rompilla's prior incarcerations, and failure to gather

evidence of a history of substance abuse. Id. at 2463. The Rompilla Court further found that "this is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts, including interviews with Rompilla and some members of his family, and examinations of reports by three mental health experts who gave opinions at the guilt phase." Id. at 2462. However, despite the scope of this mitigation investigation, the Court still found that counsel rendered deficient performance.

The United States Supreme Court recently reiterated that according to "prevailing professional norms" counsel has an 'obligation to conduct a thorough investigation of the defendant's background.'" Porter v. McCollum, 130 S.Ct. 447 (2009)(citing Williams v. Taylor, 529 U.S. 362, 396 (2000). In Porter, the Court held that a state court unreasonably applies Strickland's prejudice standard when it fails to give weight to mitigating evidence of a capital defendant's abusive childhood, brain damage, and post-traumatic stress disorder. Id.

In addressing the importance of counsel's duty to investigate for the penalty phase, this Court has said:

> Trial counsel's obligation to zealously advocate for their clients is just as important in the penalty phase of a capital proceeding as it is in the guilt phase. There is no more serious consideration in the sentencing arena than the decision concerning whether a person will live or die. When an attorney takes on the task of defending a person charged with a capital offense, the attorney

> must be committed to dedicate both time and resources to thoroughly investigate the background and history, including family, school, health and criminal history of the defendant for the kind of information that could justify a sentence less than death. I believe that the constitution and the case law from this court and the United States Supreme Court requires no less.

Coday v. State, 946 So.2d 988, 1015-1016 (Fla. 2006) (*Quince, J., concurring*).

Further, this Court has held trial counsel renders deficient performance when his investigation involves limited contact with a few family members and he fails to provide his experts with background information. Sochor v. Florida, 883 So.2d 766, 772 (Fla. 2004). See also Ragsdale v. State, 798 So.2d 713, 718-19 (Fla. 2001) (Inexperienced counsel rendered deficient performance when his entire investigation consisted of a few calls made to family members).

The ABA Guidelines have been cited by the United States Supreme Court as "guides to determining what is reasonable." Wiggins at 2537. The Guidelines in effect at the time of Mr. Buzia's trial were created in 2003. Guideline 10.11 sets out the prevailing norms for presentation of the penalty phase. The Commentary to that Guideline notes that "it is critically important to construct a persuasive narrative [of mitigation], rather than to simply present a catalog of seemingly unrelated mitigating factors." Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.11(2003). Further the Guidelines note that "[s]ince an understanding of the client's extended multigenerational history is often needed for an understanding of his functioning,

construction of the narrative normally requires evidence that sets forth and explains the client's complete social history from before conception to the present. Expert witnesses maybe useful for this purpose, and in any event, are almost always crucial to explain the significance of the observations." Id. With respect to investigation in the penalty phase, the Guidelines stress that "[r]ecords should be requested concerning not only the client, but also his parents, grandparents, siblings, and children. A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment." Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7(2003).

The standard of proof for ineffective assistance of counsel claims is set out in Strickland. Because the right to effective assistance of counsel is so fundamental, the standard for proving prejudice is low:

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, *even if the errors of counsel cannot be show by a preponderance of the evidence to have determined the outcome.*
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> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors...When a defendant challenges a death sentence...the

> question is whether there is *a reasonable probability* that, absent the errors, the sentencer – including an appellate court to the extent it independently reweighs the evidence – would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim, must consider the totality of the evidence before the judge and the jury.

Strickland v. Washington, at 694-696 (emphasis added).

Mr. Caudill testified that their theory for the penalty phase was to try to present Mr. Buzia as someone who "had some opportunities but was ultimately addicted to drugs and alcohol which is what led to these actions on this day the day of the crime." ROA Vol. 14, p.214. Despite this stated theory, trial counsel failed to present evidence of brain damage, failed to present evidence regarding the genetic predisposition to alcoholism, failed to properly prepare the witnesses that did testify, and failed to offer the jury a "persuasive narrative" of the devastating effects of addiction on Mr. Buzia's life. Each failure will be discussed in turn.

Trial counsel failed to discover and present evidence of brain damage.

Counsel's performance fell below prevailing norms in failing to discover and present testimony of Mr. Buzia's left temporal lobe and right hemisphere brain damage. Both this Court and the United States Supreme Court have recognized brain damage as a weighty mitigator, which establishes prejudice. Ragsdale v. State, 798 So. 2d 713, 718-19 (Fla. 2001); Rose v. State, 675 So.2d 567, 571 (Fla. 1996) (*citing* Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994)); Porter v.

McCollum, 130 S.Ct. 447 (2009); Sears v. Upton, 130 S.Ct. 3259 (2010). Trial counsel had clear indicators that Mr. Buzia suffered from brain damage. They had an MRI which revealed an abnormality. They had a positive screening that indicated potential brain damage, and a report from Dr. Bernstein that stated "neurological evaluation and diagnosis seem critical and necessary to rule out substantial impairments likely pre-dating the criminal allegations." Trial counsel offered no strategic reason not to obtain a confidential neuropsychological workup. Trial counsel both testified that there was absolutely no downside in doing so.

At the time of Mr. Buzia's trial, capital attorneys were taught "that temporal lobe brain damage can result in memory disorders, sudden outbursts of violence followed by emotional distress and remorse and also depression and rapid mood swings." ROA Vol. 15, p.364. Moreover, prevailing norms dictate that "heavy use of drugs and alcohol could be a basis for brain damage." Id. at 366. Capital Defense attorneys were also taught "to look for things like head injuries because that could be something that could cause brain damage." Id. Mr. Buzia's trial attorneys had the medical records of his 1994 head injury, yet never presented them. Mr. Buzia's temporal lobe brain damage *is in the exact same place where he was struck with the lead pipe.* Dr. Wu explained that head trauma can make a person more susceptible to developing an addiction. Mr. Buzia's brain damage, coupled with his genetic predisposition to substance abuse, made his ultimate

decline into addiction inevitable. The brain damage interacting with the drug addiction rendered him unable to conform his conduct to the requirements of the law.

Counsel's failure to present evidence of brain damage prejudiced Mr. Buzia in two ways. Not only was the jury unaware Mr. Buzia suffered from brain damage, but Mr. Buzia's mental health expert Dr. Riebsame, testified that he did not find "any kind of neuropsychological or neurological problem or deficit in Mr. Buzia's case that would affect his behavior." TR Vol. 14, p.1851. Dr. Bernstein had administered several neuropsychological screening instruments over the course of eight months and recommended further testing. Inexplicably, counsel failed to do so. Instead, trial counsel allowed Dr. Riebsame to conduct an inadequate examination, wherein he administered tests he was not qualified to administer, and administered them incorrectly. His "screening" for brain damage comprised of two tests: 1) Trail Making Parts A and B and 2) a neuropsychological screening algorithm. ROA Vol. 22, p.1622. He also claimed that the Shipley Living Scale was a part of his screening. Dr. Sesta explained that in his seventeen years of practice as a neuropsychologist, he had *never* seen someone name the Shipley as something that is used to identify brain impairment. Id. at 1724.

The Trail Making Part A is a forty-five second test and the Trail Making Part B is a ninety second test. Id. at 1619. As Dr. Sesta explained, there is no such

test called the neuropsychological screening algorithm. Id. at 1720. What Dr. Riebsame was calling the neuropsychological screening algorithm was in fact "part of the Reitan-Indiana aphasia screening test that is part of the larger Halstead-Reitan neuropsych test battery." Id. at 1721. The aphasia screening that Dr. Riebsame administered consisted of one page where Mr. Buzia was asked to draw four items: a cross, a triangle, a square, and a key. It takes between six and ten minutes to administer. Id. at 1633. Dr. Sesta noted that there were several errors with Mr. Buzia's drawings, including a closure error on the triangle, a vertical distortion on the cross, and "grossly impoverished key." Id. at 1721-22. The significance of the poorly drawn key is that it indicates that the left hemisphere "is not doing its job," which would cause a concern about left hemisphere deficits. Id. at 1722. These two tests took approximately ten minutes. Id. at 1636. Including the Shipley in the screening, the testing took between 20 and 30 minutes. Id.

Trial counsel admitted that at the time of Mr. Buzia's trial, he did not fully understand the difference between a psychologist, neurologist, or a neuropsychologist. Yet, Mr. Norgard testified that the prevailing norms were that a reasonably competent capital defense attorney would be taught about the importance of using an interdisciplinary approach and should understand the types of tests those experts administered and what those tests expect to show. Capital defense attorneys were taught that brain damage is easily missed or ignored absent

a neuropsychological evaluation. Trial counsel testified that he would have presented evidence of brain damage if he had it.

Objective scientific evidence of Mr. Buzia's brain damage through neuropsychological testing, neurological testing, and neuroimaging was presented at the evidentiary hearing. Such evidence would have offered the jury an explanation for his violent behavior. The 11th Circuit Court of Appeals has explained that mental health mitigation "has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior" and "not only can act in mitigation, it also could significantly weaken the aggravating factors." Middleton v. Dugger, 849 F.2d 491, 495(11th Cir. 1988) (internal quotations and citations omitted).

Moreover, this Court has found counsel deficient for failing to present evidence of a defendant's bipolar disorder and how the disorder interacted with the defendant's drug addiction. Orme v. State, 896 So.2d 725 (Fla 2005). This Court explained:

> We do find, however, that Orme was deprived of a reliable penalty phase. During the penalty phase, evidence of Orme's intoxication was presented as mitigation. The intoxication evidence involved the consumption of cocaine, pills, and alcohol. The State repeatedly told the jury that it should not let Orme 'stand behind his crack pipe' or not be responsible for his crime because he was high on drugs.
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> Orme argues that testimony linking his drug use to his bipolar disorder would undermine the State's argument that he 'hid' behind his crack pipe, *because it would explain to the jury that he was ill and that the mental illness made his addiction even greater*. We agree…. Additional testimony in support of the intoxication and its causes and effects may have warranted greater weight, and the resulting weighing of mitigation and aggravation would have been different. Thus, the fact that the jury did not hear the evidence of Orme's bipolar disorder combined with the jury's vote of seven to five undermines our confidence in the result of the penalty phase. Therefore we remand this case for a new penalty phase proceeding.

Id. at 736. (emphasis added).

The facts in Mr. Buzia's case are nearly identical to the facts Orme. In Mr. Buzia's case, the State repeatedly argued its own version of standing behind the crack pipe when it told the jury, "is this the drugs made me do it kind of argument?", "are you really going to excuse him and blame this all on drugs?" and "drugs don't make you murder people." TR Vol. 15, p.1991.

The trial court in Mr. Buzia's case found insufficient evidence to support the statutory mental health mitigators because trial counsel presented nothing other than substance abuse. The Court accepted the substance abuse as nonstatutory mitigation. Mr. Buzia's case is more compelling than Orme in this regard because in Orme, this Court found prejudice even though the trial court had given the statutory mitigators. As in Orme, Mr. Buzia has now presented evidence on how his brain damage interacted with his drug addiction. Similar to Orme, the jury in Mr. Buzia's case voted 8-4 for death, just one vote over a bare majority.

The post conviction court's prejudice analysis cannot be squared with the trial court's sentencing order. At trial, the court noted that "[the expert's] testimony, taken as a whole, is uncontradicted, in that substance abuse impacted upon the Defendant's life in the most adverse fashion possible." TR Vol. 4, p. 671. The trial court rejected the statutory mitigator finding instead only nonstatutory mitigation because the trial court concluded that "other than substance abuse, it did not appear as though there was any substantial testimony concerning the inability of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Id. at 672. Despite this conclusion in the Sentencing Order, the Order denying post conviction relief fails to address how the additional testimony regarding brain damage supports a finding of prejudice. The post conviction court misstates the prejudice analysis by stating that "the question to be resolved here is not whether the Defendant actually suffers from brain damage; it is whether counsel's actions at the penalty phase were reasonable." ROA Vol. 13, p. 2287. The lower court then concludes that "[e]vidence of brain damage would have contradicted the theory of mitigation." Id. at 2288. This is the same error made by the state courts in Porter. The Porter Court found that the Florida state courts unreasonably discounted evidence of Porter's brain abnormality and cognitive deficits. Porter at 455. Further, the Court ruled that even though the State presented contradictory testimony, "it was not reasonable

[for the post conviction court] to discount entirely the effect that this testimony would have had on the jury or the sentencing judge." Id. Similarly, the post conviction court unreasonably reduced to irrelevance Mr. Buzia's brain damage in a case where the evidence regarding brain damage was not contradicted.

In Lynch v. State, 2 So.3d 47 (Fla. 2008), this Court found *these very same trial attorneys* deficient in failing to develop and present evidence of Mr. Lynch's brain damage when they had an initial expert who wrote in his report that Mr. Lynch had brain damage and recommended further testing. Lynch at 75. Similarly, trial counsel in Mr. Buzia's case received a report from Dr. Bernstein saying, "Clearly issues related to brain function needed further complete expert examination." ROA Vol. 17, p.711. Dr. Berstein was concerned about the existence of brain damage based in part on the 1994 head injury, the drug dependence, and his neuropsychological screening, which showed impairments in various areas. Id. at 705, 709,710. He expressed his concerns to trial counsel and repeatedly recommended a full neuropsychological workup on Mr. Buzia.

The post conviction court also appears to misapprehended the law and testimony regarding brain damage, concluding that because Mr. Buzia did not have "a pattern of criminal offenses that would demonstrate a functional inability to control his impulses," the "brain damage claim [was] a red herring." ROA Vol. 13, p. 2289. This is inaccurate on several levels. First, Mr. Buzia did present

evidence that as his drug use increased, his violent tendencies increased. Jean McIntosh described him ripping a toilet out of the floor in a rage when Gail told him he could not use the car to buy more drugs. Ken Pickens told Dr. Morton that Mr. Buzia had a temper and would "snap" in a heartbeat while he was working at the Mayflower, especially if payday was late. Further, Mr. Buzia was ultimately fired from his job at Universal because the police kept coming to pick him up on outstanding cases. Second, the post conviction court failed to address the fact that none of the testimony from the State's experts actually contradicted the evidence of brain damage presented by Mr. Buzia. Drs. Cotton and Mayberg merely testified that the PET Scan was normal, not that Mr. Buzia did not have brain damage. Moreover, Dr. Danziger was not qualified to administer testing for brain damage and was not qualified to interpret or criticize Dr. Sesta or Dr. Tanner's data. As such, Dr. Danziger conceded that he cannot rule out brain damage. Dr. Riebsame's screening lasted less than 30 minutes and he ignored clear signs of impairment and was not qualified to do a full neuropsychological assessment. Trial counsel's acceptance of the conclusion that his client did not have brain damage based on less than 30 minutes of screening is unreasonable.

Third, the failure to present evidence of brain damage as a mitigating factor supports a finding of prejudice. In Sears v. Upton, 561 U.S.— , 130 S.Ct. 3259 (2010), the Court found it "significant" that post conviction counsel presented

evidence that Sears suffered from brain damage or "deficits in mental cognition or reasoning . . . as a result of several head injuries he suffered as a child." Sears at 3262. The Court noted that Sears' "well-credentialed expert's assessment, based on between 12 and 16 hours of interviews, testing and observations," established that Sears suffers from substantial cognitive impairment." Id. at 3263. The Court noted the results on standardized tests and the history of head trauma as factors in establishing prejudice. Id.

The overwhelming convergence of data proving Mr. Buzia's brain damage, in the form of a neurological exam, neuropsychological testing, psychological testing and PET Scan, supports the statutory mitigators and constitutes powerful evidence the jury never heard. Had the jury heard this testimony, it is likely they would have given it great weight and recommended a life sentence. Because his attorneys failed to investigate and follow up on Dr. Bernstein's recommendation for further neuropsychological testing, they rendered deficient performance. Further, trial counsel agreed that had they had evidence of brain damage they would have presented it. Their deficient performance prejudiced Mr. Buzia and deprived him of a full and fair adversarial testing.

Trial counsel failed to present evidence of a genetic predisposition to substance abuse.

At the evidentiary hearing, Mr. Buzia presented extensive evidence about his genetic predisposition to substance abuse. Both of his parents were alcoholics.

His mother's parents were alcoholics. His mother's brothers were alcoholics. All of his siblings were/are addicted to drugs and/or alcohol. ROA Vol. 8, p. 1370. Patty would drink and smoke marijuana with her children. Her house was known as the party house where all the neighborhood kids could hang out. There were no rules and it was a very permissive environment. Patty wanted to be a friend to her children instead of a parent.

This is in stark contrast to the evidence that Mr. Buzia's trial attorneys presented at the penalty phase. There was minimal evidence presented at trial regarding the family's substance abuse, and the evidence that was presented through Patty Breslin was minimized and some of it was patently untrue. Ms. Breslin was not asked about the circumstance of her father's death. She denied any history of mental illness in her family. Yet, Patty's father was an alcoholic who shot himself to death. She had an uncle who also committed suicide as a result of his alcoholism. She herself had two suicide attempts. When mentioning her daughter Cathy's death, she merely stated that Cathy got hit by a car and died instantly. She was not asked and did not volunteer that Cathy had just left the hospital after suffering from cirrhosis of the liver and an alcoholic delirium, was carrying a 12 pack of beer, and had a blood alcohol level of a .44 at the time of her death. Patty minimized her own drinking, describing it as "social drinking." Mr. Norgard explained that this was a common problem in capital cases, where

witnesses are reluctant to "come forward with skeletons in the closet." ROA Vol. 15, p.349. Such a concept has to be taken into account when interviewing and presenting lay witnesses. Mitigation must be thoroughly explained to them and it must be explained that "bad is good." Moreover, the ABA Guidelines stress the importance of presenting a multi-generational approach to give the jury context for the defendant's history, especially as it relates to hereditary conditions like alcoholism. In Mr. Buzia's case, more than one expert testified that the Buzia family was the most dysfunctional family they had ever encountered.

Ms. Vogelsang explained the devastating effects of growing up in a family system such as the Buzia family. Patty enabled her children's substance abuse problems and made excuses for them. She bought Jack and Cathy alcohol and drugs while they were in drug and/or alcohol rehabilitation. The jury was given the picture that this was a happy middle class family with a privileged life. They were not shown that, behind closed doors, this was a very dysfunctional family.

As noted above, in Sears v. Upton, the Court reversed a death sentence where trial counsel's deficient performance resulted in an inaccurate portrayal of the defendant's childhood. Trial counsel unreasonably relied on information from family members and therefore told the jury Sears' "childhood [w]as stable, loving, [middle class], and essentially without incident." Sears at p. 3261. "The prosecutor ultimately used the evidence of Sears' stable and advantaged

upbringing against him during the State's closing argument. In Sears, the prosecutor told the jury, '[w]e don't have a deprived child from an inner city; a person whom society has turned its back on at an early age. But, yet, we have a person, privileged in every way, who has rejected every opportunity that was afforded him.'" Sears, 3262 (internal citations omitted). Likewise, in Mr. Buzia's trial, defense counsel presented evidence that Mr. Buzia came from a stable middle class home but eventually became addicted to drugs. The prosecution turned this evidence against him arguing in closing:

> His father provided him with a home in a gated community overlooking Lake Michigan. His mother was extremely active in everything he did to the extent of spearheading getting together a trip to Europe for him to go over there and play soccer. She made sure he went to a private school. I mean, this man is far from deprived in terms of opportunities in life…..Opportunities to make more of himself in life than the average person, and what happened? He squandered it, didn't he? I mean, is this a drugs made me do it kind of argument.

TR Vol. 15, p. 1991. The trial court made similar findings in its Sentencing Order stating that Mr. Buzia "attended an expensive preparatory school and Florida State University. His friends and family all acknowledge that he was an attractive, well liked and athletic child. He grew up in an upper middle class neighborhood and enjoyed a privileged lifestyle." TR Vol. 4, p. 674.

In contrast, the evidence presented at the evidentiary hearing showed the Buzia family as one of the most dysfunctional families the experts had ever seen.

The amount of alcohol and drug related deaths, suicides, and legal troubles are staggering. Mr. Buzia had access to alcohol at the age of 5. His mother partied and slept with his friends. There was no structure, no stability, and Mr. Buzia at 19 years old was supporting the family, who was squandering his money on drugs and alcohol. The defense experts agreed that it was almost inevitable that Mr. Buzia would succumb to his family's dysfunctional and destructive lifestyle. The jury never heard any of this. Instead, they were left with an inaccurate picture that Mr. Buzia had every opportunity and squandered it. Even with the minimal mitigation that was presented, his vote was still 8-4.

Failure to develop and present a persuasive narrative of Mr. Buzia's life and bio-psychosocial history.

Trial counsel failed to conduct a reasonable investigation and meet prevailing norms in interviewing witnesses and presenting testimony in a persuasive narrative. This Court has held trial counsel renders deficient performance when his investigation involves limited contact with a few family members and he fails to provide his experts with background information. Sochor v. Florida, 883 So.2d 766, 772 (Fla. 2004). *See also* State v. Lewis, 838 So.2d 1102, 1113 (Fla. 2002) ("[T]he obligation to investigate and prepare for the penalty phase portion of a capital case cannot be overstated-this is an integral part of a capital case."); Ragsdale v. State, 798 So.2d 713, 718-19 (Fla. 2001) (Inexperienced counsel rendered deficient performance when his entire

investigation consisted of a few calls made to family members). The ABA Guidelines stress the importance of using lay witness testimony to provide the factual foundation for the expert's conclusions. In addition, "these witnesses can also humanize the client by allowing the jury to see him in the context of his family…" Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.11(2003).

Mr. Norgard testified that a typical mitigation investigation comprises hundreds of hours. ROA Vol. 15, p.348. Trial counsel received a list from Mr. Buzia containing approximately 140 names of potential mitigation witnesses. As Mr. Norgard explained, 140 witnesses is a large number, but "if the client really felt that these people know him and have relevant information about his background, your duty would be to make reasonable efforts to locate them, reasonable efforts to develop mitigation and then make your decision tactically and strategically whether you want to present those people or not." Id. at 359. Sending form letters, some with misspellings and typographical errors, to 36 witnesses and not following up if they failed to respond is not "reasonable efforts."

At some point during the three years this case was pending trial, Mr. Buzia became frustrated with the progress that trial counsel was making on locating witnesses. There was at least one occasion where trial counsel informed Mr. Buzia that he could not locate and particular witness, yet Mr. Buzia himself was able to

locate the telephone number of the witness from a phone book at the Seminole County Jail. The investigator assigned to Mr. Buzia's case and tasked with contacting mitigation witnesses was removed from the case because of allegations of drinking on the job. The investigator ultimately was required to enter a substance abuse treatment program. Mr. Caudill testified that because of the investigator's removal, he was responsible for double checking the investigators contacts and for locating and contacting witnesses. ROA Vol. 14, p. 233. As Mr. Norgard explained, it is a time intensive process to properly interview witnesses and obtain relevant information from them. ROA Vol. 15, p. 357. He emphasized that is something that must be done in person.

Trial counsel did not adequately prepare any of the witnesses who testified in the penalty phase. Trial counsel met Amber Buzia in the hallway and made a snap decision to put her on the stand. Bill Bennett arrived to court early so that he might speak to trial counsel in person before he testified, and trial counsel, needing to fill up the morning, hastily put Mr. Bennett on the stand. Mr. Norgard explained the importance of meeting with a witness before putting them on the stand.

> I mean, that is such a bread and butter aspect of trial practice the idea of preparing a witness, but you also want to be able to observe their demeanor, how they act, because, you know, that is one of the very critical things that witnesses and triers of fact look at in determining credibility is how they act. You need to know what their demeanor is for a lot of reasons that are like I said the bread and butter of trial practice stuff.

Id. at 357-358. There is nothing in the record to indicate that trial counsel had *any* meaningful conversations with the witnesses that testified in the penalty phase.[7] John Hicks, Bill Bennett, Robert Smart, Gary Selje, and Amber Buzia all stated that they had little or no idea of the questions they were going to be asked. They were all nervous and concerned that they might say something to harm John's case.

At the evidentiary hearing, Mr. Hicks relayed a story about a telephone call he received from John about a month before the crime. Mr. Hicks explained:

> I would say about a month before the crime John called me on the phone and I had not spoken to John since the summer of 1978, so the phone call came as a real shock to me. I mean, just to pick up the phone and there is John's voice.
>
> He was very emotional. He had told me that he was involved in a landscape business, but during the conversation he would break down and cry and I did not really understand why he was crying. He was lucid and spoke fairly well, but his thinking was not coherent in the sense of one subject would just turn in to a very different subject.
>
> *****
>
> It was all over the board. He would talk about his landscape business and then he would start to cry and then he would say how he missed me and then he was very nostalgic about La Lumiere.
>
> It was a very confusing phone call in the sense that different subjects would come up and I was really terribly troubled because I would say that John broke down at least three or four times in that telephone conversation.

[7] The post conviction court claims that trial counsel was present at the deposition of Bill Bennett, yet there is nothing in the record to indicate that is accurate and Bill Bennett testified that he never had a face to face meeting with trial counsel. ROA Vol. 16, p. 414.

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> I was really disturbed. I sensed that John was in trouble, but I didn't understand what sort of trouble. It was great to hear his voice, but I knew that something was really wrong because it wasn't the phone call that you would make just because you miss someone.

ROA Vol. 15, p.263-265. He was reminiscent about their past, but in an unhealthy way. Mr. Hicks learned that John had reached out to other old friends on this same night. Mr. Hicks' testimony provided evidence that John was in a downward spiral and in need of help less than a month before the crime. Proof of his life spinning out of control puts his behavior in context for the jury. Mr. Hicks became emotional at the evidentiary hearing while discussing this phone call. This testimony is far from cumulative, but instead is precisely the kind of testimony that demonstrates the "'diverse frailties of humankind' an understanding of which might place the barbaric act within the realm of tragic, but nonetheless human." Boyd v. North Carolina, 471 U.S. 1030, 1036 (1985) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

Mr. Selje testified at the evidentiary hearing that Patty contacted his parents when she noticed his drinking and drug use getting out of control, yet she failed to recognize this in her own children. This testimony laid the foundation for Ms. Vogelsang's description of the looping and enmeshed family system that was so devastating to Mr. Buzia's development.

Amber Buzia's testimony at the evidentiary hearing described how it was Patty who bought Cathy alcohol after her hospitalization because she "didn't know what else to do." She stated that it was Patty who encouraged Jack to smoke marijuana after his accident because it was "not as bad as alcohol." Neither of these examples of Patty's enabling behavior were presented at Mr. Buzia's trial. Quite the opposite in fact, Patty was portrayed as a "June Cleaver" who provided a stable, safe, and structured environment for her children. Amber described the extensive substance abuse in the Buzia family, noting that her own mother quite frequently drove around intoxicated, and often wandered in parking lots trying to remember where she parked.

Catherine Stimpert was known to defense counsel and could have provided very valuable information about John's mental state immediately following the crime. Trial counsel not only failed to videotape Mr. Buzia at their first meeting, but counsel failed to present Ms. Stimpert, who could have provided specific, documented evidence of Mr. Buzia's distraught, remorseful, and emotional state immediately following the crime. Without this testimony, the State was able to argue that he showed no remorse for his actions because he never asked about the victims on the portion of his videotaped confession that was shown to the jury.

Mrs. McIntosh had information regarding the drinking and violence that took place at Gail and John Sr.'s house. She also had an encounter with John close

in time to the crime where she believed he was under the influence of drugs. She had information about him ripping out a toilet and some carpet in a rage while intoxicated. All of these things are consistent with the interaction between Mr. Buzia's brain damage and his crack cocaine addiction.

Mrs. McIntosh's presentation was especially important because she could present evidence of Mr. Buzia both before and after the crime. She and her husband corresponded frequently with John while he was in jail awaiting trial. He would call them on the phone every Sunday night. Once he was without crack cocaine or alcohol, Mrs. McIntosh noted that John was a different person. Mr. and Mrs. McIntosh were able to develop a meaningful, spiritual relationship with Mr. Buzia. This testimony, coupled with his involvement in Operation Right Track, would have shown the jury that Mr. Buzia was not going to be violent or dangerous inmate. Presenting the testimony of Mrs. McIntosh would have allowed the jury to see that once the drugs and alcohol were out of his system, Mr. Buzia had the potential to become a productive member of society, even if he was going to spend the rest of his life in prison.

Mr. McCray rented a room from the Buzia family in Cape Cod, and noted that, at 19, the stress of being the sole provider for the household was overwhelming to John. Mr. McCray's testimony demonstrates the toll that the Buzia family lifestyle had on John. The defense experts used this lay witness

testimony to explain that while John might have held it together longer than any other member of his family, working hard and supporting everyone as best as he could, he ultimately succumbed to the family system and to his addiction and ended up in his current circumstances.

The post conviction court rejected this claim without specifically addressing the testimony of the lay witnesses and concluded generally that there was little additional information presented. The post conviction court also appears to have misapprehended Mr. Buzia's claim that it was counsel's lack of preparation and disconnected presentation of the witnesses that was ineffective. The court noted:

> As for the claim that the witnesses were unprepared because they did not know what topics to avoid, there can be no prejudice. The witnesses were not called to give narrative testimony which would require an idea of what topics to highlight or avoid; they were supposed to answer the questions that were asked. If counsel wanted them to avoid particular topics, he would not have or did not ask about them.

ROA Vol. 13, p. 2287. This finding is inconsistent with the testimony of prevailing norms and the uncontradicted testimony of Mr. Norgard, who testified that it is a bread and butter aspect of trial practice to meet with a witness, explain where you want to go with their testimony, and explain how it is relevant to the case. With the exception of Bill Bennett, most of the witnesses that took the stand had never even been in a courtroom, let alone to testify to help convince a jury not to sentence their loved one to death. At the evidentiary, the witnesses testified that

they were nervous and terrified that they would say something to hurt John's case at trial. Trial counsel failed to utilize the lay witness testimony to lay the foundation for a qualified expert like Ms. Vogelsang or Dr. Cunningham to create a persuasive narrative. Instead, trial counsel's failures led to the deficient presentation of a "catalog of seemingly unrelated mitigating factors." Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.11(2003).

ARGUMENT II

THE LOWER COURT ERRED IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE IN FAILING TO FILE A MOTION TO SUPPRESS MR. BUZIA'S CONFESSION.

Trial should have filed a motion to suppress Mr. Buzia's videotaped confession on the grounds that Mr. Buzia's waiver of his constitutional rights was not knowing and voluntary due to his intoxication and withdrawal from drugs and alcohol. The United States Supreme Court has held that in order for a valid waiver of Miranda rights to be knowingly, voluntarily and intelligently made, the evidence must show that the waiver was made with a full awareness of the nature of the rights given up. Moran v. Burbine, 475 U.S. 412 (1986).

Trial counsel admitted that they did not consult a toxicologist or other expert to view Mr. Buzia's confession prior to trial to determine whether or not he was under the influence of drugs or alcohol or experiencing withdrawal such that it

would impair his ability to understand and waive his constitutional rights. Dr. Morton testified that when viewing Mr. Buzia's taped statement to the police, he noted that Mr. Buzia had symptoms of withdrawal. ROA Vol. 19, p.1031. He noted symptoms of "not being able to focus, poor concentration, mild levels of anxiety, marked fatigue." Id. Dr. Morton further explained that someone in Mr. Buzia's state would be more susceptible to leading questions and would have diminished ability to understand and waive his constitutional rights. Id.

Based on the testimony of Dr. Morton, Mr. Buzia's attorneys should have filed a motion to suppress the statement of Mr. Buzia. Even if a motion to suppress was not successful in preventing the admission of the statement, Mr. Buzia's attorneys still should have presented evidence to the jury about the involuntariness of Mr. Buzia's statement. Florida Standard Jury Instructions in Criminal Cases 3.9(e); Harrison v. State, 562 So.2d 827 (Fla. 2d DCA 1990).

The lower court denied this claim because "there was no indication that [Mr. Buzia] was under the influence of drugs when he was questioned." ROA Vol. 13, p. 2284. However, the lower court failed to address the testimony of Dr. Morton that Mr. Buzia had smoked crack and drank the entire night after the crime and was either still under the influence and/or was experiencing withdrawal. ROA Vol. 18, p.997. Mr. Buzia's statement was used by the State to prove the CCP and HAC aggravators. It was the only evidence presented of Mr. Buzia's thought processes

at the time of the crime. Trial counsel's deficient performance prejudiced Mr. Buzia because it deprived him of evidence that would have negated a substantial portion of the aggravation. The lower court's ruling was an unreasonable application of Strickland and its progeny.

ARGUMENT III

THE LOWER COURT ERRED IN FINDING THAT TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY FAILING TO ENSURE THE JUDGE AND THE JURY SAW THE ENTIRE VIDEO TAPED CONFESSION.

Mr. Buzia's Fifth and Sixth Amendment rights were violated when counsel failed to ensure that the full video of Mr. Buzia's confession was played for the jury. During the last twenty minutes of the tape, Mr. Buzia was crying, putting his head in his hands, and displaying extreme remorse for his actions. Mr. Buzia states that he is "terribly sorry for what I did." ROA Vol. 14, p.93. He repeatedly puts his head down on the table, appears dazed, and has a look of utter disbelief.

Mr. Buzia was prejudiced both because the jury failed to see his mental state and because the State improperly insinuated that there was something damaging on the tape. Without this last twenty minutes of the tape before the jury, the State was able to effectively argue to the jury in the penalty phase that Mr. Buzia never showed remorse. TR Vol. 15, p.1997. To compound the prejudice, the State told the jury the entire tape was in evidence. The State argued that Mr. Buzia was dazed because he didn't think anyone had discovered the crime yet, not because he

was under the influence of drugs. This improper argument could have been prevented had counsel demanded the state present the entire video. Counsel had a duty to show the entire tape to minimize any aggravation the state could argue from it. ABA Guidelines 10.11 (I)(2003). The lower court denied this claim finding that counsel made a "valid strategic decision not to present this portion of the tape." ROA Vol. 13, p. 2289. This is an inaccurate summary of Mr. Caudill's testimony, who specifically stated it was not a strategy decision to keep it out. ROA Vol. 14, p.101. Counsel rendered deficient performance.

ARGUMENT IV

MR. BUZIA'S ATTORNEYS RENDERED INEFFECTIVE ASSISTANCE IN THE GUILT PHASE. THE LOWER COURT'S RULING IS AN UNREASONABLE APPLICATION OF THE LAW TO THE FACTS.

Mr. Buzia's Sixth Amendment right to counsel under Strickland was violated due to counsel's errors during the guilt phase in three areas.

Counsel failed to preserve and test the blood samples.

Trial counsel was ineffective for failing to ensure that Mr. Buzia's blood was tested promptly for the presence of drugs and/or alcohol at the time of the offense. Mr. Caudill testified that when he first met Mr. Buzia he was aware that Mr. Buzia was under the influence of crack cocaine at the time of the crime. Counsel filed a motion for preservation of samples and prior to the hearing on the matter, ASA

Carter assured Mr. Caudill that the blood would be preserved and tested for the presence of drugs or alcohol.

Mr. Caudill did not do anything to follow up on this assertion, seek to have the blood tested independently, or ensure that the sample was properly preserved. Mr. Caudill learned in June of 2001 that the blood had never been tested. Four months later, counsel filed another motion and in November of 2001 the motion for independent testing was granted. The blood was sent to Weustoff Laboratories and was tested on December 5, 2001, twenty-one months after it was collected. Not surprisingly, the results were negative.

Dr. Barbieri, an expert in toxicology and pharmacology, testified that cocaine itself breaks down very quickly. Within a month, if it is stored in a gray topped tube, you will lose about 25 to 30 percent of the cocaine. ROA Vol. 16, p.530. However, cocaine converts to a metabolite called Benzoylecgonine or BZE. Id. BZE has a half life of 99 days, or approximately 3 months, which he explained means that half of it will disappear every 3 months. Id. After a 21 month period (as in the instant case), there would be little likelihood that BZE would be present in the sample. Id. at 531.

Trial counsel has a duty to uncover and present favorable evidence. ABA Guideline 10.7(A)(1). In denying this claim, the lower court concluded that voluntary intoxication is not a defense that was available to Mr. Buzia. However,

the court failed to address the significance that a positive blood result would have added objective scientific evidence in support of a motion to suppress Mr. Buzia's videotaped statement to the police. In addition, because a jury is always free to consider the voluntariness of a defendant's statement to police, objective scientific evidence of intoxication would have been relevant in the guilt phase. The lower court failed to address these arguments.

Mr. Norgard testified that prevailing norms in that situation would require an attorney "to take reasonable efforts to document the client's condition." ROA Vol. 15, p.343. He further explained such reasonable efforts to be "obtaining samples from the client for testing such as blood, urine, and hair." Id. Had trial counsel ensured that the blood was tested immediately, they would have been able to present objective evidence that Mr. Buzia was under the influence of crack cocaine at the time of the crime and at the time of his interrogation by police. Failure to do so was deficient performance which prejudiced Mr. Buzia by depriving him of relevant evidence to negate premeditation and established that his statement to the police was involuntary and inadmissible.

Failure to present evidence of Mr. Buzia's brain damage, which would have negated a finding of premeditation.

Trial counsel was ineffective for failing to uncover and present evidence of brain damage. Mr. Buzia's damaged brain could not cope with the psychological

stressors in his life at the time of the crime, i.e. his homelessness, sleep deprivation, and crack addiction.

As noted above, Mr. Buzia was stuck in the head with a lead pipe in 1994, which caused facial fractures. As pointed out by Drs. Tanner and Wu, the location of Mr. Buzia's temporal lobe brain damage *corresponds perfectly with where he was struck with the lead pipe.* Dr. Wu explained that head trauma can make a person more susceptible to developing an addiction. Mr. Buzia's brain damage interacting with his drug addiction rendered him unable to form the necessary premeditation to satisfy the elements of first degree murder as well as the underlying felonies of burglary, robbery, and kidnapping, which the State used to support the charge of Felony Murder. The objective scientific evidence of Mr. Buzia's brain damage presented at the evidentiary hearing through neuropsychological testing, neurological testing, and neuroimaging would have resulted in the jury finding him not guilty of first degree murder.

The lower court rejected this claim, finding that because "the murder was not impulsive, a showing of brain damage would not have negated the premeditation necessary for this to be first-degree premeditated murder." ROA Vol. 18, p. 2284. However, the court fails to address the extensive testimony of Dr. Cunningham which explained that Mr. Buzia's conduct on the day of the murder was in fact impulsive. Dr. Cunningham explained that there were a

number of features of the crime that are consistent with judgment impulsivity, such as not bringing a weapon, using the duct tape in a illogical fashion, and not taking items of value. Id at 788-790. Dr. Cunningham explained that Mr. Buzia's actions demonstrated short term judgment impulsivity and that he was not thinking anything beyond getting money to get more crack. Id. at 791. This corroborated Dr. Morton's testimony that Mr. Buzia's brain was literally telling him that he needed the crack in order to survive. His addiction was so strong at that point, that it is reasonable to conclude that if he had gotten his advance in pay he would have walked away and the crime never would have happened. The lower court wholly fails to address Dr. Cunningham's or Dr. Morton's extensive testimony. This is an unreasonable application of Strickland and Williams.

Failure to present an effective, consistent, and coherent closing argument.

Mr. Buzia demonstrated that trial counsel was ineffective in his closing argument. Mr. Caudill admitted that "it wasn't a closing argument, it was more like if I had been lecturing a law school class." ROA Vol. 14, p.181. He further admitted, "I knew that it was nothing the jury would care about." Id. The only thing Mr. Caudill could recall was that Mr. Figgatt had come up with some argument for the second closing that they did not want the State to be able to respond to. However, neither Mr. Caudill nor Mr. Figgatt could point to any articulable facts as to what that idea was. They never had the opportunity to

present this "novel" idea, because Mr. Caudill's first closing argument was so weak and nonsensical that the State waived its closing argument.[8] The defense theory in the guilt phase was to try to limit aggravation in order to prepare for the penalty phase. However, by his own admission, nothing that Mr. Caudill said in closing argument did anything to negate aggravating circumstances. ROA Vol. 14, p.131. His closing argument failed to offer any theory of defense. He failed to offer any alternative theories of guilt, such as Second Degree Murder or other lesser included offenses. Counsel's strategy decision to present a weak, rambling closing argument that he knew the jury would not care about cannot be considered reasonable. The prejudice is Mr. Buzia's conviction for first degree murder.

ARGUMENT V

THE LOWER COURT'S SUMMARY DENIAL OF SEVERAL OF MR. BUZIA'S CLAIMS WITHOUT EVIDENTIARY HEARING DEPRIVED HIM OF A FULL AND FAIR EVIDENTIARY HEARING AND VIOLATED HIS DUE PROCESS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

In reviewing a trial court's summary denial of post conviction relief without an evidentiary hearing, this Court must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record. Hodges v. State, 885

[8] Mr. Caudill testified that the State had done that to him on a prior occasion, but that he did not think they would necessarily do it again. ROA Vol. 14, p. 181.

So.2d 338, 355 (Fla. 2004) (quoting Gaskin v. State, 737 So.2d 509, 516 (Fla. 1999)). The court summarily denied the following claims.

Failure to present depth and severity of Mr. Buzia's drug and alcohol problem during the guilt phase, which would have negated a finding of premeditation.

The post conviction court ruled that because voluntary intoxication is not a defense, counsel cannot be ineffective for failing to present evidence of Mr. Buzia's devastating addiction. However, the court failed to address how evidence of the severity of Mr. Buzia's addiction would have supported the argument that this murder was not planned, but rather a spontaneous decision made by Mr. Buzia made to secure money to purchase more drugs. Dr. Morton explained that at the time of the murder, Mr. Buzia's addiction was so strong, that his damaged brain literally believed that he would not survive without crack cocaine. ROA Vol. 19, p. 1026-1027;1037. Post conviction counsel was precluded from questioning trial counsel as to why he failed to present evidence of Mr. Buzia's addiction in the guilt phase. Because this claim is not facially invalid, nor refuted by the record, a summary denial is improper. The court's denial of this claim violated Mr. Buzia's due process rights under the Federal and Florida Constitutions.

Failure to object or preserve for review the prosecutor's improper closing argument.

The court denied this claim, finding that none of the comments by the state were so "prejudicial as to vitiate the entire trial." ROA Vol. 4, p. 726. By

summarily denying this claim, the court was unable to undertake a proper analysis under Strickland and Donnelly v. DeChristoforo, 416 U.S. 637, 645, 94 S.Ct. 1868,1872 (1974), because there is no testimony in the record to indicate why counsel failed to object to the inflammatory statement that Mr. Buzia is an "axe murderer." Because there was no testimony regarding counsel's strategy, the claim is not refuted by the record. As such, summary denial was error.

Failure to request a specific verdict form that would require the jurors to specify each aggravator found and the vote for that aggravator.

The lower court summarily denied this claim relying on Kormondy v. State, 845 So.2d 41,54 (Fla. 2003). Mr. Buzia argued that counsel's failure to request a specific verdict form violated his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and his corresponding rights under the Florida Constitution. By summarily denying this claim, the court was unable to undertake a proper analysis under Strickland because there is no testimony in the record to indicate why counsel failed to request a special verdict form. Further, the court failed to address Mr. Buzia's federal constitutional claims. The claim is not refuted by the record, and therefore the court erred in entering a summary denial.

Due process violation for inadequate mental health evaluation.

Due Process requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. Mason v. State, 489

So.2d 734 (Fla.1986); Sireci v. State, 536 So.2d 231 (Fla. 1988); Ake v. Oklahoma, 470 U.S. 68 (1985). Due Process is violated under Ake where a mental health examination is so "grossly insufficient" that clear indicators of brain damage are ignored. Sireci v. State, 502 So.2d 1221, 1224 (Fla. 1987). See also Powell v. Collins, 332 F.3d 376 (6th Cir. 2003) (recognizing that a defendant's Fifth and Sixth Amendment rights are violated when, in a capital sentencing, counsel fails to prepare and present mitigation evidence of brain damage). The lower court found the issue procedurally barred under Marshall v. State, 854 So.2d 1235 (Fla. 2003).

Mr. Buzia did not receive a professionally adequate mental health evaluation and hence, a fundamentally fair sentencing, in light of the mitigation which should have been presented. Dr. Riebsame, the psychologist appointed by the court to assist Mr. Buzia, did not give Mr. Buzia competent mental health assistance because he did not perform a competent evaluation which would have revealed Mr. Buzia's longstanding brain damage. Dr. Riebsame's mental health evaluation failed to detect obvious signs of brain damage and/or he was not qualified to administer the tests that he administered. Counsel failed to understand this and seek a properly trained expert.

Mr. Buzia has show that his due process rights were violated under Ake because his mental health examination was so "grossly insufficient" that clear indicators of brain damage were ignored. This Court has allowed Fifth

Amendment Due Process claims in post conviction. Sireci v. State, 536 So.2d 231 (Fla.1988). [9] As such, the lower court erred in entering a summary denial.

ARGUMENT VI

THE LOWER COURT ERRED IN DENYING MR. BUZIA'S CLAIMS WITH RESPECT TO THE FALSE TESTIMONY GIVEN BY FINGERPRINT EXAMINER DONNA BIRKS.

At the evidentiary hearing, Joy Williams from the Seminole County Sheriff's Office testified about the internal affairs investigation involving latent print examiner Donna Birks. Joy Williams is a professional standards investigator with the Seminole County Sheriff's Office. ROA Vol. 15, p.239. As part of that position, she conducted an administrative review of the latent print unit after concerns were raised about the failure to follow proper procedure. Id. at 240. Her report and records from the investigation was admitted into evidence. ROA Vol. 6, p. 934-1123. Ms. Williams found that Ms. Birks made several false identifications as a latent print examiner. ROA Vol. 15, p.248. The problems and false identifications dated back to 1998, two years before Mr. Buzia's arrest. Id. at 251.

Mr. Buzia argued this claim before the lower court in three alternative ways. Each argument will be addressed in turn.

[9] Mr. Buzia recognizes that this Court has held this issue to be procedurally barred, but argues that the procedural bar is arbitrarily applied, as evidenced by Mason and Sireci.

Ineffective Assistance of Counsel: The lower court denied this claim in part because "[a]t the time of trial, Donna Birks was a respected expert in Seminole County who had over twenty years of experience in fingerprint analysis." ROA Vol. 13, p. 2284. The fact that a state witness has experience does not relieve counsel of his duty to investigate and challenge the physical evidence that the State presents against his client. See Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7(2003)("counsel should … aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence."). Trial counsel was ineffective for failing to verify the existence of a palm print on a cabinet that housed the murder weapon. At trial, latent print examiner Donna Birks testified that Mr. Buzia's palm print was located the cabinet in the victim's garage. During post conviction, the palm print was reexamined by independent defense expert, Ken Zercie, as well as an expert for the State, Debbie Fischer. Both experts agreed that the palm print was of insufficient detail to be matched with Mr. Buzia. Therefore, Ms. Birks' testimony at trial that it was a match was false. Trial counsel's failure to properly investigate or obtain an independent fingerprint was deficient performance which prejudiced Mr. Buzia because it allowed the State to argue premeditation and time for reflection since he had to go out to the garage to obtain the murder weapon. Without the fingerprint

on the cabinet, the State would have been unable to prove that the murder weapon was located inside the cabinet.

Brady: This Court has defined the prosecutor's requirement under Brady as follows: "[t]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf and to disclose that evidence if it is material." Archer v. State, 934 So.2d 1187,1203 (Fla 2006)(citing Allen v. State, 854 So.2d 1255,1259 (Fla. 2003). See also Kyles v. Whitely, 514 U.S. 419, 115 S.Ct. 1555 (1995). Moreover, evidence is material if it "tends to negate the guilt of the accused or tends to negate the punishment." Allen at 1259.

The State relied on the Seminole County Sheriff's Office to test, evaluate, preserve and testify about physical evidence. Especially in a capital case, the State has a duty to ensure the evidence presented by the Sheriff's Office is reliable and accurate. The State knew or should have known that Ms. Birks' conclusions as a fingerprint examiner were flawed. Ann Mallory was not qualified to examine or verify latent prints, yet she approved Ms. Birks' decisions. The State Attorney's Office as a whole, as well as the individual prosecutors assigned to Mr. Buzia's case should have conducted a periodic review of the latent print section. Had they done so, they would have discovered that as far back as 1998 the lab was not following accepted procedures in record keeping, training, oversight, and proficiency testing.

The lower court ruled that Mr. Buzia failed to meet his burden under Brady in part because Mr. Buzia "has not demonstrated that the result of the trial would have been different if the fingerprint evidence was not presented, or even if it was impeached." ROA Vol. 13, p. 2291. However, the lower court failed to address Mr. Buzia's argument that the discovery of Mr. Buzia's palm print on the cabinet allowed the State to argue that he left the house where Mr. and Mrs. Kersch were located and went to the garage cabinet to get the axe, thus proving premeditation, a time for reflection, and an intent to kill. Had Ms. Birks' inaccurate conclusions been disclosed, there exists a reasonable probability that the outcome would have been different. Finally, Mr. Buzia argued that the evidence is material because the State argued that it tended to prove an element of first degree murder (premeditation) and at least one of the aggravators (cold, calculated, premeditated).

Newly Discovered Evidence: Under Florida and federal law, there are two requirements needed for relief based on newly discovered evidence.

> First, the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of the trial, and it must appear that defendant or his counsel could not have known them by the use of diligence. Second, the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial. The Jones standard is also applicable where the issue is whether a life or death sentence should have been imposed.

Scott v. Dugger, 604 So.2d 465, 468 (Fla. 1992)(internal quotations and citations omitted)(emphasis in original). See also Jones v. State, 591 So. 2d 911, 914-915

(Fla. 1991); Robinson v. State, 707 So.2d 688, 691 n.4 (Fla. 1998); Fla.R.Crim.Pro. 3.851(d)(2)(A).

The lower court rejected Mr. Buzia's claim because "Birks' suspension did not occur until 2007, so the jury could not have heard any evidence of the suspension at the trial in 2003." ROA Vol. 13, p. 2291. The lower court misapprehended Mr. Buzia's claim and the law. The fact that the palm print was not his is *newly discovered evidence* and could *not* have been presented at trial. Because the lower court misapprehended the law, it failed to address the Jones standard. It also failed to address Mr. Buzia's argument that the false testimony about the fingerprint on the cabinet allowed the State to argue premeditation and time for reflection since he had to go out to the garage to obtain the murder weapon. Without the fingerprint on the cabinet, the State would have been unable to prove that the murder weapon was located inside the cabinet. Therefore, there is a reasonable probability that Mr. Buzia would not have been convicted of first degree murder, or if convicted, he would not have been sentenced to death. The lower court's ruling violated Mr. Buzia's Fifth and Sixth Amendment rights to present evidence on his behalf.

ARGUMENT VII

THE LOWER COURT ERRED WHEN IT DENIED MR. BUZIA'S CLAIMS THAT HIS DUE PROCESS RIGHTS UNDER BRADY WERE VIOLATED WHEN THE

PROSECUTOR PROMISED TRIAL COUNSEL THAT MR. BUZIA'S BLOOD WOULD BE TESTED FOR DRUGS.

In order to establish a Brady violation, a defendant must prove 1) the evidence is favorable to the accused because it is exculpatory in guilt or sentencing, 2) it was suppressed by the State willfully or inadvertently, and, 3) prejudice ensued. Carroll v. State, 818 So. 2d 601, 619 (Fla. 2002). A court should consider the evidence in the context of the entire record. Id. at 619. "A criminal defendant alleging a Brady violation bears the burden to show prejudice, i.e. to show a reasonable probability that the undisclosed evidence would have produced a different verdict. Guzman v. State, 868 So.2d 498, 506 (Fla. 2004).

As demonstrated at the evidentiary hearing, two vials of blood were taken from Mr. Buzia at approximately 1900 hours on the day of his arrest. ROA Vol. 5, p. 823. ASA James Carter assured by trial counsel that the blood would be preserved and tested for the presence of drugs or alcohol. ASA Carter repeated this assurance in open court stating "we did take some blood from him *that is being used and tested for drugs and alcohol and so forth in his system the day after the homicide and the day of his confession."* ROA Vol. 5, p. 844 (emphasis added). Despite this promise, the State never tested Mr. Buzia's blood for the presence of drugs or alcohol. Nor did the State ever notify the defense that it was not going to conduct this testing. Mr. Buzia has satisfied the requirements under Brady. As noted by trial counsel, a positive drug test for cocaine was a crucial piece of

evidence. Without it, the State was able to question whether in fact Mr. Buzia was under the influence of crack cocaine at the time of the crime. In fact, in its penalty phase closing argument, the State questioned the veracity of Mr. Buzia's drug addiction, pointing out that he didn't have a crack pipe or any other paraphernalia on him at the time of his arrest. The State effectively argued, "there's a real question as to how close in time he ever used any crack cocaine to this murder." ROA Vol. 15, p.1996. A positive drug test result for cocaine would have bolstered a motion to suppress. A positive result would have provided objective evidence to support a finding of the statutory mental health mitigators. The State's failure to test the blood for cocaine after assuring the court and the defense that it would do so deprived Mr. Buzia of favorable and exculpatory evidence. A positive drug test result would have produced a different verdict in the guilt and/or penalty phase.

ARGUMENT VIII

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. BUZIA OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE UNITED STATES CONSTITUTION.

Mr. Buzia did not receive the fundamentally fair trial to which he was entitled under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in Mr. Buzia's guilt and penalty phases, when considered as a whole, virtually dictated the sentence of

death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel significantly tainted Mr. Buzia's guilt and penalty phases. Trial counsel failed to properly investigate and present mitigation. They failed to recognize clear signs of brain damage, and ignored the recommendation of their expert who requested further neurological and neuropsychological testing. Trial counsel failed to present a persuasive narrative of Mr. Buzia's childhood and his genetic predisposition to substance abuse. Trial counsel failed to preserve and secure independent testing that would have shown Mr. Buzia was under the influence of crack cocaine at the time of the crime and/or at the time of his statement to the police. They failed to file a motion to suppress. They failed to adequately challenge the State's case in the guilt phase, and failed to adequately challenge the State's case in aggravation. In the guilt phase, trial counsel gave a weak, nonsensical, and irrelevant closing argument that he knew the jury would be not receptive to. Finally, the state presented false testimony that Mr. Buzia's fingerprints were on the cabinet that housed the murder weapon. The lower court denied the cumulative claim based on Bryan v. State, 748 So.2d 1003, 1008 (Fla. 1999). However, as argued *supra*, the lower court's analysis of each individual claim was flawed, therefore the denial of the cumulative claim is also error.

The errors in Mr. Buzia's trial cannot be harmless. Under Florida case law, the cumulative effect of these errors denied Mr. Buzia his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Ray v. State, 403 So.2d 956 (Fla. 1981); Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So.2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So.2d 1099 (Fla. 4th DCA 1993).

ARGUMENT IX

MR. BUZIA'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. BUZIA MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

This claim was raised below and stipulated as being premature. However, it is necessary to raise it here to preserve the claim for federal review. In Re: Provenzano, 215 F.3d 1233 (11th Cir. June 21, 2000). Mr. Buzia suffers from brain damage. His already fragile mental condition could only deteriorate under the circumstances of death row causing his mental condition to decline to the point that he is incompetent to be executed.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Buzia relief on his 3.851 motion. This Court should order that his sentences be vacated and remand the case for a new trial, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to Barbara Davis, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 and John M. Buzia, DOC #E11617, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026 on this ____ day of August, 2010.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210**.**

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