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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Any claims not argued are not waived and Appellant relies on the merits of his Initial Brief.

STATEMENT OF THE CASE AND FACTS

Appellant objects to the characterizations of the following facts presented in Appellee's Answer Brief. The specific objections are as follows:

(1) Appellee states that Mr. Caudill "visited the house where Buzia's mother lived." Answer at p. 10. While this is accurate, Appellee fails to acknowledge that it was not a residence that Mr. Buzia ever lived. Mr. Caudill did not visit any places where Mr. Buzia had lived prior to the crime. ROA Vol. 14, p. 30.

(2) Appellee states that the trial judge and jury were aware that Mr. Buzia's sister was killed while crossing the road in an intoxicated state. Answer at p. 11. This is inaccurate. The only testimony regarding Cathy's death at the penalty phase was during the testimony of Patricia Breslin and was as follows:

> Q: Could you briefly tell us how your daughter Kathy (sic) passed away?
>
> A: She was with an acquaintance, she called him a friend, he was not a friend, he was an acquaintance, they were going across Colonial, which is a Main Highway 50 to go to a convenience store, they were on their way back and she was hit by a car.

Q: Okay, did she die immediately?

A: Yes.

TR Vol. 13, p. 1527-28. It was not mentioned at all at the Spencer Hearing. TR Vol. 18, p. 2572-2649. At the evidentiary hearing, Mr. Buzia presented evidence that Cathy was killed less than one month after her release from the hospital from an alcohol delirium, her blood alcohol was a .44, and she was carrying a 12 pack of beer.

(3) Appellee states that the McIntoshes were not willing to testify on Mr. Buzia's behalf at the original trial. Answer at p. 12. This is inaccurate. Mrs. McIntosh testified that 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. ROA Vol. 17, p.668. They relayed that to the lawyers, but the lawyers never followed up and asked them what that detrimental information might be. Id. The incidents they were concerned about were when John had been violent while under the influence of drugs, which was consistent with the mitigation picture that trial counsel claimed was his strategy. Jean McIntosh explained that, had the lawyers told them that their testimony would have been helpful, they would have been willing to testify. Id. at 671.

(4) With respect to the strategic decision to give a weak closing argument, Appellee states "[i]t was very unlikely that the State would waive argument in a capital case." Answer at p. 15. However, Mr. Caudill testified that the State had done that to him on a prior occasion, though he did not think they would necessarily do it again. ROA Vol. 14, p. 181.

(5) Appellee states that Dr. Danizger reviewed Dr. Sesta's neuropsychological testing and found nothing in the data that would indicate "dementia or any severe cognitive impairment." Answer at p. 38. However, Dr. Danziger, a psychiatrist, is not qualified to interpret Dr. Sesta's neuropsychological data. Further, Dr. Danziger did not do any standardized objective testing to rule in or rule out the existence of brain damage in Mr. Buzia's case. Dr. Danziger conceded that he cannot rule out brain damage in this case. ROA Vol. 21, p. 1541.

Any other factual inaccuracies will be discussed in the body of the argument. Mr. Buzia relies on the remainder of his original Statement of the Facts to support his arguments herein.

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.

Appellee correctly identifies that Mr. Buzia raised three specific areas where counsel's performance fell below prevailing norms: 1) failure to discover and present evidence of brain damage, 2) failure to present Mr. Buzia's genetic predisposition to substance abuse, and 3) failure to present a persuasive narrative of Mr. Buzia's life and bio-psychosocial history. Answer at p. 47. However, Appellee fails to address two of those three areas, discussing only the third area. The bulk of Appellee's argument consists of more than six pages of block quotes from the post conviction's order denying relief. Answer at p. 47-54. Appellee's argument is that because counsel presented some witnesses and conducted some investigation, their performance was not deficient, and, alternatively, everything presented at the evidentiary hearing was cumulative. Appellee appears to be arguing that because trial counsel called a relatively large number of witnesses (14-16) at the penalty phase, counsel's performance was therefore reasonable. However, it is not the quantity of witnesses that is presented that determines performance, but rather the reasonableness of counsel's investigation. See Wiggins v. Smith, 539 U.S. 510, 527, 123 S.Ct. 2527, 2538, 80 L.Ed. 2d 674(2003)(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."). See also Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)(finding deficient performance even where

defense counsel consulted with three mental health experts and interviewed Rompilla's family members. "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..." Id. at 2462.).

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

As argued in the Initial Brief, 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." ROA Vol. 5, p. 850. 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.

Appellee fails to address Mr. Buzia's argument that the post conviction court misapprehended the law and testimony regarding brain damage, when it concluded 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. The post conviction court's finding is in conflict with established precedent of the United States Supreme Court.

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.

Moreover, 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.

The post conviction court's prejudice analysis is flawed because it failed to apply the clearly established law of Strickland and its progeny. As noted above and in the Initial Brief, the United States Supreme Court in Porter 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.

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. 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 questions 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 post conviction court then concludes that "[e]vidence of brain damage would have contradicted the theory of mitigation." Id. at 2288. The post conviction court's discounting of the evidence of Mr. Buzia's brain damage is the same error made by the state courts in Porter. 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. Appellee wholly fails to address any of these arguments.

Further, the post conviction court's conclusion that Dr. Sesta manipulated his data is a clearly erroneous factual finding. ROA Vol. 13, p. 2289. A fair reading of Dr. Sesta's testimony and State Exhibit 3 (Dr. Sesta's data summary) demonstrate that Dr. Sesta used two different scoring methods and based his opinion on the more conservative scoring method. ROA Vol. 19, p. 1172. He explained:

> A: No. What we did here for the court to be fair is that we used two drastically different normative systems. Doctors Reitan and Wolfson do not believe that age, education, gender or race significantly impact neuropsychological test functioning. There is an enormous amount of literature that suggests that that is not true.
>
> Q: Uh-huh.
>
> A: Authors like Wheaton (sic) have given these tests to people who are seventy or eighty and they find out you

> know what, it does matter. It matters if you have a Second Grade education or an MBA. It matters if you are twenty-two or if you are eighty-two.
>
> Q: Uh-huh.
>
> A: So, what I did here in this case was that I gave the court both. Instead of arguing controversy, I gave you both scores….So you have Doctors Reitan and Wolfson on the one side and Dr. Heaton and his demographic corrections on the other. I presented both to the court. What's neat about this case is I don't have to argue. They both produce mild impairment overall in the aggregate scores.

Id. at 1187-1188.

Dr. Sesta continued:

> It's not a matter of consistency, it's a matter of disclosure. I am telling you and the court these are two scoring systems that don't agree. I am showing you both of them.

Id. at 1199. Dr. Sesta repeatedly tried to explain to the State that he erred on the side of caution and used the more conservative scoring method. He stated:

> I could have presented the court with more evidence that Mr. Buzia is brain impaired. I could have probably argued in the light of that additional evidence that he is not mildly brain impaired that maybe he is moderately to severely brain impaired. I thought that was not accurate.

ROA Vol. 20, p. 1211-12. Finally, he explained that in a forensic case or a death case, "making a false positive error and calling someone brain injured when they're not is probably the worse error….I erred on being conservative. So, if I

made a mistake it is in the direction of not calling Mr. Buzia brain impaired." Id. at 1216.

The post conviction court misapprehended Dr. Sesta's testimony and conclusions. Both methods of scoring show brain impairment. Dr. Reitan's method shows a more severe brain impairment because it is not demographically corrected. Dr. Heaton's method shows a milder brain impairment since those scores are demographically corrected for education, race, and gender. Dr. Sesta was not manipulating his data, he disclosed to the State and the Court two different methods of scoring neuropsychological tests. Further, he erred on the side of caution and chose the most conservative approach. In denying this claim, the post conviction court overlooked and misapprehended facts and law and made a clearly erroneous factual finding. Appellee fails to address this argument.

In addition, Appellee fails to address Orme v. State, 896 So.2d 725 (Fla 2005), or argue how Mr. Buzia's case is distinguishable from that case. In Orme, this Court found that Orme was entitled to a new penalty phase where trial counsel failed to present the link between Mr. Orme's addiction and his bipolar disorder. Id at 736. Failure to do so allowed the State in Orme to urge the jury not to "let him stand behind his crack pipe." Id.

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 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 he would have gotten the two additional votes needed to obtain 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. Appellee has failed to address any of Mr. Buzia's arguments as they relate to ineffective assistance of counsel for failure to discover and present brain damage.

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

Appellee does not specifically address this subclaim, however it makes general assertions that counsel's performance was reasonable. In the block quoted portion of the post conviction court's order that Appellee cites, the court notes that the mitigation witnesses presented at trial "painted a vivid picture of the Defendant's life and the impact that his substance abuse had on him." Answer at p. 49. This conclusion is not supported by competent, substantial evidence. The jury was deprived of knowing the full picture of the depth and severity of Mr. Buzia's substance abuse problem as well as the devastating effects the genetic predisposition had on the entire Buzia family.

A specific example is the death of Mr. Buzia's sister. Appellee argues that counsel was not deficient in failing to present the circumstances surrounding Cathy Selje's death and notes that "[t]he trial judge and jury were aware of Cathy Selje's death." Answer at p. 11. Trial counsel conceded an important part of the theme of the mitigation case was the family substance abuse and how the substance abuse affected John and the rest of the family. Despite this, trial counsel failed to locate

or introduce the accident and autopsy report of Cathy's death, 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. 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. In addition, presenting such evidence would have prevented the State from mocking the mitigation evidence regarding family substance abuse that was presented. The State argued that other people in Mr. Buzia's family used drugs but did not commit murder. TR Vol. 15, p. 1991. Trial counsel could have neutralized this argument by showing that other members of Mr. Buzia's family had suffered equally devastating effects due to the substance abuse that plagued the family.

Despite the State's assertions to the contrary, 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." 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, in fact one of the most dysfunctional that the experts had ever seen.

In Sears v. Upton, the United States Supreme 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. Appellee fails to address the arguments raised in Mr. Buzia's Initial Brief, and instead merely repeats the post conviction court's conclusions.

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

This is the only area where Appellee attempts to address Mr. Buzia's arguments. In response to Mr. Buzia's argument that trial counsel's presentation and preparation of the mitigation witnesses was woefully inadequate, Appellee spends several pages listing the witnesses who did testify and what they offered. Answer at p. 54-58. Appellee then argues that everything that was presented at the evidentiary hearing was cumulative to this information. This assertion is unsupported by the record. As noted in Mr. Buzia's Initial Brief, there were

numerous facts, stories, and witnesses presented at the evidentiary hearing that were not presented in the penalty phase.

There is nothing in the record to indicate that trial counsel had *any* meaningful conversations with the witnesses that testified in the penalty phase.[1] 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.

Appellee summed up John Hicks' testimony as follows:

> Jonathan Hicks testified he grew up with Buzia in Odgen (sic) Dunes, Indiana, played sports with Buzia, went to England on a soccer trip with him, and socialized with Buzia during high school. (R1624-1625). Then he lost contact with him after high school. He testified when he heard of the murder he was absolutely shocked.

Answer at p. 55. This testimony was meaningless and did nothing to offer the jury an explanation of how Mr. Buzia, with no prior criminal history, went from a seemingly normal childhood and adolescence to committing a murder. If anything, it was more aggravating, because the jury believed, and the prosecution argued, that he had all the advantages growing up. At the evidentiary hearing, Mr. Hicks gave a starkly different picture of the Buzia family. Even though Mr. Hicks testified about the soccer trip at the original trial, he was not asked any details

[1] 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.

about whether there was drinking on the trip. At the evidentiary hearing, he described how the boys began drinking as soon as they arrived. ROA Vol. 15, p. 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.

He also relayed a story about a telephone call he received from John about a month before the crime. John was crying and barely coherent, and 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).

Similarly, at trial, Mr. Selje's 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, Answer at p. 55. He was not asked about Patty's parenting.

Conversely, he 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. He also relayed a story that he had seen John about 18 months before the murder and John looked terrible. Mr. Selje was shocked by his appearance. He was never asked about that at trial, and the jury was left with the inaccurate picture that the last contact he had with Mr. Buzia was in 1996. Answer at p. 55.

At trial, trial counsel found Amber Buzia in the hallway and hurried to put her on the stand. She was unprepared and nervous. Her testimony at trial ending up being merely 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).

Conversely, 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." ROA Vol. 16, p. 457-58. She stated that it was Patty who encouraged Jack to smoke marijuana after his accident because it was "not as bad as alcohol." Id. 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, Mr. Buzia's sister Mary Perez, quite frequently drove around intoxicated, and often wandered in parking lots trying to remember where she parked.[2]

Appellee, much like the post conviction court, fails to address the lay witness and expert testimony that was presented at the evidentiary hearing that was not presented at trial. At the evidentiary hearing, Mr. Buzia presented the testimony of the following witnesses.

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[2] Mary Perez in fact was arrested for Driving Under the Influence in the parking lot of the Evidentiary Hearing after sideswiping a deputy's police car. She was supposed to testify that afternoon, but was unable to due to her arrest. ROA Vol. 17, p. 655.

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. By doing so, the post conviction court failed to follow clearly established precedent of the United States Supreme Court when, "it failed to evaluate the totality of available mitigation evidence – both that adduced at trial, and the evidence adduced in the [post conviction] proceeding in reweighing

it against the evidence in aggravation. See Clemons v. Mississippi, 494 U.S. 738, 751-752...(1990)." (Terry) Williams v. Taylor, 529 U.S. 362, 397 (2000).

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 hearing, the witnesses testified that they were nervous and terrified that they would say something to hurt John's case at trial. Trial counsel also 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.

Appellee's (and the post conviction court's) mere tallying of witnesses and a recitation of their trial testimony without any meaningful comparison to what was presented at the evidentiary hearing deprives this Court of adequate review. The post conviction court failed to even address the testimony of most of the lay witnesses and several of the expert witnesses.

Appellee argues that "the trial judge, as the finder of fact, made credibility determinations." Answer at p. 60. However, Appellee fails to articulate which witnesses, if any, the post conviction court found to be not credible. The sole witness the court questioned the credibility of was Dr. Sesta, which was discussed extensively above. The post conviction court did not even address the testimony of

mitigation specialist Jan Vogelsang, forensic psychologist Dr. Mark Cunningham, or psychopharmocologist Dr. Alexander Morton.

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.

Appellee misapprehends Mr. Buzia's argument about the post conviction court's failure to adequately address this claim. Appellee states that "Buzia claims the trial judge did not address intake of drugs or alcohol." Answer at p. 61. However, Mr. Buzia argued that 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.

Further, Appellee inappropriately categorizes Mr. Buzia's claim as an ineffective assistance of counsel claim for failure to hire a "confessionologist." Answer at p. 62-63. The State misapprehends Mr. Buzia's claim. Mr. Buzia was not arguing that his confession was false. Instead, Mr. Buzia argued the waiver of his constitutional rights was not knowing and voluntary due to his intoxication and withdrawal from drugs and alcohol. Dr. Morton testified that after 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).

Mr. Buzia's statement was used by the State to prove the CCP and HAC aggravator. The State repeated Mr. Buzia's statements in closing argument and used them to urge the jury to find the CCP aggravator. The State argued:

> He gets in the house and he immediately strikes her, and then he starts thinking, and in his statement on the videotape he talks about what he's thinking. What am I gonna do? I've beaten Thea, now what do I do? Charlie's gonna come home. He's thinking things.
>
> *****
>
> He's got Thea out, he's still got Charlie on the way, he's getting axes, he's going through drawers, he's doing all of these things,

> and he's thinking, and in his confession he admits that he went through it. What am I gonna do with Charlie? Charlie's gonna come. Do I tell him I beat his wife? Or do I . . . I think he says, and it's kind of strange language, or do I involve Charlie, do I beat Charlie, too, do I kill Charlie. He's thinking those thoughts.

TR Vol. 15, p. 1985. Mr. Buzia's confession was the only evidence presented of Mr. Buzia's thought processes at the time of the crime and was given at a time that he was intoxicated and/or suffering from withdrawal of drugs and alcohol.

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.

Appellee argues that trial counsel made a reasonable strategic decision not to show the last twenty minutes of the videotape. Answer at p. 66. This is inaccurate based on trial counsel's testimony at the evidentiary hearing. When questioned about his failure to ensure the jury saw the entire tape, where Mr. Buzia was distraught and extremely remorseful, trial counsel replied, "..we never made a *decision* not to show it to the jury in the penalty phase. We didn't show it to the

jury in the penalty phase." ROA Vol 14, p. 100-101(emphasis added). The record demonstrates that there was no strategic decision not to play the tape, but was instead a failure by trial counsel. Further, neither trial counsel nor the State have provided a reasonable basis not to show the tape. The fact that Mr. Buzia asked for the deputy's gun to commit suicide shows his disturbed mental state, his anguish, and his remorse. Moreover, as counsel testified, he could have moved to redact that portion of the tape. Trial counsel agreed that the tape showed Mr. Buzia tearful, remorseful, and visibly upset. Id. at 99. 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. 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. See ABA Guidelines 10.11 (I)(2003)("Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading, or not legally admissible."). In a case such as this where the vote was only 8-4, failure to show the entire tape was deficient performance which prejudiced Mr. Buzia. The post conviction court failed to consider the last

twenty minutes of the video tape presented at the evidentiary hearing in conjunction with the other mitigation evidence presented. By failing to do so, the post conviction court failed to follow clearly established precedent of the United States Supreme Court when, "it failed to evaluate the totality of available mitigation evidence – both that adduced at trial, and the evidence adduced in the [post conviction] proceeding in reweighing it against the evidence in aggravation. See Clemons v. Mississippi, 494 U.S. 738, 751-752…(1990)." (Terry) Williams v. Taylor, 529 U.S. 362, 397 (2000).

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.

Counsel failed to preserve and test the blood samples.

Appellee argues that because the blood was drawn at 7:00 p.m. on the day after the murder, any cocaine in Mr. Buzia's blood would have been eliminated, therefore counsel cannot be ineffective. Answer at p. 68-69. However, both Appellee and the post conviction court ignored the uncontradicted testimony of toxicologist Dr. Barbieri, who explained that cocaine metabolites stay in the bloodstream for up to twenty-six hours. ROA Vol. 16, p. 537. Mr. Buzia smoked crack throughout the day of the murder and all throughout the night after the murder until he was arrested in the morning. During the confession and at the time

of the blood draw, there would have been cocaine metabolites in his system. Mr. Buzia's argument was not limited to the fact that trial counsel was ineffective for failing to show that Mr. Buzia was under the influence at the time of the crime, but also that he was experiencing withdrawal symptoms and/or was under the influence of cocaine at the time of his statement to the police.

Additionally, the post conviction court and Appellee failed to address the testimony of Mr. Norgard who explained 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 establish 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.

Appellee argues that even if Mr. Buzia has brain damage, counsel was not deficient because he "consulted three experts, arranged for two MRI's, and

requested a PET Scan which he ultimately did not do based on the advice of Dr. Riebsame. Trial counsel was not ineffective for relying on the opinion by a qualified expert." Answer at p. 73. First, as a psychologist, Dr. Riebsame is not "qualified" to determine the existence of brain damage. Mr. Norgard explained that capital defense attorneys were taught that brain damage is something that can be easily missed or ignored absent a complete evaluation by a neuropsychologist or other qualified expert, such as a neurologist. ROA Vol. 15, p. 368. He 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.

Furthermore, as noted above and in the Initial Brief, Mr. Buzia was struck 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.

Both Appellee and the post conviction court argued that trial counsel was not deficient for failing to present brain damage because the murder was not impulsive. However, the court and the State fail 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.

Appellee argues that because trial counsel made a strategic decision to deliver a weak closing argument, counsel was not ineffective. Answer at p. 75. However, as the record below demonstrates, 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. This cannot be considered a reasonable strategic decision. In Lawhorn v. Allen, 519 F.3d 1272,1293 (11th Cir. 2008), the Eleventh Circuit Court of Appeals recognized the closing argument as a "critical stage" of the trial and found trial counsel deficient for waiving closing argument based on the mistaken belief that waiver of argument would prevent the State from giving an argument. The Court noted, "Because one of the most important functions of the capital sentencing process is the opportunity to humanize the defendant, the importance of the defense's closing argument cannot, therefore, be overstated." Id. at 1296 (citing Marshall v. Hendricks, 307 F.3d 36,99.103 (3rd Cir. 2002). While Lawhorn dealt with waiver of a closing argument in a penalty phase setting, instead of the guilt phase, the reasoning applies equally especially in Mr. Buzia's case. Prevailing norms as well as the ABA Guidelines dictate that "trial counsel must coordinate and integrate the presentation during the guilt phase of the trial with the projected strategy for seeking a non-death sentence at the penalty phase."

Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 1.1 (2003).

By his own admission, trial counsel's 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.

Appellee argues that "[t]his issue is inadequately pled because Buzia has failed to identify the specific claims which the trial judge denied summarily, and is not adequately briefed to present a viable claim." Answer at p. 76. This is inaccurate. Mr. Buzia argued four separate claims that were improperly summarily denied by the post conviction court, and argued each one under a separate heading. Initial Brief at p. 89-90. It is unclear what the basis of the Appellee's argument is, especially when the Appellee uses the *same* headings that Mr. Buzia used in his Initial Brief. Answer at p. 76-80. The claims were adequately pled and

sufficiently briefed for this Court to rule on the merits. As to the specific arguments as to why summary denial was improper, Mr. Buzia relies on the arguments in his Initial Brief.

ARGUMENT VI

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

Ineffective Assistance of Counsel:

In support of its argument on this claim, Appellee merely cites the post conviction court's order and argues that it is supported by competent, substantial evidence. Answer Brief at p. 81-82. However, Appellee fails to acknowledge that prevailing norms require trial counsel to challenge physical evidence, even in the face of a confession or strong evidence of guilt. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7(2003). See also the 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.").

While defendant's actual guilt was not in dispute, the time for reflection and premeditation certainly was. Trial counsel's failure to properly investigate or obtain an independent fingerprint expert 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.

Brady:

Again, Appellee cites to the post conviction court's order and argues that it is supported by competent, substantial evidence. Answer Brief at p. 82-84. Additionally, Appellee argues that because Mr. Buzia confessed that he went to the garage for the axe, there can be no deficient performance. However, as argued above, trial counsel rendered ineffective assistance of counsel in failing to file a motion to suppress Mr. Buzia's 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. Absent Mr. Buzia's statement and the false testimony of Donna Birks, the State would have been unable to prove that the murder weapon was located inside the cabinet and could not have used that fact to argue premeditation and reflection while Mr. Buzia went to obtain the weapon.

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:

Appellee correctly identifies the Jones standard for newly discovered evidence, but then argues that Mr. Buzia's is not entitled to relief on this claim because "Buzia presented no evidence that trial counsel knew or could have known of this evidence at the time of the trial." Answer at p. 86. Based on that statement, it appears that the State is conceding that Mr. Buzia has met prong one.

As argued in his Initial Brief, the lower court misapprehended Mr. Buzia's newly discovered evidence claim and the law. The fact that the palm print did not belong to Mr. Buzia *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. Both the lower court and Appellee 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.

Appellee claims that this issue is waived for appellate purposes because the post conviction court did not issue a ruling on the issue. This is inaccurate. Before the post conviction court, Mr. Buzia combined his argument regarding the false testimony about the fingerprint match and the failure of the State to preserve and/or test the blood. The post conviction court acknowledged this in its order, "In claim four, the Defendant argues that the State violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), with regard to the fingerprint evidence *and the blood* and hair evidence collected from the Defendant." ROA Vol. 13, p. 2290 (emphasis added). While the post conviction court did focus more on the fingerprint claim, it is clear that the court also denied the Brady claim with respect to the blood. Id. Moreover, the case the State relies upon (Richardson v. State) to

argue that this issue is waived on appeal deals with a failure to of trial counsel to obtain a ruling on an objection at trial. The Richardson Court noted:

> Appellant claims that the trial court committed reversible error in permitting the testimony that appellant shook his "private" at Franklin since this tended to show bad character and was irrelevant. We agree that appellant's character was not at issue but note the absence of a timely objection. The only objection registered was a move to strike the testimony after the three attorneys went to sidebar on a later separate objection. We note also that appellant did not pursue his motion to strike even though the judge did not rule on the motion. Under these circumstances, appellant has not preserved the issue for appeal.

Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983). This is distinguishable from the instant case where Mr. Buzia raised the Brady claim with respect to the blood in his initial 3.851, presented evidence on it at the evidentiary hearing, and argued the issue in his written closing argument before the post conviction court, which is also part of the Record on Appeal. ROA Vol. 12, p. 2087-2176; ROA Vol. 13, p.2256-2281. Moreover, as noted above, the post conviction did issue a ruling.

As to the merits of the claim, 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).

The post conviction court concluded that "[t]rial counsel was under the *mistaken impression* that the State was going to conduct drug testing at its testing facility, so he did not make any arrangements to do so." ROA Vol. 13, p. 2283. (emphasis added). However, as demonstrated, it was not a mistaken assumption, but rather an affirmative assurance by ASA James Carter 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. By promising to test the blood, the State was able to lull trial counsel into a false sense of security and ultimately deprived Mr. Buzia of exculpatory evidence. As noted above in Argument IV , the State compounded this disingenuous conduct by arguing in post conviction that trial counsel could not have been ineffective for failing to test the blood because it relied in good faith on

the State's promises to conduct the testing. The State cannot have it both ways. Mr. Buzia has satisfied the requirements under Brady.

ARGUMENT VIII

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

Appellee simply argues that because Mr. Buzia did not establish individual error, there can be no cumulative error. Answer at p. 88. However, 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.

Mr. Buzia relies on the arguments and facts set out in his Initial Brief for this claim.

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 January, 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply 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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