IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-2083

GARY RICHARD WHITTON

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF WALTON COUNTY, FLORIDA
Capital Post Conviction

INITIAL BRIEF OF APPELLANT

MARK E. OLIVE
Fla. Bar No. 0578533
320 W. Jefferson Street
Tallahassee, FL 32301
(850) 224-0004

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of a post-conviction motion in a capital case. The trial and direct appeal record will be referred to as "R. ___" or "Trial Transcript ___;" the post-conviction record will be referred to as "V_____" (Volume) or "SV ____" (Supplemental Record).

REQUEST FOR ORAL ARGUMENT

Mr. Whitton has been sentenced to death. He respectfully requests oral argument on his substantial claims for relief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT CASES

FEDERAL CIRCUIT COURT CASES

CONSTITUTIONAL PROVISIONS

I. STATEMENT OF THE CASE

A. Procedural History

On December 3, 1990, a Walton County grand jury indicted Mr. Whitton for First Degree Murder and Robbery. He was found guilty on August 1, 2002, and on August 3rd the jury recommended a death sentence, which the trial court imposed. This Court affirmed. *Whitton v. State*, 649 So.2d 861 (Fla. 1994). On March 24, 1997, Mr. Whitton filed his initial incomplete post-conviction motion. An Amended Motion was filed, an evidentiary hearing was conducted, and relief was denied May 31, 2011.

B. The facts

Mr. Maulden, the victim, was an alcoholic who worked offshore. When he returned to shore he would cash his paycheck, check into run down motels, and take cabs to purchase alcohol. He asked cab drivers where to find prostitutes, waved cash around in public while drunk, looking for prostitutes, and hired prostitutes. Just days before he was killed, drunk, in a seedy motel, he had been "rolled" by a transvestite prostitute. Before his death, he was drunk, flashing cash, looking for another hooker. Defense counsel failed to show these and many other available, pertinent, facts about the probable perpetrator(s).

The prosecution was not so inactive. The jury heard the prosecution's contrived story of a vicious, planned, murder of the helpless Maulden by his best friend, Mr. Whitton, desperate for Maulden's cash. Whitton denied it from the start and

testified in his own defense.[1] According to an FDLE agent, there was no DNA evidence against Whitton-thus the prosecutor and the Sheriff threatened her not to appear and testify.[2] So the state's case hinged upon the late-developing testimony of jailhouse snitches Jake Ozio and "Satan."

Ozio was a teenager justifiably scared to death of the Walton County jail; Satan was, unknown to defense counsel and the jurors, a gross sexual pervert, terrified of being so exposed to fellow inmates, and, luckily for him, *engaged to the prosecutor's mother*. Both Ozio and Satan testified Whitton confessed to them, with inflammatory depictions of the crime and the victim.[3] If they were lying, acquittal was imminent. They were. Satan is dead, but after trial he told the truth-he had been told what to say at trial by his then intended step-child, the prosecutor, Adkinson. Whitton had admitted nothing to Satan. Ozio swears now that he never heard Whitton say anything incriminating, but would

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[1]Whitton told police and the jurors he was with his friend the day of his death, took him to a motel, left him alive, and returned to find him dead. There were no witnesses to a killing. Whitton's explanations were plausible and could not be refuted.

[2]The trial defense investigator testified below Whitton was offered ten years in prison to plea guilty. V.20,649. Others remembered 25 years. The offer was withdrawn when the state's case was significantly enhanced by Ozio and "Satan." *Id.*

[3]Satan testified Whitton said he killed Mr. Maulden because he had gotten the better of him in a fight, and for money. Satan swore he had not received any promises for his testimony. Ozio testified he heard a conversation between Satan and Whitton and Whitton admitted "stabbing the bastard." Ozio testified he volunteered this information to law enforcement and did not receive any benefit. At sentencing, Satan testified Whitton told him he killed the victim so his parole would not be violated.

not testify because he was threatened with perjury.[4]

II. SUMMARY OF ARGUMENT

Argument I. In a criminal prosecution, the State can strike hard blows, but not foul ones. *Berger v. United States*, 295 U.S. 78 (1935). In Mr. Whitton's case, the prosecution "corrupt[ed] ... the truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 104 (1976). For example, due to the weakness of its case, the prosecution offered a plea bargain for a term of years. But after the State secured the testimony of a jailhouse snitch appropriately called "Satan," and a frightened, jailed, teenager, Jake Ozio, to say Whitton confessed to them, the State's case looked better and a trial ensued. But both Satan and Ozio said later that the prosecutor made them testify and they were lying; the lower court would not hear the testimony about what they say really happened.[5] The State introduced evidence and arguments that were false or created false impressions, and suppressed material exculpatory evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), in a variety of other ways. For example, the prosecutor and sheriff knew that they had threatened an FDLE agent if she appeared to testify to the truth! She did appear, but with three other armed agents to keep her

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[4]Ozio's and Satan's depiction of the corrupt prosecution in this case resonates with how FDLE agents described it below.

[5]The prosecutor did not reveal that Satan was engaged to be married to the prosecutor's mother.

safe. This brazen intimidation of a law enforcement agent was not disclosed. These and a litany of other underhanded actions by the prosecution undermine confidence in the proceedings. *Kyles v. Whitley*, 514 U.S. 419 (1995).

Argument II. Defense counsel in a criminal case must subject the prosecution's case to the crucible of meaningful adversarial testing. *United States v. Cronic*, 466 U.S. 648, 656 (1984) They failed. Counsel could have shown, *inter alia*: the victim was virtually asking to be attacked by someone other than Gary Whitton, drunkenly waiving around a wad of cash that could "choke a mule" in broad daylight, looking for a prostitute; the victim had been attached shortly before this offense for engaging in the same drunken conduct, when he was "rolled" by a transvestite prostitute; Gary Whitton's car would have been blood soaked had he committed this crime; the victim's attack did not last 30 minutes (as this Court found) but no more than 5 minutes; and Gary was not in need of cash. Trial counsel's omissions singly, or cumulatively, undermine confidence in the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Argument III: During trial, jurors passed notes back and forth to the judge via a bailiff. These notes were first discovered in a sealed envelope in post-conviction proceedings. Under Florida law, the bailiff is "not to permit any person to communicate with the [jurors] on any subject except with the

permission of the court given in open court in the presence of the defendant or the defendant's counsel." Florida Statute 918.07 (2012). Such communication occurred in this case and it did not occur in open court. This is per se reversible error. Furthermore, the lower court erred by not allowing counsel to interview the jurors to find out what had happened, inasmuch as the trial judge and the parties do not remember.

Argument IV: Counsel were prejudicially ineffective at sentencing for failing to conduct a constitutionally adequate penalty phase investigation under prevailing professional norms. *Williams v. Taylor*, 529 U.S. 362, 368-70 (2000). Defense counsel did not go or send anyone to New York State where Gary Whitton was born and raised. The detailed post-conviction evidence from non-family members, family members, teachers, administrators, foster care witnesses and extensive mental health and brain damage evidence provides descriptions and details about the depth of abuse and neglect suffered by Gary Whitton which "far exceeded what the jury was told." *Johnson v. Sec'y, DOC*, 643 F.3d 907, 937(11th Cir. 2011). There is a reasonable probability the result would have been different with such evidence.

Argument V: The cumulative effect of all of the state statutory and federal constitutional violations in this case mandate a new trial.

V. ARGUMENT

ARGUMENT I: The Prosecution Was Corrupt[6]

It violates due process for the state not to disclose material exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963). Exculpatory evidence is material if it undermines confidence in the verdict, regardless of whether "disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 435. When two or more pieces of favorable evidence are suppressed, materiality "must be considered collectively, not item by item." *Id.*

A. The State's False Testimony

1. Satan lied

a. Concealing his sexual perversion

The state presented the false testimony that Wayne McCollough, aka, Satan, had nothing to gain by saying Whitton had confessed to him. On November 2, 1990, McCollough was arrested for deriving support from prostitution. Ex. 62, SV 1673. He was placed in the county jail, Whitton was there, and Satan testified at trial he first spoke with Gary about the case that November.[7]

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[6]**Standard of Review:** "*Brady* claims are mixed questions of law and fact. When reviewing *Brady* claims, this Court applies a mixed standard of review, 'defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law.'" *Johnson v. State*, 921 So. 2d 490, 507 (Fla. 2005)(citations omitted).

[7]The defense investigator testified below the defense knew the prosecutor and Sheriff used snitches and the defense warned clients, including Gary, not to speak with anyone about their

He said Gary told him he had gotten into a fight with Maulden, Maulden had beaten him up, and Gary came back later and stabbed him, killed him, and took the money they had earlier withdrawn from Maulden's bank account. R.1640,1643. Satan pled guilty to aiding and abetting prostitution and was released from jail January 3, 1991. He was rearrested for burglary in August 1991. He testified he again discussed the case with Gary in April, 1992, and said Ozio could have overheard them. Satan said Gary said this time "he killed the bastard." R.1645.

George Broxson was in jail and knew Satan before trial. V.20, 3927. Broxson said Satan was charged with "a type of sexual deviant crime" and "didn't want it known" and "therefore, he had made an offer to the state attorney's office and the sheriff had worked out a deal with him somehow." *Id.* 3929. "He stated something to the effect that he would do whatever it took for this crime not to come into the view of the public." *Id.* 3930.

During the post-conviction hearing, corroboration for Broxson's testimony surfaced. A transcript of a tape recording of a police interview with Sheila McCollough, Satan's then-wife, was discovered.[8] This is what led to Satan's 1990 arrest. She told

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case. V. 20, 3844. This should have been introduced at trial.

[8]A subpoena duces tecum was issued for Satan's lawyer's file and a motion to quash was denied. The transcript was in this file. The lower court's statement that "[o]bviously, Defendant's post-conviction counsel were aware of this transcript before the evidentiary hearing, as he submitted it as evidence in support of Defendant's motion" (V. 24, 4701, n.38), is inexplicable. It was submitted as evidence after it was discovered *during* the evidentiary hearing, as was fully explained to the court. V.20,

police she had sex with men for money while Satan also had sex with her, and Satan arranged it. He would go with her to truck stops for her to have sex with men and bring him the money. S.V. 9, 1676. They lived directly off of prostitution. *Id.* She was asked about Satan's "sexual habits" and whether her having sex with men "in his presence, did this happen quite a bit?" She said yes. *Id.* She stated Satan preferred black men and he would make Sheila have sexual intercourse with them at their home and then "he would have oral with her," i.e., "he would want to perform oral on you, not you on him? A. Right. After the black male had had intercourse with you? A. Right." *Id.* When she would have sex with men at the truck stop, he made her not use a condom and when she had had sex with a black man Satan always performed oral sex on her. Clayton Adkinson was the prosecutor of the case against Satan.[9]

3813-3819. It should have been disclosed to defense counsel.

[9]After Sheila's recorded statement, Satan was arrested and put in the County jail. It is reasonable to conclude he did not want men in jail to know his sexual desires. Jails can be sexually violent places. On January 2, 1991, he entered a negotiated plea of no contest to aiding and abetting a person to commit prostitution. SV9, 1691-94. Atkinson was the prosecutor.

The lower court wrote the recorded statement "is hearsay," V.24. 4701, but admitted it into evidence. V.30, 2819. The court also wrote "this Court is unable to surmise a situation in which the details of Mr. McCollough's previous crime would have been explored on the record." *Id.* 4701. Counsel for the State explained: "I think what the defense is trying to suggest is Sheila McCollough gave law enforcement...intimate proclivities of Kenneth McCollough...[which] could be used ..to blackmail Kenneth McCollough to testify in a certain way against Gary Whitton in exchange for non-disclosure of that information, in addition to, I assume, 'We'll give you a sweetheart deal for any pending case

b. Concealing his betrothed, the prosecutor's mother

Satan also had an intimate relationship with the prosecutor's mother, Inez Adkinson, which should have been fully revealed by the State and/or discovered by defense counsel. A PSI was prepared--on Satan's burglary charges from 1991 that resulted in his being placed back into Walton County jail--before Satan testified against Whitton. In it, Satan listed "Katie Inez Adkinson" as his "next of kin."[10]

On June 11, 1992, Satan, who was in prison for the burglary charges, filed a written request to have his "girlfriend," Inez, visit him in prison. He wrote "we have plans to get married when I get home." Ex. 48 B1. On June 17, 1992, Inez wrote on a visitation form that she had known McCollough for 15 years. She visited Satan on June 25, 1992. *Id.* The trial in this case occurred in July, 1992.[11] On November 18, 1992, the prison

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you have now and since you helped us out before, we are reducing the felony to a misdemeanor and we're going to have some long standing things with you as an informant.'" V. 20, 3814.

[10]The lower court would not consider the PSI: "it would not have been discoverable material" because it was under seal at the time of trial. V20, 3828. Surely the prosecutor had an obligation to let defense counsel (and the jury) know that his star snitch witness was the prosecutor's mother's next of kin!

[11]The lower court would not consider this evidence but "it's proffered and it will be part of the record." V. 20, 3833.

The lower court also wrote that "[t]he fact that Mr. McCoullough and Ms. Adkinson maintained some sort of relationship was considered by the jury at the time of Defendant's trial," citing to the trial transcript. *Id.* at 4700. The only thing that appears on the cited page is that Ms. Adkinson was a "close personal friend" who visited Satan in jail. And prosecutor Adkinson then defended his mother: "disbelieve his testimony, I

approved a visit for Inez, Ex. 48B2 ID, Satan's "girlfriend." She visited seven times before he was released, Ex. 49 ID, and then he moved in with her. Ex. 48.[12]

Kenneth McCollough, Jr., testified Satan was his father and he lived with him for two weeks in 1994. He testified his father was living with Inez Adkinson, the mother of the prosecutor in this case, Clayton Adkinson. He said they lived together as boyfriend and girlfriend. V.18, 3595.

c. Satan confessed to lying at trial

Paula Saunders is a public defender and was assigned Whitton's appeal. She testified her office received a letter from Billy Key "indicating he had met Kenneth Wayne McCollough in prison and McCollough had recanted the testimony that he had given against Whitton at trial." V. 18, 3536; Ex. 45, SV 4, 781-795. "McCollough wants to sign a sworn statement that the State Attorney, Clayton Adkinson, made him a deal to testify to something he knew nothing about, and that Clayton told him everything to say, that [Whitton] did not tell him anything about the crime." He "wanted to retract his testimony."[13]

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suppose, because my mother knows him. And what that has to do with this case, I don't know. **Mr. Bishop knows it doesn't have anything to do with it either.**" Tr. at 1996 (emphasis added).

The defense investigator from trial testified he did what the defense attorneys asked him to do and he did not investigate the relationship between Satan and Inez Adkinson. V.20, 3866.

[12]The lower court would not consider this evidence.

[13]The lower court wrote (at first) it would not consider the contents of these letters for their truth, but admitted them on

Saunders made two telephone calls, one to Bill Bishop (trial counsel)and one to Michael Minerva (CCR). Minerva advised her to "get sworn statement from McCollough now...and pin him down as much as possible." *Id.* Her notes and her letter reflect a telephone conversation with Bishop on November 1, 1993, in which she wrote she "will send him copy of the [Key] letter and he will pursue it." In her letter she wrote "it would be a good idea to pursue this information as quickly as possible." *Id.* She spoke with Bishop again on November 19, 1993. Her notes reflect Bishop had spoken with Satan who was concerned with a perjury charge. Also on November 19, Key wrote another letter to Saunders:

> Gary's Public Defender, Bill Bishop, showed up here yesterday to talk with Wayne. Mr. Bishop stated that they would probably prosecute him for perjury, and according to Wayne, Mr. Bishop stated that he would help on his prosecution and that he didn't like Wayne anyway. So, with this attitude, needless to say, Wayne wouldn't talk and told me he would only talk to Gary Whitton's ... appellate counsel and an investigator, since the others were from the county he was prosecuted in "Walton County."

Id.[14] Saunders wrote Whitton on December 23, 1993, to advise him of these developments. She recounted the two letters from Key and

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the issue of whether counsel were ineffective for not following up on the letter. V. 18, 3546.

[14]Bishop testified he did not go and see Satan. V.20, 3968-3970. Saunders made it up? In any event, the lower court used this second letter to deny relief: "Defendant presented evidence at evidentiary hearing that showed Mr. McColllough had refused to recant for fear of facing perjury charges," citing this exhibit. V.24, 4702. Not only had the court previously refused to consider the letter's contents for their truth, *see* note 13, *supra*, but also the exhibit does not say Satan refused to recant. He refused to recant to the defense lawyer who threatened to help prosecute him! He asked to speak to Whitton's appellate counsel.

"that McCollough is willing to talk only to me" and "I will pursue it." She wrote "I have decided that it would be best to contact McCollough now." However, she did not actually pursue it. She did not try to talk to Satan. V.18, 3541.[15]

Key testified. He lives in Fort Walton Beach and has his own business. In 1993 he was in prison and was a law clerk in the prison library. He wrote Ex. 45 to the P.D. Office, and it reflected what had actually happened. V.19, 3759, 3761. Satan came to the prison law library where Key was a law clerk and asked him to find out who Whitton's appellate attorney was because "he wanted to retract his statement of what he testified in court because he didn't know anything about the case." *Id.* 3765. "He told me that he made a deal to testify; that he knew nothing about the case; he said that Clayton told him everything to say and that the above person, Gary, didn't tell him anything about the crime whatsoever." V.19, 3772.[16]

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[15]She did write to Wilmer Adkinson, an inmate Whitton told her about, on March 24, 1994, to ask what he knew about Satan. He wrote back that he would be happy to discuss it with her. Ex. 45. She did not follow up on this either.

[16]The state objected to this testimony, counsel for defendant argued that the witness was recounting Satan's statement against penal interest, and the court reserved ruling. Ultimately the lower court ruled it would not consider Key's testimony. V20, 3804. The court erred by not considering this testimony as it reflects a statement against penal interest. After excluding this testimony, the court wrote "Defendant presented no evidence at evidentiary hearing that showed Mr. McCollough ever actually recanted," and cited to page 576 of the transcript. V24, 4702. Page 576 is V. 19, 3766, and the only thing relevant on that page is that Satan never gave a <u>sworn</u> statement recanting. One can recant without swearing.

2. Jake Ozio lied, but the State sealed his lips

Jake Ozio also lied. In an affidavit, Ozio swore:

> In April 1991, I was arrested on burglary, grand theft and felony possession of a short-barreled shotgun and taken to the Walton County (Florida) jail. I was arrested with a friend of mine, Kelvin Wallace, who was placed in a different cell. Kelvin and I had come to Florida together from Texas for spring break.
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> I was in a cell with Gary Whitton, Kenneth Wayne McCollough and Michael Wayne "Patches" Johnson. I had just turned 18 in December 1990, and when I was arrested I was very scared, since I'd never been arrested on felony charges before. Walton County Sheriff officers told me that the weapons charge carried a 5-year minimum mandatory sentence which made me even more scared. I was terrified of having to do hard time, a long way from my family and friends, and in an unfamiliar place. I have never been more scared in my life than I was at this time. I was committed to getting out as fast as possible.
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> I testified at Gary Whitton's trial that I overheard Gary admit to stabbing a man. I also testified that no one made me any promises in exchange for my testimony. The truth is that I was scared and felt pressured by the police and knew this testimony could help me and Kelvin....**I never heard Gary Whitton admit he had killed anyone, and I never heard him say that he stabbed anyone.** The Whitton case was big news around the jail at that time. I remember a guard poking around the cells trying to find information about the Whitton case.
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> ....
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> Captain Trusty told me that I could really help myself if I could tell him anything about Gary Whitton's case. Captain Trusty was the one who brought the subject up.
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> I had daily contact with my co-defendant and close friend, Kelvin Wallace. I felt great pressure to help him in any way I could. Walton County Sheriff officers told me repeatedly that I was going to do five years. I was told point blank that if I wanted to get out of doing five years, that I had to help them. **I was told explicitly that in exchange for my testimony against Gary Whitton, the five-year minimum mandatory weapons charge would be dropped.** I felt like I had no choice. ...I told them that anything having to do with me had

to include Kelvin Wallace as well. **They told me explicitly that if I testified against Gary, Kelvin would get the same deal I got.** Had Kelvin and I not both been getting out, I never would have agreed to testify.[17]

Before I had these conversations with members of the Walton County Sheriff's office, there was no movement in my case. Following my agreement to testify, my case moved so fast I could barely keep up with it. I was also given a trusty position at the Walton County jail. There is no doubt in my mind that this was a result of my agreeing to testify against Gary Whitton. I was told by Walton County Sheriff officers that they wanted my case wrapped up before the Whitton trial, so that I could appear in street clothes and thus would appear to be more reputable....

When Gary Whitton went to trial, I was flown to Florida for my testimony. After my testimony, I was told never to return to Florida. I never received any paperwork from Florida, nor had to serve any conditions of my parole. Ex. 47, S.V.4,798.

Ozio was a necessary witness below. The state successfully sealed his lips.[18] If we take the allegations in the Rule 3.850

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[17]Kelvin Wallace testified below he and Jake Ozio were arrested together. They were childhood friends, 18 years old, on spring break, and in high school. They were staying in a place that was not theirs and started pawning things that were not theirs. They were arrested and charged with theft and burglary. Wallace thought he would get at least two years in prison. But one day they went to court, he did not see a lawyer, and he was released the day after. He was in jail for 4 ½ months, and then suddenly he was free to go on probation. V18, 3464. He and Ozio had the same court date and left together. He testified within the first month in jail Ozio became a trusty and Wallace was in regular population. Wallace would like to have been a trusty. You get to do things instead of staying in one cell confined to one bunk. V.18, 3464. When they got out of the Walton County jail, **Ozio told Wallace that if it was not for Ozio, they'd both still be in jail in Walton County.** He did not go into detail and Wallace did not ask. *Id.* 3469,

[18]Ozio was in Washington State when the evidentiary hearing was conducted. An attorney spoke with Ozio on a pro bono basis and advised Ozio would not voluntarily attend. Thereafter, the lower court issued a certificate for out of state witness

motion as true -- and there is, in fact, a sworn affidavit supporting these allegations - then the state had Ozio lie at trial in order to convict Whitton. Now the state threatens Ozio with perjury and prison if he tells the truth, and succeeds in preventing even his deposition.[19] These circumstances themselves present a due process violation under the Fourteenth Amendment.[20] This case should be remanded so as to have Ozio testify.

B. The State Threatened FDLE Agents; These Actions Showed Exculpatory Desperation Which the Jurors Should Have Heard[21]

An FDLE lab technician wiped a piece of gauze across spots on Whitton's boot to determine whether the victim's blood was

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requiring Ozio to attend a continued evidentiary hearing. However, because counsel for the state would not assure Mr. Ozio he would not be prosecuted in Florida for perjury, the Washington court would not require Ozio to attend the Florida hearing. However, the Washington court did agree to continue to exercise jurisdiction over Ozio for the purpose of requiring his deposition and/or further response to service. The state opposed a deposition in Washington, arguing the Washington court had erred by finding it would be an undue hardship for Ozio to be required to come to Florida. The lower court ruled it would not allow a deposition of Mr. Ozio. V.21, 4155-72.

[19]The lower court wrote that even if it heard from Mr. Ozio the court would "find Mr. Ozio's affidavit statement to be unreliable as Mr. Ozio was obviously unwilling to stand behind his word and accept the consequences of his actions." V24, 4703, n. 44. As shown *infra*, not even an FDLE agent would appear to testify in this case without three armed, FDLE, escorts.

[20]The State hired Satan and Ozio and violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. *United States v. Henry*, 447 U.S. 264, 271 (1980).

[21]The lower court analyzed this solely as a *Giglio*, false evidence, claim. V24, 4705. The post-hearing brief plainly labels the claim a *Brady* claim (Suppress Exculpatory Evidence), as did the Amended 3.850 Motion. V. XII, 2270

there. It was sent to the crime lab, Agent Shirley Ziegler tested it, and *the blood matched neither the deceased nor the defendant*. Ex. 3, S.V. 1, 3-3.[22] The prosecutor (Adkinson) and the Sheriff (McMillian) threatened Ziegler with physical harm, tried to make her avoid service, and promised her she would not testify.

1. The Sheriff and prosecutor terrified FDLE Agents

Agent Ziegler was scheduled to leave Jacksonville Thursday and testify Friday. She received numerous phone calls on Thursday - "the phones were ringing off the hook all afternoon" (V.17, 3203) - sometimes taking up both of the lab's telephone lines. *Id.* 3200. She had originally been subpoenaed by the defense. *Id.* 3202. Then the state called to say they had subpoenaed her instead, so the defense released her. Then "[t]he state attorney's office called and told me they didn't want me to come, but they didn't want me to hang around so the defense could subpoena me again." *Id. The Sheriff then contacted her because the defense was trying to re-subpoena her; he told her to avoid the subpoena.* They were upset because "the blood didn't match." "Mr. Adkinson called again and told me that he was going to discredit me and FDLE and DNA in particular and he definitely did not want me in the courtroom in the courthouse" *Id.* 48-49.[23]

The most frightening conversation was with McMillian who

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[22]Ziegler started the DNA lab in Jacksonville in 1989, and performed DNA work in 14 cases a month. V.16, 3190.

[23]To backup his threat, Adkinson demanded to see the DNA work Ziegler had performed in every FDLE case. V.17, 3214.

told her to leave the lab immediately and go home. She said she could not do that "[and to paraphrase what he said, 'If I did come to Defuniak I definitely would not testify.'" *Id.* 3200-3201. This upset her because

> I knew that FDLE had investigations going on here in DeFuniak about the sheriff and some of the things that were going on in the office[24] and frankly I was very upset. I didn't like the **menacing tone of voice** that was being used by both the sheriff and the state's attorney in this case. I figured I was just one individual. They had an entire office of deputies and that I could disappear very easily if they wanted. (V.17, 3201)[25]

2. The armed response (to prosecution actions) by FDLE

Before she left the office Thursday, Ziegler prepared a report about McMillian and Adkinson so Marion Estes, the acting director, would "know what was going on." V.16, 3196, Ex. 4, S.V. 5-6. She also told Director Estes she was afraid to go to court alone "because of the threats I had received." V.16, 3196. Director Estes told her he would contact the Commissioner's office. V.17, 3201. He apparently called the Commissioner who called the bureau chief, Steve Platt. Chief Platt called Ziegler and said he would "escort her to the courthouse and that we would meet two agents from Pensacola," for her protection. *Id.* 3202.

Platt was Ziegler's colleague and one level of supervision

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[24]The state did not disclose the exculpatory information that the Sheriff's Office was being investigated for "goings on."

[25]Ziegler's husband testified "we got very agitated and scared." V.17, 3217. He had never seen her frightened before by anyone or anything but she was "very frightened." It was "pretty scary." *Id.* 3223.

above her. He knows she is not easily excited or scared. *Id.* 3228. He testified Ziegler "reported to me a series of phone calls that I think involved the state attorney's office, and maybe local law enforcement." *Id.* 3229. He said "she talked it over with her husband" and "she was obviously very tense and concerned about her personal well-being." *Id.* That night he arranged for two other agents from the Pensacola office of FDLE to rendezvous and "escort us into the courthouse," id., because "[w]e were concerned for her well-being." Id. 3230.

Agents Platt and Ziegler drove to DeFuniak Springs. Ziegler told Platt she felt she had been physically threatened. *Id.* 3231. They met with Agents Smith and Norad, Platt asked if they were armed, and they said they were. Platt was also armed because they were "there for her personal safety." *Id.* 3230, 3235.

3. The showdown-"come with me"

Ziegler, sitting in the courthouse, was abruptly approached by Adkinson who said she was going to go with him to the Sheriff's office. "And he politely grabbed me by the arm by the elbow and started to lift, you know, kind of like you're coming with me type attitude." *Id.* 3204. The three agents walked over and said "she is not going anywhere with you unless we accompany you," and "[t]hen he got very nice." *Id.* 3205. Ziegler was being facetious when she testified that Adkinson had "politely" grabbed her arm. In fact, he was forceful and demonstrative: "He grabbed ahold of my arm and kind of rather in a forceful manner said we're going to the sheriff's office." This frightened her, but

"I knew I had three agents there with me. But if I had been there by myself I think I would have been petrified." *Id.*[26]

4. What the defense knew and did not do

Counsel for the State asked Ziegler what defense counsel knew about all of this at the time she testified at trial. She responded that defense counsel knew that the defense had subpoenaed her, then the state did, then the defense released her, then that the state told her they did not want her to come, and that the defense re-subpoenaed her. *Id.* 3212. "That's as much as I know that he was aware of." *Id.* 3213.

During trial, defense counsel moved for sanctions stating that he had learned that McMillian had told Ziegler to "leave the lab" so that she would not be served by the defense for testimony. TT 1888. That's all. The prosecutor did not advise the Court that he had just tried to force Ziegler out of the courthouse and to the Sheriff's office, but had been foiled.[27]

C. Suggesting There Were Two DNA Samples

At trial, FDLE Agent Lonnie Ginsberg testified for the state that Type A blood was found on Whitton's boots. Type A is consistent with the victim and inconsistent with Whitton, who is Type O. The state tried to show that the blood Ziegler and

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[26]She worked for FDLE for 12 years, testified more than a 100 times, and never saw anything like this. V.17, 2306.

[27] Defense counsel filed a motion for new trial with a claim the court erred by "[f]ailing to grant Defendant's motion for Sanctions and Motion for Mistrial." ROA 655. At the MNT hearing, counsel added nothing and offered no proof. *Id.* Vol XII, p.2268.

Ginsberg tested came from two different samples from different areas of the boot. If there were two different samples, it would not matter that Ms. Ziegler's "particular sample," ROA 1953, did not match the victim. In closing argument, the state argued Ziegler received a "swab" from Mr. Ginsberg, "not a gauze pad, as Lonnie said he took that blood off there with." R. 1954. But Ziegler and Ginsberg did test **the same blood sample**, and the state knew it. As Ziegler testified below, a "swabbing" is just "a piece of gauze." V.16, 3192. The size of the gauze depends on who does the initial analysis. Lonnie Ginsberg did the swabbing and the gauze was very small, approximately a square centimeter. *Id.* 3192-93. Thus, the prosecutor falsely argued that Ziegler had a "swab" while Ginsberg had tested "gauze."[28]

D. The prosecution: "We are not gonna bring it up"

The state was frustrated with the fact that the FDLE DNA tests did not support their case. It began a hunt for an outside lab that would help. Lt. Mann from McMillian's department recorded a conversation he had with a person at Serological Research Institute (SERI):

> "Now we find out that the girl who did the DNA, this was her first case."
>
> "So we've got problems" because the DNA does not match. (Laughter)
>
> **"Our Sheriff [McMillian] has been rattling cages up in Tallahassee. He's very vocal"** said Mann
>
> **"[the] Sheriff's not too keen on FDLE DNA analysts**

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[28]The lower court ruled only under *Giglio*. V24, 4707.

right now"

The agent from SERI told the state:

"as you say the defense attorney is going to have a field day with this"

Mann replied:

"Oh definitely yes, yea, there's no doubt"

"yep we're not gonna bring it up and I'm sure he is" (laughter)

"Well I'm sure at this point that the FDLE analyst would be subpoenaed by the defense"

Mann then said how he wanted to contradict Ziegler:

> hopefully we can come back and say, well, we were able to do, uh, not go so far maybe as far as DNA but with what blood we had we were able to do this other test. You know. That is where you come in.

Mann said what blood existed and that the Sheriff "is not too keen on FDLE." Ex. 11, SV1,46-65.

This tape recording was found at the Florida repository. Defense counsel was not told about it,[29] knew nothing about the efforts by the Sheriff's department to undermine FDLE, did not know there was additional blood to be tested that did not connect Defendant to the crime, did not know that there was this taped conversation, or that the Sheriff was "rattling cages" concerning Ziegler, not just during trial, but back at a time when "we haven't even had depositions yet." *Id.*[30]

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[29]The defense investigator was not aware of this contact between Mann and SERI. V.20, 648. Defense counsel responsible for the guilt/innocence phase also did not recall. V.20, 3964-67.

[30]The lower court erroneously found this tape recording "does not contain any exculpatory evidence." V20, 4706.

E. Cellmark-Insufficient vs. Inconclusive

The State also used a company called Cellmark to attempt to discredit FDLE. The Cellmark Report given to trial counsel stated that there was not enough HWM (high molecular weight) to test. Ex. 16, S.V.1`, 106-129. However, Cellmark records, not provided to the defense, reveal: "HMW (high molecular weight) DNA was extracted from the boot - he wanted to know where the stains from the boot were taken - inside the boot the best- called Clayton [the prosecutor] and left message about **inconclusive** results." *Id.* Ex. 16. Cellmark tested and reported to the prosecutor they could not connect the victim to the boots. This is not the same as not being able to test, and is exculpatory.[31]

F. *Whitton v. State*, 649 So 2d at 863, "a receipt indicating that Whitton obtained a car wash on October 10 at 2:37 a.m was found in his car;" not true

The person who committed the crime would have been covered in blood. The state's theory was Whitton cleaned his car at a car wash to remove blood, which Whitton denied. The state used a car wash receipt found in Whitton's car to attack Whitton's credibility. Despite unequivocal evidence in the possession of the state that Whitton did not use this car wash ticket, the state elicited testimony and presented false argument that he did.[32] A Walton County Sheriff's Report reveals:

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[31]The lower court found that the state suppression of this result was not prejudicial. Vol. 24, 4710.

[32]In his examination of an employee of the car wash, the prosecutor asked "When you use the car wash, now, do you have to actually use that ticket to use the car wash?" answer: "Yes, sir.

> The code number printed on the car wash machine was a "one time deal" and could be only used once. The code # was inserted by the above Investigator as indicated on the wash ticket found in Whitton's car and the car wash started. ***Whitton did not use the car wash at the Conoco Station with the receipt found.***

Ex.6, SV1, 31.(emphasis added).[33] *See also* Ex. 43, SV4, 772-73.[34]

You would have to punch in this code right here." And to the question: "So could they get a car wash and just punch in the numbers and then put the ticket in the floorboard or wherever they wanted to?" the answer was " Yes, sir." (R. 1520). During cross examination the state confronted Whitton about the imaginary car wash: "Q. You get in your vehicle, you drive back to Pensacola and you casually stop and get gas and get a car wash." Mr. Whitton said "I never got a car wash." (R. 1874). The state argued to the jury "wouldn't it be reasonable that the defendant would have washed his car out after he had been in that motel room and having beaten James Maulden to death and having gotten blood all over him." (R. 1987-1988).

> He'd been to a gas station where there was a car wash. That he got a ticket for that car wash. **All he had to do to use that car wash was to just punch in the numbers.** So he was active during that, that period of time, not just sitting around doing nothing. Cleaning his car....

(R.1888-1889). "He gets back in his car, drives back to Pensacola, goes by a car wash." (R. 2001)(emphasis added); *see Whitton v. State*, 649 So 2d 861, 863 (Fla. 1994)("a receipt indicating that Whitton **obtained a car wash** on October 10 at 2:37 a.m was found in his car.").

[33]The lower court wrote the attendant who prepared the car wash ticket testified if you put 8 gallons of regular gas you get a single wash but with super a double wash, and that the ticket was for a "double wash." Thus the State could argue that Whitton washed his car once. V. 4712, 5264. In fact, the manager of the station told Officer Mann that "the holder of the carwash ticket would have had to get 8 gallons of Super unleaded gasoline in order to get the free car wash [singular].," SV 42, and the card itself stated "one time deal." *Id.* If anything, the testimony of the attendant is seriously subject to challenge by her manager and by Officer Mann.

[34]Counsel testified he did not remember if he knew at trial there was a written report that the car wash ticket had not been used. V.20, 3558. The defense investigator testified he

G. Lying to Maureen Fitzgerald; *Not True*

The state contended Whitton did not want Maureen Fitzgerald, the victim's ex-girlfriend, to know what hotel the victim was staying in. In Fitzgerald's testimony, she could not remember if she wrote down the hotel name that Whitton told her, and the state referred her to her 10-15-90 statement in which she wrote "Sun Den or Sun Dun." R. 1497. The state cross-examined Whitton as follows: "And you say [you told her] he was at the Sun and Sand, right?" And "she testified it was Sun, that you told her it was Sun Den." In fact, Whitton gave her the correct name all along and the prosecutor knew it. When Fitzgerald was interviewed by Officer Sunday on 10-11-90 she clearly knew the name of the motel: "and he [Whitton] carried him to a motel in Destin, **she thought it was the Sun & Sand Motel**." Ex. 5, S.V.1, 7-19 (emphasis added). The state argued to the jury: "he gave her a different name than the Sun and Sand Hotel." R.1950.[35]

H. The Corrupt Prosecution

"Deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with

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believed the defense knew this fact. *Id.* 3852. The lower court sustained the state's objection to "was that something that you expected to be used as part of the defense" and "was he surprised when it didn't happen." *Id.* Counsel proffered below the investigator believed the car wash ticket not being used was to be a part of the defense, was surprised by it not being used, and has no explanation for the omission.

[35]The lower court held Defendant "failed to demonstrate that the outcome of his trial would have been different if the State had not made this argument." This is not the prejudice standard.

rudimentary demands of justice." *Giglio v. Mooney*, 405 U.S. 150, 153 (1972). The prosecutor knew Whitton had not lied to Maureen, had not washed his car, the blood evidence was inconclusive, and that he and the Sheriff had threatened Ziegler and she was being protected by three other FDLE agents, among other things. The snitches showed how corrupt the prosecution was, but the lower court's treatment of them ranged from not considering evidence (unless it supported the state's position-letters from Key), to wrongly excluding testimony altogether (Ozio).

"'[F]airness' cannot be stretched to the point of calling this a fair trial." *Kyles*, 115 S.Ct. at 1551. Had counsel known the facts in this case they could readily have "[a]ttacked the reliability of the investigation," *id.* at 1572, "raise[d] a possibility of fraud," "[u]ndermine[d] the ostensible integrity of the investigation," *id.*, and "discredit[ed] ...the police methods employed in assembling the case." *Id.* There simply was not "overwhelming evidence that [Gary Whitton] was the murderer," *id.* at 1574, and there can be no "confiden[ce] that the jury's verdict would have been the same" if the state had not misbehaved. *Id.* at 1575. The truth is the case against Gary Whitton is "considerably weaker than the one heard by the first jury" and "the prosecution's blatant and repeated violations of a well-settled constitutional obligation ...deprive[d] petitioner of a fair trial." *Id.* at 1575-1576.[36]

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[36]When the lower court considered these claims under both *Brady* and *Giglio* cumulatively, it wrote "some of the actions

ARGUMENT II: INEFFECTIVE ASSISTANCE AT GUILT/INNOCENCE

The state's theory at trial was that, because Whitton was desperate for cash, he went to the victim's motel room at 10:30 p.m. and killed his friend by beating him for thirty (30) minutes (elicited by defense counsel). Whitton left the motel at 12:30 a.m. and drove back to Pensacola. The state introduced a car wash ticket taken from Whitton's car, bearing the time 2:37 a.m., and argued the car wash ticket was used by Whitton. Counsel should have discredited this and other evidence. Lawyers have "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Ineffective assistance of counsel occurs when counsel acts contrary to professional norms, with prejudice resulting. Prejudice is proven if there exists a reasonable probability that the result in the case would have been different. *Id.* Counsel were ineffective.[37]

A. Car Wash Ticket

Trial counsel tried to develop information it was not possible to determine whether Whitton had used the car wash ("Q. You cannot tell whether or not the car wash was used or not, can

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alleged to have occurred by State actors is not admirable or condoned," but none showed constitutional violations. V24, 4715.

[37]**Standard or review:** Ineffectiveness is a mixed question of law and fact, reviewed *de novo*. *Evans v. State*, 946 So. 2d 1, 24 (Fla. 2006). As to findings of historical fact, this Court will not substitute its judgment for the trial court's so long as "competent substantial evidence" supports the findings. *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997).

you? A. No, sir.")(R. 1523). If trial counsel knew about the report that proved Whitton had not used the ticket, they provided patently ineffective assistance. *See* Arg. I, F, supra.[38]

B. Fingerprint Evidence Inside Sandwich Wrapper

There was a cellophane wrapper from a sandwich sold commercially found in the hotel room. On the inside of the wrapper-the side that touches the bread-there was a fingerprint and a palm print that did not match either the victim or Whitton. So another person ate a sandwich in the motel room. However, the state asked the FDLE fingerprint expert at trial whether the prints could have been placed on the plastic during the manufacturing process and the expert said that it could have. ("Q. It could just as easily have been made by the person [at the time the sandwich was made] as the person that opened the [sandwich] bag. A. That's correct, sir.") R. 1811.

This is not true. Had counsel asked the actual manufacturer of the sandwich and the sandwich bag, counsel would have learned that it is virtually impossible to get a fingerprint (much less a palm print) on the inside of the sandwich wrapper during the manufacturing process. Ex. 46, SV 4, 796-97; V19, 3730.[39]

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[38]The lower court wrote that the sheriff's report was hearsay (yet, admitted it into evidence) and, given the trial testimony that a "double wash" was provided, it would make no difference. V24, 4712. The Sheriff's report rebutted all of this. *See* note 33, *supra*.

[39]The defense investigator was not asked by counsel to investigate the prints. V.20, 2845. Prints on an ice bucket, a wine bottle, and a small paper bag did not match Whitton or the victim. R. 1794-1799. The lower court improperly here, and

C. Obstruction of Justice

Witnesses would have testified that Agent Ziegler was threatened with physical harm in an attempt to prevent her from testifying. Thus, she traveled to court accompanied by three armed FDLE agents, at the direction of the Commissioner of FDLE. She was accosted by the prosecutor whose antics only stopped when three armed FDLE agents intervened. Evidence that the State would threaten a law enforcement officer whose only intent was to tell the truth would have helped the defense case, based as it was on challenging the truthfulness of witnesses (like snitches) who might have been similarly threatened. Counsel unreasonably and prejudicially failed to ask and determine the extent of the Sheriff's/prosecutor's misconduct, seek a mistrial based upon the full facts, and introduce this evidence to the jury.[40]

D. Cellmark-Desperation

After Ziegler reported that blood on the boots was not helpful to the state, Adkinson sent the boots to CellMark. CellMark reported that nothing useful to the state could be determined. Ex. 16, S.V. 1, 106-129. Trial counsel was aware of and unreasonably did not introduce these facts.

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throughout its order, applied an outcome determinative prejudice test; i.e., Defendant had to show that this sandwich-wrapper fingerprint evidence "would have changed the result." V24, 4720.

[40]The lower court incorrectly wrote that "counsel would not have been permitted [at trial] to present the state's misconduct to the jury." V24, 4722.

E. Fight lasted five minutes at most (not "thirty minutes," *Whitton*, 649 So.2d at 867) and it is not possible to determine if the victim "was aware of what was happening to him." *Id.*

Accurate scientific testimony regarding the time and manner of death was crucial to the defense. Trial counsel did not consider consulting an independent medical examiner. V.20, 3970.[41] From the testimony of the state's forensic pathologist, both the trial court and this Court concluded that the "attack" lasted thirty minutes[42] and Maulden "was aware of what was happening to him" and "felt pain." *Whitton*, 649 So.2d at 867. Had defense counsel properly prepared, these conclusions would not have been possible.[43] The failure to retain/consult with a forensic pathologist was prejudicially ineffective.[44]

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[41]The lower court did not find this to be reasonable attorney performance but decided the ineffectiveness issue solely on prejudice grounds-the wrong prejudice grounds, i.e., the evidence must produce "a change in the outcome of defendant's case," V24, 4729, or "demonstrate that the results of his sentence would have been different." V20, 4732.

[42]Defense counsel unreasonably and prejudicially asked the state's medical examiner, on cross-examination, how long the fight went on, and the medical examiner stated thirty (30) minutes. **The state argued defense counsel "got the answer he wasn't expecting...'Roughly thirty minutes'"** R. 2235 (emphasis added). The lower court did not address this grievous error.

[43]According to the defense investigator, the state pathologist, Dr. Kielman, was elderly and his work had deteriorated. For example, he performed an autopsy in 1992 - the year of Whitton's trial - and declared that the death was accidental. It was later independently determined to be murder. Dr. Kielman's professional problems stemmed from surgery he had had on his brain. V.20, 3867, 3851, 3862.

[44]*See Steidl v. Walls*, 267 F. Supp. 2d 919 (C.D. Ill. 2003); *Cravens v. State*, 50 S.W.3d 290 (Mo. Ct. App. 2001); *See also Gersten v. Senkowski*, 426 F.3d 588, 607 (2nd Cir. 2005)

Dr. LeRoy Riddick testified before the lower court and the state did not dispute his expertise.[45] He had reviewed several volumes of materials before arriving at his opinions. *See* Ex. 50, S.V. 5, 876-1001, S.V.6, 1002-1059.[46] He read the medical examiner's testimony from trial and concluded that **it was not plausible, not even possible, that this episode lasted thirty minutes.** V.19, 3692. He testified it lasted "[n]o more than five minutes." *Id.* 3693, 3713. It could well have been less than five minutes, but not more. *Id.* 3694.[47]

He also testified that it is not possible to conclude to a reasonable degree of scientific certainty whether Maulden actually experienced fear, pain, or suffering. First, "[t]o experience pain you've got to have an intact nervous system. Mr. Maulden had a blood alcohol content of .356 grams. So his central nervous system was depressed on that." *Id.* 3693. Second,

> endogenous morphine like chemicals, endorphines, kick in and sort of smooth things out. I know Dr. Kielman

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(affirming 299 F. Supp. 2d 84 (E.D.N.Y. 2004)); *Draughton v. Dretke,* 427 F.3d 286 (5th Cir. 2005).

[45]Dr. LeRoy Riddick is a well-respected forensic pathologist who has testified over 500 times in state and federal court, "[u]sually for the state." V.19, 3685.

[46]He reviewed all crime scene photographs, law enforcement and FDLE lab reports, sheriff's office investigative reports, autopsy report, the medical examiner's file, and trial testimony. It was error under *Strickland* for the lower court to discount entirely the effect that Whitton's post-conviction expert's testimony might have had on the jury or the sentencing judge. *Porter v. McCollum,* 558 U.S. 30 (2009).

[47]Riddick said a boxing round lasts 3 minutes and "a whole lot of blows can be inflicted in that amount of time." V19, 3705.

> indicated that because of adrenaline and the rush, that it might have overcome the alcohol. But those - If you're in a fight or whatever where it's- where the adrenaline goes, people can get hurt and they don't realize they're hurt until after everything stops.

Id. 3694. Third, "[h]e lost a lot of blood, so he's not profusing his central nervous system, so once again, his central nervous system was not intact." *Id.* Thus, "[b]ecause of blood alcohol, because of blood loss, and maybe because of the adrenaline and maybe in terms of some evidence of normal hormones that kick in in a situation like this; endorphines...**there is a possibility he was not feeling anything at the time.**" *Id.* Thus, he completely disagreed with the state's pathologist and concluded that it is simply "very difficult for the pathologist to opine about what people feel"and it was not reasonable for a physician to opine that there was pain and suffering. *Id.* 3695.[48]

F. Mr. Whitton Was Not Present at the Time of Death[49]

Trial counsel was prejudicially ineffective *vis-a-vis* time of death. Dr. Kielman testified broadly regarding the time of death, setting it at within 24 hours of discovery of the body. So it could have been 8 hours earlier; it could have been 24. Dr.

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[48]On cross-examination, Dr. Riddick testified even if there were defensive wounds "I can't testify exactly what he was feeling at that time, given the degree of alcohol that he had, the degree of adrenalin he had, and other things." V.19, 3701 "People that have been in combat and ...get all sorts of wounds and get out of it and then they look down and find that, you know, they've been hurt. I just think its very difficult for a pathologist to do that." *Id.*

[49]The lower court again applied the wrong standard-that the testimony presented would not have persuaded the jury, V24, 4735, and did not address the effect of the evidence at sentencing.

Riddick testified that in fact the time of death was between twelve and eighteen hours before Maulden was found at eleven o'clock in the morning. *Id.* 3693. It was at least twelve, and could have been eighteen hours earlier, meaning it could have been from 2:00 p.m. the previous afternoon to 11:00 p.m. the previous evening, *i.e., times when Mr. Whitton was not there.* Dr. Riddick based his conclusion on several scientific facts. First, when Lt. Mann arrived at the scene at 11:00 a.m. the body was in full rigor mortis and it takes "twelve hours to be in that sort of situation, and - and it could be longer to get in full rigor mortis." *Id.* 3709. Second, Dr. Kielman's notes say the time of death was "___ p.m.," meaning Dr. Kielman thought the time of death was the day before, before midnight, rather than the same day the body was found. *Id.* 3710.[50]

G. Evidence Rebutting Motive; Whitton Was Not Desperate

The State's theory was Whitton murdered his friend for money. Trial counsel was prejudicially ineffective for failing to show Whitton had money from other sources and was not desperate for cash. For example, Whitton had cash from Debra Sims. He testified Sims paid half of the utility bills and she had recently given him her half.(R. 1842, 1844.) He had $200 the Sunday before the victim was killed, including "money from my paycheck, plus what she'd [Debra Sims] give me, plus I had sold

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[50]Riddick testified on cross-examination he also considered what Kielman had said about the corneas being clear, and the absence of discoloration of the lower abdomen. V.19, 3723.

my kitchen set to a Terry, Terry Norwood in Pensacola for a hundred dollars." (R. 1845.). Trial counsel presented no corroborating testimony. Sims could have testified she gave Whitton $200.00, but counsel did not ask. Worse, Sims was called as a defense witness during the penalty phase and was not asked about this.[51] Sims testified below she and Gary were friends, he was lived in her house, she moved out, and she agreed to pay the utility bills up to the time that she moved. V18, 3496. The weekend before the offense she gave Gary $200.00. *Id.* 3498.[52]

Whitton was not desperate. He lost his job because he missed work trying to help the victim out for a couple of days. However, Whitton testified "I was gonna quit working there anyway because I had already made arrangements to go offshore working. **I had already told all my friends and family that.**" (R. 1841, emphasis added.) The prosecutor pressed:

> Q. You quit the job on Wednesday—or got fired on Wednesday because you didn't need it any more at that point. You had a pocket full of money then so it didn't matter, you didn't have to work on Wednesday.

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[51]The prosecutor wondered why:

> But he has to come up with another story, "But I got half the money from Debra Sims." **Debra Sims didn't tell us anything** about paying half of any utility bills. Yet, it's a friend of his? **And if it's that important, where is she?** (R. 1948, emphasis added.)

[52]Defense counsel further undercut Whitton. On cross-examination of a utility representative, counsel said the receipt did not show whether Whitton personally paid the bill. The prosecutor ridiculed: "Trying to create a question in your mind that maybe, maybe the defendant didn't go pay that bill. But yet the defendant comes on the stand and says, 'Yes, I went up there.'" (R. 1948).

A. No, sir, I did not. I did not have a pocket full of money.

Q. You weren't concerned about your job?

A. I had already told you I had planned to leave that job anyway.

(R. 1880.) Trial counsel had corroborating testimony readily available. Cynthia Shelton testified she knew Gary well and the Sunday before the offense Gary told her he was going to quit his job and he and Maulden were going offshore to work. V18, 3481. In a separate conversation before the offense, Gary told Ms. Sims he "was going to go offshore with James [Maulden]." *Id.* 3501.[53]

He also had other funds. In the repository, post-conviction counsel found a log of items collected by the Sheriff's Department from Whitton's residence. Ex. 59, SV9, 1640-1649. Included are pay stubs showing approximately $1000.00 paid to him in salary beginning in August, 1990, and a student loan in the amount of $2300.00 to run from 7/90 to 7/91, with the first disbursement being made for the 7/90 - 12/90 time period. This would have been in an amount that was at least 1/4th of the total, or $800.00. Whitton was not desperate for money.[54]

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[53]Officer Mann's report reveals "Whitton told Ms. Norwood that he was going to work off shore." Ex. 6, S.V. 20-39. The lower court held that this testimony was hearsay, although the State did not object to it. The testimony in fact relates to then existing mental state, i.e., a statement of intent or plan to prove or explain subsequent conduct by the declarant.

[54]The defense investigator testified he did not investigate whether Gary had any income or funds available to him. V.20,3854. The Sheriff's department apparently thought this was important evidence, but failed to provide it until post-conviction.

H. Blood-You Can't Clean It Off in the Bathroom

At trial, the state argued that a trace amount of blood found in Whitton's car was consistent with the victim. Counsel failed to effectively argue that, assuming the blood was the victim's, this was consistent with Whitton entering the room after Maulden was dead and stepping in blood. Furthermore, given the crime, the perpetrator would have been covered with blood--even if he tried to clean-up--and would necessarily have left more than trace amounts of blood in the vehicle.

Dr. Riddick testified he had seen hundreds of crime scenes. He testified in this case the assailant would have had "a large amount of blood on them." V.19, 3690; *id.* at 3691 ("a significant amount of blood"). He also testified "it's difficult, difficult" to remove blood from skin and clothing and hair and that "**a large amount of blood would be transferred**" to the car by the assailant. *Id.*(emphasis added). He knew the state's theory that the assailant cleaned the blood off in the bathroom, but "You can't clean it off in the bathroom" because "[i]t takes a Brillo pad to clean it off." *Id.* Trial counsel unreasonably and prejudicially failed to adduce such testimony.[55]

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[55]The lower court inexplicably wrote "Defendant failed to present any evidence at evidentiary hearing to support this claim." V24, 4740. The Court also wrote, without citation, the "blood found in Defendant's vehicle was not found on the floorboards" which is inconsistent with the theory of Whitton having "simply walked through the motel room." *Id.* Whitton presented evidence, that was admitted, that the scant blood in the vehicle was "on the seats and **floor**." Ex. 7, SV1, 41.

I. Incompetent Police Investigation

Trial counsel unreasonably and prejudicially failed to present available evidence regarding the inadequate, sloppy, and incompetent police investigation. For example, Whitton's trial investigator discovered days after the crime the crime scene was released and relatives of the victim were allowed to enter the motel room and remove whatever they wanted. One family member discovered hair and flesh evidence in plain view, assumed it was Maulden's, and put it in his pocket. Ex. 69, SV9, 1699-1700; *see also* ROA 204 (deposition of hotel clerk). Mr. Maulden's brown suitcase **containing knives** was released without any forensic testing, and a gray gym bag containing other items of evidentiary value was similarly released, as was a red address book. Ex. 15, SV1, 105, and Ex.13 a-f,S.V.1, 91-102, and Ex. 14 a-b, S.V.1 103-104 (crime scene photos).[56] Reasonably competent counsel would show the processing of the crime scene and handling of evidence was incompetently done, which is exculpatory. *Kyles, supra.*[57]

J. Victim was Drunk, Flashing Cash, Getting Rolled

There was law enforcement evidence Maulden left his motel room and encountered others after Whitton left:

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[56]Again, the lower court wrote that "Defendant failed to present any evidence" to support this claim. V24, 4741. Every Exhibit mentioned *supra* was admitted into evidence.

[57]The defense investigator was shown pictures of the knives and testified the defense had not known there were knives found at the scene that were not tested and were returned to the family and that it would have been important to have known this. V.20, 3849. This is either police misconduct, or ineffective counsel.

> Cab Driver for Destin Cab Co., picked James Maulden up from Room 5 at the Sun 'n Sand Motel. Saw a large amount of money Maulden was carrying.

Ex. 7, SV1, 37. Mr. Lee was interviewed by the defense investigator and said he picked Maulden up, Maulden was drunk and depressed, and he took him to a liquor store. After buying liquor, Maulden asked Lee to help him get a prostitute and he refused but referred Maulden to an escort service. When Maulden got out of the car at the motel he pulled out a wad of cash that would "choke a mule." Ex. 70, S.V. 9, 1701; *see also* Ex. 56A, S.V.0, 1620. The investigator was asked to investigate whether the victim had been murdered by a prostitute he picked up that evening after leaving the cab-driver, for example, someone from the escort service. V.20, 3853. That is why he interviewed Lee.

It was not reasonable for the defense not to call Mr. Lee as a witness. Lee testified below that he picked Maulden up at the Sun and Sand Motel on the date of Maulden's death. V18, 3854. He took him to Delchamp's liquor store in Sandestin. Maulden had been drinking, and bought a fifth of liquor. Maulden "kept trying to get me to hook him up with a prostitute," asking "probably three or four times during the short drive." V.18, 3584-85; *see also* Ex. 56B,SV 9, 1621. Lee said no. When they got back to the motel, Lee saw "astoundingly" that Maulden had "just a huge roll" of money that he had trouble getting out of his pocket "because it was so large." *Id.* This was in "broad daylight" standing outside of the cab. Lee warned Maulden that "[i]t's not really a good idea to have that kind of money

carrying it around. I said, *'You're just making yourself a target.'"* *Id.* 3886 (emphasis added). Maulden asked again for a prostitute "and then had even more trouble putting [the roll of money] back in his pocket because it was so large ['huge; huge'],," and left saying "I really need a woman bad." *Id.* On cross-examination, Lee was asked when Maulden "was flashing his money around," and said. "[a]t the time of paying his fare." V.18, 3591. **He warned Maulden because "it is common knowledge for any cabbie" that when a drunk person is flashing money "somebody else could roll them, even if they were in a motel. It's just something that happens.**" V.18, 3593 (emphasis added).[58]

Cynthia Shelton was visiting Gary the Sunday before Maulden's death at Gary's residence when Maulden came over. Maulden was drinking Mad Dog 20/20 and was "very smashed; very, very." Maulden told Gary "that he had just been rolled by a prostitute" that he thought was a woman but who turned out to be a man.[59] On cross-examination, she said Maulden was so drunk "he

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[58]The lower court did not address this testimony. V.24, 4743. Had defense counsel acted reasonably, they could have proven Maulden was vulnerable to being beaten and robbed by strangers. Police reports show that Maulden was constantly drunk and in motels (*See, e.g.*, Ex. 6, SV1, 20-39: Maulden was "pretty drunk" and "better watch himself."). And he was always trying to procure prostitutes. *See* Ex. 57A, SV9, 1631-35 (solicitation by Maulden upon first meeting a woman).

[59]V.18. 3476; *see also* Ex. 6; Ex. 57 C (Maulden "started talking about picking up a black female prostitute, who turned out to be a male."); Ex. 57 A (tenant at motel stated that on Sunday October 7, 1990, Maulden told him "he had been ripped off for $500.00 that night"). The lower court, after having admitted this evidence without objection, wrote that these statements were inadmissible hearsay. V. 24, 4743-4744. Certainly a law

needed refuge" and he could not go to the Barcelona house because it is a recovery house where you cannot be drunk. V.18, 3477.

K. Malleable Maleszewski

A hotel clerk, Mr. Maleszewski, testified at trial the victim checked into the hotel accompanied by Mr. Whitton. Thereafter, according to the state's rendition of the facts in its brief on direct appeal, "[a]round 10:30 p.m., [Maleszewski] heard a car door close. R. 1431. Anticipating a customer, Maleszewski looked outside and saw Whitton's car in front of apartment nine. R 1432. At approximately 12:32 a.m., he heard another noise, looked outside, and saw someone get something from the trunk of Mr. Whitton's car and drive away. V.23, 4541. These facts, if true, destroy Mr. Whitton's defense and refute his alibi-he testified he left Pensacola around 10:00 or 10:30 p.m. to check on his friend, found the door ajar when he arrived, knocked, entered a bloody scene, and left almost immediately. If Maleszewski in fact first heard the noise and saw the car after midnight, then Mr. Whitton is innocent and was telling the truth.

That is exactly what Maleszewski first told the police, but defense counsel failed to impeach him with this evidence. On cross-examination, counsel asked if it was around midnight when the witness first awoke. R. 1452. The witness said he was not sure. Then counsel asked what he had told the defense investigator about the length of time and the witness stated that

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enforcement official could be asked on the witness stand why he or she included these interviews in a police report.

he must have told the investigator that it was no more than fifteen minutes but "it's kind of hard to tell time when you're asleep....So that might be where that mix-up is." R. 1459-60.

However, the "mix-up" was not just with the defense investigator-the day he discovered the body and spoke to Officer Sunday the witness told Sunday it was at 12:20 a.m. that he "heard the car door slam." He saw a person get out of the car, walk to the trunk, open the trunk, and return to the car. He then "heard the car crank up." Ex. 58, SV9, 1636-1639. Nothing about two doors shutting; nothing about an hour and a half apart. **Defense counsel attempted no impeachment on this.**[60] The jury also

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[60]The lower court wrote that "it appears that Mr. Maleszewski did not inform Officer Sunday of when he first heard the car door slam, looked out his window, observed the Defendant's vehicle but did not see a person sitting in the car," so Sunday's report would not "have assisted trial counsel." V 24, 4748-49. If this is true then it was indeed a very sloppy investigation. But it is not true. Sunday's report states:

> Ar approximately 12:20 a.m. Wednesday, October 10, 1990, John said he heard a car door slam outside in the parking lot. He looked out the window and observed the yellow Buick parked in front of unit number 9. John lives in unit number 8. He said he was positive *it was the same car he saw earlier in the day* with the two subjects in room number 5.

SV 1, 10 (emphasis added). John did not say "it was the same car I saw at 10:30 p.m." The probable cause affidavit prepared by Lt. Mann recites the same 12:20 timeline, but the lower court writes that Mann may have gotten this information "from Officer Sunday's report." V24, 4749. Lt. Mann swore under oath that at "(approx.12:30am) of October 10, 1990 the motel clerk observed the same vehicle at the motel." SV1, 40. This timeline also actually appears in Mann's written report -Maleszewski "observed same vehicle around midnight." SV 1, 37. The lower court concluded that "to use either one of these documents as possible impeachment ...would have been of little value." *Id.* These reports are classic prior inconsistent statements.

never heard that according to the occupants of a nearby room a knock was heard on the victim's door around midnight, which would coincide with what Maleszewski said to the deputy.[61]

L. Inadequate Investigation Regarding Snitches-"He Wasn't Truthful About Nothing Ever"

Trial counsel was ineffective with respect to confronting the snitches Ozio and Satan. First, counsel did not investigate the snitches' reputations for truth and veracity. Second, defense counsel did not interview other individuals in jail who knew about snitch activity. Third, they did not investigate the relationship between the prosecutor's mother and Satan.

Shelia, who told police about Satan's sexual habits, had known him since 1981. She knew his reputation for truthfulness, veracity and honesty in the community. She testified that his reputation was "[h]e wasn't truthful about nothing ever." V.18, 3483. On cross-examination, she testified that her view of his reputation was based upon the way he was with her and what she

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The lower court also writes that because there were 4 cigarette butts that contained Type O secretor, and because Whitton is Type O, Whitton must have been in the hotel room a long time. Maleszewski told Sunday that when the two men checked in they spent about ten minutes in the room and then went to a nearby Exxon station. *Id.* at 9. The lower court wrote that "ten minutes "seem hardly enough time for Defendant to have smoked four to five cigarettes." V24, 4750. That would be a perfect issue for the jury to decide. But they would not have to. Maleszweski said he did not see the two return from the Exxon station-he cannot say how much time Mr. Whitton was in the room that afternoon. VS1, 9.

[61]These police reports were fully admitted below without objection. V20, 3808. The lower court incorrectly wrote that because the author of the reports did not testify below, Defendant could not prevail. V24, 4747.

knew about him. She testified that "he sat around and thought up things to lie about. He - actually he was just always out to get somebody." *Id.* 3486. On re-direct, she testified that nobody would trust him and that she did not know anyone who thought he was honest. *Id.* 3488. She also said that she was available to testify at the time of trial. *Id.* On re-cross, she stated his reputation was "just something that he was known; his reputation; it was just something that he was known for" by "lots of others in Defuniak" including "law enforcement," *id.* 3490, i.e., prosecutor Adkinson. On re-re-direct, she stated law enforcement officials in Walton County believed Satan was "not truthful." Id. 3492-93. This included "Officer Sutton." *Id.* 3490.[62]

With respect to not interviewing other inmates,[63] Gary wrote a letter about the snitches and defense counsel did not follow up. It said that Mr. Gray told him "'Gary, you know that they are bringing Wayne McCollough (Satan) and Michel Wayne Johnson (Patches) back next week from Lake Butler to testify against you!'" Whitton asked how Gray found this out, and he said "Its all over the whole jail, and Jake Ozio told me, the state

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[62]The lower court wrote (1) this testimony constituted "her personal belief that Mr. McCollough was a liar," and (2) "[h]owever, Ms. Lowe was unable to give any specific background or examples as to why she believes Mr. McCollough "wasn't truthful about nothing ever." V.24 at 4701. As the above quotes illustrate, she was testifying about reputation in the community, not simply personal belief, and one may not provide examples of behavior when testifying to reputation. Thus, the lower court's comment that "Lowe's testimony would not have been admissible at trial," V24, 4753, is wrong.

[63]The defense investigator spoke to no inmates. V.20,3843.

attorney was trying to make a deal with him also!!" The letter said George Broxson had heard the conversation. Ex. 45, SV4, 781-795. Below, Broxson acknowledged his signature on the letter. Had trial spoken to Broxson they would have learned he knew Satan was helping the state to keep his sexual interests from being known by other inmates. *See* Arg. I, A, 1, a *supra*.

Had counsel found out who else was in the jail they would also have found Donald Hanish. He testified below everyone in the jail knew Satan was a snitch who had gotten in trouble several times and "always pretty well got off fairly light." V.19, 3735. He said Satan was a snitch. *Id.* He learned from other people in the jail Satan was a snitch. *Id.* 3737. Satan had access to Gary's legal papers because he was supposedly helping him on his case and Satan told Hanish before Gary's trial he believed that Gary would be found not guilty and he believed he was innocent. *Id.* 3744. Satan said "I believe he's going to beat it because I've been helping with his case and from what I've seen, the man didn't do nothing." *Id.* 5754. Hanish would have provided effective cross-examination, *i.e.*, "didn't you say you believed based upon everything you know that Gary is innocent?"[64]

Finally, defense counsel unreasonably did not investigate the prosecutor's mother's betrothal. *See* Arg. I, A, 1, b, *supra*.

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[64]The lower court wrote that "the testimony regarding conversations with Mr. McCollough were hearsay evidence and would not have been permitted at trial." V.24, 4752. But the court ruled during the evidentiary hearing that this would be admissible as impeachment. V19, 3744.

M. A New Trial is Required

Whitton was not broke. The victim was drunk and publicly flashing cash (that would choke a mule), as was his wont. Whitton was not at the scene at the time of the death. If he committed the crime he and his car would be covered in blood. He did not get a car wash. The snitches were liars, the struggle did not last 30 minutes, the clerk first said Whitton arrived at the hotel at 12:20 p.m. Armed FDLE agents had to protect their own from the prosecution. Fingerprints found in the room belonged to someone else. Any one of the failings by counsel in this claim would require relief; considered cumulatively they compellingly do. Counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S at 686.

Argument III: SECRET NOTES BETWEEN JURORS, BAILIFF, AND COURT VIOLATED FLORIDA STATUTE AND THE FEDERAL CONSTITUTION, AND A REMAND IS REQUIRED[65]

A. Notes Between the Jurors and the Judge Were Sealed and Not a Part of the Direct Appeal Record, and the Lower Court Wrongly Forbade Interviews of the Jurors

At Vol. 11, p. 106, of the direct appeal record, the trial court judge stated:

> Let me make a general announcement before you call your first witness, and that would simply be to advise the jury that I have dealt with the situation that you brought to my attention. And I will, for the record,

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[65]**Standard of review**: Whether a state statute was violated, and whether a process violated the federal constitution, are reviewed *de novo*. Whether interviews of jurors should have been allowed appears to require *de novo* review. *Van Poyke v. Florida*, __ So.2d ___ (SC11-724, Revised 6/14/12).

just **file this note** with the clerk.

No such **note** appeared in the record on appeal or in prior counsel's files. As it turns out there were several "communications that appear to be from the jury to the trial judge and from the trial judge to the jury," which had been placed under seal. V.9, 1765, and which the post-conviction judge unsealed. *Id.* The letters showed repeated off-the-record contact between the Court and the jurors, apparently with a bailiff named Tim as an emissary/messenger:

Handwritten note on notebook paper:

"I understand you may have a question. If so, please write it down & Tim will hand it to me.

L. Melvin

Judge"

Handwritten note on notebook paper:

"Mrs. Keyer's feet cannot touch floor in jury box which is causing feet to swell-could I get a box to prop up feet."

Handwritten note on notebook paper:

"Is it to our understanding that a lady in the audience has a tape recorder recording this? We the jury object. It gives us an uneasy feeling."

Handwritten note on notebook paper:

"What is the soonest possible time he could get out of prison?

Gain time?

Model prisoner?

etc. Or is 25 yrs the soonest he could get out?"

Handwritten note on Judge's Stationary:

"With regard to your question, please refer to the jury instructions.

L. Melvin
Judge"

Handwritten note on notebook paper:

"List of her (Judge Melvin's) instructions to the jury."

V.9, 1769-70.[66]

Upon reviewing these notes, counsel filed a series of motions notifying the court, as required in Florida, of his intent to interview the jurors, which the state opposed. The lower court ruled there was "no compelling reason why inquiry to or interview of the jurors should be made." V.8, 2536.[67]

Thereafter, at an evidentiary hearing, the trial court judge had no recollection of the jurors' questions or her own actions,

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[66]The one reference in the record to a communication between the judge and the jurors appears to address one juror's comfort, but counsel cannot be certain. If this is the case, then the other two questions involve juror concerns over someone recording the proceedings and over what a life sentence meant. Nothing in the record memorializes the circumstances. Trial counsel were ineffective. Petitioner was entitled to a complete recording and transcript of the proceedings in this case, including (especially) communications between the Court and the jurors, between the jurors and the bailiffs, and between the jurors and any other third parties. The record on appeal to this Court should have included these jurors interactions.

[67]The Notice of Intent to Interview Jurors was filed under Rule 403.5(d)(4), Rules Regulating the Florida Bar which requires that before interviewing jurors an attorney must "cause a notice of intention to interview" jurors be filed and served upon the Court and opposing counsel "a reasonable time before such interview." The only cause for conducting such interviews is that the lawyer have "reason to believe" that "the verdict may be subject to legal challenge." Counsel did have such a reason to believe, and was not required to show "compelling reasons."

despite having reviewed the notes and her handwriting and letterhead, Ex. 44a-d,SV4, 774-780,V.18, 3523-3533, and having reviewed the transcript. V.21, 4151, 4153. Trial counsel Tongue recalled that there was one juror question, but could not recall what it was about, even after being shown the questions, V.20, 3871-72, and did not recall what the Court and/or counsel did about the question. V.21, 4155. The state's witness, counsel Bishop, testified that he remembered that there were notes from the jurors, but did not recall how he learned about them. V.20, 3960. Prosecutor Adkinson had no memory of juror questions. V.20, 3951. The bailiff is mentally unstable and has no memory of the events. V.16, 3181, 3187. These circumstances provided additional support for the motion to conduct juror interviews, Defendant renewed his motion to conduct such interviews, V.22, 4302, but the lower court would not allow it.[68]

B. Hidden Communications Require Reversal Under Florida Law and the Federal Constitution

Even without juror interviews, Defendant is entitled to a new trial. Florida Statute 918.07 provides:

> When the jury is committed to the charge of the officer, the officer shall be admonished by the court to keep the jurors together in the place specified and not to permit any person to communicate with them on any subject except with the permission of the court

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[68]The lower court, generally concerned about hearsay, freely relied upon the trial judge's conversations with her bailiff in other cases to deny relief. V24, 4691. The lower court wrote that the testimony of the trial judge and the attorneys "demonstrates that no *ex parte* communications [by judge with jurors] occurred." V24, 4692. The trial judge testified to her habit, not what happened in this case, which is inadmissible. *Id.*, 4692,

> given in open court in the presence of the defendant or the defendant's counsel. The officer shall not communicate with the jurors on any subject connected with the trial and shall return the jurors to court as directed by the court.

Under this statute, any questions from the jurors must be submitted to the Court and answered in open court after consultation with counsel for both parties. Wright v. CTL Distribution, Inc., 650 So.2d 641 (Fla. 2d DCA 1995); *Caldwell v. State*, 340 S.2d 490 (Fla. 2d DCA 1976). If a Court takes action on a jury request or question without the defendant being present, and/or without opening court, and/or without advising counsel for the parties, it is error requiring reversal. *Slinsky v. State*, 232 So.2d 451 (Fla 4th DCA 1970). If the bailiff answers the question-even correctly-outside the presence of the defendant, reversal is required. *Holzapfel v. State*, 120 S.2d 195 (Fla. 4th DCA 1960).[69] This statute was violated-over and over again-in Defendant's case, and relief is required.[70] Whatever was done in response to the juror questions here, it was not done in open court, on the record, and in the Defendant's presence, which is itself an Eighth and Fourteenth Amendment violation.

Furthermore, these notes reveal that the jurors were

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[69]"[T]he potential for prejudice and the danger of an incomplete record of the trial court's communication with the jury are so great as to warrant the imposition of a prophylactic per se reversible rule." *State v. Franklin*, 618 So.2d 171 (Fla. 1993).

[70]The lower court did not address this case law.

intimidated by third parties (the person who was recording) and were communicating with a third party--the bailiff. Both of these circumstances violated the constitutional right to a fair trial by unbiased jurors unsullied by extraneous influences. *Remmer v. United States*, 350 U.S. 377 (1956); *Remmer v. United States*, 347 U.S. 227 (1954). In a capital case, the risk of unfair trial cannot be tolerated under the Eighth Amendment.

C. By Not Allowing the Jurors To be Interviewed, the Lower Court Violated the Federal Constitution and State Rules; This Court Should Remand for Juror Interviews

While Defendant is entitled to relief based upon what is known, any state law prohibition on counsel interviewing the jurors in this case violates his right to a fair trial, to access to the courts, to equal protection, and to be free from cruel and unusual punishment under the Sixth, Eighth, and Fourteenth Amendments. Other defendants in other states freely interview jurors and raise claims of constitutional violations based thereon.[71] Mr. Whitton is entitled to interview jurors under local rules which he followed. Given the unique circumstances of this case, this Court should remand for juror interviews.

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[71]For example, relief is required for improper viewing of the crime scene (*Ex parte Potter*, 661 So.2d 260 (Ala. 1994)), deliberating prematurely (*United States v. Resko*, 3 F.3d 684 (3rd Cir. 1993)), consulting dictionaries for legal terms (*Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919 (10th Cir. 1992)), lying during voir dire (*Williams v. Taylor*, 529 U.S. 420 (2000), and considering matters not in evidence (*Leonard v. United States*, 378 U.S. 544 (1964)(per curiam)).

ARGUMENT IV: COUNSEL WERE PREJUDICIALLY INEFFECTIVE AT SENTENCING

A. The Duty to Investigate and the Right to a Meaningful Capital Sentencing Proceeding[72]

"It is unquestioned that under the prevailing professional norms at the time of [Defendant's] trial, counsel had 'an obligation to conduct a thorough investigation of the defendant's background.'" *Porter v. McCollum*, 130 S.Ct 447, 453 (2009), quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000). Thereafter, counsel were required to present "the full picture"[73] of mitigation, the "entire,"[74] "cohesive,"[75] and "complete" story, rather than a "scattered"[76] narrative. Counsel failed.

B. The Sentencing Evidence Introduced About Gary Whitton's Upbringing - Around 10 pages From a Brother and an Aunt

Defense counsel introduced the testimony of Dr. Larson who interviewed Whitton for two hours. He testified to what Whitton had told him about growing up-he had a very abusive and chaotic childhood (Tr p. 116, lines 9-25). The defense then introduced the testimony of Royal Whitton, one of defendant's brothers, the only close family member to testify-3 ½ pages about growing up.

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[72]**Standard of Review:** Ineffectiveness claims present mixed questions of law and fact and are reviewed de novo. Findings of historical fact, if based upon substantial competent evidence, are not to be disturbed. *See* note 37, *supra*.

[73]*Gray v. Branker*, 529 F.3d 220, 233, n.2 (4th Cir. 2008).

[74]*Id.* at 236.

[75]*Id.* at 235.

[76]Williams v. Allen, 542 F.3d 1326, 1339 (11th Cir. 2008).

He said that their parents drank daily, someone was whipped daily, their mom would put their heads in the toilet, and their father threw Gary into a wall once. He said the kids tore plaster off the walls of their room to burn for heat. The eight kids slept in one large room on the floor or a bed, and there was a broken window and sometimes there was snow on the bed. He testified that Gary was "lucky" because Royal got most of the abuse in the family. *Id.* at 137.[77] The defense introduced the testimony of Gary's aunt, Ruth McGuinness. She said she never saw Gary's father abuse him.[78] She said Gary's mother would not let him in the house once when he was 4 or 5 and he had to sit in the snow soaking wet from "wetting" himself. *Id.* 155. She did not mention Gary by name after that. She said one day the kids were all locked in a room with one bed that had rotted from being wetted on, plaster was peeled off the walls, and the room stunk. Gary's mom would slap and hit the kids and pull their hair and

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[77]In addition to it not being true that Gary was "Lucky," Royal himself had abused Gary. SV1, Ex. 23, 159 ("Abuse was inflicted ...extensively by Gary's older brother[], Royal Junior (Roy)...upon Gary."). He did not discuss the time when Gary's father picked him up by his hair and the seat of his pants, opened the drawer of a small chest of drawers, and tried to jam Gary head first into the drawer. Ex. 32, SV1, 190. Gary has the scar on his head today from this abuse, which the jurors were not shown. And Royal did not mention that Roy, Sr., would line the children up from youngest to oldest in the morning and "beat us with anything, a belt, branches, pieces of wood, his fists, and anything else he could reach." *Id. See also* SV2, 199 (all children were beaten "with belts, branches, and fists...even kicked"). He did mention-on cross-examination-that Gary had been in foster homes.

[78]This undermined the little which Royal had said and is completely false-Gary's father abused him horribly.

would placed one (Bob) in the corner once for 5 - 6 hours. She feed one baby (Val) wine to stop her from crying, and threw her against the crib. She fed babies paregoric so they would sleep. Police were called to the house but they just said to call welfare and by the time welfare arrived the house would be cleaned up and food in the refrigerator. *Id.* at 158.[79] She left when Gary was 7 or 8 and did not see him again until he was 15. This testimony took up four pages of transcript-155-158.

C. Unreasonableness: Defense Did Not Go to NY Where Mr. Whitton Was Born/Raised, Seek Available Medical and Social Services Records, or Speak to Teachers and Social Workers, Thereby Depriving their Expert and the Jury of Important Background Material

James Tongue was primarily responsible for the penalty phase. V.20, 3890. He started with the public defender's office in February, 1990. Before that, he was in private practice handling "anything that would walk through the door with a retainer; mostly divorce and civil matters." *Id.*, 3889. The trial was in July of 1992. He did not try a felony case while in private practice. *Id.* at 3908. The first year as a pubic defender he was second chair in a capital case. Whitton's case was 17 months(at most)after his first felony. *Id.* 3909.

The defense spoke with three family members who lived in Florida. *Id.* 3907. They learned Gary's brother, Michael, had been "beat to death" as an infant by his mother and that state police

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[79]This suggested that "welfare" had no records of abuse and neglect in the house, which is not true.

had investigated. Ex. 74, SV 9, 1760-61.[80] They learned the names and ages of all of Gary's siblings, that there were health department and foster care records in New York state, and the family grew up in New York "near Watertown." *Id.*

The defense sent no one to New York for any purpose. V.20, 3838. Tongue testified that it was not necessary because "we had interviewed the ones that we had closer by." *Id.* 3896. They spoke to no school teachers, no foster care workers or record-keepers, and no acquaintances of the family. They did not obtain autopsy records for baby Michael's death. *Id.* 3908-11. They made no decision to limit the amount of testimony from the family at sentencing. *Id.* at 3897. They simply introduced what they had locally. It is not evident that any person left the office to investigate for mitigating circumstances.

They had Dr. Larson appointed, he evaluated the defendant, and issued a report. Close to the time of sentencing, attorney Bishop asked attorney Tongue "Have we heard from Doc Larson? Possible mitigation?" Ex. 76, SV9, 1763. Larson's billing shows ½ hour for "consultation with attorney." Ex. 78, SV9 at 1765. Dr. Larson found Mr. Whitton was an alcoholic from a deprived and abusive childhood who had no mental infirmities.

This was not reasonable. Counsel "abandoned their investigation of [the defendant's] background after only a rudimentary knowledge of his history from a narrow set of

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[80]Nothing about this was introduced at sentencing.

sources." *Orme v. Crosby*, 896 So.2d 725, 732 (Fla. 2005). Counsel "did not conduct follow-up interviews with [the defendant's] family and friends," *id.*, 896 So.2d at 732, and did not obtain available "corroborating data from family, friends, and others ...[that] would have supported a [] diagnosis" of mental illnesses. *Id.*, at 733. This violates professional norms, and establishes the first prong of *Strickland*.

D. The Background and Social History that Was Available But Not Presented[81]

Roy, age 22, married Dot, age 16, who was pregnant. Ex. 37, SV2, 235. They then had nine children. Luckily, Dot killed only one, baby Michael. All of other children--Valerie, Royal, Robert, Kim, Gary, Carl, Tim, and Jeff--grew up knowing they could be killed next, in a constantly threatening,[82] dangerous,[83] environment, being beaten,[84] threatened,[85] starved,[86] raped,[87] and

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[81]The lower court did not dispute that every bit of this evidence was true and available to trial counsel.

[82]*See* Ex. 32, Royal, SV1, 193-95 ("we were abused by almost every adult we ever came into contact with."); Ex. 31, Jeff, SV1, 187-89)("Our childhood was more horrible than I can say.")

[83]See Ex. 33, Tim, SV1, 193-95("[w]hen I was about five, my father flipped the truck into a snowbank [and]...was passed out for hours and my brother and I huddled together to try and keep from freezing."); Ex. 32, Royal ("My father was always drunk and as a result he got in a lot of wrecks. He took me with him when I was about thirteen and we both passed out from drinking. When I woke up the next morning, I was lying on the cold ground... [T]he truck [was] nearby, overturned, with my father still inside.").

[84]*See* Ex. 32, Royal("My father was violent and mean and drunk all the time. ...Sometimes we were beaten if we had wet the bed, which we all did all of the time. Other times it did not matter whether we had done anything or not, he would just beat us for no reason at all. He beat us with a belt, pieces of wood, his

fists, and anything else he could reach. He beat my mother too. Many times I remember my mother's face being all black and blue from the beatings he gave her."); Ex. 22, Kim, SV1, 154-158 ("My father also beat us all the time. In the morning our father did a line-up where we would be made to stand in a straight line and say nothing. This included Gary. If we had wet the bed we would all get beaten, and someone had always wet the bed. *We were beaten for nothing.* Our father beat us with his fists, kicked us, whipped us with a belt, tree branches and whatever he could reach or make us find. He was mean to all of us."); Ex. 33, Tim ("My father also beat all of us kids.... *We were all beaten even if we did not do anything. No one was spared.* My father picked me up and threw me head first through a wall once. I had to wear an eye patch for a while after that."); Ex. 35, Val, SV2, 199-202 ("It wasn't just my mom that beat us. Our father beat us, too - more often and worse even than our mother. We were beaten with belts, branches, and fists - anything my father could get his hands on - and we were even kicked too. I still have a scar from a beating with a metal brush he gave me when I was four years old. Every morning my father conducted a line-up where *we would all stand side by side, oldest to youngest, and we were all beaten in turn.*"); Ex. 31, Jeff, SV1, 187-189 ("my father would beat [my mother] all the time.... He beat us all the time, too. He would line us up from oldest to youngest and whip us for anything and with anything. I remember getting beaten with studs torn from the walls of our house. Another time my father slammed my head through a wall for pretending to be asleep.")

[85] *See* Ex. 22, Kim("Even when we were not being beaten, we were scared. When I was about 7 or 8 years old my father was cutting up a melon and my brother Bobby went for it.'I'll chop off your finger if you touch it,' my father said. Bobby reached for a piece and my father cut down hard, just missing Bobby's hand.")

[86] *See* Ex. 22, Kim ("We were also all starving a lot of the time. One place we lived had grapes and pear trees growing in a next door lot. That fruit was a big part of what we ate, but if we got caught our father would beat us."); Ex. 31, Jeff ("kids were always hungry. One place we lived had some fruit trees. The fruit was really important, but if our father caught us eating or even picking the fruit we were beaten."; Ex. 32, Royal ("Most of the time we children were left hungry and alone. We would fight over food because there was never enough to eat. *I remember eating dog food because .... we were starving.*"); Ex. 33, Tim ("We were always hungry and had only thin ragged clothing.").

[87] *See* Ex. 35, Val ("My father sexually abused me from as early as I can remember up until my mother actually caught him

tortured.[88] None of the survivors can discuss their childhood without dissolving into tears. V.18, 3428.[89]

The parents were notorious for their depravity. Everyone knew. "When you talk to people who lived in this neighborhood for four or five decades, born in this neighborhood, in this area, lived in that neighborhood, they describe the Whitton family as

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when I was around six or seven years old. My mother beat me. She was jealous of my father's affection toward me and always treated me as an outcast."); Ex. 22, Kim ("When I was twelve, my mother told me she thought my father had been having sex with my sister. I had been sexually abused also. My Uncles Ralph and Reg tried to get me to give them sex by offering me bread or biscuits because I was so hungry."); Ex. 31, Jeff ("[M]y Uncle Reg was a sexual abuser. He sexually abused me and my brothers and sisters. As an adult, Reg confessed in tears to me once, saying that he was sorry for what he put us kids through."); Ex. 32, Royal ("When Val and I were really small, I overheard my parents screaming and arguing about whether or not my father had molested Valerie. I remember him saying 'I did not touch her, I did not do it,' but he was lying. He also bragged to me about how he had coerced my fifteen-year old cousin, Rita, to give him oral sex while he lay on the couch.").

[88]Ex. 32, Royal ("*My mother used to hold my head in the toilet, underwater, until I was gasping for air.* She did that to my brothers too. When I was five, I was walking out off the back step once and my mother was sitting on the steps with a rifle. I was startled by a loud gunshot. I turned around and she was looking right at me with the gun pointed at me, smiling. It scared me to death. When I was about six or seven and we lived in Watertown, *my mother dressed me in girl's clothes and made me stand in front of a wall for hours at a time. Often, my parents had other adults over who watched me.* It was humiliating."); Ex. 32, Royal ("Though she beat us too, my mother was more just horribly cruel. She would exaggerate things we did or just make them up and tell my dad so that he would beat us when he got home."); Ex. 33, Tim ("We were all terrified of my father. He was totally unpredictable, explosive and mean.").

[89]Dr. George Woods testified below "the single overriding sense from the Whitton children that I had the opportunity to talk with was fear of people. They were afraid of their father. They were afraid of their mother." V.17, 3376.

the worst family in terms of loving their children, taking care of their children, providing for their children that they had *ever* seen." V.17, 3368. (Woods testimony)(emphasis added).

1. Infanticide in St. Lawrence County, New York

Saint Lawrence DSS got involved with the Whitton family in 1957 and stayed involved until the family moved to another county. DSS was involved because "the parents just didn't want their children," had left them with a 13 year old mentally retarded boy who was on probation, and one of the children had to be hospitalized for a horrible rash.[90]

Three months later this infant was murdered - thrown down stairs by his mother. Roy made up a story about it-he had opened a door into a bassinet and accidentally knocked the infant to the ground-but the autopsy records prove this false and show homicide.[91] Family members, including all of the children, and

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[90]Ex. 37, 8/6-7/57 entries,SV2, 238 (judge "asked that a doctor be called"); *see also* Ex. 36, SV2, 203-228 ("pt. was found neglected at home w a severe rash all over his body & parents not around.")

[91]Dr. Riddick reviewed Ex. 50, SV6, 1002, baby Michael's autopsy records, and stated: "This is child abuse." V.19, 3687. Michael "died from the injuries," specifically, "he died from blunt force injuries." *Id.* 3709, 3689. He rejected as implausible ("not consistent" [*Id.* 3688]) the story of the door/bassinet which "doesn't fit with the fact that he undoubtedly had some injury to his central nervous system that was manifested by the fact that he couldn't move his left leg" and

> he was in very poor condition. He had a diaper rash, he had a large bruise ....more than a bruise; it was a hematoma, which is a large amount of blood beneath his skin or in some other place. This was about four and a half inches over his buttocks. He had bruises down his left leg and bruises down his right leg. And he was

others in the "village," knew it was murder.[92]

2. Parents Dot and Roy were mean drunks

Dot drank alcohol heavily when she was pregnant with Gary and the other children. Ex. 23 (SV1 at 159-163), 27 (*Id.* 171-177), 30 (*Id.* 182-86), 32 (*Id.* a90-92). Dot and Roy were mean drunks every day. *Id.*[93]

3. Keeping young children out of sight and unattended

> having a difficult time being fed.....My opinion, he had some sort of closed head injury.

Id. 3688. Michael had "injuries to both lower extremities," "injuries to his head, injuries to his buttocks." *Id.* 3689.

[92]*See* Ex. 23 (SV1, 159-163), 27 (*Id.* 171-77), 30 (*Id.* 182-86), 35 (SV2, 199-202); V.17, 3374 (siblings believe Dot killed Michael); Ex. 37, DSS Records, at SV2 at 246(babysitter's family "questioned the death of the child and why it was solved the way it was solved. They felt it was something very mysterious..."). As discussed *infra*, Roy moved the family next door to the Jesmer's "so she wouldn't kill another child." V.17, 3375.

[93]*See* Ex. 33, Tim ("Both of my parents drank more than they breathed air. I do not ever remember seeing them when they were not drinking. They were always drunk."); Ex. 22, Kim ("Our mother and father were mean drunks. Our father was out and drunk almost every night and my mother was just as bad.... Once my mother was beaten black and blue by my father when he came home drunk late one night. Mom was too slow to feed him and he beat her so badly that a friend of my father's who was there had to pull my father off of her.); Ex. 31, Jeff ("I do not have a single memory of them where they were not drinking. When I was in kindergarten I remember coming home from school one day and seeing my father's truck on its side in the ditch. My father was drunk and still inside the truck. At school the other kids teased me constantly about it, saying, 'Ha, ha, your dad is a drunk and he wrecked the truck again.' These drunken wrecks were regular occurrences growing up."); Ex. 32, Royal ("Most days my father did not even come home after work - he just went straight to the bar. My mother would meet him or already be there."); Ex. 32, Royal("My mother smoked and drank heavily the whole time we were growing up, and *never slowed down even when she was pregnant, including when she was pregnant with Gary.*").

When they were young the Whitton children were not seen.[94] They were left day and night unattended.[95]

4. Money only for alcohol while children starved

Their home was "no place for little ones, too much drinking." Ex. 37, DSS, SV2, 259(foster care mother). "Something should be done about these little ones. Because they were undernourished. And parents used too much beer to take care of their children....I felt sorry for the children. Baby had water in his bottle instead of milk a lot. But they had beer bottles all over the place." *Id.*

None of the children were properly fed. They had to scavenge for food. DFS, Ex. 37, SV2, 245(Children "weren't getting a lot of" the food that was purchased because it was for "entertaining the company who hangs around her house all day and half of the night and sometimes all night."). For example, a school teacher reported to DSS Val was "not adequately dressed and she did not feel that they were getting enough to eat because they had had a time of her stealing lunches from the other children and she felt a child was hungry who would steal and if they were getting

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[94] *See* DSS Records, Ex. 37, SV2, 245 ("Mrs Bishop also agreed that there was plenty of rumors passing around about the abuse of the children and that the children are never seen too much and the rumor is that they are locked upstairs at all times and never let downstairs or outside. They haven't seen them only once or twice since they have been there.").

[95] *Id.*, DSS records, SV2, 250 (Dot lied about leaving kids unattended; "Knowing that she had been caught in a lie, Mrs. Whitton still brazingly [sic] faced the worker and didn't seem to be a bit embarrassed knowing that she had lied to me.")

enough to eat at home, they would not." Ex. 37, SV2 at 249. The teacher reported "they had had an old dry corn cob with some corn on it in the school and little Valerie had been caught chewing the corn off the cob. [T]he teacher) really felt that it was a pitiful situation." *Id.*

It is repeatedly noted the money goes for "drinking and having crowds at their home for beer." *Id.* at 250. A worker said that however poor the food might be in foster care, "it certainly would not be as poor as they had at their own home because at that time they didn't even get food." *Id.* at 247.[96]

Sharon Bogardus, a 13 year old girl who had been a babysitter, reported the family to DSS. *Id.* She told the worker "she was too young a girl to be babysitting for a group of small children" and that "[s]he was very concerned over the welfare of these children." *Id.* at 246. She reported:

> They are upstairs all the time and they have very little to eat. She said one Saturday when she cared for them they only had two bologna sandwiches all day long. She also stated that the baby that has just been born sleeps in a bureau drawer in the bathtub. This upsets Sharon Bogardus.
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> One Sunday the children had a can of beans in the morning. The father gave them the beans in a can and told them to get the hell upstairs and eat it and keep quiet so they could sleep. Evidently they had been out

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[96]But always money for alcohol. Mr. Woodside rented (they never paid) a 2 bedroom place to the Whittons and told DSS "he was very glad that the family was [now] out of the home; they had done more damage than good." Ex. 37, SV2, 245. "Many times there were many adults who stayed all night at this home." *Id.* at 246. "[T]here was loads of drinking because the bottles are piled up in the backyard and in the shed and in the cellar and when the weather dries they will have to have a truck to move them."). *Id.*

the night before.....

DSS, Ex. 37, SV2, 246.[97]

5. Living in filth and human waste

The family was forced to move often and left their residences a total wreck. Many of the children wet the bed involuntarily, and others did so intentionally because they did not have indoor plumbing and it was freezing outside. The beds

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[97]Post-conviction counsel obtained the DSS records, Bogardus' name was there, counsel contacted her, and she said:

> Around 1960 when I was about 13 years old, I babysat a few times for a very poor family in Huevelton that lived in really bad conditions. Even though that was forty-five years ago, I still have some clear memories of this babysitting. The parents were drunks. One of the children's names was Royal. The youngest child had to sleep in the tub and the other children had to sleep right on the mattress springs because there were not any mattresses for them. The kids hardly had any food. One time the father left them only one can of food to split between them. That was not the worst, though. The worst thing I remember is that **I and the kids had to keep their feet off of the floor when we were sitting because there were so many mice and rats running around.** The conditions those kids lived in was awful.

Ex. 26, SV1, 169-70. Her mother "finally decided that it was no place for a little girl to be and this had been stopped." Ex. 37, SV2, 244. See also Ex. 32, Royal ("Another one of our houses in Watertown was right next door to the dump, and people used to come with their guns to shoot at the huge rats. In the winter the rats would move into our house. I still have nightmares about being bitten by rats. One time at that house the cops were called. There was no electricity and so they were looking around with a flashlight. Everywhere we lived we kids all shared one room that had one single-sized urine-soaked mattress on the floor, and this house was no exception. When the policeman shined the light into our room and onto that filthy mattress, I heard him gasp and say "'Oh my God, look at all these maggots!'").

were thus constantly urine-soaked.[98] A DSS worker said

> the children were in the bedroom and this is usual. The little boy's bed and the crib was sagging in one corner which must make it very uncomfortable to sleep. The other beds were filthy looking. There is no bedding and they just sleep on the wet mattresses. Mrs. Whitton had the other part of the house the living room comparatively clean....

SV2, 248.[99] One DSS worker states "[t]his family should definitely be brought into Children's Court and a plan made for those children. *Id.* Before any help was provided, the Whittons moved to another county.

6. The Move to Watertown so that Dot could be "watched" and Not Kill Another Child

Kathy Robinson is Gary's paternal aunt.[100] In 1961 when she was 8 the Whittons suddenly moved from St. Lawrence County to the residence beside her home in Watertown. Dot had broken Kim's arm,

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[98]Persons who had gone to one home had "been overwhelmed at the odor that came out of the cellar from the dirty clothes that had been thrown down there and left. There were baby's dirty diapers and quilts, blankets, etc. that had never been washed. She had stated that there was a great number of beer bottles, and whiskey bottles around." Ex. 37, DSS, SV2, 244.

[99]*See* Ex. 33, Tim ("Another memory burned into me is of often waking up and seeing urine and feces everywhere. We lived in a house up on a hill in Pierrepont Manor. All of us kids slept on one mattress that was soaked through with urine. We did not have running water or indoor plumbing and in the winter it was too cold to go outside so we just went to the bathroom on the floor."); Ex. 22, Kim ("We only sometimes had water. All of the kids slept on the floor or on one mattress. It was always soaked with pee and I would wake up and see piles of feces on the floor because we had no place to go to the bathroom and it was too cold outside. We went from one falling apart, dirty, smelly, cold house to another more times than I can count.").

[100]She provided an affidavit detailing what she knew about his upbringing and said the affidavit was true. V18, 3563; Ex. 30, SV1, 182-86. She then testified.

about two years after she killed Michael. *See* Ex. 27, Aff. of Ruth McGinnis, SC1, 171, 173-74. Gary's father told Kathy's mother that "Dot had broken Kim's arm," Ex. 30, SV1, 182 and "had thrown her baby, Michael down the stairs and killed him." "[H]e was asking my mom if she would help look after the children while he was working and that he needed mom to help him because he didn't want her [Dot] to kill another one." V18, 3565. Charles Jesmer is Gary's uncle[101] and also said Gary's father wanted Jesmer's mother "[t]o watch Dorothy so she wouldn't harm the children.....[b]ecause she had done it before." *Id.* at 3576.[102]

7. As children Grew, Dot Tied them Up With Rope so She Could Drink

Kathy Robinson testified that she saw Gary's parents drinking "all the time" and "every day." *Id.* at 3566. She said since the children were older and could leave the house, when Gary's father was at work Dot would "sit them on that love seat - and she would tie them on there with rope." *Id.* And "they would

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[101]Jesmer submitted an affidavit regarding some things he knew about Gary's background, affirmed his affidavit, and testified. V.18, 3575. In his affidavit, he said "I lived next door to the Royal Whitton family from around 1959 until around 1963 and so I had direct contact with them over a period of many years and observed firsthand an ongoing and increasing pattern of physical and emotional abuse inflicted upon Gary and his siblings." SV1, 159-162.

[102]*See* Ex. 23, Jesmer, SV1, 159-163 ("Roy was increasingly concerned that Dorothy would go over the edge with the children, and he wanted someone around to keep an eye on them (Roy himself, couldn't be bothered, of course). Roy had good cause to fear this, because it's common knowledge in the family that Dorothy killed her second child, Michael when he was around 6 months old. It was written off as an accident, but we all know that Dorothy snapped.").

stay there like that until just before it was time for my brother [Roy] to come home." *Id.* at 3568. All day tied up. *Id.*[103] Jesmer also testified that Gary's parents were drunks[104] and Dot tied her kids to furniture with rope. *Id.* at 3573.[105]

8. More filth and squalor-"the skuzziest, filthiest, most rat-infested kids in the whole county"

Robinson testified the places Gary lived were "filthy," the children had to sleep crammed onto one mattress on the floor, and "they all wet the bed so it was urine soaked. The bathrooms were filthy." V. 18, 3567. "Especially where the children had to sleep was just - just awful."[106] Jesmer testified the "children were

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[103]According to Kathy Robinson, "[w]hen the Whitton's first moved in, my mom gave them vitamins because they were so malnourished they had rickets." Ex. 30, SV1, 183.

[104]See Ex. 23, SV1, 159-163.

[105]*See also* Ex. 23 ("It was not uncommon for her to tie the younger children...to the couch or bed, so that she could take the older children...to Dugan's Bar with her where she would drink all day. When she stayed home it was commonplace for her to lock the children out of the house. Dorothy would neither feed nor tend them. This happened .... during the bitter cold and snow of winter. She would untie her children or let them back in right before Roy Sr. would get home from work.")

[106]Living conditions never improved. According to Robinson,

> The Whittons moved to two other houses. The first had lots and lots of rats ... they were huge. I guess there were so many rats because the house had no indoor plumbing, just a bucket on a ledge outside on the back porch for going to the bathroom. The Whittons just threw their garbage over that porch ledge and onto the floor of the garage. The rats were everywhere.
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> 11. After that, the Whittons moved to a house in Pierrepont Manor. You could see right through the exterior walls. The grownups thought it was funny because when you drove up at night you could see right

poorly cared for at home."[107] Conditions were "just a mess and in disarray and dirty and vermin infested. It was just bad; it was really bad." *Id.* at 3577.[108]

9. Abusive, torturous punishment

Robinson testified Gary would be punished by making him kneel in a corner "for hours" or by making him stand with a heavy weight "in each hand with their arms extended." *Id.* at 3569. She remembered Val being sent to bed with only rubber pants on because she had wet the bed and then she had to walk "through this crowd of drunken men to get to the bathroom and in her rubber pants and nothing else. And I - I - I remember - just remember feeling really bad because everybody was making fun of her." *Id.* Jesmer testified "Roy and Dorothy were both abusive with the children," *id.* at 3577, and gave specific examples.[109]

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through the holes in the walls. Ex. 30, SV1, 185.

[107] *See also* Ex. 23, SV1, 159-163 ("As an adult, my sister Kathy was driving to the beach one day with one of her friends when the Whittons drove by. Kathy waved. Her friend turned to her in horror and exclaimed, "'Do you know them? They're the Whittons -**the skuzziest, filthiest, most rat-infested kids in the whole county.**'")

[108] *See also* Ex. 23 ("They had one mattress up there that was bug-infested and constantly soggy from urine, and they never had any sheets. The kids broke through a wall upstairs to our house so they could escape, and this gaping hole was never repaired. Their unit was *absolute squalor.*")

[109] *See also* Ex. 23, SV1, 159-163 (saw kids and "their hands would be frozen stiff and they'd all be soaking wet from wetting the bed. I remember one visit to the Whittons' where at least four of the children had wet their bed. Dorothy marched them out to a creek that was about 10ft wide and two feet deep and made the children stand in the freezing water. She told them to sit down and to wash themselves. Only Gary and Timmy did so; the

10. No health care for serious injuries and illnesses

Robinson remembered when Gary's brother Jeff was an infant he was very sick and vomiting and she had to turn him on his side to keep him from choking. *Id.* at 3569. She then saw he had a horrible infection so long-standing that "it infected the bone and the green discharge that I saw was puss that was coming out of the infected ear; puss." *Id.* at 397. "It had to have been going on for along time for it to get that bad." *Id.*[110]

11. Principals/teachers witness dangerous conditions, squaller, kids reeking of human waste, and try to help

Like the school teachers in Jefferson County, teachers and the principal in Watertown documented and attempted to address the Whittons. Max Bovee testified that he had lived in Adams, New York, for 40 years and was a retired school administrator and schoolteacher. He taught for 4 years and was a principal for 36.

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others just stood there shivering and crying....Roy would beat the one(s) blamed with a belt, kitchen utensils and/or Roy's fists. *Serious physical trauma was the punishment for everything.*"). Robinson was never contacted before trial, she loved Gary, and she "wished she'd had the chance to" provide the information in her affidavit and her testimony at sentencing. V. 18, 3572. Jesmer also was not contacted before trial and had he been he would have provided the information in his affidavit and in his testimony. *Id.* 3578.

[110]*See also* Ex. 31, Jeff ("[A] horse... bit me and took a good-sized chunk out of my neck. My father beat [the horse] to death with a 2x4 that had a nail sticking out of it while we watched. I never saw a doctor for my neck wound. I remember another time Gary and I were climbing in a barn. Gary put a magnet on the fuse box and got shocked. His hand turned black. He never went to a doctor for that either. When I was twelve we lived in Dexter and I collapsed. The next thing I remember there were doctors around. I had to have heart surgery. That was the only time I ever saw a doctor as a child, and I do not think any of my brothers or sisters ever saw a doctor or dentist.)

He was principal at Mannsville, Scholtz, and Wilson elementary schools, all in South Jefferson, New York. This was a sparsely populated rural agricultural area. He got to know his students and their families very well.[111]

Bovee knew the Whitton family. V. 17, 3276-77. The Whitton children went to school in Mannsville but lived off by themselves in the country. He remembered very well visiting the Whitton home, and the reasons he went: "because of concerns that I had and my staff had. I was concerned to have the school nurse go alone to the home." *Id.* at 3279. "I was concerned for the safety of my staff." "The parents were known to be alcoholic, have alcohol problems, and I didn't want to put my nurse or anyone else in a situation where they had to go up there alone and possibly face a situation that was not safe." *Id.*[112]

He testified "[i]t was not unusual to speak with [Gary Whitton's mother] and get slurred speech or a situation where you weren't sure how capable she was of even responding to the concerns that you had. If one of the kids got sick and you had to call to try to get her to come and get them or take them home, it was often a situation where we had to keep them at school and let

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[111]Bovee provided an affidavit and testified the affidavit was true and correct. V17, 3300, Ex. 17, SV1, 130-32.

[112]*See also* Ex. 17("From first-hand knowledge I know that the Whitton family was horribly dysfunctional. Both of Gary Whitton's parents were severe alcoholics. They were notorious in our small town. Gary's father, Roy Sr., drank constantly. The mother also drank continuously, consuming several quarts of whiskey per week. I remember her heavily slurred speech on the phone.").

them spend the rest of the day in the nurse's office because either she wasn't able to come and get them or it wasn't safe, in our opinion, to send them home in that setting." V.17, 3279-80.[113]

He testified that "[o]ne of the occasions is a very vivid memory." *Id.* 3280. It was in the spring, and it was muddy and cold. The children had not come to school, so Mr. Bovee went to their home. There were no cars, so the parents were not home. He knocked and one of the older kids let him in:

> Several of the kids were lying on the [kitchen] floor wrapped up in something. It didn't look like blankets, but whatever they had to try to keep warm[114] and there

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[113]Bovee testified Gary's parents drank a lot based on what he observed and was aware of. He had not watched them drink, but that 75-100 people at most lived in the Whittons' community and "they were notorious as alcoholics" unfortunately. On cross-examination, he was asked how he knew that Gary's parents were alcoholics and how he knew that Gary had been abused. He responded that he had good friends who lived next door to the Whittons and owned the property and who said Gary's mother drank several quarts of whiskey per week. V17, 3303-03. Other people who knew them better than he did outside of school said the same. Dot smelled of alcohol and her speech was slurred on the phone. The prosecutor then asked for names of specific witnesses. The principal responded that Gene and Becky Ellis owned the property where the Whittons lived, still own it, and they are still around. He saw them the week before his testimony. *Id.* 3303.

He also testified he recalled bruises on Gary that were unexplained. *See also* Ex. 17 ("The Whitton children regularly came to school with obvious signs of physical abuse. It was clear that they suffered verbal and emotional abuse as well. I saw two school pictures from the late 1960s - one of Timothy with an eye patch and one of Carlton with a large bruise on his chin. These sorts of injuries were commonplace"). The prosecutor asked whether Mr. Bovee had an obligation to contact the authorities if he suspected abuse and neglect and Mr. Bovee responded that he had reported it to welfare: "We called the hotline and reported it as we did on more than one occasion." V.17, 3305.

[114]Being very cold is a vivid memory for all the children. *See* Ex. 22, Kim ("Winter was always awful. We were freezing all

were no beds or anything in that room...[T]here was no parent there to speak with and the conditions were certainly deplorable.

Id. 3280. The house was "dirty" and smelled of human waste. *Id.* 3281.[115]

As a school teacher and principal, Mr. Bovee had worked with "a lot of families" over forty years. *Id.* The Whitton family could have been the worst off he had ever known: "I don't recall anybody any worse than they were, but they were certainly - I can think of two or three others that were close but they were among

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the time. ...Our mother would send us outside to get us out of the house. It did not matter if it was raining or snowing or 10 degrees outside. I had no boots and my shoes had holes in them. It was freezing and awful."); Ex. 31, Jeff "("Wherever we lived, our parents always had a bed and heat. We just slept on the floor huddling for warmth and freezing."); Ex. 32, Royal ("When my mother and father would finally get home (well after midnight), my father would yell at me to come downstairs to keep the wood burning stove stoked for the rest of the night, so mom and dad would stay warm. We kids slept upstairs where it was unheated and always freezing. If I fell asleep and my parents' room got cold, I would be punished."); Ex. 35, Val ("My mother would lock us out of the house regularly during the day. It didn't matter what the weather was like.... [Once] when Gary and Tim were about 12 years old, my mother came home drunk and threw them out in the snow. They had to steal a car and run the heat to stay warm. When they got caught, Gary took the blame.")

[115] *See also* Ex. 17 ("I visited the Whitton home on more than one occasion. They lived in absolute filth, stench, and poverty. I remember a specific visit....It was early spring, and still quite cold and very muddy. I knocked on the door around 9:00 a.m. No one answered. Eventually one of the older children came to the door and let me in. There were no adults around. The children were just bodies in rags huddled around on the floor. They were lying on tattered clothes or whatever scraps of cloth they could find, and no beds or mattresses visible anywhere. The stench of filth, rotting food, and human waste was horrible.").

the most needy."[116] *Id.* 3282. He explained the Whitton children were always harassed by other children because they had inadequate clothing that did not fit and was not clean.[117] Children would "[n]ot willingly," sit by Gary and his siblings on the bus because the Whitton's smelled so bad. *Id.* at 3282-83.[118]

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[116]*See also* Ex. 17 ("There is a lot of poverty in the region and I have seen many cases where environment has played a negative role. The Whitton case stands out as the most extreme I have ever seen and I will never forget it.")

[117]*See also* Ex. 22, Kim ("I was called "retard" and "stupid" in school for being in special education classes. We were made fun of by the other kids because of how we looked and smelled, but at least it was warm and we got a free meal."); Ex. 31, Jeff ("School was a terrible, humiliating experience for all of us. We were all isolated outcasts. **Sometime around 2nd or 3rd grade, one of my teachers actually built a huge cardboard box and put it around my desk to isolate me because I smelled so bad.** We all did."); Ex. 32, Royal ("We were outcasts at school and other places. We did not wash clothes much and I do not even remember ever having a change of underwear. Most of the houses we lived in had no running water, so we almost never took baths, especially in the winter. Of course, that meant that we were always filthy, and our clothes were always dirty, smelly, and worn out. At school, we were picked on and made fun of all the time by the other kids...I **still hated going home because school was so much warmer.** I do remember that there was one teacher who used to keep clean t-shirts and underclothes for us to put on after washing up."); Ex. 33, Tim ("School was horrible. Since we did not have running water, and my parents drank away all the welfare money they got, our clothes were always filthy and ragged, and they smelled terrible. We were picked on all the time."); Ex. 35, Val ("My brothers and sister and I were all ridiculed because our clothes were ragged and filthy and they stank. The other kids teased us constantly and treated us as outcasts...*School was still a reprieve from home.*").

[118]Arlene Moore taught elementary school for over 30 years in Jefferson County. She had Kim for 2nd grade and later also taught at Mannsville Elementary where she had Tim for a reading class. "Kim smelled really badly. One time I bent down to tie Kim's shoelaces and just about passed out from the stench." But as bad as Kim was, the boys were worse. She remembers Tim "trying to sit close to me for some human contact, but I'd have to back away because the smell was so strong." Her daughter road the bus with

Carol Bushell taught Gary in second grade. She said "[h]e was one of a very few students who made a profound impact on me. I really wanted to adopt him and to get Gary out the awful situation he was in. It was very frustrating because there was little in the way of effective social service intervention back then - you just did not get involved. Gary never talked about his home life or his parents (who were completely absent) but it was clear that something was very wrong." Ex. 20, SV1, 150-51.

Irene Erickson was a school-teacher and taught Gary in third

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the Whittons and told her: "'Nobody wants to sit with them - they fight and they stink.' I told her that I knew that, but that Kim and the others needed a friend, so I asked her to please sit with them anyway. She did, until one day she came home excited and said, 'Mom! Guess what? The Whittons have moved - I don't have to sit with them anymore!'" Ex. 28, SV1, 178-79; *see also* Ex. 17 ("Other children picked on the Whitton children at school because they were dirty, smelly and behaved badly....Other children would not sit near Gary or his siblings on the school bus because they smelled and looked awful.").

Dr Woods spoke to school officials and testified:

> The physical condition of the Whitton family was of such tremendous concern to the different teachers and administrators and other parents in the school that the Whitton family was often isolated. Bilkey Moore describes the fact that the Whitton children because they so smelled of urine were in fact assigned seats on the bus. [*See* Ex. 29 ('The bus driver made them sit together because they all reeked so bad.')]. Arlene Moore talks about really coercing her daughter to sit next to Kim Whitton because no one would sit next to the Whitton children. And that when they moved, as they did a number of times, approximately eight times, that when they moved her daughter came home and was so happy that she no longer had to sit with the Whitton children. V.17, 3367.

grade.[119] She is retired from teaching at South Jefferson Central School District after 28 years. She testified "I saw an awful lot of neglect and it was about the worst situation I had seen in twenty-eight years of teaching." V.17, 3313. The Whitton children were not cared for properly, that they came to school without proper clothing, that they smelled very bad and "this was about the worst situation that I had ever seen in all the years that I taught....I never did see any situation that bad." *Id.* at 3313. They had to bathe and clothe the children while they were in school and then have them change back into their own clothes when they went home. V.17, 3313-14.[120] She never saw Gary's parents at school. *Id.* 3314.[121]

She testified Gary's parents were alcoholics and the children were neglected. They did not have running water even though their father worked. The Whittons lived in a house her

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[119]She identified her affidavit (Ex. 18, SV1, 133-34), stated that she had a copy of it, and it was accurate. V.17, 3316.

[120]The school tried to give Whitton children clean, warm, clothing, but the Whittons refused. Erickson said Val was given mittens and a cap that had been left at the school. The next day Val returned them and a teacher said to keep them to stay warm. Val said her mother did not want charity. Ex. 37, DSS records, SV2, 249. Thereafter, the children were given clean clothes when they got to school, and put their home clothes back on when they left school. *See also* Ex. 18 ("Whitton children were sent to the school nurse to get tolerable clothes, because their own were filthy and stank of urine and dirty, unwashed bodies.").

[121]*See also* Ex. 18 ("The Whitton children were extremely neglected. They were much worse off than 'average' poor kids, of whom there were many in the area. The Whittons were the absolute poorest in terms of care and attention, and I think the most severe case of neglect and poverty I ever saw in 28 years as a teacher. I cannot remember a worse case.")

brother owned and after the Whittons moved out the house "was a national disaster. After they left the house it was not habitable. It had to be completely redone." *Id.* 3314.[122] She testified no one contacted her in 1991 or 1992 about Gary's trial and she would have provided the information in her testimony and affidavit to a jury or mental health expert. *Id.* 3315.[123]

12. Principal and teachers saw Gary's brain damage

Principal Bovee testified both the school nurse and physical

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[122]"My brother, Bob Fowler, rented a house in Pierrepont Manor to the Whitton family and saw first-hand how horrible their living conditions were. The place had no running water and according to Bob it was filthy and virtually uninhabitable after the Whitton's moved out." Ex. 18. Fowler stated that when they left "the house was left in terrible shape. It was a total disaster." While the Whittons lived there he "saw the house and the way they lived....The house reeked. There was feces and urine on the floor, and urine stains on the ceiling where it had soaked through from the upstairs floor." He said "the kids would be huddled up like animals on old coats or whatever was lying about. They were always filthy and smelled. The house always smelled of garbage and feces." Ex. 21, SV1, 152-53.

[123]On cross-examination she was asked how she knew the Whittons were alcoholics if she never saw them drinking and she testified that it was "common knowledge. It's a small village." V.17, 3323. *See also* Ex. 18 ("The Whitton children received no parental support. I never saw them at school. It was common knowledge that both parents were severe alcoholics and that whatever income they had went towards booze. As a result, the children did not get much food and always had to fend for themselves."). Ms. Erickson's brother, Bob Fowler, swore that

> I remember walking into bars after work hours and seeing Roy passed out head first on the bar. When Roy would leave the bar, he would buy a six-pack for the ride home and you could follow the trail of empty bottles from the bar to his house. Roy's wife Dot stayed at bars from dusk to dawn everyday drinking. She practically lived there. Any time of day, you could walk into the bar and you would be likely to find Dot there. Ex. 21, SV1, 152-53,

education teachers were concerned about Gary's gross and fine motor skills. He had trouble holding a pencil and his coordination and ability to write were impaired.[124] His gross motor skills were impaired as evidenced when he tried to play games or was running and attempting other large muscle activities.[125] Gary also had what is now known as attention deficit problems, staying on task and following through.

Based upon his training and experience, Bovee gave his opinion Gary had brain damage and cognitive dysfunction.[126] He testified as an educator he takes into consideration the comments of teachers and other administrators when assessing a child's physical and mental health, and did in Gary's case. He suspected Gary had organic brain problems based on his lack of

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[124]*See also* Ex. 17, SV1, 130-32 ("Gary's ears stuck out and he had a small flat face. He also suffered from coordination problems, hyperactivity, learning difficulties, poor attention span, stuttering, difficulty adapting, impulsiveness, and an inability to make friends.").

[125]*See also* Ex. 17 ("Both the Physical Education teacher, Mr. Dunn, and the nurses' office, expressed concerns about Roy, Bobby, and Gary's exceedingly poor coordination. There were test problems with both fine and gross motor skills. Gary had a lot of difficulty sitting in his seat and attending to his business. He had neither the ability nor maturity to think through the consequences of his actions with the skill normally Ex.ed by other children his age. None of the Whittons could function without some sort of accommodation by the school such as remedial reading classes. A lot of this was due to low intelligence. I cannot remember specific IQ scores, but they would have been in the low 70s at best.")

[126]The lower court allowed this testimony "for the purpose of the court considering whether or not the trial attorney should have contacted this witness and then should have made any follow-up [i.e., providing information to a mental health expert] after contacting this witness." V17, 3294.

coordination, his learning difficulties, and hyperactivity. V. 17, 3255[127] Also, Gary's IQ scores were in the "low 70 range." *Id.* 3295.[128] They did not have special classes for learning disabled then but had they he would have been referred. *Id.*[129] Gary was not an instigator or a bully, and "I always felt sorry for him when I had to deal with him because of what he had gone through, what he was experiencing." V.17, 3309[130]

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[127]*See also* Ex. 17 ("Also, based on 36 years experience as an educator and school administrator, my opinion is that Gary's cognitive problems stemmed from more than just the awful neglect, poverty, and abuse that he endured. There were organic or brain problems as well. The deck was tragically stacked against Gary Whitton, genetically and environmentally.")

[128]Irene Erickson, discussed supra, knows and recognized Mr. Bovee. They taught at the same school. She testified that she had seen about 30 children a year over 28 years of teaching and the way the Whitton children were forced to live affected the way they functioned. See Ex. 18 ("He had a low IQ and was very slow. I do not know whether this was the product of an organic defect, environment, or some combination, but I do know that there is a tremendous amount of trauma inherently associated with growing up in the kind of environment that the Whitton children did.").

[129]The lower court addressed Bovee, clarified there was no special education when Gary was in school, and said "back then they didn't use the term yet but they would have been essentially main streamed; is that correct?" Bovee agreed and said once special education classes began a person with Gary's background and limitations "would have been referred for an individualized work-up and testing by our school psychologist." V.17, 3296.

[130]Bovee testified no one contacted him about Gary's case before the trial. Had he been contacted he would have testified and provided information to defense counsel or an expert. V.17, 3299. *See also* Ex. 17("No-one advised me that I could testify on Gary's behalf at his murder trial in Florida. I would have testified about the horrible conditions under which Gary was born and raised, and about my lay and expert opinions about his cognitive functioning and deficits in adaptive behavior, based upon being a school administrator and principal.").

13. Dot and Roy break up and children are scattered

DSS in Jefferson County documented some of the Whitton nightmare. "This family has been known to this agency for many years." Ex. 39, SV3, 596. The agency received complaints the children were filthy and smelly and neglected. They would investigate and find "there are 14 people living in a small home which has very poor facilities. The Chimney cracked during the holidays and the children huddle around one stove to keep warm." Ex. 39, SV4, 735. No medical care was being provided to sick children, and "[t]he school nurse at the Henderson school, Mrs. Horton, is very disturbed." *Id.*

Dot and Roy finally broke up and Roy asked that the children be placed in foster care. At the time the children were living alone, unsupervised, unclothed, and unfed. SV3, 505. "Mrs. Whitton appears to have been a very poor mother and seemed to give the [children] no supervision whatsoever nor to provide for their proper clothing." *Id.* 506. "*Neighbors have stated that the children request to use the phone frequently in the evenings to call local bars looking for their mother.*[131] The family leads a rather isolationists life." SV3, 701. Dot would not cooperate with the foster care workers, and continued "gallivanting and

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[131] "[T]he children were running all over the neighborhood constantly at all hours and they never had any clothing...always begging for money from the neighbors and in general were quite a nuisance factor in the neighborhood." SV4, 654. The Whitton boys "begged for food." *Id.*

leaving her children alone." SV3, 472.[132] When her children were placed in foster care she "never asked about the boys." *Id.* 464.

After asking for foster care, Roy "abandoned his job and left the area when the agency filed a non-support petition in family court." SV4, 670. The children were placed in foster care "scattered" all over the school district, SV3, 517, and "bounced around from place to place." *Id.* 447. Gary was placed with Mrs. Lenora Cough on December 12, 1970, but only stayed for 17 days because his father appeared and told the agency that Mrs. Fred Langworthy was going to take placement of Gary privately.

14. Foster care, a chance to succeed snatched away

Langworthy testified she worked with Gary's father. One day Gary's father said he and his wife were splitting up and asked her if she would take all of the children. Langworthy and her husband had taken in children before and she agreed. V18, 3555-56. When Gary started foster care with her "he was totally confused ...he was neglected. He had a rash all over his body and wasn't clean, really, and not - not good clothes. And it was very hard for him I think." *Id.* 3556.[133] He was "dirty and smelly

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[132]"This agency has had many referrals regarding this family, in regard to poor home condition, complaints regarding neglect of children and innumerable foster care placement of the children." SV3, 524.

[133]*See also* Ex. 24, SV1, 164-66 ("The minute I saw Gary it was obvious that he was suffering from extreme neglect. He looked like a shaggy dog or a poor orphan. He arrived dirty, smelly, and virtually without clothes. He had only the ragged clothes on his back, one pair of muddy worn-out shoes, a couple pairs of underwear, and one change of clothes in a paper bag. Plus, he had a terrible skin rash all over his body. It was heart-breaking.).

and virtually without clothes." *Id.* Gary was ten or eleven years old but did not know how to act with a family because "I don't think he'd ever had one." *Id.* at 3557.

Under her care Gary started improving. He was never mean spirited or violent, but at first when you would hug him and kiss him good night "he didn't know what to think of that." "After awhile, he really got to where he did what the other kids did and he just began to fit in. He went to Sunday school with us and church with us and his marks began to improve in school." *Id.*[134] "He wasn't an especially good student, but he really did work at it. The teachers sent several reports home to me saying that Gary was really trying hard." *Id.*

But then Gary's father ruined it. He would come get Gary and "take him to this booze joint in Henderson and they'd be gone all day" and when he came home he'd "have the language of a sailor and stories that would curl your hair." "[W]e felt he was

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[134]See also Ex. 24:

> At the beginning of his stay, Gary was bewildered and disoriented. He could not react normally to any showing of support or nurturing. He did not know how to react to someone who tucked him in at night, kissed him goodnight, took an interest in him, or encouraged him. He always worried about what was going to happen to him next and was accustomed only to total uncertainty and chaos. He had no social tools and no ability to make decisions. He was never meanspirited or violent, just lost.
>
> 9. After a few months he began to open up some. He played with other kids, and went to church and Sunday school. He liked the feeling of belonging, and of being part of a family. It was plain that he had never had any of these things before.

probably having some - some booze in his Coke" because "[h]e would come home and tell the kids, Boy; you ought to have seen that Coke; they fixed it up special for me; was that ever strong." *Id.* 3558. It was "so counterproductive to what we were trying to do that I asked Roy please not to take him anymore. I said I thought it was harmful to him. He got mad at me and took Gary out." *Id.* She did not make Gary leave, "[a]bsolutely not. **We'd have kept him until he was old enough to be on his own. He was a good boy.**" *Id.*[135] She was not contacted at trial and would have provided this information had she been.

E. Expert opinion: Brain Damage, FASD, and PDSD

Dr. George Woods is a highly qualified and experienced physician specializing in neuropsychiatry. His practice involves

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[135]This was not the first time Gary had started to have a normal sort of life only to have that potential shattered by his parents' destructive actions. Earlier DSS records from St. Lawrence County document the time that the Whitton children were placed with the Harris family. In Mrs. Harris care, "[t]he children seemed happy. There are in and out of the house and for the first time are enjoying the freedom of playing in the yard." Mrs. Harris was providing food that "would be nourishing" and "the[ir] substantial needs will be met." Ex. 37, SV2, 248. Mrs Harris wrote that "I love them all. Poor little things." Inexplicably, just over two weeks later the social worker reported that she had learned that the Whitton family had "taken the Whitton children from the Harris home and had made their home in a small camp-like house..." *Id.* Dr. Woods testified,

> we see a history of [Gary's father], in many cases, snatching defeat from the jaws of victory. There are multiple circumstances where Mr. Whitton and his siblings were in a place where they could have done better ...and yet time after time we see Mr. Whitton's mother and father literally snatching defeat from the jaws of victory; making him take clothes back to the school because they 'did not want charity,' lying to the social services about where Valerie was. V18, 3425.

diagnosing and treating people with brain injuries or impairments. Without objection (or even voir dire) by the state, the lower court accepted Dr. Woods as an expert qualified to express opinions regarding whether a person suffers from brain damage and how such damage affects behavior. V17, 3430. Dr. Woods' opinion is Mr. Whitton does have significant impairments in brain functioning and suffers from mental diseases and defects that provide mitigating, including statutory, circumstances. The bases for his opinions include: interviewing Mr. Whitton twice at length;[136] conducting a physical and a dysmorphological exam, looking at bone and body structure (*Id.*, 3443); reviewing social history background, school records, medical records, and social services records(*Id.*);[137] reviewing affidavits submitted below (Id. 3380); personally interviewing the people who had submitted affidavits and who testified below (*Id.*); reading trial testimony; and reviewing the reports of other professionals.

Dr. Woods diagnosed Gary Whitton as suffering from:

(1) brain impairment.[138]

(2) fetal alcohol spectrum disorders(FASD). V17,

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[136]Dr. Woods examined Gary Whitton first at the prison and then at the jail in Defuniak Springs. V17, 3385.

[137]The DSS in St Lawrence and Jefferson had extensive interaction with the Whitton family. Records from these agencies were readily available to trial counsel but they made no attempt to obtain them. *See* Ex.s 37, 38, and 39, SV 2- 4.

[138]The term used by Dr Woods was "static encephalopathy." "Static" means unchanging and constant; "encephalo" means brain; and "opathy" means damage. Gary has brain damage which cannot improve and which he has had all of his life.

3380;[139] and
(3) Post-traumatic stress disorder(PTSD). Id. 3479.[140]

1. Gary Whitton was born with a brain that cannot function properly and it is not his fault

Gary Whitton's brain did not develop normally when his mother was pregnant. Dr. Woods concluded this from three separate sources. First, he considered the resalts of neuropsychological testing. Second, he examined Gary's upper torso and face which are malformed in a manner consistent with the brain damage shown from the testing. Finally, he considered the medical history and congenital defects of several of Gary Whitton's siblings all of

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[139]Fetal alcohol spectrum disorders "develop congenitally. They are congenital disorders. They are the impact of alcohol on the fetus during the first trimester of pregnancy." V17, 3380. "Fetal alcohol spectrum disorder includes both fetal alcohol syndrome and static encephalopathy." *Id.* 3342. Fetal alcohol syndrome (FAS) has four criteria. The first is that the individual have a small stature, typically greater than two standard deviations out of range. The second is congenital (i.e., from birth) structural defects (dysmorphology) in facial features. The third is neuropsychological impairment reflected in neuropsychological testing. The fourth is a history of exposure to alcohol in utero. A person who meets all four criteria has FAS. Gary Whitton meets all four. V17, 3340-44.

[140] As Gary Whitton's life history demonstrates, he was exposed to unrelenting trauma pre-birth, upon birth, and throughout infancy, adolescence, pre-teen, and teen-age years. Dr. Woods testified this is an extraordinary case where the diagnosis of PTSD was one "I could have made when he was five years old." V18, 3443. Gary cried throughout the testimony below about his childhood. Dr. Woods stated:

> The tearfulness has really been consistent with what you see in traumatic stress; when you see a person that has been - that suffers from traumatic stress and is forced, for whatever reason, forced to undergo or relive the circumstances that were -- the stresses that were the direct stressors for PTSD. *Id.* 3429.

whom have very similar damage.

a. Neuropsychological testing shows brain damage

Neuropsychological testing is used to examine brain function and impairment. Dr. Barry Crown is a neuropsychologist well-trained and well-experienced in conducting such testing, V18, 3410, he performed such testing of Gary Whitton on October 21, 2005, and he concluded: "[t]his is an impaired neuropsychological profile identifying longstanding multiple levels of cerebral disturbance (brain damage). Impairments are associated with anterior dominant hemisphere (left) and sub-cortical functions. Mr. Whitton has significant neuropsychological impairment impacting language-based critical thinking, information storage and retrieval." Ex. 40, SV4, 762-69. Dr. Woods testified

> What we see in the neurological tests is that Mr. Whitton clearly has impairments of memory sequencing and ability to weigh and deliberate. All of these reflect left frontal lobe and left temporal lobe impairment in certain academic functions.

V18, 3413. His impairments affect his ability to think abstractly:

> Abstract thinking is the ability to look past what is on your plate. There is difficulty with abstract thinking, the ability to conceptualize on a larger scale, think of alternatives, develop a plan outside of the specific issues in front of you, and take into consideration information you have that isn't right there in the process.

Id. 3415. It impairs his ability to organize and process information, reason, and plan. "The problems with sequencing, processing, and organizing information are particularly true in rapidly evolving circumstances. *Id.* 3416. "This is exactly the

area in which Mr. Whitton had significant impairment." *Id.*

b. The physical abnormalities in Mr. Whitton's face and torso show in-utero brain damage

A fetus develops from the midline. In the first weeks after conception the fetus looks "like a question mark and the top of the question mark is the brain." This question mark is the midline. The body develops to the left and the right from this question mark (midline): "that little tube is in the middle and then you develop arms, you develop legs, you develop heart." In an adult, the midline runs straight down the middle of the face and straight down through the sternum of the torso. Defects that occur in the fetus during the first trimester appear as problems along this mid-line, known as mid-line defects. V17, 3381-82.

Gary has multiple midline defects. First, in his face. For example, the philtrum is the midline groove in the upper lip that runs from the top of the lip to the nose. Dr. Woods testified that Gary Whitton's philtrum was flat, as opposed to being grooved in normal people. V17, 3385. Also, the border line (vermillion) over his upper lip is thin and without pigmentation. *Id.* "[W]hen you see no line on their lips ...you know these congenital defects occurred in that first trimester." V17, 3382. Further, Gary's facial structure is asymmetrical, *i.e.*,the right side of his face does not line up with the left side and "the right-hand side is not only not even it's sunken in a way that's not consistent with normal birth." *Id.* 3386. ("significant concavity"). This is a defect in the midline. And he has right

sided gum or dental dysplasia, *i.e.*, abnormal development. *Id.* 3388. Gary had to have his teeth removed. *Id.* Finally, Gary's eyes are smaller than normal, making the distance between them greater than normal. *Id.* 3386. These are all midline defects.

Gary also has midline defects in his body. Dr. Woods examined Gary's upper torso: "[h]is right chest reflects a dysmorphological syndrome called pectus excavatum ...a sunken chest." But "the difference in Mr. Whitton's chest is that only his right side was shrunken....so once again we saw asymmetry. And it's rare that you get as much asymmetry once you get into the body structure but his right side was shrunken as well." V17, 3386-87. "[W]hen we see impairment on the left side of the brain, we see bone problems and the kinds of dysmorphic problems on the right part of the body. They are very, very consistent ...[and] they're directly related." V18, 3411.[141]

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[141] Mental and physical midline defects are associated with the mother drinking alcohol and "the impact of alcohol on the fetus." V17, 3480. The other Whitton children also have midline defects. First, Michael was killed as a result of child abuse. "The autopsy records for Michael describe a congenital anomaly or a congenital problem." *Id.* 3377. Specifically, "the autopsy records describe a congenital problem with Michael Whitton's ureter....The ureter is in the midline of the body." *Id.* at 3378. Second, Jeff had "an aortic heart and aortic aneurysm," which is "a weakness in the wall of a blood vessel that eventually becomes like a bubble." *Id.* 3383; *see also* Ex. 38, DSS records, SV2, 387(diagnosis "organic heart disease" at age 9). This is a midline defect that occurred congenitally. V17, 3383. Third, Royal has an umbilical hernia that was repaired twice. A hernia is "like an aneurysm. Aneurysms are weaknesses in the walls of blood vessels. Hernias are weaknesses in the walls of wither muscle or skin tissue." *Id.* 3384 It is rare to have a hernia along the midline - most occur to the side. *Id.* An umbilical hernia is along the midline. Fourth, Carl had "lazy eye" which is "weakness of one muscle again in the midline." Id. "[Y]our eyes

2. Fetal alcohol syndrome

Gary has the small stature, the facial structure, and the deficits in neurological functioning that constitute three of the hallmarks of fetal alcohol syndrome. The only remaining question is whether he was exposed to alcohol while in the womb. Dr. Woods, and everyone who knew Mrs. Whitton, reasonably concluded that he was. Thus, Dr. Wood concluded that Gary suffers from fetal alcohol syndrome.[142]

Dr. Woods testified Gary's fetal alcohol syndrome and fetal alcohol spectrum disorders impair his ability to sequence, organize, and process information, particularly in fast-moving situations. V18, 3415. He has difficulty with abstract thinking and the ability to conceptualize and develop plans outside of the specific issue before him. *Id.* His condition makes it very difficult for him to generalize information, to change his behavior depending upon the situation he faces, to remember things in the short-term, to understand cause and effect relationships, and to control impulsive behavior. *Id.* 3418. Dr. Woods concluded "that these findings indicate a significant neuropsychological impairment" and agreed that it is "fair to say

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are designed to pull together ... and the muscles of your eyes ...are designed to pull your eyes in. That's why you can focus." When someone has a lazy eye, "[t]hat means that the muscle here that's designed to pull your eye in doesn't work and your eye wanders. Again, a midline defect." *Id.*

[142]*See also* Ex. 40, SV4, 762-69, Dr. Crown's neuropsychological report ("The findings of this examination are neurodevelopmentally consistent with early alcohol exposure and Fetal Alcohol Syndrome/Fetal Alcohol Effects.")

that this constellation of factors results in disabilities in areas of reasoning, judgment, and control of impulses." Id.

3. Post-traumatic stress disorder-"documented depravity"

Dr. Woods described Gary's background as "tremendous abuse and neglect," *id.* 3425, "profound abuse and neglect," V17, 3364, "overwhelming neglect," "overwhelming picture of alcoholism," *id.* 3354, "profoundly abusive," *id.* 3371, indeed "abuse doesn't really capture the quality of what I'm trying to convey based upon the records that I reviewed and the interviews." *Id.* This level of mistreatment "impairs one cognitively as well as the soul." *Id.* Dr. Woods called it "documented depravity," V18, 3424.

F. The Forensic Consequences of Brain Impairment

Dr. Woods testified that he was familiar with: the evaluation conducted pre-trial by defense expert Dr. Larson, the report Dr. Larson generated, and Dr. Larson's testimony; the Florida statutory mitigating circumstances regarding mental health issues; and the testimony at the sentencing proceeding.

1. Gary Whitton has a mental infirmities

Dr. Larson testified at sentencing Gary did "not have a mental infirmity, defect or disease." Tr. at 2170-71. He testified that Gary had "no mental illness" and no "impairments in his ability to judge and reason adequately."*Id.* at 2172. Dr. Woods testified: "that is incorrect." V18, 3414; *id.* at 3413 ("I would have to respectfully disagree."). "What we see in the neuropsychological tests is that Mr. Whitton clearly has ....left frontal and left temporal lobe impairment" which is a "mental disorder and defect" and "impairment of the brain that is ongoing

and disrupts the functioning of the brain." *Id.* 3413-14. Not knowing the background facts suggesting brain damage, neuropsychological testing was not done pre-trial.

2. Trial Expert Dr. Larson Had Insufficient Information to Diagnose Gary Whitton

Dr. Larson did not diagnose fetal alcohol syndrome. He did note "*possibly* fetal alcohol syndrome," Ex. 80, SV9, 1787-97 (emphasis added), but he did not diagnose it.[143] Dr. Woods testified that Dr. Larson could not diagnose it because "I don't think Dr. Larson had all the information necessary." V18, 3421.

Dr. Larson did not interview family members, speak with teachers, have neuropsychological testing, have the department of social services records from New York state, and did not know the midline defects that Gary and his siblings have. *Id.* He considered Gary's school records, records for alcoholism treatment, offense reports, an MMPI, and his interview with Gary.

3. Defense counsel and Dr. Larson unreasonably did not consider whether statutory mitigating circumstances were present - two are

Dr. Larson believed that he could not opine about whether there were any statutory mitigators because "[a]s you know, the Defendant denies any wrong doing relative to the charges." Ex. 80. Dr. Larson stated that he "had no opinion" on statutory mitigators. R. at 2172-73. Given Mr. Whitton's infirmities, two

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[143]Dr. Woods testified that three other siblings suffer from midline defects. Larson did not have that information. Larson knew Michael had died, but he did not review any autopsy records and defense counsel did not obtain them. Larson spoke to no one other than the defendant about his background. V18, 3422.

statutory mitigators apply: first, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; and, second, that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. V18, 3419-21.

Dr. Woods testified that Gary's brain damage "is not a type of neurological or psychiatric disorder that waxes and wanes, so the impairment and impulsivity, the poor attention span, the impairment and deficits, in the ability to weigh and deliberate *are always there,*" and impairs the capacity to conform one's conduct to the law. *Id.* 3420 (emphasis added). On cross-examination Dr. Woods explained that Gary's mental abilities are not "gone," but are "impaired," especially "in stressful situations." V18, 3434. "[H]is options are limited" and "his ability to develop options" is impaired. *Id.* 3435. "His options are always limited, but those limitations are less problematic the greater the structure of the situation." *Id.* 3440.[144]

Dr. Woods also testified "extreme mental or emotional disturbance" applied. *Id.* 3420. He stated that "we're talking about a static disorder neuropsychiatrically...that is always there" and is "an extreme mental disturbance." *Id.* "[T]hat chronic neurological impairment is extreme because it affects the

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[144]So in alcohol treatment, with twelve-steps and other program requirements, it was "this very limited structure that allowed him to function pretty well, but that's much different than any rapidly evolving situation" such as a fight. V18, 3441.

part of the brain that handles what we call executive function; the ability to weigh and deliberate, the ability to sequence one's behavior, the ability to look at the larger picture, the ability to withstand stress." *Id.* 3444. Because Mr. Whitton's "brain has been bad all his life," and "Mr. Whitton has suffered from this every day of his life," then "that would be true of that day [the day of the offense] as well." *Id.*

G. Prejudice is Palpable: *What "[t]he jury heard nothing about." Johnson v. Sec'y, DOC, 643 F.3d 907, 937(11th Cir. 2011)*

The evidence that could have been presented in mitigation, and to rebut aggravation, was extensive. The failure to uncover and present this evidence was prejudicial. Plainly the evidence discussed above "may have warranted greater [mitigating] weight...and the resulting weighing of mitigation and aggravation would have been different" *Orme,* 896 So.2d at 737.

The lower court held the evidence presented below "was largely cumulative of the evidence heard at the penalty phase," V24, 4759, but that is untenable.[145] The detailed post-conviction evidence from non-family members, teachers, administrators, foster care witnesses and others included the following which "[t]he jury heard nothing about." *Johnson, supra.*

Gary Whitton grew up knowing that his mother could just

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[145]Under *Strickland,* a lopsided order that greatly exaggerates what trial counsel actually did (*Cooper v. DOC,* 646 F.3d 1328, 1352, 1553 (11th Cir. 2011)) or "consider[s] less than the totality," and "unduly minimiz[es]" the "import," of the post-conviction evidence, *Elmore v. Ozmint,* 661 F.3d 783, 868 (4th Cir. 2011), is not reasonable.

kill him at any time, like she did his brother, with impunity (known but not presented by counsel);

Gary has brain damage that affects the way he thinks and responds in stressful situations (not known by counsel and actually disavowed at trial);

Gary has post-traumatic stress disorder (not known by counsel and not presented at trial);

Gary has fetal alcohol affects/syndrome (Larson could not so find at trial);[146]

Gary and four of his siblings have congenital mid-line defects (not known by counsel or presented at trial);[147] Given Mr. Whitton's mental infirmities, two statutory mitigators apply (not known by counsel and actually disavowed at trial);

Throughout his life when Gary was given opportunities to thrive his father would pull him back(not known by counsel and not presented at trial);

State workers from DSS whose job it was to document and correct the problems in Gary's homes documented but did not correct the problems and did not protect Gary (not known by counsel and not presented at trial);

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[146]Dr. Larson advised defense counsel that he would review any additional information that they could provide. Ex. 80 ("Should you like me to proceed further with other third party information you may [have] available, do not hesitate to contact me") *specifically requesting records from New York*.) A diagnosis of a major mental illness would reasonably require further investigation. *Orme*, 896 So.2d at 735.

[147]Brain damage, even possible brain damage, is one of the most significant mitigating factors. *Jefferson v. Upton*, 130 S. Ct. 2217 (2010)("permanent brain damage" that "causes abnormal behavior" over which he 'has no or substantially limited control," "impulsiveness," "diminished impulse control," "impaired social judgment"); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 237 (2007)(constitutionally relevant mitigating evidence includes "**possible** neurological damage"); *Smith v. Texas*, 543 U.S. 37, 41(2004)(mitigating evidence that "he had been diagnosed with **potentially** organic learning disabilities and speech handicaps at an early age"); *Williams v. Taylor*, 529 U.S. 362, 370 (2000)(mitigating evidence included defendant "**might have** mental impairments organic in origin"); *Mills v. Maryland*, 486 U.S. 367, 370(1988)("minimal brain damage" mitigating).

Gary had foster parents who could have helped him had his parents allowed it (not known by counsel and not presented at trial);

Gary's mother tied the children up with rope all day so she could drink alcohol (not known by counsel and not presented at trial);

School principals and teachers swear this was the worst case of abuse and neglect they had seen in years of teaching (not known by counsel or presented at trial);

School principals and teachers believed there was something wrong with the way Gary's brain worked (not known by counsel and not presented at trial) and that he had brain damage.

The lower court's "finding that the mitigation evidence presented at the evidentiary hearing was cumulative to the evidence submitted at sentencing was an unreasonable determination of the facts" and a "great exaggeration." *Cooper v. DOC*, 646 F.3d 1328, 1353 (11th Cir. 2011).[148] "The descriptions, details, and depth of abuse in [Defendant's] background that were brought to light in the evidentiary hearing in the state collateral proceedings far exceeded what the jury was told." *Johnson*, 643 F.3d at 936; *see also Robinson v. State*, 95 So.3d 171, 178 (Fla. 2012) "This testimony and evidence pales in comparison to the postconviction evidence.") "With a reasonable investigation [counsel] could have painted for the jury the picture of a young man [who] resembled the tormented soul in 'The

[148]The trial prosecutor suggested that the jurors should reject the "abusive home" notion because it was only suggested by the defendant himself and the few family members who had testified: "you wouldn't expect anything else from the brother of the person that's here on trial for his life today." R. 2236.

Scream.'" *Johnson*, 643 F.3d at 936.[149]

If counsel's chosen strategy was to "focus[] on establishing ... a troubled background," *Williams, supra*, 542 F.3d at 1378, as the lower court must have believed, then counsel had "*every reason* to develop *the strongest mitigation case possible*." *Id.* (emphasis added). Counsel here did not do so.[150]

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[149]Even were it true that some of the evidence was cumulative, the Supreme Court has "never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little of no mitigation evidence' presented" at trial. *Sears v. Upton*, 130 S.Ct 3259, 3265-66 (2010); *Collier v. Turpin*, 177 F.3d 1184 (11th Cir. 1999) (ten witnesses at sentencing sketched just the "hollow shell" of the mitigation that was available."). The critical question is whether "the totality of the available mitigating evidence" from trial and post-conviction creates "a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 534, 537 (2003). *See also Porter*, 558 U.S. at 40, 42 (applying *Wiggins* to an "advisory jury.")

[150]The lower court did not discount Dr. Woods' expert opinions or that Dr. Woods was provided with the types of background information by counsel that would lead to a serious investigation of brain damage. The lower court did not dispute that such an investigation would include neuropsychological testing which was conducted in post-conviction proceedings and which showed significant brain damage. Indeed, the lower court did not even mention the results of the post-conviction neuropsychological testing. The Court simply wrote that because no evidence was presented that Dr. Larson would change his mind after seeing what Dr. Woods saw, there was no prejudice. V24, 4761. This is contrary to *Strickland*:

> While [trial counsel] found "nothing helpful to [Whitton's] case," their postconviction counterparts, alerted by information from school, medical, and prison records that trial counsel never saw, found plenty of "red flags" pointing up a need to test further. ***When they tested***, they found that [Defendant] "suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions.

Rompilla v. Beard, 545 U.S. 374, 392 (2005)(emphasis added).

ARGUMENT V. CUMULATIVE ERROR, THE VIOLATIONS OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS UNDERMINE CONFIDENCE IN THE RESULT AT GUILT/INNOCENCE AND SENTENCING [151]

For a criminal trial or sentencing result to be entitled to finality, it must be demonstrated that the prosecution's case was required to "survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656 (1984) (internal citations and internal quotations removed). There was no crucible in this case because the State presented a bankrupt prosecution and defense counsel were singularly un-adversarial.

This trial and sentencing were rife with error. Knowing everything we now know, is it even possible that today this case would be tried? as a capital case? And, if it was, is there a reasonable probability the result would be different? Yes. Consider a trial/sentencing at which, *inter alia*:

> FDLE agent Ziegler and her colleagues tell the jurors that they are armed because the prosecutor and the sheriff scared them to death;
>
> Satan's fear of the exposure of his gross sexual perversion is presented as the reason why he wanted to help the prosecutor;
>
> the star snitch witness Satan is properly identified as the putative step-child-to-be of the prosecutor;
>
> it is shown that the time of death made it impossible for the defendant to be guilty;
>
> the state's eyewitness must explain why he told the police Whitton returned to the hotel at 12:20 a.m.;
>
> witnesses verify Mr. Whitton was not in need of money;

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[151] **Standard of review**: The lower court's judgment on this issue is reviewed *de novo*. *See* notes 6 and 37, *supra*.

the prosecutor cannot argue Whitton washed his car;

the victim's habit of being beaten up and robbed by prostitutes while drunk (and being drunk and looking for one, flashing around cash that would choke a mule the afternoon of his death) is known;

it is explained the fight did not last half an hour;

it is known that whoever killed the victim had blood all over them that could not be removed and would have been transferred in large quantities to any vehicle; and

defendant's full and complete mental condition and life history is presented, and the state is not allowed to have an expert speculate about the victim's suffering.

Surely the result would be different.

Gary Whitton claims his innocence, always has, testified for himself, and turned down deals for a term of years in prison. These are unusual circumstances. Cumulatively, the *Brady* and *Strickland* constitutional violations erase all confidence in the verdict and a new trial is required.[152]

IV. CONCLUSION

Appellant requests that this Court reverse the judgment below and order a new trial.

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[152]See *Jackson v. State*, 575 So. 2d 181, 189 (Fla. 1991) ("even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation"); *Ellis v. State*, 622 So. 2d 991 (Fla. 1993) (new trial ordered because of prejudice resulting from cumulative error).

CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a copy hereof has been furnished to Meredith Charbulla at Meredith.Charbula@myfloridalegal.com and that Meredith.Charbula@myfloridalegal.com is the e-mail address on record with The Florida Bar as of this date for Ms Charbullla, pursuant to Rule 2.516(b)(1)(A).

I ALSO certify that this Brief of Appellant was computer generated using Courier New 12 font.

Respectfully submitted and certified:

MARK EVAN OLIVE
Law Offices of Mark E. Olive, P.A.
320 W. Jefferson Street
Tallahassee, FL 32301
(850) 224-0004
Primary Email: meolive@aol.com

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