IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 12-132

STATE OF FLORIDA

Appellant/Cross-Appellee,

v.

THOMAS D. WOODEL

Appellee/Cross-Appellant

ON APPEAL FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT, IN AND FOR POLK COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE/ INITIAL BRIEF OF CROSS-APPELLANT

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PRELIMINARY STATEMENT

This is an Answer/Cross-Appeal of the circuit court's Order granting in part and denying in part Mr. Woodel's motion for post conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Citations shall be as follows: The record on appeal from Mr. Woodel's 1998 trial proceedings shall be referred to as "1998TR" followed by the appropriate volume and page numbers. The record on appeal from Mr. Woodel's 2004 trial proceedings shall be referred to as "2004TR" followed by the appropriate volume and page numbers. The post conviction record on appeal shall be referred to as "ROA" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

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

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Procedural History

Mr. Woodel was charged by indictment on January 16, 1997 with two counts of first degree premeditated murder, one count of armed burglary, and one count of armed robbery for the murders of Bernice and Clifford Moody, which occurred on December 31, 1996.

Mr. Woodel's trial began with jury selection on November 9, 1998. The jury returned its verdict on Friday December 4, 1998. The penalty phase began and was completed on Monday December 7, 1998. The jury recommended death by a vote of 9 to 3 for Clifford Moody and 12 to 0 for Bernice Moody. The Honorable Robert E. Pyle followed the jury's recommendations and sentenced Mr. Woodel to death. Judge Pyle found one statutory mitigator – no prior criminal history. Judge Pyle also found seven non-statutory mitigators: (1) Mr. Woodel was abused as a child, (2) Mr. Woodel was neglected by his mother, (3) there was instability in his residences as a child, (4) both of Woodel's parents were deaf, (5) use of alcohol and drugs, (6) Mr. Woodel met with the victim's family prior to trial and, (7) Mr. Woodel was willing to be tested as a possible bone marrow donor for his daughter who had leukemia. Judge Pyle rejected the mitigator that Mr. Woodel was so intoxicated that he could not form the intent to kill. On direct appeal, this Court affirmed Mr. Woodel's conviction but remanded the case to the circuit court

because the trial court's order failed to "expressly evaluate each mitigating circumstance, fails to determine whether these mitigators are truly mitigating, fails to assign weights to the aggravators and mitigators, fails to undertake a relative weighing process . . . and fails to provide a detailed explanation of the result of the weighing process." Woodel v. State, 804 So. 2d 316, 327 (2001).

On remand, the Honorable Susan Roberts conducted a new penalty phase as Judge Pyle was no longer available. The jury recommended a life sentence for the murder of Mr. Moody and recommended death by a vote of 7 to 5 for Mrs. Moody. Judge Roberts sentenced Mr. Woodel to death for the murder of Mrs. Moody.

The trial court found four aggravating circumstances: 1) prior violent felony (contemporaneous murder), 2) HAC, 3) murder during commission of a burglary, and 4) victim vulnerability due to age. The trial court found four statutory mitigators: 1) Mr. Woodel's age at the time of the crime (little weight), 2) Mr. Woodel's ability to conform his conduct to the requirements of the law was substantially impaired (unclear whether moderate or little weight), 3) Mr. Woodel was under an extreme emotional disturbance (little weight), 4) and no significant prior criminal history (moderate weight). The trial court also found ten non-statutory mitigators, 1) physical abuse as a child (moderate weight), 2) neglect and rejection by his mother and others (moderate weight), 3) unstable home as a child (moderate weight), 4) both parents were deaf and mute (moderate weight), 5)

abuse of alcohol and drugs (little weight), 6) willingness to meet with the victim's daughter (little weight), 7) willingness to be tested for a bone marrow donation for his daughter (little weight), 8) belief in God (little weight), 9) voluntary confession (little weight), and 10) the defendant's compassion for others (little weight). This Court affirmed. Woodel v. State, 985 So. 2d 524 (Fla. 2008).

Mr. Woodel filed a timely 3.851 Motion for Post Conviction Relief. The post conviction court conducted an evidentiary hearing over the course of 9 days. Mr. Woodel presented 27 witnesses. The State did not call any witnesses. The Court also took Judicial Notice of the 1989 and 2003 ABA Guidelines and the fact that Dr. Henry L. Dee is deceased. The Defense introduced 66 exhibits. The post conviction court granted relief in an 87-page Order. (ROA V. 36, p.5989-6075). The court found that trial counsel rendered deficient performance which prejudiced Mr. Woodel in his 2004 penalty phase. The State appealed. Mr. Woodel cross-appealed the lower court's denial of Mr. Woodel's Guilt Phase and Brady/Giglio claims.

STATEMENT OF THE FACTS

Mr. Woodel objects to the State's Statement of Facts. Mr. Woodel notes that the State devoted 65 pages of its brief to detail the mitigation presented at the 2004 trial. (Initial Brief, pages 3-68) This testimony comprised only 453 pages of the 2004 trial transcript, (See 2004Trial, Vol. 13, p.1937 -1980, and Vol. 14, p. 2046-

2456), and while relevant, is not properly summarized as facts of the instant case. Further, the State devoted a mere 35 pages of its Brief to detail the record in the instant case. The transcript for the instant case included almost 2,000 pages of testimony and approximately 865 pages of records.

Mr. Woodel hereby presents the following facts that were established at the evidentiary hearing and not contained in the State's Initial Brief.

1. Allen R. Smith

Allen R. Smith represented Tommy Woodel in his 1998 trial. Mr. Smith had primary responsibility for the guilt phase and was the lead attorney. ROA, V. 11, p. 1712-13. Mr. Colon was the penalty phase attorney and it was his responsibility to find mitigation witnesses and records. Id. at 1732. The focus of the defense was the fact that Tommy had been drinking continuously from 9 p.m. to 4 a.m. and Mr. Smith was trying to show that Tommy had consumed a "tremendous amount" of alcohol. Id. at 1714-15. The guilt phase theory was that Tommy was too drunk to form intent and there was no evidence that he had premeditated the murder or the underlying burglary. Id.

In preparation for trial, Mr. Smith hired Wayne Tucci to investigate Tommy's drinking on the night of the murders. Id. at 1716-17. Mr. Tucci was not asked to conduct a mitigation or background investigation. Id. Tommy told Mr. Smith that he had had somewhere between 18 and 24 beers on the night of the

murder. Id. at 1803. Mr. Smith did not consult with a toxicologist, or other similar type of expert, to assess the effects of alcohol on Tommy's blood alcohol level or brain function at the time of the murders. Id. at 1718. He had never hired a toxicologist before. Id. at 1735; 1739-40. Mr. Smith conceded that he did not even know how a toxicologist would come into play in this case. Id. Mr. Smith never even thought of using a toxicologist in support of the defense of negating specific intent and has no idea how the expert could deal with facts of the case because it never crossed his mind. Id. at 1764-65.

The theory of the 1998 penalty phase was that Tommy had no history of violence, had been rejected by his parents, was intoxicated and the victim had pulled a knife on him when all he wanted to know was the time. Id. at 1727.

Mr. Smith agreed that Dr. Dee was appointed in September of 1998 after they had retained Dr. McClane. Mr. Smith could not remember any conversations with Dr. McClane. Id. at 1726. Nor could he remember why they did not call him at trial. Id. Mr. Smith agreed that if Dr. McClane had uncovered mitigating evidence, he could have used that evidence with another expert without having to call or disclose Dr. McClane. Id.

Dr. Dee's role in the 1998 Penalty phase was to explain Tommy's childhood and "what kind of role it might have had in this situation." Id. at 1727. He also wanted Dr. Dee to testify about alcoholism and Tommy's drinking. Id. at 1728.

Mr. Smith thought that Toni Maloney was brought into the case in November of 1998 after jury selection in the guilt phase. Id. at 1730. It was Toni who discovered both parents were deaf. Id. Mr. Smith wasn't aware both parents were deaf until "well into the proceedings, I know that." Id. It was after jury selection had started. Id. Neither he nor Gil Colon ever considered hiring an expert to explain the phenomena of being the child of deaf adults (CODA). Id. at 1730-31. It never crossed his mind. Id. at 1736. Mr. Smith did not try to educate himself about CODA, other than through Dr. Dee. Id. at 1809.

Tommy's sister Bobbie was the one who found Tommy's father, Albert. Id. at 1809-08. Mr. Smith spoke to Albert, Tommy's father. The interview was "sometime toward the end of the trial ... just before the penalty phase started." Id. at 1731. He used Bobbie to translate for Albert as they did not have a sign language interpreter. Id. at 1734. Tommy was a cooperative client and never told them not to contact witnesses. Id. at 1735.

As to jailhouse snitch, Arthur White, Mr. Smith took his deposition and he thinks he reviewed his criminal record. Id. at 1734. He did not see any specific evidence of a deal. Id. He did not file a motion in limine to keep out the statement Mr. White claimed Tommy made about fondling the victim and did not object at trial. Id. at 1737. Tommy always denied the fondling. Id. at 1809. Mr. Smith also

conceded that he could have argued that the fondling allegation was irrelevant and unduly prejudicial. Id.

2. Wayne Tucci

The State did not include this witness' testimony in its Initial Brief. Mr. Tucci was appointed in December of 1997 to investigate Mr. Woodel's case for the defense. Id. at 1812. He had no training in mitigation investigation or conducting a biopsychosocial history. Id. In preparation for the 1998 trial, he spoke to seven or eight witnesses, all via telephone and all for the purpose of corroborating Tommy's drinking. Id. at 1813-17. He did not speak to these witnesses until September of 1998. Id. at 1831. He had never worked on a capital case before. Id. at 1819. He was retained again for the 2004 trial and for that his *only* duty was to serve subpoenas. Id. at 1819-20. He billed a total of $128.00. Id.

3. Toni Maloney

Toni Maloney is a licensed private investigator in Florida. She has a master's degree in criminal justice. Id. at 1835. She regularly attends Life Over Death and Death is Different, which are seminars that train and teach people how to investigate and defend a capital case. Id. at 1836. She has worked on over 100 capital cases. Id.

In addition to the testimony summarized in the State's Initial Brief (pages 71-73), Ms. Maloney offered the following testimony. The role of a mitigation

specialist involves reviewing the discovery, interviewing the client several times and developing a life history. Id. at 1837-38. It also involves developing a time line, a family tree, collecting records of client and family, including school records, military records, health and employment records, and then more specific records as you learn more about the client. Id. It is standard practice to obtain releases for confidential records. Id. Mitigation specialists also generate a multi-generational history to establish factors in mitigation which may have a genetic component such as alcoholism. Id. at 1838-39. Mitigation specialists work with the attorneys to identify and interview potential witnesses, identify areas where expert assistance might be helpful and communicate and provide experts with background material. Id.

Ms. Maloney is familiar with the 1989 and 2003 ABA Guidelines for the appointment and Performance of Counsel in Death Penalty Cases. Id. at 1840. (Guidelines). The Guidelines, and the knowledge of how to investigate and defend a capital case, have evolved over time. Id.

It is important to develop rapport and trust with the client, his family and with witnesses because you are trying to elicit sensitive information. Id. at 1841-42. If a witness is deaf, it is important to obtain a qualified American Sign Language interpreter. Id. It is typical to travel to the areas where a client grew up in order to meet witnesses and family members, to see the environment first hand,

to assess the client's socioeconomic background and to collect records. Id. at 1843-44. This was the standard in 1997-1998. Id.

Ms. Maloney was appointed to Tommy's case on November 12, 1998, three days after the guilt phase jury selection started. Id. at 1845. She was retained at Dr. Dee's suggestion. Normally she would start work months earlier. Id. at 1846. She did not even have a file on this case and really only acted as a witness coordinator. Id. at 1846-47. The only witnesses she recalls speaking to were Bobbie, Albert and Margaret Russell (Tommy's paternal aunt, also known as Becky.) Id.

Ms. Maloney has a distinct memory of speaking to Tommy and noticing that he was signing with his hands. She recalls leaving the interview and "immediately getting a hold of Dr. Dee and saying we have an issue here that I've not dealt with before." Id. at 1848-49. She felt it was "pretty significant." Id. She distinctly remembers that Dr. Dee *did not know Tommy's parents were deaf at the time* and his report does not indicate Tommy's parents were deaf. Id. and at ROAVol. 12, p. 1859 and 1889, and (Def. Ex. 6; ROA V. 24, p. 3964-3981). Ms. Maloney was "frantic" to try and understand the "dynamics" of it and "the impact it would have on Tommy's early childhood development." Id. at 1855. Ms. Maloney felt she did not know enough about the family at that point to know whether the parents were "responsible folks" or whether they had a "good support system." ROA V. 11, p. 1849. She found the book, Mother/Father Deaf and gave it to Dr. Dee. "Our

concern was we were in the trial, so getting someone else involved was going to be a difficult proposition." Id. at 1850. She tried to contact an expert on the topic but ran out of time. Id. If given enough time she would have found an expert.(ROA V. 12, p. 1884-85). Dr. Dee encouraged her to keep looking. Id. at 1886.

In its Answer brief, the State asserts that, "Everyone had known that the father was deaf, since they were in contact with him." (Initial Brief, p. 72 citing ROA 12/1860-62). This is inaccurate. A review of the transcript makes clear that Ms. Maloney never stated that "everyone" knew. In fact, she said that whether they knew one parent was deaf, she couldn't say. (ROA, V.12, p. 1862).

Ms. Maloney obtained the Children's Home Records (Defense Exhibit 8; ROA V. 24, p. 3992-4009) and Tom Kerwin's counseling records (Defense Exhibit 7; ROA V. 24. P. 3982-3991). Ms. Maloney felt there was additional mitigation investigation which needed to be done but they "just didn't have the time." (ROA V. 12, at 1855). Ms. Maloney felt that they needed to, among other things, contact the Children's Home and Tom Kerwin, and find people from these areas who could talk about the dynamics in this family. Id. at 1856-57. She never saw Dr. McClane's confidential history, which indicated that both parents were deaf. (Def. Ex. 5, ROA V.24, p.3953-63; ROA, V. 12, p. 1888).

Ms. Maloney was present when Albert testified and "formed the opinion that he was not forthright." ROA, V. 12, p. 1857.

She was not contacted after the 1998 trial and not asked to help prepare for the 2004 trial. If she had been contacted, she would have recommended that additional investigation was needed. (EH Vol. 1, p.181;missing from ROA.)

4. Dani Waller

Ms. Waller has a master's degree in social work and is a licensed clinical social worker. (ROA V. 12, p. 1894). She has been involved in 50 to 55 capital cases investigating mitigation at the trial level in state and federal court. Id. She has also taught mitigation investigation at approximately 25 conferences. Id.

In addition to the testimony summarized in the State's Brief (p. 73-74), Ms. Waller also offered the following testimony. A mitigation specialist interviews witnesses, obtains records, and conducts a multigenerational investigation. Id. at 1896. She also identifies areas where expert assistance might be helpful. Id. She obtains records to corroborate witness testimony, establish information that might never have been known and identify potential witnesses. Id. at 1897. Obtaining a multigenerational history is important because it helps illuminate issues such as patterns of dysfunction and genetic predisposition to substance abuse. Id. at 1897-98. "The more people you talk to, the more you begin to get a picture of this person's life." Id. It is standard practice to start before birth and look at parents and grandparents. Id.

Ms. Waller is familiar with the 1989 and 2003 ABA Guidelines. Id. at 1898. She was trained under the 2003 Guidelines. Id. The time it takes to investigate a case can be from 600 to 1,000 hours. Id. at 1899. It is important to develop rapport because as a "virtual stranger," you are asking people to share private, embarrassing things about their lives and their background about which they are often ashamed and have not told people about before. Id. It is important to have rapport with the client and the client's family because they "are the people who have family secrets . . . to share. And you're a stranger coming in asking for some very . . . hurtful, painful personal information." Id. at 1902. It is important to retain a qualified interpreter and in general it is not good practice to rely on a family member to interpret for another family member. Id.

Ms. Waller spoke to 18 witnesses, eight of whom were deaf, and reviewed/or obtained numerous records including Jackie and Albert's school records, divorce records, police reports and criminal records. Id. at 1907 to 1964.

Ms. Waller would recommend, based on the 2003 ABA guidelines, to obtain an expert in CODA and deaf culture in this case. The Guidelines speak to the importance of not relying on a generalist or all-purpose expert. Id. at 1964.

Ms. Waller provided an overview of what she had learned about Tommy's family and background that was not presented at trial and prepared a genogram or

family tree to demonstrate the multigenerational dysfunction in Tommy's family. Id. at 1970.

Tommy's maternal grandparents, Robert and Edna Alward, were alcoholics as were his maternal uncles. Id. at 1977. Robert was violent to Edna, knocking her down and trying to stomp on her while the children were watching. Id. at 1970. Jackie's brother, Robert Alward, was also deaf and neither of the parents learned to sign. Id. at 1972. Jackie was a high school drop-out with an I.Q. in the 70s according to her records from the Michigan School for the Deaf. (Def. Ex. 17; ROA V. 26, p. 4225-4288). Jackie was also rejected by the deaf community for a number of reasons, including her strange behavior, and that she was a deaf peddler and an alcoholic. Id. at 1972-74. She was chronically neglectful of Tommy from an early age, sending letters to Aunt Becky asking her to take the children. Id. at 1975. Tommy was seen at a funeral and at counseling sessions without shoes. Id. at 1976.

Tommy's paternal grandparents, Mary Young and Davis Woodel, were also dysfunctional. Mary abandoned her children, Albert and Becky, when they were young after she got pregnant by another man while her husband, Davis Woodel, was away in the military. Davis was an alcoholic and was rarely involved with Albert and Becky, who were raised by his mother Ella. Ella was Tommy's great grandmother. Id. at 1982-83. Davis remarried a woman by the name of Catherine Little who treated Albert and Becky as outsiders, having them watch t.v. in the

hallway when they came to visit so as not to get the carpet dirty. Id. at 1983. Both Davis and Catherine were alcoholics. Id. at 1984. Davis could not sign and Becky does not sign. Id.

Tommy's father Albert is an alcoholic and drank heavily through his first and second marriages. Id. at 1979-80. He was a known thief who stole from the deaf club and from other deaf people. He had a history of violence, threatened to kill his second wife, and sold drugs. Id. at 1980-81. Albert was sent to the North Carolina School for the Deaf when he was six years old. Id. at 1985. He dropped out of school at 16 and was later equally neglectful and uncaring of Tommy's education. Id. Albert's school records indicate that he was "lazy, stubborn and unwilling to accept advice." Id. at 1986.

Albert was married to his second wife, Linda Mattson, for three years. He drank excessively and was violent to her and neglectful to Tommy. Id. at 1988. Linda had been warned that Albert was a thief, a drunk and a womanizer but she married him anyway. Id. at 1988-89. Albert and Linda's marriage broke up due to Albert's affair with Beverly. Linda asked her brothers and parents to help her move out while Albert was away as she was afraid that he would hurt her.

Albert married Beverly, his third wife, prior to the 1998 trial. Beverly had just given birth to their second child, Fletcher, near the time of the trial. Id. at 1989. Beverly was 17 and Albert was 44 when they became involved. Id. at 1990.

Tommy had feelings for Beverly. Id. at 1991. This is important for the mental health expert to know because it is the ultimate rejection/betrayal by a father. Id.

After Albert and Linda's marriage broke up, Albert *and* Tommy moved to Maryland to stay with Aunt Becky. Albert spent his weekends going to Gallaudet University where Beverly was attending school. Id. at 1992. Becky and her husband were fed up with Albert leaving every weekend and demanded that Albert pay attention to his children. As a result, Albert pretended to take Tommy with him on the weekend trip to see Beverly but made Tommy hide in Becky's house instead. Bobbie brought him food but Becky ultimately discovered the scheme. Id. at 1993. While still at Gallaudet in 1987, Albert impregnated Beverly who gave birth to a daughter, Allison. Beverly gave Allison up for adoption. Id. at 1994. Tommy never spent any meaningful time with Albert after these events. He left Becky's house and joined the Navy. Id. at 1995. In mid-December of 1996, shortly before the murders, Tommy found out that Albert and Beverly were getting married. Id.

The State claims that Ms. Waller "did not discover any information about Albert abusing Woodel beyond what the jury had heard. (13/2111)." (Initial Brief, p. 74). However, a review of the transcript shows that the question posed was whether *Bobbie or Tommy* told Ms. Waller about any additional *physical* abuse. As

listed above, Albert's relationship with Tommy and his emotional abuse of Tommy was extensive and chronic above and beyond what the jury was told.

Ms. Waller also described the pattern of dysfunction in Tommy's siblings' lives. Charles Sisk, a half-brother, died at 16 years of age in an alcohol related car accident. Id. at V.12,p. 1998. Scott Sisk, another half-brother, went to prison when he was 18 years old, has had a chronic problem with drugs and alcohol, has had children by different women and has pretended to be deaf and peddled deaf cards. Id. at 1998-2002. Bobbie, Tommy's sister, had a suicide attempt at 13 years of age, has had alcohol issues, been convicted of DUI, and has had children with different men. Id. at 2002-01. As Ms. Waller explained, "Nobody left this family unscathed; none of these kids got out of this family unscathed." Id. at 2003-04.

5. Gene Bowen

In addition to the summary in the State's Initial Brief (P.74-75), Gene Bowen gave the following testimony. Gene Bowen was at the Children's Home when he was 11, 12, and 13. Tommy was also there and he was 6, 7, and 8. Mr. Bowen remembers that Tommy's situation was unusual because he was dropped off; most children had been taken away from their parents and placed there by the State. ROA V.13, p. 2119-2120. Tommy and Gene were placed in Cornelius Cottage; Bobbie was placed in Smith Cottage. Id. at 2120. Boys and girls were kept separate. Id. at 2121.

Tommy "struggled pretty much the whole three years." Id. at 2122. Everybody else would be ready to get dressed and go to breakfast and Tommy would still be in his pajamas. Id. He was the opposite of defiant. Id. at 2123. "He just couldn't get it. . . . It seemed like there was some communication gap or something like that. It was really strange." Id.

Tommy needed speech therapy, he sounded like a deaf person trying to speak. Id. at 2131. Tommy and Bobbie always signed when they were together. Id at 2131-32. He was "animated" when he signed; there was "clarity." Id.

Gene Bowen had not been contacted by anyone about Tommy's case. If he had been contacted he would have testified to the same things. Id. at 2134.

6. Dawn Perdue

In addition to the testimony summarized by the State in its Initial Brief (p. 75-76), Ms. Perdue gave the following testimony. Ms. Perdue has worked for 30 years with the North Carolina Department of Social Services. Id.at 2154. She was the house parent from 1976 to 1980 in Cornelius Cottage. She has a master's degree in education with an emphasis in counseling. Id.

Boys and girls were separated at the Children's Home. Id. at 2155. Tommy and Bobbie would not have been separated today as it is now against North Carolina state standards to place children under 12 years of age in group care unless they have significant behavioral or physical problems that would preclude

them from living with a family. Id. at 2156. Tommy did not have any severe problems that would have precluded him from living with a family. Id.

Tommy's parents did not come often to see Tommy or Bobbie, but the grandmother visited while she was alive. Id. at 2157. (She was actually the paternal great grandmother, Ella). She was living in subsidized housing for the elderly in Winston-Salem and was not allowed to have children live with her. Id. at 2160. When the parents came, they came together. Id. at 2164.

Tommy was the youngest in the cottage. Id. at 2157. His language skills were behind; he lacked vocabulary and enunciation skills. Id. at 2158. He had the speech pattern of a hearing impaired adult . Id. at 2169. She was sure she paddled Tommy. Id. at 2168.

7. Gilberto Colon, Jr.

In addition to the testimony summarized by the State in its Initial brief (p. 76-84), Mr. Colon gave the following testimony. Mr. Colon was appointed to represent Tommy on March 7, 1997. He claimed he had done two or three capital trials prior to this case but could not recall them by name. (ROA V.13,p.2179; ROAV. 17, p. 2724-25). He was second chair, which is a "learning" position. Id. at 2727. He also admitted his memory about the case is not clear. Id. at 2752. He is aware of the ABA Guidelines but stated that, "I hope you are not quizzing me on them, but I'm aware of them." ROA V. 13, p. 2180.

His theory of the case in the guilt phase was this was an unintentional killing and the defense team couldn't quite understand why it happened. Id. at 2185. A large part of the theory was Tommy's drinking and that he did not remember all the details of the murder. Id. at 2186. Mr. Colon was responsible for investigating the 1998 penalty phase. Id. at 2189-90. The 1998 penalty phase theory was that alcohol was a factor, Tommy had no prior criminal history, his parents were deaf and his mother was abusive, neglectful, and provided a poor household environment where Tommy had to go to a Children's Home and, as an older child, steal food from neighbors. Id. at 2190.

Mr. Colon has no independent memory of investigating anything about Arthur White prior to the 1998 trial. (ROAV.14, p.2193). Arthur White's testimony about the alleged fondling provided the "yuck effect." Id. at 2194. Prior to the 2004 trial, Mr. Colon did no investigation of his own to look at Arthur White's record to see the number or nature of his priors. Id. at 2195-96. The only thing he did was ask the Assistant State Attorney if he had any certified copies because he had no reason to doubt the number Assistant State Attorney Paul Wallace gave him. Id. at 2196. "He may have had a folder and I looked at it, or I may have just taken him at his word." Id. at 2197. He conceded there was no reason not to impeach Mr. White if he gave him the wrong number of felonies. Id. He cannot say why he failed to impeach him and there was certainly no downside.

Id. at 2198. He had done no investigation to see what type of a sentence Mr. White got, nor did he read any deposition transcripts contained in the court files of Mr. White's other cases. Id. at 2198-99. He did not investigate to see whether there was a deal because both the snitch and Mr. Wallace denied a deal. (ROA V. 17, p. 2738). He did not file any pretrial motions written or oral to exclude Mr. White's testimony even though he and Mr. Smith thought it was horrible that the "mention of fondling" came in. (ROA V. 16, p. 2698). Tommy had always denied the fondling and didn't remember the underwear. (ROA V.14 , p. 2194-95).

As to the 1998 penalty phase, he did "some investigation." Id. at 2199. He didn't remember seeing records from the Children's Home and didn't know if they were in his file. Id. at 2200. He remembers "some background check" about the fact Tommy was in a home, probably by Toni Maloney. Id. at 2200-01. He likewise did not remember Tom Kerwin's counseling records and thought Toni Maloney got those also. Id. at 2201-02. He didn't remember what investigative efforts he made to prepare for the 1998 penalty phase other than speaking with Tommy, "perhaps with family members," and "we may have done a background check." Id. at 2202.

Dr. McClane was appointed on December 10, 1997. Dr. McClane's notes, introduced as Defense Exhibit 5 (ROA V. 24, p. 3953-3963), were *not* in Mr. Colon's file. He first saw those notes when Mr. Wallace gave them to him during

the lunch break of his post conviction testimony. (ROA, V. 14 at 2217-18). He did not know Dr. McClane's notes existed and he never got a report from Dr. McClane. Id. at 2217-18. He has no memory of why he did not call Dr. McClane. Id. at 2219.

He agreed that Dr. McClane's notes reflect that Dr. McClane left a message with Mr. Colon's office that "neuropsych testing did not yield much." Id. at 2220. Two days later, on August 19, 1998, Dr. McClane's notes reflect he had a 15 minute phone call with Mr. Colon. Id. Mr. Colon has no memory of what they discussed. Id. at 2221. Mr. Colon conceded that per Dr. McClane's notes, Tommy had told Dr. McClane that both of his parents were deaf and that "all" of his relatives had problems with alcohol or drug abuse. Id. at 223-24. Mr. Colon conceded that a multigenerational pattern of alcoholism should have been developed at trial. Id. at 2224-25.

Colon received Dr. Dee's Report on October 21, 1998. Id. at 2204. Colon received a memo from Dr. Dee on Nov. 6, 1998 at 6:03 p.m., which would have been the Friday before jury selection started. Id. at 2207- 08. In that memo, Dr. Dee wrote:

> It may be of use to know that this extremely chaotic childhood ***might*** provide excellent mitigation ***if it could be pursued more thoroughly. One would need something of a mitigation specialist to further develop this.*** It may be useful to talk to such a person, Toni Maloney, about further developing such mitigation since frankly, it is difficult to

> know what more one could do for this unfortunate young man. Sincerely yours, Henry L. Dee

Id. at 2208; ROA V. 28, p. 4597-98 (emphasis added). As a result of Dr. Dee's memo, Mr. Colon filed a motion to have Toni Maloney appointed. (ROA V. 14, p. 2209). She was appointed three days after the trial started. Id. Dr. Dee's memo told Mr. Colon that, "Dr. Dee didn't have much to offer based on his evaluation," and felt there was more that needed to be developed. Id. at 2221.

Mr. Colon said his 2004 theory was that Tommy was under the extreme influence of alcohol and repressed aggression based on his childhood. Id. at 2229. He further described his theory of defense for the 2004 penalty phase as Tommy being under "the extreme influence of alcohol," and that he had no intent to kill and that his past and family environment, "may have provided a basis for that but that Dr. Dee could not pinpoint that." Id. He *thought* Dr. Dee testified to both statutory mitigators. ROA V. 16, p. 2659-60.

Mr. Colon does not know who discovered that both parents were deaf. ROA V.14, p. 2210. But, he admitted, regardless of who discovered it, it was discovered at the last minute during the guilt phase of the trial. Id. at 2211. Mr. Colon never considered hiring a CODA expert because he relied on Dr. Dee who read a book about it. Id. at 2213-14. Mr. Colon did not do any independent research or reading on CODA or deaf culture. Id. The CODA issue was significant mitigation. Id. at 2236.

On cross examination, Mr. Colon described his 2004 theory as, "a situation that developed during an alcohol induced, quote, unquote, coma, as the way we referred to it, because Tommy couldn't remember much about it." ROA, V. 16, p. 2582. Tommy was "very, very intoxicated." Id. at 2587. Mr. Colon did not consider hiring a toxicologist or expert to determine Tommy's blood alcohol level and the effect Tommy's drinking may have had on his brain and thought processes because he didn't think it was necessary. (ROA V. 14, p. 2214). He felt that "a good portion" of Polk county jurors know "what it is to be drunk, so I know that they know what a drunk person does when they're drunk." Id. He wouldn't want to see the jury questioning his expert on some area "as basic as being drunk," although he was unaware of what parts of the brain are affected by alcohol. Id. at 2215-2216. He said he would "never" think about hiring a toxicologist. (ROA V. 16, p.2589). He conceded that presenting a toxicologist was not inconsistent with his theory. (ROA, V. 14, p. 2216).

Mr. Colon admitted that the only family members he spoke to were Bobbie, Albert and Aunt Becky. Id. at 2225-26. To prepare for trial, he met with Tommy's sister and father either at Dr. Dee's office or "even perhaps at the motel." Id. at 2205. He did not travel to North Carolina or Michigan to see the communities where Tommy grew up, did not speak to anyone from those communities and did not send an investigator to do so. Id. at 225-27.

In 2004, he did not ask Wayne Tucci to conduct any additional mitigation investigation and did not seek to have a mitigation investigator appointed to reinvestigate or continue to investigate the case. Id. at 2232. All he did was review the records and "proceed with the same type of defense." Id. He did not hire Toni Maloney because he felt everything he had was sufficient. Id. at 2235. He admitted on redirect that may have been a bad idea. (ROA, V. 17, p. 2739). He also said at one point, that he didn't hire a mitigation investigator to talk to family members about other potential witnesses because he thought his English skills were good enough. Id. at 2751. He did not think about a multi-generational history, patterns of alcoholism or abandonment or a family tree because his package was sufficient. Id. at 2712.

He "hopefully touched base" with Dr. Dee in 2004 prior to his testimony but he has no recollection of it. (ROA V. 14 p. 2237). He did no additional work to investigate anything else about CODA. Id. He conceded, "Looking back, I wish I had hired somebody that would come in and provide further testimony." Id. The only investigative work done in 2004 was to rehire Dr. Dee and talk to "the sister, the aunt and the dad. That may have been the extent of it." Id. at 2238. He admitted that, "We did badly in '98" with a 12-0 and 9-3 verdict, so he decided to let Tommy testify because he felt they had nothing to lose. (ROA, V.16, p. 2659-58).

On cross - examination, Mr. Colon said his strategy with mental health experts was, "the more the merrier." Id. at 2669. He later said when explaining why he didn't hire a CODA expert, "I don't like to present a lot of expert testimony, but that's me, that's my style." Id. at 2686. He conceded maybe he should have tried to find a CODA expert but "looking at the package I had," he didn't think it was necessary. Id. at 2687. He admitted he did not remember making a specific analysis about a CODA expert, other than that he was comfortable with the package he had. Id. at 2688-89.

Prior to the 2004 trial, he knew Tommy had a good prison record but did not consult with a prison expert so he doesn't know what they would have been able to say. (ROA V. 17, p. 2743). He said there was no downside in bringing in a corrections officer to testify about Tommy good behavior as a prisoner but that he did not think about it and did not contact anyone at Union Correctional Institution. Id. at 2746-47.

8. Nancy McKenzie

In addition to the testimony summarized by the State in its Initial Brief (p. 84), Ms. Mckenzie gave the following testimony. Nancy McKenzie is a certified sign language interpreter who has worked for 20 years at the Communication Access Center for the Deaf and Hard of Hearing in Flint, Michigan. The Center is on the campus of the Michigan School for the Deaf. (ROA V. 14, p. 2240-46). The

Center provides interpreters for hospitals, courts, police departments and also coordinates services for developmentally disabled and mentally ill deaf adults. Id. at 2240-41. The Center also provides interpreter services for deaf individuals in the community, including assistance reading documents. Id. at 2243. Ms. McKenzie is also a CODA. Id. at 2241. CODA is an international organization comprised of hearing people with at least one deaf parent. Id. at 2256-57. There is a large community of deaf people and CODAs. Id. at 2271.

For many deaf people, English is their second language and reading English in written form is very difficult for them. Sign language does not translate word for word with spoken English. Id at 2244. Without the services of the Center, deaf adults could find themselves in dire situations such as facing eviction or jail because they don't understand how to respond to certain documents or how to navigate and apply for social security. Id. at 2244-45. It was common for deaf people to rely on their hearing children to interpret for them but this is less often with the advent of services like the Center. Id. at 2245.

Ms. McKenzie was just starting at the Center when she first met Tommy, his mother and siblings. Id. at 2246. Tommy was about 10 to 12 years old at the time. Id. at 2245. Jackie came to her for assistance with financial issues such as food stamps and aid for dependent children. Id. at 2246. She remembers that Jackie struggled with understanding basic principles. Id. at 2247. Hearing people are

often exposed to incidental knowledge by listening to the radio and thus hear about politics, finances, and religion. Id. at 2264. Deaf people don't get that information. Id. Jackie did not have that knowledge and did not "understand budgeting," or how to take care of her finances. Id. Jackie's talk of alcohol was "extensive and open," and "there were times when I could actually smell leftovers from the night before." Id. at 2272. Jackie was such a bad parent that Ms. McKenzie might have called Child Protective Services today. She did not call as people familiar with or part of the deaf community were more hesitant about calling because of a history of officials quick to remove children from a home simply because the parents were deaf. Members of the deaf community were sensitive to the issue. Id. As a CODA herself, she may have been even more sensitive to it. Id.

What stood out in Nancy's memory was "thinking, myself being a CODA, and the children being CODAs, I could really relate to what they were going through. But I felt more heart tugging because I felt that Jackie wasn't being the parent in this situation." Id. at 2247. Ms. McKenzie recalled that as a child she was embarrassed and didn't want anyone to know her parents were deaf. Id. So she felt she could relate to how Tom and his siblings must have been feeling being out in public with their mother but felt they must have been even more embarrassed because of Jackie. Id.

Ms. McKenzie is familiar with the deaf community in Flint, Michigan. She has lived there all her life, both of her parents are deaf, all her siblings are deaf, her aunts and uncles are deaf and she has met many other deaf people through her work at the Center. Id. at 2249. Jackie did not fit in with the deaf community because people couldn't sit down and have an adult conversation with her. Id. They "just sort of rejected her." Id. Jackie was unable to understand things intellectually or socially. Id. at 2250-51. Jackie's third husband, Don Bigelow, was also an outcast in the deaf community. Id. at 2251.

Ms. McKenzie also knew Jackie's brother Robert but Robert never mentioned Jackie. Id. at 2253. He was ashamed of her. Id. They were totally different. Id. Robert is very active in the deaf community; he's very social and well-liked. Id. Jackie and Robert's parents never learned to sign. Id. at 2254.

Ms. McKenzie was never contacted about this case prior to 2005. She first found out about the case when Robert came in seeking her assistance in responding to a letter from post conviction counsel. Id. If she had been contacted in 1998 or 2004, she would have given the same testimony. Id. at 2255.

9. Thomas J. Kerwin

In addition to the testimony summarized by the State in its Initial Brief (p. 84-86), Mr. Kerwin gave the following testimony. Mr. Kerwin received his Master's Degree from the University of Detroit in Guidance and Counseling in

1965. Id. at 2276-77. He is 86 years old. Id. at 2325. He worked for 22 years at the Genessee Community Health Center in Flint, Michigan (Center). Id. The Center provided counseling and mental health services for those who couldn't afford to pay. Id. The Center is still in existence. Id. at 2324.

Mr. Kerwin counseled Tommy and his mother, Jackie, at the Center when Tommy was 12 years old. Id. at 2278. His counseling records were admitted as Def. Ex. 7. (ROA V. 24, p. 3982-3991). He remembered Tommy when contacted by post conviction counsel. Mr. Kerwin's notes indicate that Tommy came to counseling sessions covered in mosquito bites, barefoot and, once, hobbled in after getting a nail in his foot while out with Jackie and her boyfriend. Id. at 2284-85; 2291-92. He also showed up once with a black eye. Id. at 2295. He never saw Tommy smile or laugh. Id. at 2297. He felt Jackie was an unfit mother. Id. at 2314.

Tommy stood out for a number of reasons, most significantly because most of the children were referred to the Center by the school but Tom was referred by the adult counseling unit where Jackie was getting counseling. Id. at 2279. His overall impression was that Jackie was "roping her son in here," in an effort to get him "placed out of the home." Id. at 2280-81. Tom was not doing too badly in school and Mr. Kerwin wondered, "Why is [this child] here?" Id. at 2281.

Mr. Kerwin explained that he had to give Tommy a diagnosis in order to get funding but that he came to the conclusion that he was mistaken. Id. at 2286-87 The problem wasn't Tommy but his mother, Jackie. Id. at 2287. Mr. Kerwin felt that in light of his situation, Tommy was doing a good job controlling his thoughts and his fears. Id. at 2294.

Tom still had contact with his father at this time but Albert's contact was limited and not supportive. Id. at 2296-97. Mr. Kerwin felt that as Tommy was ending the latency stage of adolescence when children need to firm up their relationship with the parent of the same sex, "he was missing a father at a very vulnerable time." Id. at 2297. Tom also had a Big Brother from the Big Brother/Big Sister program who bought him new shoes and a running suit. Id. at 619. Jackie was upset about the new shoes. Id. at 2296. Tommy also wore his Boy Scout shirt to a session and was "proud" to wear it. Id.

The counseling sessions ended abruptly when Jackie announced she was displeased with the services and that they were going to go someplace else." Id. at 2298. As far as Mr. Kerwin could tell, they didn't have the funds to go anywhere else. Id.

Mr. Kerwin was not contacted by anyone regarding Tom's case in 1998 or 2004. If he had been contacted he would have provided the same testimony. He

was first contacted about Tommy's case in 2009 when he received a letter from post conviction counsel. Id. at 2299.

10. Robert F. Alward

Mr. Alward is Tommy's maternal uncle. He is deaf. He is retired from General Motors where he worked for 41 years. Id. at 2331. He was married for 43 years. Id. His wife recently died. She was deaf also. Id.

In addition to the facts presented in the State's Initial Brief (p.87-89), Mr. Alward also testified to the following:

His father had a bad temper. When his father was violent, sometimes he was drunk, sometimes he wasn't. Id. at 2345. His father stomped and jumped on his mother after she rolled off the bed trying to get away from him. Id. at 2333. When he was 20 years old, he remembers his mother running into his room to try and get away from his father. Id. at 2334. He saw his father strike his mother seven or eight times but because he stayed at the deaf school "he didn't see what was going on at home all the time." Id. at 2344. Neither of his parents learned to sign and this made it hard to do things with his parents. Id. at 2333-34.

Robert attended The Michigan School for the Deaf starting at six years of age. He lived at the school and only came home on weekends. He graduated from the school. Id. Jackie started at The Michigan School for the Deaf when she was

14 years old. Id. at 2335. The other students teased her and made fun of her. Id. at 2335-36.

Jackie married three times. He met all of her husbands. Albert was a peddler. Id. at 2337.

He had not been contacted by anyone about Tommy's case until 2009 when he received a letter from post conviction counsel. If he had been subpoenaed in 2004 he would have come to court and said the same things. Id. at 2360.

11. Jesse Church

In addition to the facts presented in the State's Initial Brief (P.89-90), Jesse Church testified to the following:

Jesse Church is 74 years old, he is deaf and lives in Morganton, North Carolina. (ROA V.15, p. 2367 and 2374). He has known Albert Woodel since 1974. Id. at 2367. Mr. Church was afraid to talk about Albert at all because he was worried that after he left court Albert would confront him and *might kill him.* Id. at 2371. On questioning by the Court, Mr. Church said he liked Albert but didn't trust him. Id. at p. 2384-85. The Court instructed him that, if he did see Albert upon his return to North Carolina, that he could tell Albert that he was not allowed to talk about what was testified to in Court. Id.

Albert liked to get drunk a lot. Mr. Church saw him drinking a lot at the Deaf Club. Id. at 2369. He would "pass out drunk." Id. at 2382. Albert would bring

his children to the Deaf Club and just ignore them. Id. at 2372. Albert drinks less now but he is still mean. Id. at 2372-73.

Albert is known in the deaf community to be a thief and a liar. Id. at 2370. He stole from the Deaf Club and tried to blame it on his second wife, Linda Mattson, but everyone knew it was Albert. Id. at 2373. He would borrow things and then claim he lost them but *everyone knew* he was lying. Id. at 2378-79.

The first time he was contacted about this case was in 2010. If he had been contacted, he would have come to court and given the same testimony in 2004. Id. at 2372-74.

12. Bonnie Holland

Bonnie Holland is Christina Stogner's aunt and knew Tommy when Tommy and Christina were dating. As set out in the State's Brief, they had a child together who died of leukemia. Tommy and Christina lived with her in Michigan. Id. at 2386-87. In addition to the testimony set out in the State's Brief, Ms. Stogner testified that after Tommy was arrested, Christina had a relationship with Tommy's half-brother, Scott Sisk, and they have a son together, Brandon. Id. at 2390. Scott does not support Brandon at all. Id.

She was never contacted by any attorneys about the case. If she had been contacted she would have given the same testimony. Id. at 2390-91.

13. Annie Swann

Annie Swann is deaf. She is 68 years old and has lived in Belmont, North Carolina for 35 years. Id. at 2406-07. She celebrated her 50th wedding anniversary in December 2011. She has four children, they are all hearing. Id. at 2407. Tommy used to play with her children when he was seven or eight years old. Id.

In addition to the testimony set out in the State's Brief, Annie Swann testified that she knew Jackie, Albert, Bobbie and Scott. Id. at 2407-08. Jackie and Albert were both "unfit" parents. Id. at 2408. Jackie called the police about Albert and the police took the children to a shelter for about six weeks. Jackie wanted the children back but they didn't want to come back. They wanted to stay with their foster family. Id. at 2421. Jackie had a low I.Q. and would sign to herself in the mirror. Id. at 2415-16; 2424-45. Ms. Swann would try to explain things to her over and over but Jackie "still just didn't learn anything." Id. at 2424-45. "I knew she had problems, she couldn't learn things very well." Id. at 2425.

Albert and Jackie "drank every day. It never stopped." Id. at 2412. Jackie drank shots and even Annie Swann's grandchildren's cough medicine. Id. at 2416.

Albert had a "bad temper, very, very mean." Id. at 2408. He was violent, he would steal and he would exact "revenge on other people." Id. "If he saw something he wanted, he would [steal] it." Id. at 2409. He stole a "t.v., kitchen things, bed sheets, anything that he could get his hands on." Id. Albert broke into

Jackie's house and stole things when they weren't getting along. Id. at 2423. Albert also sold drugs. Id. at 2409-10; 2424.

Annie Swann was also present when Roberto, the deaf Mexican National was spending time with Albert and Jackie. Id. at 2411. Roberto also drank every day. Id. at 735. Albert, Jackie and Roberto would "peddle." Id. at 2412. Ms. Swann remembers Tommy having trouble with his bowel movements, "struggling" "one or two hours" to go to the bathroom. Id. at 2412-2413. Jackie refused to take him to the doctor even though Annie Swann urged her to do so. Id. at 2413. Roberto was in the home at this time. Id. at 2416.

Ms. Swann was first contacted by a lawyer about this case in 2010 or early 2011. Id. at 2425-26. If she had been contacted in 2004, she would have given the same testimony. Id. at 2417.

13. Linda Mattson

Ms. Mattson is deaf. She moved to North Carolina in 1981 and married Albert in 1983. Id. at 2427-28. In addition to the testimony outlined in the State's Brief, the following was presented through Linda Mattson.

Her divorce records from Albert were admitted as Defense Exhibit 26. (ROA V. 26, p. 4350-4372). They document the violence of the marriage and that Ms. Mattson sought and obtained a Restraining Order against Albert.

Ms. Mattson met Albert through some deaf friends. She only knew him a couple of months before getting married. Id. at 2429. Her friends warned her not to marry him but she ignored them. Id. They told her that Albert was a drunk, liar, thief and a womanizer. Id. at 2430 and 2435.

Albert was the treasurer of and stole from the Deaf Club while they were married. Id. at 2430. His drinking during their marriage caused problems. Id. at 2444. After she found out about the affair with the teenage Beverly, which had been ongoing for about a year, she moved out. Id. at 2442-43. Her brother and her parents helped her pack and run away because she "never wanted to see Albert after that." Id. at 2435. She was afraid of Albert; he looked mean. Id. He hit her one time. Id. She got an injunction to keep him away. Id. The 1986 divorce records (Def. Ex. 26; ROA V. 26, p. 435072) show that Albert broke Ms. Mattson's glasses and threatened to kill her. The family law judge issued a protective order after entering a finding she was in "immediate and present danger of serious injury from" Albert. Id.

Tommy lived with Linda and Albert ***towards the end of their marriage***. Id. at 2433; 2447. Tommy was 14 or 15 years old. Id. at 2438. Albert was not a good father to Tommy. Id. at 2434. He ignored Tommy and would not discipline him. Id. at 2433-34. She did not see any affection between Albert and Tommy. Id. at

2446. Sometimes Tommy was disrespectful but sometimes he was respectful. Id. at 2440. Albert didn't care whether Tommy went to school or not. Id. at 2436.

She was first contacted about this case in 2010. She would have come to court and given the same testimony if contacted in 2004. Id. at 2437.

15. Lt. Randolph Salle

Lt. Salle has been a correctional officer with the Florida Department of Corrections (FDOC) for approximately 24 years. Id. at 2454. In addition to the testimony presented in the State's Brief, Lt. Sallie testified that during April 2000 to January 2003, he had daily contact with Tommy. Id. at 2455. He was recreation sergeant at the time and took the inmates out to the yard for two hours twice a week. Id. In addition to being compliant and respectful, Tommy got along with other inmates. Id. at 2456. Tommy has had only one disciplinary report since being sent to prison: for excessive stamps, a popsicle stick and a latex glove. That was when Tommy first arrived at prison. Id. at 2458.

He was not contacted about this case previously. If he had been contacted, he would have come to court and testified in the same way. Id.

16. Lisa Wiley

Ms. Wiley has worked for the FDOC for more than 20 years. She worked at UCI from 1998 to 2005. Id. at 2466-67. She has a master's degree in psychology from George Mason University. Id.

In addition to that presented in the State's Brief, Ms. Wiley also testified to the following. DOC inmates are classified by their psychiatric grade which ranges from an S1 to an S5. An S1 indicates no identified mental health concerns and an S4 or S5 indicates an inmate in need of inpatient mental health care. Id. at 2467-68. Her job is to counsel inmates under the supervision of a psychiatrist or psychologist. Id. at 2468. Mental health services are voluntary except where an inmate is acutely psychotic. Id. at 2469. Inmates can request or be referred to mental health care. Id. at 2470. Staff does weekly rounds to observe inmates and check on them. Id.

Ms. Wiley saw/observed Tommy from April of 2000 to January of 2003. Tommy's grade was an S1. Id. 2472. His grade went to an S2 in September/October of 2002 (when he found out about his half-brother impregnating his former girlfriend). Id. at 2473. Tommy was in a dysphoric or depressed mood. Id. Ms. Wiley developed a treatment plan with him to help him cope with his depression, loneliness and isolation. Id. at 2474. All of these services were voluntary. Tommy was respectful, compliant and interested in trying to resolve his issues. Id. at 2475-76.

Ms. Wiley was not contacted by Tommy's attorney prior to the 2004 trial. If she had been contacted she would have given the same information but she would have had a more detailed memory. Id. at 2477-78.

17. James Aiken

Mr. Aiken has a master's degree in criminal justice and began working in the prison system in 1971. Id. at 2494-95. He has been a warden in various prisons in South Carolina and Commissioner of Corrections for the State of Indiana and the territory of the United States Virgin Islands. Id. at 2497-99. He was appointed by the United States Congress and the President to the Committee to Eliminate Rape in Prisons. Id. at 2500. He has testified more than 75 times on inmate classifications and management. Id. at 2502.

In addition to that presented in the State's Brief, Mr. Aiken testified to the following. He explained that the best predictor of whether an inmate will be violent in prison is the prisoner's age. Id. at 2503. Once an inmate reaches his mid to late 30s he is less disruptive. Id. at 2504. An inmate's crime does not correlate with their behavior in prison; inmates with violent crimes are not necessarily violent inmates. Id. at 2506. For inmates who had a chaotic life and childhood outside, they tend to do well when exposed to the structure and stability of the prison environment. Id. at 2508. Prison studies that were available in 2004 corroborate this. Id.

Mr. Aiken met Tommy at UCI to evaluate him and determine his institutional adjustment. Id. at 2508-09. He also reviewed Tommy's jail and DOC records and spoke to guards and staff. Id. Tommy's institutional adjustment was

favorable. Id. at 2509. "For an inmate to be incarcerated for the extended period between 1997 and 2004 and have only one write-up and that was not involved with systemic or random violence or potential for violence is *highly unlikely*." Id. (emphasis added). Tommy's DR for stamps, a popsicle stick and a glove would not make him a danger. Id. at 2510.

Mr. Aiken also evaluated the prison setting and how Tommy reacted with the officers. Id. at 2510-11. Tommy was "reserved," "respectful to staff," and "impressed [him] as an individual." Id. His impression was validated with what he saw in Tommy's records and in Mr. Aiken's interviews with Lt. Salle and Lisa Wiley. Id. at 2512-13. Tommy Woodel's request for counseling was "very significant," because inmates under stress can "demonstrate adverse behavior." Id. at 2513. But Tommy sought "problematic intervention" and gave staff "professional trust." Id. at 2514. Mr. Aiken believes that Tommy "can be safely confined for the remainder of his life without causing undue risk of harm to staff, inmates and the general public." Id. Mr. Aiken was able to give this type of testimony since the mid to late 1990s. Id.

18. Scott Sisk

Scott Sisk is Tommy's half brother. They have different fathers but Jackie is mother to both of them. (ROA, V. 16, p. 2540-42). Scott's father was deaf also. Id. at 2544.

In addition to that presented in the State's Brief, Scott testified to the following. Scott was sent off to various places as a child. He spent a year with his maternal grandparents and then was placed in the Children's Home. Id. at 2545. Bobbie and Tommy were also there but he was not in the same cottage. Id. He has no memory of his mother ever coming to visit him at the Children's Home. Id. at 2547. When he left the Children's Home, he went to live with his mother who got money through AFDC, food stamps, help from churches and "peddling." Id. Scott also peddled when he was older, pretending to be deaf. Id. at 2547-48. When his maternal grandfather died they all went to live with the maternal grandmother in Flint. Id. at 2548. They lived with Grandma Edna for about two years until she went into a nursing home with Alzheimer's Disease. Id. at 2549.

In 1987, when he was 18 years old he went to prison for arson. Id. at 2549-50. He was sent back to prison in 1990 and released in 1994. Id. at 2550-51. He then moved to North Carolina. In December of 1997 he was placed on probation. He violated his probation in March of 2000 and was sent to prison in North Carolina for approximately one and a half years. Id. at 2551-52.

He has had a drug and alcohol problem for many years. He started using alcohol at 13 and marijuana between 12 and 14. He has used acid, cocaine and started smoking crack when he was 31. Id. at 2553-54. The mother of his youngest child, Brandon, is Christina Stogner, Tommy's former girlfriend. Id. at 2556-57.

Christina and Tommy had a daughter who died of leukemia. Id. He has been a "pretty bad [Dad], not being around, not helping too much, in and out of their lives." Id. at 2558.

Roberto, the deaf Mexican National, anally raped Scott when he was a child. Id. at 2559. Jackie was in the house when it happened; she was usually passed out drunk when Roberto would rape him. Id. at 2560. He wet the bed because he was too scared to get out of bed at night and feared he would run into Roberto. Id. at 2561. Jackie did not seem to care. Id.

Scott was also raped by a Big Brother from the Big Brother/Big Sister program, Charles Patterson, Jr.. Id. at 2562. He took him to the PTL Club. They had swimming, camping and canoeing. Id. at 2563. It was when he took him camping that the rapes occurred. Id. at 2564. He bought him shoes, clothes, a watch and let him drive his car. Id. at 2568. Scott was 12 or 13 years old at the time and afraid to tell. Id. at 2569. He was later raped by an overweight sign language interpreter that his mother encouraged him to spend time with. Id. at 2570-71. He was also raped when he was sent to prison. Id. He never spoke to his family about this because he did not feel close enough to any of them and did not feel his mother or siblings could help protect him. Id. at 2571.

He was not contacted by any lawyers prior to post conviction counsel contacting him. Id. at 2572. If he had been contacted he would have given the same testimony. Id.

19. Dr. Alan L. Marcus

Dr. Alan L. Marcus is a clinical psychologist in private practice where he works with deaf and hard of hearing adults and families, including CODAs, facing difficult issues. (ROA V. 17, p. 2754). He has a Ph.D. in clinical psychology. Id. at 2756. He has been a certified American Sign Language Interpreter for 20 years. The focus of his practice for 25 years has been on issues relating to the deaf and hard of hearing. Id. at 2753-54. He worked at Gallaudet University as a staff psychologist and Director of Community Services from 1989 to 2001. While there, he was affiliated with the forensic evaluation team and also taught courses in counseling and psychology. Id. at 2755. He is also a CODA. Both of his parents are deaf. Id. at 2755-56. Working to understand "the lives of hearing children born to deaf parents has been something that's been a part of me my whole life." Id. He is also a member of the National Association for the Deaf, the Registry of Interpreters for the Deaf, the American Deafness and Rehabilitation Association, CODA and the Maryland Association for the Deaf. Id. at 2758.

In its Brief, the State asserts that "there was no testimony that he would have been able to testify in 2004." (Initial Brief at 97.) This is misleading. There is no

testimony that he was unavailable, and as set out above, he was a practicing psychologist eminently qualified to testify in 2004 as to the issue of growing up CODA. More importantly, he testified that the information he gave about CODAs was widely known to psychologists like himself in 2004. There were also numerous studies that were available in 2004 about CODAs and the psychological effects of growing up CODA. Id. at 1215.The State's assertion is a red herring.

In addition to the one page summary of testimony set out in the State's Brief, (Initial Brief at 97-98) Dr. Marcus testified to the following. As part of his efforts in this case, he met with Tommy, reviewed numerous records, including Albert and Jackie's records from the North Carolina and Michigan School for the Deaf, reviewed Dr. Dee's testimony, and the transcripts of the trials. Id. at 2761. He is familiar with the book Mother/Father Deaf ,which is an anthropological study. It is a "scholarly" book but not a "psychological review." Id. at 2762. He also interviewed Tommy in sign language. Id. at 2761-62. Tommy is fluent in sign language. Id.

Dr. Marcus explained that 90 percent of deaf people have hearing parents and, until recent changes requiring early hearing tests for all children, deaf children were not identified as deaf until they were two or three years old. Id. at 2768. This is significant because the opportunity for language acquisition is then limited and many deaf people only read at the 4th or 5th grade level. Id. at 2769. Also, deaf

children of Jackie and Albert's era were separated from their parents at an early age and sent to deaf school. This resulted in a lack of bonding and attachment because the child feels rejected by the family. Id. at 2771. In addition, their parents were told not to learn to sign or their deaf children would never learn to speak and this also contributed to a lack of bonding. Id. at 2770-71. Today we know that "is a total farce" to suggest that a parent learning to sign prevents a deaf child from learning to speak. Id. Also, deaf children were being raised by strangers at the deaf school who may have taken advantage of them, physically or sexually. Id. at 2769-70.

Deaf people tend to live in areas where there are deaf schools or programs because the deaf school is the "central magnet" for deaf people and where they socialize. Id. at 2779. Deaf people have their own Olympics and sporting events. Id. They are also often underemployed and end up on social security disability or welfare. Id. at 2783.

Dr. Marcus also explained the phenomena of "Deaf Peddling." Deaf Peddling has been going on for a long time and has been kept "underground." Id. at 2784. It is "very shameful and not something that people want to admit and talk about." Id. It can become a "pyramid scheme where the top dog will hire other people who will hire other people ... and then send them out into the street and bully them and actually use scare tactics to get them to do work." Id. There was a

scandal in the 1990s with deaf Mexican immigrants who were abused and traumatized in New York. Id. Scott Sisk admitted to Dr. Marcus that he was a peddler and actually got his peddler cards from Jackie. Id. Albert was also a peddler and "he was probably one of the top dogs." Id. at 2785. In essence, Deaf Peddling is deaf people victimizing other deaf people. Id.

Dr. Marcus also explained Deaf Clubs, which are social organizations where deaf people come together to socialize, and if they have a liquor license, they drink. Id. at 2785-86. Thefts can occur and that is what happened in Albert's case. Id.

CODAs grow up in this deaf world and can feel marginalized from or reject the hearing world and identify strongly with deaf values because of their life story. "So, in essence they are rejecting themselves," and often do not know where they "fit in the world." Id. at 2772. They are not really part of the deaf community nor are they part of the hearing community. "They're really part of almost no community except within themselves." Id. at 2773. CODAs can never really choose to live in the deaf world because they can hear. They are always outsiders looking in. Id. at 2865. They face many issues. Id.

As CODAs grow up and realize they are not part of the hearing or deaf world, they "try to create their own space." Id. at 2797. When Tommy and Bobbie

were at the Children's Home and would sign to each other, "they were just talking in their own language and keeping their identity whole and sacred." Id.

CODAs can be parentified, where they are required to be the interpreter and mediator for their parents and the hearing world. Id. at 2790. There is shame and embarrassment to this because of the "stigma that goes along with being deaf." Id. It also robs the CODAs of their childhood because they are "adults before they're ready to be adults." Id. This makes them feel inadequate and unsafe. Id. at 2791. CODAs also pick up mannerisms and habits of the deaf, including an emphasis on eye contact in communication, less boundaries with body space and an ease with walking into other people's houses without knocking. Id. at 2796.

Jackie was "very much struggling with her identity as a deaf person." Id. at 2800. There is a big stigma within the community to identifying with hearing people and lip reading. Id. at 2799. The record at trial shows there was a lot of speculation about how much she could hear. Id. So Jackie probably felt a level of "self-hatred and self-loathing that she was a deaf person," but at other times she saw it as an advantage, "so she never really accepted herself." Id. at 2800. She engaged in a lot of strange behavior, signed to herself, took the doors off. Id. at 2802-03. She also went to downtown Flint trying to fit in with the hearing community. Id. at 2804. She was likely victimized by hearing "hoodlums" who were drinking and doing drugs and she was giving herself up sexually for a "false

sense of acceptance." Id. A deaf person who is accepting of their deafness may still drink and do drugs and so on, but would do it with other deaf people. Id. Jackie was also arrested for being "insane" at this time (Def. Ex. 13, ROAV. 25, p. 4156-4185). She may have just been drunk, high and out of control. "Guttural voicing" by deaf people can be scary for hearing people. Id. at 2806. Deaf people do vocalize and they don't know they are making noises. Id. at 2806-07. Jackie's school records show that her IQ was 71 which indicates mental retardation. In a deaf person, a performance IQ in the low 70s is even more significant. Id. at 2778.

Albert was more comfortable about being deaf than Jackie but he was still someone who was abandoned as a young child. Id. at 2809. His way of gaining a sense of power was to oppress and take advantage of other deaf people to "work out the pecking order." Id. Albert "would pull other people down to his benefit and he took advantage of women and other people so that he could feel good about himself and better himself with no regard for the impact it would have on others." Id. at 2810.

The issue with Jackie and Albert is not just that they were deaf, but that they were "quite broken individuals," and add to that that they were deaf, both were limited in their education, were drug users and alcoholics, and liars and "you have the perfect storm to set up a situation where not only are they incapable of handling

their own lives, but [are] unable to really manage their children and teach their children how to manage their own lives." Id. at 2787.

Tommy has the mannerisms of a deaf person. Id. at 2797. He showed a "very deep love of the deaf people and a very deep disappointment and hurt and rejection." Id. at 2796-97. When Dr. Marcus spoke to Tommy "he would be trying to formulate signs in his head to put into words." Id. at 2798. His facial expression was more blunt, more flat, . . . than when he was signing." Id. There is "so much within him that identified him as a CODA, as someone who is strongly connected to the deaf community." Id. As Dr. Marcus explained, "When I look at Tommy, I sometimes see this deaf man buried within him; that there is this sense of being a deaf man trapped inside a hearing person's body. . . [H]e has a lot of the deaf mannerisms, including going into friends' homes . . . where he really wouldn't think twice about walking in without knocking." Id. at 2987-98.

Dr. Marcus identified a number of areas where Dr. Dee was mistaken or lacked an understanding of the full implications for Tommy growing up as a CODA with the type of deaf parents he had. Dr. Dee stated that Tommy's manner of speech was idiosyncratic but he failed to fully explain why this was so and the significance of it. Because a CODAs first language is sign language, spoken English is their second language. Id. at 2763. Sign language is like a romance language with the nouns and verbs reversed so CODAs sometime reverse their

nouns and verbs. Id. Sign language does not translate directly into spoken English. It is very pictorial, with all the emphasis in the face. Id. at 2766-67.

Dr. Dee also spoke about a lack of emotion in Tommy's vocalization. Id. at 1219-20. That was significant to Dr. Marcus because when people speak in their second language there is a diminished ability to express their feelings. Id. at 2764. However, when engaged in their primary language, "there's a depth and breadth of effect and emotion that just overwhelms the room and them. They become much more in touch with their feelings. And this is evident time and time again when I've worked with CODAs, [and] when I work with deaf people who try to communicate through an interpreter." Id. When Dr. Marcus interviewed Tommy in sign language, "I thought I was talking to somebody different. He was much more in touch with his feelings. He cried several times," and expressed remorse about the murders. Id. at 2765. He was "torn up about it and was actually tearful about it and just wondering how he could have gotten to that place, how did he get there, how could he have done such a thing." Id.

Dr. Marcus also stated upon cross-examination that Dr. Dee's example of CODA shame and embarrassment when Jackie was teased by Tommy's friends behind her back at school does not convey the "long term ramifications" of that and what happens when it goes on repeatedly. Id. at 2864-65.

If contacted by the lawyers or Dr. Dee at the time of trial, Dr. Marcus recommended different strategies that should have been considered. First, he would have steered Dr. Dee to recent studies done on the psychological impact of growing up CODA to give him a foundation. (ROA V.18, p. 2883). He also would have urged him to consider cultural aspects of deafness. Id. Further, he would have cautioned him to not use the MMPI on a CODA as it has been shown to be unreliable. He would also advise him to consider the impacts of testing someone from a culturally different background and how language is used. Id. at 2883 and ROA V. 17, p. 2773-74. He also would have encouraged him to use a sign language interpreter or team up with someone who is fluent in sign language to do a follow up to obtain a more complete picture of Tommy. (ROA V. 18, p. at 2884). Dr. Marcus explained that Tommy needed to be evaluated both as a hearing person and as a deaf person in a hearing person's body. Id. Tommy would hide his deaf self because of the shame and lack of pride because of his life experiences, especially growing up with deaf parents who acted in ways that were "inhumane at times." Id. When a person grows up full of shame and confusion and instability, that is how they live their lives. Id. at 2885-86.

Dr. Dee did not "totally understand" the "profound effect" that having two deaf parents had on Tommy's life. "He got a glimpse of it with Paul Preston's book," but he was "reading one textbook that looked at 120 some odd subjects with

a limited scope and it was anthropologically focused... and it didn't bring out all the dirty laundry. It tried to paint a picture that was challenging, but it didn't get into the dirty laundry . . . that you have to dig to find." Id. at 2890.

20. Margaret Russell

Margaret Russell, also known as Aunt Becky, is Tommy's paternal aunt and Albert's sister. She testified at both the 1998 and 2004 trials. In addition to that presented in the State's Initial Brief, Aunt Becky offered the following testimony that was not presented at either trial. Aunt Becky stated that the first time she spoke to Mr. Colon was in the courtroom. Id. at 2905. She spoke to Mr. Smith over the weekend at the hotel where she, Albert and Bobbie were staying. Id. When Mr. Smith interviewed Albert, Bobbie translated or they wrote down questions. Id. at 2905-06. Aunt Becky cannot sign. Id. at 2906. She felt she could not talk freely with Albert sitting in the room because it would have been hurtful to say certain things in front of him. Id. at 2956. She spoke to Dr. Dee at the Denny's Restaurant in Bartow the weekend before she testified at the 1998 trial. Id. at 2907-08. Mr. Colon was also supposed to call to speak to them but he never did. Id. at 2908. She has no memory of speaking to any lawyers prior to arriving in town to testify in the 1998 trial. Id. at 2954-55.

In preparation for the 2004 trial, she, Bobbie and Albert met with Mr. Colon the night before the trial. Id. at 2906. He spoke to all of them together in the same

room. Id. at 2907. The only communication with Mr. Colon prior to the 2004 trial was in his office, the night before her testimony the next day. Id. at 2957.

Aunt Becky's parents are Davis Woodel and Mary Young. Her older brother Albert was born March 3, 1942 and she was born July 16, 1943. Her parents got married on June 5, 1943, one month before she was born. Her mother Mary left town after she got pregnant by another man while Davis was in the military. Id. at 2910. Becky was six months old. She was raised by her grandmother, Ella. Id. at 2909. Ella's husband, Charles Martin, was a drunk who physically abused Ella. Id. at 2942-43.

She went to find her mother when she was 16 and her stepfather welcomed her with open arms. Id. at 2911. Her mother turned out to be a hurtful liar so she eventually broke off communication with her. Id. at 2913-15.

Albert was sent to the deaf school when he was six. Id. at 2915. Neither she nor Albert felt love from their father Davis or his wife, Catherine. Id. at 2915-16. Davis only came to see her about twice a year when she was a child. Id. at 2917. She has a half-sister, Barbara Jean, who was Davis and Catherine's daughter. Davis and Catherine both had a drinking problem. Id. at 2914.

Albert did not know how to be a good father. Id. at 2919. He was a "peddler." Id. at 2920. Once, she got a phone call from a deaf woman trying to find

Albert saying she had a son by Albert. Id. at 2952. When she told him about it, Albert didn't seem to care. Id. at 2953.

From the ages of one to five, Tommy was moved from person to person. When he was six or seven months old, Jackie asked her to keep Tommy. Id. at 2921. She kept him for three months. Id. She took him again when he was three years old also for about three months because Jackie said she couldn't take care of them. Id. at 2921-22. At one point, Jackie left with Scott. Albert asked her to take Tommy and Bobbie. She said no, so they were cared for by her grandmother, Ella, who was actually Tommy and Bobbie's great-grandmother. Id. at 2923. Ella got cancer so Tommy and Bobbie were placed in the Children's Home. Id. Also, at some point during this time, Albert's girlfriend took care of Bobbie and Tommy. Id. at 2923-24. Jackie also sent letters to Becky when Tommy was an infant and again at 1 year of age, asking her if she wanted Bobbie or Tommy. Id. at 2953.

Albert's second marriage to Linda ended with Albert's affair with Beverly. Id. at 2924. Becky does not like Beverly as she is very possessive of Albert and all communications with Albert must go through Beverly. Id at 2925. After Albert's marriage with Linda broke up, Tommy *and* Albert came to live with Aunt Becky in Maryland near Gallaudet University. Id. at 2925-26. Albert was going to see Beverly at Gallaudet every weekend. Id. at 2927. Becky's husband told Albert that he had to spend some time with his children. Albert acquiesced and pretended to

take Tommy with him when he left for Gallaudet on a Friday. Becky later discovered that Albert had dropped Tommy off and had him go back to Becky's and hide all weekend. Bobbie had been bringing him food. Id. at 2927-28.

Tommy got expelled from school but Albert didn't care; he was just involved in his own life with Beverly. Id. at 2929. Albert continued his relationship with Beverly after Tommy left to join the Navy. Id. at 2930. Albert and Beverly got married in 1998. Id. at 2936.

Bobbie has had her share of trouble also. She got a DUI and was arrested while at work at the Cracker Barrel when she was 17 or 18. Id. at 2932-33. In 1996, Bobbie's landlord called Becky because Bobbie was sharing her rented room with Tommy and Christina. The landlord/roommate changed the locks and Tommy, Christina and Bobbie had nowhere to live and no money. Id. at 2935-36.

Tommy never talked, he kept everything inside. Id. at 2948. When Tommy was with them, she felt that was the only time he had real family. Id. at 2949.Aunt Becky tried to be a good influence on Tommy but she blames everybody that had a part in Tommy's life, because with Tommy, "[I]t's not what people did for him, but what they did to him." Id.

21. Dr. Daniel Buffington

Dr. Buffington is a clinical pharmacologist currently on staff at the University of South Florida School of Medicine in Tampa, Florida. He has

testified in capital cases in Florida in both the guilt and penalty phases and during Spencer hearings. (ROA V. 29, p. 4839-40). He routinely consults with psychologists or psychiatrists on capital cases. Id. at 4914. He has testified for both the prosecution and the defense. Id.

In addition to the testimony described by the State in its Initial Brief (pages 99-100) Dr. Buffington offered the following testimony. In Mr. Woodel's case, he reviewed records, met with Tommy and took a medical and substance abuse history. Id. at 4841-42.

Dr. Buffington explained the difference between a blackout and pass out. In a pass out a person is incapacitated, in a stupor or comatose. Id. at 4843. A blackout, however, is a "cognitive phenomenon where the individual can be functioning, talking, having thought processes, having behaviors and have no recollection of them at a later point in time." Id. A blackout can be partial, where the person has memory like snapshots or scenes from a movie, or it can be complete, where the individual has no memory. Id.

Blackouts are indicative of both chronic substance abuse and a high exposure to a particular substance. Id. at 4844. The hippocampus, which is the portion of the brain responsible for creating memory, is highly sensitive to alcohol and that is why blackouts occur. Id. at 4944-45. The nerves involved with forming memory are impaired. Id. at 4845. Tommy had a previous history of blackouts that

he recalled and that his friends and family had described to him. Id. at 4845-46.A prior blackout is a risk factor or contributor for a subsequent alcohol-induced blackout. Id. at 4846.

Tommy had 9 risk factors for an alcoholic blackout, including a family history and genetic predisposition for alcoholism documented over three generations, exposure to alcohol in childhood, early use of drugs and alcohol, being a CODA, emotional stress and tragic childhood, a history of rapid binge consumption, and intermittent access to alcohol among others. Id. at 4851-55.

When you "binge drink, your potential for an alcohol-related blackout is significantly increased." Id. at 4855. Even if a person does not drink everyday and can hold down a job that does not mean he is not an alcoholic. Id. at 4856-57.

Behavior disinhibition and violence are common with high blood alcohol level and chronic alcoholism. Id. at 4860. A person in an alcoholic blackout "may carry on a conversation with you." Id. An observer may say they are sloppy, they are slurring their speech. Id. During a blackout, a person may engage in behaviors that others think require cognitive thought process but the individual is having an "inability to lay memory foundation" and displaying "behaviors that they would otherwise not have displayed." Id.

Dr. Buffington calculated Tommy's blood alcohol level based on his initial statement to police that he drank 7 to 8 beers and including a range up to 24 beers,

with a mid range of 12 beers. The higher numbers of beers consumed was based on Tommy's testimony at the 2004 penalty phase and Tommy's statement to Dr. McClane in January of 1998 that he drank approximately 15 beers, "to upwards of 30 beers." Id. at 4912-16. Based on Dr. Buffington's calculations, at the time of the murders Tommy's BAL was at a low of .10 and a maximum of over a .5. Id. at 4864. At those levels of intoxication Tommy would be disoriented, confused, experience "exaggerated emotional states, fear, anger, grief, disturbances of sensations, [and] impaired consciousness." Id. He would be vomiting at a .18 and .20. Id. at 4865. Tommy would have met the voluntary intoxication defense. At a .3, .4, .5 the effects are so significant that a person's cognitive status would qualify and he would be incapable of forming the requisite intent or the mental state would not exist. Id. at 4866-67.

The areas of the brain that are affected by alcohol include the "cerebral cortex which is the area of the brain that is responsible for thought, judgment, speech, and blunted senses and perception." Id. at 4868. The limbic system, which regulates emotion and behavior and memory foundation, is also affected. Id. The cerebellum, the hypothalmus and the medulla are also affected. Id. at 4869.

Dr. Buffington also explained that the statutory mitigators would apply because, "based on the testimony and the alcohol consumption and the corresponding and resulting levels . . . the individual would be at a level of both an

emotional and extreme mental imbalance" and his ability to conform his conduct to the law would be substantially impaired. Id. at 4869-70. The blood alcohol levels in this case are "significant." Id. at 4870. He estimates that Tommy was probably somewhere under a .4. Id. at 4874. Chronic alcoholics have an enhanced tolerance but are not immune to the effects of alcohol. Id. With significantly high blood alcohol concentrations, individuals can have unpredicted violent outbursts with significant results even though the individual is in a period of alcohol related black out and has limited memory of the event. Id. at 4892.

There was no mathematical assessment of Tommy's blood alcohol level or a "dialogue regarding the impact that would have," at either trial. Id. at 4916. There was *no expert testimony on the effects of alcohol* at the 2004 trial. Id.

22. Robert Norgard

The State in its Initial Brief describes Mr. Norgard's testimony in a single sentence. (Initial Brief p. 100). Mr. Norgard is an expert in prevailing norms among Florida capital defense attorneys. He has been an attorney since 1981, including ten years with the Polk County Public Defender's Office. Id. at 4920. He has tried 213 criminal trials, 76 of which were homicide cases. In 32 of those, the state was actively seeking death. Id. at 4920-21. He is a member of the Florida Association of Criminal Defense Lawyers (FACDL) and was chairman of the FACDL Death Penalty Steering Committee from 1992 to 2004. Id. at 4921. He is

the author of chapters in the Florida Death Penalty Manual, Defending Capital Cases in Florida. Id. at 4923. He has lectured at Life Over Death and Death is Different many times. Id. at 4925. He has also been Board Certified in Criminal Law since 1995. Id. at 4927.

He was asked about prevailing norms in reference to investigation and trial preparation for cross-examining a snitch, for investigating and presenting alcohol intoxication as a defense/mitigation, use of a specialist expert regarding deaf culture and CODAs, and general practices regarding background investigation.

Prevailing norms on investigating a jail house snitch in preparation for cross-examination require obtaining prior convictions. Id. at 4931. But that is only a "starting point." Id. It is important to do an independent investigation, particularly in Polk County where informants may not have had an obvious deal but still got a benefit. Id. at 4932-33. It is a "significant red flag" to look at what a snitch is facing and see that he received substantially less. Id. at 4933. To establish a deal, the defense attorney needs to look at a snitch's horrendous prior record and the fact that he got a "sweetheart deal." (ROA V. 30 at p. 4996). Regardless of whether the prosecutor and the snitch deny a deal, the jury can draw an inference from that. Id. "A sweetheart deal on its face is something a jury should be aware of . . . because a lot of [prosecutors] don't fully understand what *Brady* means." Id. at 4998. This is especially true in Polk County, because the State Attorney's Office "goes out of its

way to try to avoid any hint of a deal." Id. at 4999. Polk County has a history of the "wink-wink" that there is no deal up front, "and then after the trial, you find out the guy gets a sweetheart deal. I mean, that stuff used to go on." Id. In this case, the lawyers never got far enough to make the tactical decision about whether or not to argue that Arthur White got a deal because they never investigated it. Id. at 5002.

In addition, in this case, it would have been important to file a motion in limine to keep out the snitch testimony of the fondling because there was no charge of sexual battery so the testimony essentially came out as an uncharged aggravator. Id. at 5006-07 and ROA V. 29 at 4935. This was an especially strong argument in a resentencing. Id. at 4935. Without Arthur White's testimony, the cutting of the clothes and the tying of the underwear just raises more issues. (ROA V. 30 at 5011). It's a bizarre behavior that would have helped support the intoxication defense. Id. It was Arthur White's testimony that made it sexual versus just a circumstantial piece of evidence that could be interpreted different ways. Id. at 5012. Mr. Norgard noted that the only time he's had a case where the defendant cut off a person's clothes and tied things up, the defendant was found NGRI. Id. "It's just so bizarre." Id.

When presenting a voluntary intoxication defense or alcohol intoxication in support of statutory mitigation, prevailing norms require an attorney to at least consult with an expert in this area to see what their opinion might be and whether

they could give favorable testimony. (ROA V. 29, p. 4937, 4939-40). It is not reasonable to rely on a juror's "casual knowledge" of the effects of alcohol because most jurors do not have the level of sophistication to really know about the effects of alcohol and the long term effects of abuse. Id. at 4937-38. It is a specialty area and you need an expert to come in and educate the jurors because of common misperceptions of an intoxication defense. Id. "Very few jurors . . . ever imagine that they would become so intoxicated they would kill somebody . . . They can't identify with it. . . . The public perception is that it's an excuse." Id. at 4940-41. That is why it is so important to have an expert explain the concepts of addiction, genetic predisposition to alcohol and lack of control. Id. at 4941. The multigenerational history must be explained by an expert to show why it is significant. Id. at 4942.

"One of the things that . . . really bothers me about this case is that . . . here you had an expert, Dr. Dee, who essentially quoted and paraphrased from a book about CODA, spoke in very general terms about what the psychological testing showed as to character aspects of Mr. Woodel, but did not address the issue of alcohol, how that impacted Mr. Woodel specifically in terms of his psychological background and his characteristics . . . the jury heard none of that." Id. at 4988.

In this case, prevailing norms in 2004 would require an attorney to consult with an expert in deaf culture and CODAs because this is a unique issue which

requires a specialist over a generalist. Id. at 4943-44. Mr. Norgard explained that he "reviewed the penalty phase testimony of Dr. Dee, and you know, I respect Dr. Dee. I used him a lot. But the idea that the expert sits up there and says, well, I don't know anything about it, but I read a book and here's what I read, to me that's not what you want to present to a jury. You want to present a witness . . . who is truly an expert." Id. at 4944. The jury makes the ultimate call if they believe someone is an expert or not, and if all they've done is read a book, they're not going to come across as an expert. Id. at 4944-45. Dr. Dee's testimony was very disorganized and unfocused. Id. at 5024 CODA is "so unique, so unusual that you need somebody that has that expertise and training." Id. at 5026.

Counsel's failure to discover that both of Tommy's parents were deaf until the start of the 1998 trial "boggles his mind." Id. at 5020-21. "A basic penalty phase investigation starts with the parents. And in the first contact with the parents you would have known they were deaf whether your client told you or not. . . . That's the part of it that, you know, surprises me about the late discovery of it." Id. at 5021.

In 2004, a reasonably competent attorney would have hired Toni Maloney and given her adequate time to "hunt high or low for a CODA expert," and have her do an "exhaustive search for materials to help support the expert testimony." Id. at 5026-27. Dr. Dee's testimony about CODA was in the abstract and "got

buried in his rendition of what he read in the literature." Id. at 5028-29. As to any tactical decision about whether or not to call an expert, "you can't make that tactical decision unless you've done the homework to begin with." Id. at 4979-80.

As to overall background investigation, capital defense attorneys have been trained for many years to do a comprehensive biopsychosocial multigenerational history. Id. at 4945. "You need to investigate any and all aspects of your client's life." Id. The amount of hours required depends on the unique aspects of the case, it can take 200 to 400 or *more* hours. It takes "a lot of work and a lot of time." Id. When dealing with interpreters that always takes more time. Id. at 4947.

When interviewing witnesses, it is important to speak to them individually and more than once because getting witnesses to "reveal the skeletons in the closet can be very difficult," especially in front of other family members. Id. at 4948. It is also important to travel to where the client grew up and to obtain records to help corroborate witness testimony. Id. Sometimes counsel may feel like they are looking for a "needle in haystack" but that can make "the difference in a capital case." Id. at 4951-52. Mr. Norgard explained that in a re-sentencing it is important to continue to investigate because time has passed, the client has a prison record you may want to present and also you can improve on what you missed the first time. Id. at 4954.

It is also important to link the background information through expert testimony. Id. at 5030. Dr. Dee didn't take the background information and "explain the psychological meaning of it. ... There was no meaningful psychological overlay that put that all into perspective." Id. at 5029. Dr. Dee's testimony reminded him of how he might sound in an initial meeting where he "starts randomly saying things off the top of his head with no structure or amplification or development." Id. at 5030-31. There was *no testimony geared towards the statutory mitigators or the specific situation.* Id. at 5031. "It's one thing to throw out a laundry list of mitigators. It's something else to present significant and . . . meaningful testimony regarding each mitigator." Id.

As to Dr. Dee's statement that he did not know how the crime occurred, "An expert who looked at the overall dynamics of this should have been in a position to explain why they believed it happened. There is nothing scarier in my mind than a situation where somebody has killed two people and we don't know why." Id. at 4988-89.

23. Corporal Phillip L. Henry(Cross-Appeal)

Corporal Henry has been with the City of Bartow Police Department for 23 years. Id. at 5065. In 1999 he was a narcotics detective involved in the investigation of two robbery cases involving Arthur White. Id. at 5064-65. He was the arresting officer. Id. at 5067.

Arthur White was seeking "substantial assistance." Substantial assistance means an individual is hoping to "work off the charges," or get compensated in some fashion, including receiving a lesser prison sentence depending on the State Attorney's Office. Id. at 5068-69. Arthur White asked Corp. Henry to use him as an informant on drug cases. Id. at 5069. Arthur White also offered his girlfriend to Corp. Henry to use as a snitch and informant to benefit Mr. White. Mr. White was in jail at the time. Id. at 5071-72. Corp. Henry did not want to use Mr. White or his girlfriend. Id. at 5072.

Mr. White called Corporal Henry every day. Id. at 5074. Mr. White also asked him to contact Paul Wallace because Mr. Wallace knew that Mr. White "knows how to be a good witness." Id. at 5074-75. Mr. White indicated "something about a murder case." Id. at 5074. Corp. Henry didn't know about the murder case, but the Assistant State Attorney who was handling the deposition and prosecuting the robbery case was John Kirkland. Id. at 5075. It was Mr. Kirkland who mentioned the murder case in the deposition when Arthur White said he had testified for somebody. Id. at 5076. The defense attorney then indicated he wanted to "keep the door open," for his client. Id. at 5077.

24. Leola Kilbourne

Leola Kilbourne is retired and had worked with Tommy and Bobbie at Pizza Hut. Id. at 5087. She was Bobbie's landlord at the time of the murders. She

testified at both the 1998 and 2004 trials. In addition to the summary offered by the State in its Initial Brief (p. 100), Ms. Kilbourne also testified that the lawyers never really sat down with her; they spoke on the elevator coming up to the courtroom. Id. at 5090. They did not discuss the specifics of her testimony. Id.

Tommy was alone at the time of the crime. Id. at 5092. After Tommy's arrest, Leola found Bobbie laying on the bed "very, very upset" and "sobbing" "in the fetal position". Id. at 5093. She was in a "real bad way." Id. at 5094. She would have given this testimony if she had been asked. Id. at 5095.

25. Bobbie Hermes

Bobbie Hermes is Tommy's sister and she testified at both the 1998 and 2004 penalty phase proceedings. She is a CODA and has worked as a sign language interpreter for the last year. In addition to the testimony described in the State's Initial Brief (p.101), Ms. Hermes offered the following testimony that had not been presented at trial.

At the time of the crime she was living with Tommy but was out of town at the actual time of the murders. Id. at 5106. Her baby was 4 ½ months old. When she came back and realized what had happened after Tommy was arrested, she "pretty much had a meltdown and moved out of state." Id. at 5107. She moved to North Carolina but people knew where she was and she stayed in touch with Tommy through letters. Id. at 5108. Her first contact with any lawyers regarding

Tommy's case was Assistant State Attorney Paul Wallace. Id. at 5109. She had lengthy conversations with him. Id. It was the prosecution that arranged for her to travel to Florida for the 1998 trial. She stayed at the hotel with the Denny's Restaurant. Id. at 5110-11. She spoke to the defense attorney on the phone after she arrived in Florida. Id. at 5112. The first night she got in she met with Toni Maloney and she may have had a phone call with her in North Carolina also. Id. Toni Maloney had her sign releases to get the records from the Children's Home. Id. The next day she met with Al Smith and also spoke to Dr. Dee. Id. at 5113. All of this occurred after she had been brought to Florida for the trial by the State Attorney. Id. She was brought down on the Sunday night before the trial started on a Monday. Id.

She knew her maternal grandfather was violent in the past. Id. at 5118. She did not know much about her paternal grandmother. Davis, her paternal grandfather was "awesome," but he was also a "drunk." Id. at 5120.

In 2004 she was still living in North Carolina. Id. at 5121. The first time she was contacted for the 2004 trial was by the State Attorney's office. Id. But the defense arranged her travel. Id. Nobody from the defense team ever asked her any additional questions to try to find out more about her or the family. Id. at 5122. She met with Mr. Colon the Sunday before trial at his office with Albert and Aunt

Becky. Id. at 5124. She interpreted for Albert. Id. at 5124-25. There were no additional questions, just going over what he was going to ask. Id. at 5125.

Bobbie is afraid of Albert. (ROA V. 31, p. 5126-27). She is afraid that Albert might hurt her if he knew about her testimony but she still would have given this testimony in 1998 or 2004 if asked. Id. at 5163-64). She has heard of him pistol whipping deaf people and hitting deaf people with a lug wrench and a crowbar. Id. at 5127. Albert always carried a gun under the driver's seat of his car. Id.

Albert's third wife Beverly is about three years older than Bobbie. Id. at 5128. Beverly is deaf and so are her parents. Id. at 5129. Tommy had feelings for Beverly and they were dating when Albert started seeing Beverly. Id. at 5130. Tommy carried a picture of Beverly in his wallet. Id.

Albert would "assist" deaf Mexicans into the United States. Id. at 5157. Bobbie would wake up in the morning and have to step over deaf Mexicans sleeping on the living room floor. Id. at 5157-58. It was scary for her as a child. Id. at 5205. Roberto, the man who raped her when she was a child, was one of the deaf Mexicans Albert brought back.[1] Id. at 5158. He stayed on and eventually had a relationship with Jackie. Id. at 5159. Albert would say he was going fishing,

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[1] Bobbi testified at trial that Roberto raped her but did not testify about Albert's connection to Roberto and Albert's Human Trafficking of deaf Mexican Nationals.

would be gone for a couple of days or weeks, and then return and there would be a house full of deaf Mexicans. Id. Albert did this work with other deaf people. Id. She remembers Albert taking her to see one of those business associates when she was 11 or 12. Id. at 5161-62. Jackie had photos of these men, including Albert and the man named "Cigar" with the deaf Mexicans, standing next to a white van at signs welcoming them to various states. Id. at 5162-63. It was clear to her growing up that she was not to speak about the deaf Mexicans. Id. at 5163.

She knew that Albert was a "peddler." Id. at 5205. Albert was not candid; he made himself out to be a better Dad than he was. Id. at 5206. There was no discussion at trial of Albert abandoning them, but he did. Id. at 5208.

26. Arthur White (Cross-Appeal)

Arthur White was a jail house snitch called by the prosecution in both the 1998 and 2004 trials to testify that Tommy told him he fondled Ms. Moody during the crime. Arthur White has been in and out of prison since 1972-73. Id. at 5224. He has used three different aliases. Id. at 5219. In 1991 he was sentenced to nine years in prison for a crime occurring in Orange County. Id. at 5221. He was released early on controlled release (aka parole) in 1996. Id. He was back in custody almost immediately with a charge of possession of cocaine and burglary of his sister's house. Id. at 5222 and 5231-32. He was also charged with extortion and threatening a witness for telling a relative that he was going to "burn down her

shop and kill Teresa if she calls the police [about the burglary] because I ain't going back to prison for no bullshit." Id. at 5222. This statement was detailed in his arrest affidavit which was contained in the court file of the case. (Def. Exhibit 10, ROA V.5, p. 4071-4144). Mr. White denied making that statement but admitted, "Don't nobody want to go back [to prison]." Id. at 5224-25. He also denied he was engaged in extortion against his sister Teresa: "I took everything [Teresa] had in her house. It wasn't no extortion. I just robbed her blind." Id. at 5253. He also said he wasn't stealing from his sister, just doing an altruistic thing to honor his mother after Teresa disrespected her. Id. at 5258 and 5275.

While Mr. White was in jail on these allegations, Tommy was arrested for the murders of the Moodys and placed in jail where Mr. White spoke to him. Mr. White admitted that the case was a high profile case covered on the television news and he had access to television in jail. Id. at 5226-27.

Mr. White wrote a letter to Assistant State Attorney Aguerro who sent Detectives Cash and Cloud to see him. Mr. White told them, "I'm willing to give you information if you can help me with my charges. I'm willing to give you information on that." Id. at 5228. He also drew a map of the trailer but refused to give it to the Detectives, calling it his "bargaining chip." Id. at 5231.

Mr. White was also noticed as an HFO so he was facing 30 years on the burglary charge. Id. at 5231-32. Mr. Woodel's case had not yet gone to trial but in

September of 1997, about a year after he was arrested, he got a "pretty sweet deal." Id. at 5232. On the burglary case, he pled to a grand theft and a misdemeanor and received a 15 month prison sentence, concurrent and coterminous with his controlled release violation. Id. at 5233-34. The cocaine charge was reduced to a misdemeanor or dropped. The prosecutor who gave him the deal on these cases was John Kirkland. Id. at 5235. Mr. White was then brought from prison to testify in Mr. Woodel's case in 1998 where he denied receiving any benefit from the prosecution. He continued to deny any benefit during his testimony during the post conviction hearing but admitted he saw offering himself up as a witness against another inmate as his "job." His "job is to help [himself] be free." Id. at 5238-39. He further said, "I don't know if a deal came from me giving the information or whatever or whatnot. But nobody ever approached me and let me know that something was getting done in my behalf." Id. at 5252.

Mr. White got out of prison shortly after Mr. Woodel's first trial and was again almost immediately arrested. This time he was charged with two different robbery cases, including the purse snatching of a local woman with family in law enforcement and who was involved in local politics. Id. at 5236. While in custody on these cases, Mr. White admitted he called Corp. Henry seeking substantial assistance. In contrast with Corporal Henry's testimony, he denied offering his girlfriend to do substantial assistance. Id. at 5237.

Mr. White told Corp. Henry that he knew Mr. Wallace and that Mr. Wallace could vouch for his ability as a witness. Id. at 5237. Mr. White called Mr. Wallace himself and even knew Mr. Wallace's secretary by her first name, Pat. Id. at 5238. Mr. White was again noticed as an HFO and was facing 30 years on each robbery. Id. at 5263. He got a plea deal on those charges also. One of the cases was dropped and he got 5 years prison, followed by 5 years probation on the robbery involving the woman with prominent friends and family. Id. The prosecutor who gave him the deal was the same prosecutor who gave him the deal in 1997, John Kirkland. Id. at 5238.

At the time of Mr. White's testimony in the 2004 trial, he had 8 prior felonies. He testified falsely that he had only 5 prior felonies. Id. at 5240. The certified copies of conviction were received in evidence at the post conviction hearing pursuant to Florida standard rules of impeachment. (Def. Ex. 56 to 64; ROA V. 28, pp. 4666-4722).

Mr. White also testified at both the 1998 and 2004 trials that his attempt to help himself as a witness actually hurt him because he was losing gain time. Id. at 5259 and 5266). He testified that he was "in open population in prison doing good." Id. at 5259. In truth, however, Mr. White admitted at the post conviction hearing that he has had numerous DRs and lost gain time as a result, including a DR on Nov. 4, 1998 immediately prior to telling Judge Pyle he was "doing good in

prison." Id. at 5273. He also had five DRs of a serious or violent nature from 2001 to 2004 where he lost gain time and received disciplinary confinement, including one in March of 2004, shortly before his testimony in Tommy's second trial. Id. at 5273-75.

Lastly, he was arrested and charged with introduction of contraband into a detention facility in 2011 when he was transported to the Polk County Jail in March of 2011, prior to testifying in the post conviction hearing. Id. at 5248 and (Def. Ex. 55;V.28, p. 4658-4665). The police report details a series of false statements by Mr. White regarding the concealment of batteries and a lighter in his anal cavity. Id. That charge was also dropped. Id.

27. Mark D. Cunningham

Mark Cunningham is a clinical and forensic psychologist with extensive experience and expertise in capital sentencing. He received his Ph. D. From Oklahoma State University and did a two year post-doctoral study at the Yale University School of Medicine. Id. at 5278-79. He has been in private practice since 1983. He is board certified in clinical and forensic psychology. Has received numerous awards, including an award from the American Psychological Association for distinguished contribution to research that informs an issue of significance before the courts, legislative bodies or the public at large. Id. at 5280. He is a Fellow of the American Psychological Association which is an honorary

election that reflects having made an outstanding contribution to the field on a national level. Id. He has also authored and peer reviewed numerous articles and journals in the areas of forensic psychology and criminal justice. Id. at 5281. He has also been the invited guest editor of The Journal of Psychiatry and the Law for the issue addressing capital sentencing considerations. He is also the invited author of the book, Evaluation for Capital Sentencing, which is part of a series of texts on forensic mental health practice published by the Oxford University Press. Id. at 5282-83. He has testified before commissions, legislative bodies, in approximately 60 federal capital trials and 105 state capital trials. Id. at 5286.

In addition to the 1-page summary in the State's Initial Brief (P.101-102), Dr. Cunningham offered the following testimony.

Dr. Cunningham was retained by post conviction counsel in two areas. First, he was to identify the presence of any adverse developmental factors that would be expected to have formative influence on Tommy's life. Id. at 5292. Second, he was to consult with post conviction counsel to evaluate the presentation of mitigating information and argument at trial and consider what additional perspectives could have been offered. Id.

At sentencing, the state and defense present two competing legal theories. The State argues the crime is the product of the "wholly volitional choice of the malignantly evil heart." (ROA V.32, p. 5302). The Defense is arguing, "childhood

matters." Id. "The conduct of the defendant is the product of the complex interaction of biopsychosocial forces." Id. at 5302-03. "The choice was significantly influenced and shaped by things that happened, most importantly in his childhood." Id.

Based on scientific research, if a jury isn't given an understanding of the relationship of damaging and impairing factors to choice and moral culpability, they may not know how to connect this information with the decision they are called to make. Id. at 5303-04. It's critically important for defense counsel to have a clear theory in mind to convey to the jury so that the jury knows what to make of the background and expert information. Id. at 5305-06.

Dr. Cunningham interviewed numerous witnesses and reviewed numerous background documents and records from both trials as part of his assessment in Tommy's case. Id. He also consulted with or listened to the testimony of Dr. Buffington, James Aiken, Dani Waller and Dr. Marcus. Id.

Dr. Cunningham would have recommended defense counsel retain an expert in deaf culture and issues affecting CODAs and retain a psychopharmacologist. Id. at 5505-06. The CODA issue in this case is so unique that it is outside the expertise of most clinical and forensic psychologists. Id. at 5316. It is "routine" for him to recommend bringing in another expert where the defense team has identified a particular issue in a case that requires a special assessment such as

psychopharmacology or neurology. Id. The deaf community is a whole subculture that is not well known to clinical and forensic psychologists. The whole phenomena of deaf clubs, peddling, increased risk of drug and alcohol addiction, and sending kids away to institutions is not well known. "I could have done what Dr. Dee did, which is to read some things, but that doesn't equip me sufficiently. That's not a substitute for somebody who actually knows this community." Id. at 5502-03.

In this case he would also have recommended a mitigation investigator from the "get go." He could not give the extensive presentation he gave without Dani Waller's work in developing family information, especially the information she developed about Albert. Id. Dr. Cunningham's function is not to start at the beginning but to work from the foundation that is built for him by a mitigation specialist. Id. at 5505-06. He noted that Dr. Dee was "handicapped" in that he did not have access to the extensive materials and background information that Dr. Cunningham had. Id. at 5562. In fact, Dr Dee noted that himself when he sent the memo to Mr. Colon on November 6, 1998. Id.

Dr. Cunningham looked at five main areas of adverse developmental factors: neurological, family and parenting, special family and cultural circumstances, community factors and disturbed trajectory factors. Id. at 5310-11. Neurological factors can be described as wiring and in Tommy's case included speech and

language deficits, and hereditary predisposition to drug and alcohol abuse and personality disturbance. Id. The adverse family and parenting factors included multi generational dysfunction, alcohol and drug abuse by parents, disrupted primary attachment, neglect, abandonment, pathological divorce, traumatic sexual exposure and father's criminality. Id. These factors in particular are significantly injurious. Id. at 5314. Disturbed trajectory factors include communication and interpersonal deficits, teen onset drug and alcohol use, premature marriage and intoxication at the time of the offense. Id. at 5316-17. The special family and cultural circumstances are that both parents were deaf. Community factors involve school, education, relationships with peers and positive influence of non-family adults.

Dr. Cunningham also explained that in addition to the toxins he was describing in Tommy's life, psychologists have also learned that there are protective factors that contribute to healthy child development. These include a secure stable child-parent relationship that is enduring, continuing and uninterrupted. Id. at 5324. Neurological and developmental health is also important. Id. In the teen years, positive same sex role models are important. Id. at 5326. Dr. Cunningham concluded that Tommy had a "paltry concentration" of protective factors. Id. at 5480; 5501.

Dr. Cunningham also explained that research shows that jurors tend to view substance abuse and alcoholism as an aggravating factor rather than a mitigating factor because they attach a value judgment to it. Id. at 5338-39. That is one of the reasons why it is critically important for juries to be informed about the factors that put somebody at risk for alcohol and drug abuse, including genetic factors. Id. In addition, in Tommy's case the alcoholism was a critical issue because the crime occurred while he was under the influence of alcohol and in an alcoholic blackout. Id. at 5565. Further, the prosecutor had argued that it was Tommy's choice to drink and be intoxicated. Id. at 5556. A jury must be told that Tommy's drinking is a developmental feature beyond *simple* choice. Id. at 5568.

In Tommy's case all siblings, both parents and both sets of grandparents had problems with alcohol and/or a likely personality disturbance. Id. at 5342-43. Research that has been available for 30 years establishes if you have a first degree relative who is an alcoholic or drug abuser, you are three to five times more likely to end up as an alcoholic or substance abuser. Id. at 5343. It is the single most powerful predictive factor. Id. at 5343-44.Other factors in Tommy's life that put him at risk for alcoholism include modeling by parents, developmental trauma and instability and early onset of drug and alcohol use. This is important because early use sensitizes the developing brain and its metabolism to need or crave drugs and alcohol. Id. at 5347. Also, teen drug abuse inhibits a teen's developing emotional

maturity. Id. at 5346-47. Alcohol and drug abuse in parents as exhibited by Albert and Jackie is a source of many different types of psychological injury for the children growing up in these households. Id. at 5383. The risks include emotional detachment and increased risk of physical and emotional abuse, including from outsiders. Id.

Albert's behavior also had a profound effect on Tommy. Albert was physically violent in the home while the children were present. Id. at 5416-26. Even if the children were not targets themselves, it is as damaging to observe family violence as it is to be hit. Id. at 5427. Albert's involvement in human trafficking of Deaf Mexicans would likewise have been harmful. Viewed through the lens of a child, they would see that there is no special protection, even if you are a child or if you are deaf. Id. at 5426-27. Albert's affair with Beverly, when his own son was involved with her, demonstrates Albert's lack of loyalty or obligation to anyone other than himself. Id. at 5443-44. Albert's deception damaged Tommy's budding sexuality and was exploitative. Id. at 5622.

Albert's human trafficking was likewise disturbing and scary. Id. at 5447. This was not a benevolent attempt to help better other people's lives. In the 1990s, there were large scale operations in New York, Chicago, Los Angeles and North Carolina smuggling deaf Mexican Nationals into the United States. Id. at 5447-5450. Deaf Americans and Mexicans were going to Mexico persuading

impoverished deaf Mexicans to enter the United States illegally. When they got to their destination, they were forced to peddle trinkets and deaf cards and bring in $100 per day or they would be beaten. Some were sexually abused. It was essentially human slavery. Id.

Dr. Cunningham also described other risk factors Tommy faced, including frequent moves, recurrent changes in school, lack of enduring relationships, and no long term friendships. Tommy also did poorly in school, failed in the military and married Gayle at a young age because she was pregnant. Id. at 5455-64.

Intoxication proximate to the offense was also highly significant. According to the Department of Justice, in 41% of homicides the assailant is drunk with an average B.A.L. of .28, or approximately three six-packs over six hours. Id. at 5465-66. Excessive use of alcohol is "a very common part of the calculus of homicide." Id.

Dr. Cunningham concluded that the effects of disrupted attachment, emotional and physical neglect, wiring deficits, probable sexual abuse, abandonment and rejection, parental drinking and inadequacy, intoxication to the level of a blackout, and situational stressors of losing his job, being alone and having a pregnant girlfriend were "catastrophic" in Tommy's case and resulted in the murder of the Moodys. Id. at 5481-83.

Dr. Cunningham also stated that the Florida statutory mitigators apply because Tommy was under the influence of extreme mental or emotional disturbance and his capacity to conform his conduct to the requirements of the law was substantially impaired. Id. at 5485-86. The cumulative effects of Tommy's life and the adverse effects it had on his morality, value system, social identity, empathy, judgment and impulse control in combination with his high level of intoxication supports a finding of these factors. Id.

Dr. Cunningham explained that a more informed appreciation of the damage these factors had can be made in the context of thinking of your own children. Id. at 5487-88. Would you as a parent let your child spend one night with Albert and Jackie, a place where Tommy Woodel spent his entire childhood? How about a weekend, or a summer? Even with all the protective factors a parent would give to their child, most parents would not want their child to spend even a day with Albert and Jackie for fear of what they would be exposed to, or see, or suffer. "The answer to that question tells you something about the gravity of the exposures that he's having." Id. at 5487.

Lastly, Dr. Cunningham addressed the importance of presenting good prison behavior to juries. Research shows that juries are concerned about potential violence from a capital defendant whether anyone talks about it or not. Id. at 5488. It is the "elephant in the room." Id.

In a case like this, where the defendant has a seven year record of good adjustment to confinement it is important to educate the jury about that and the significance of it. Id. at 5491. A 2004 assessment of Tommy would have shown that he is extremely unlikely to commit violence in prison because of his age (34), his positive prison record, the absence of any assaults or misconduct in seven years, the fact that he has a G.E.D. and that he is a capital inmate. Id. at 5493-5500.

SUMMARY OF ARGUMENT

In finding that counsel rendered deficient performance in the penalty phase the lower court correctly applied the relevant law. Further, the court's extensive factual findings are supported by the record. Trial counsel failure to conduct any additional mitigation investigation prior to the 2004 trial fell below prevailing norms. Counsel ignored pertinent avenues of investigation and failed to develop mitigation evidence of Mr. Woodel's background, including multi-generational dysfunction, and failed to consult with and present expert testimony on deaf culture, CODAs, and the effects of alcohol at the time of the crime. Substantial and compelling mitigation was presented in post conviction which established prejudice. This Court should uphold the lower court's ruling.

The lower court erred in finding that counsel's deficient performance in the guilt phase in failing to object to the snitch's allegations of Mr. Woodel fondling

the victim and failing to retain an expert on the effects of alcohol on Mr. Woodel at the time of the crime did not prejudice Mr. Woodel. This Court should reverse.

The lower court erred in finding that the prosecutor did not commit a Brady/Giglio violation when he presented the testimony of the snitch, Arthur White, who testified falsely about his prior record and that he received no benefit for his testimony. This Court should reverse.

STANDARD OF REVIEW

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

ARGUMENT I

MR. WOODEL'S ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE 2004 PENALTY PHASE BY FAILING TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATION. THE LOWER COURT'S RULING IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND CLEARLY ESTABLISHED LAW.

The lower court made extensive and detailed factual findings, quoted the correct legal standard set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984), and correctly applied that law in finding that trial counsel rendered deficient performance below prevailing norms which undermined confidence in the 2004 penalty phase verdict. The lower court properly found that, had counsel conducted a meaningful investigation within prevailing norms, there exists a reasonable probability of a different result. There is nothing in Appellant's Brief that establishes that the lower court erred in its extensive factual findings, that the court applied the wrong law or, that it misapplied the correct law. This Court should affirm.

Deficient Performance

The post conviction court found counsel's performance fell below prevailing norms in three areas: 1) Failure to conduct a meaningful and effective background investigation by failing to hire a mitigation specialist and conduct a multi-generational history, obtain background records, speak to family members, friends, childhood counselors, members of the deaf community and prison guards, 2) Failure to obtain experts tailored to the needs of the case including a CODA/deaf culture expert, a toxicologist to explain alcoholism, blackouts and the effects of alcohol on the brain, and a forensic psychologist to explain the effects of neglect and disturbed family trajectory and link those factors to the crime, and 3) Failure to object to the snitch's uncorroborated testimony of alleged fondling of the victim.

The State argues that the lower court's "finding of deficiency is flawed, using hindsight to identify additional witnesses that could have been presented at the resentencing. This analysis is not helpful or relevant." (Initial Brief at p. 106). However, the State does not identify or explain with any kind of particularity how the lower court's analysis was flawed or what it means by using "hindsight."

The lower court appropriately found, based on the extensive evidence and testimony presented, that counsel's performance and investigation fell below prevailing norms. The lower court stated that in preparing its Order, "the Court was particularly concerned with how counsel used the experience of the 1998 penalty phase in preparation for the 2004 penalty phase." ROA p.75 of Order . In doing so, the lower court expressly relied on the guidance of the Supreme Court of the United States which instructs a reviewing court when assessing counsel's performance to consider the following:

> [S]trategic choices made *after thorough investigation of law and facts* relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535 (2003) quoting Strickland, 466 U.S. at 690-691 (emphasis added). (See Order, ROA p. 75) The lower court further relied on Wiggins for the principle that, "In assessing

reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." (Order, ROA, 75 p. citing Wiggins v. Smith, 539 U.S. 510, at 527, 123 S.Ct. 2527, at 2538). A reasonable strategic decision is based on informed judgment. "[T]he principal concern . . . is not whether counsel should have presented a mitigation case. Rather, [the] focus [should be] on whether the investigation supporting counsels' decision not to introduce mitigating evidence . . . was itself reasonable." Wiggins at 2536. The lower court referenced the controlling Supreme Court case law and properly applied the relevant legal standard.

In Mr. Woodel's case, counsel conducted a profoundly incomplete investigation in 1998 having acquired only rudimentary knowledge of Mr. Woodel's history from a narrow set of sources. In light of this failure, counsel's judgment to conduct no additional investigation for the 2004 re-sentencing fell far outside the wide range of professional norms.

In spite of the fact that prevailing norms have long established that capital mitigation investigation is a difficult and time-consuming task, trial counsel waited until *after the trial started* in November of 1998 before seeking the services of a mitigation specialist. Toni Maloney was not appointed until November 12, 1998, three days after jury selection started. Trial counsel only thought to retain her when

they received a memo from Dr. Dee at 6 p.m. on the Friday before jury selection started. Dr. Dee's Memo made clear that trial counsel needed to do further investigation into their client's background. Trial counsel only spoke to three family members and had not done so until after the guilt phase had started.

The post conviction court credited the testimony of Toni Maloney who stated that more work needed to be done. Ms. Maloney identified specific areas of mitigation that she had been aware of in 1998 but had been unable to investigate since she was hired after the trial had already started. Ms. Maloney stated that a multi-generational history was needed to explain the genetic component of alcoholism, that someone from the defense team needed to travel to North Carolina and Michigan where Tommy and his parents had lived in order to meet and speak to family members and members of the deaf community in those places, and that contact should be made with people familiar with Tommy's life at The Children's Home and with Tom Kerwin. Ms. Maloney had obtained The Children's Home records and Kerwin's records during trial. They contained information that could lead to potential witnesses. Ms. Maloney also clearly stated that both she and Dr. Dee recognized the special need for a CODA expert.

Regardless of Ms. Maloney's testimony, trial counsel knew, or should have known, that the 1998 investigation was lacking. The jury rendered a 12-0 death

verdict for the killing of Mrs. Moody. At post-conviction trial counsel admitted he "did badly."

Trial counsel's explanation of his decision in 2004 to not investigate or contact additional witnesses or experts because he was comfortable with his "mitigation package," was objectively unreasonable because "counsel ignored pertinent avenues for investigation of which he should have been aware." Porter v. McCollum, 130 S.Ct. 447, 453 (2009). Trial counsel had two sets of records in his file that contained important leads for further investigation: Tom Kerwin's counseling records and The Children's Home Records. Yet, trial counsel paid no attention to them and seemed unaware that they were even in his file. The failure to follow up on these records was due to inadvertence and neglect, not to an informed strategic decision.

Also in 1998, their own expert, Dr. Dee, had instructed Ms. Maloney to find a CODA expert to help him understand this unique area but Ms. Maloney was unable to do so because she had run out of time. All the witnesses who testified as to prevailing norms (Ms. Maloney, Ms. Waller, Mr. Norgard and Dr. Cunningham) concluded that specialist experts were required due to the unique facts of this case. This is in keeping with the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 10.11. (Commentary at p.112-13) (2003), which advise that, "Counsel should choose

experts who are tailored to the needs of the case, rather than relying on an 'all-purpose' expert who may have insufficient knowledge to testify persuasively about a particular fact/field of expertise."As the post conviction court found, "Mr. Colon was on notice that he had unique issues regarding his client." (Order, p. 76.) Yet, he did nothing to further his investigation.

Reasonably competent trial counsel also would have known about Tommy's multigenerational history of substance abuse and alcoholism based on Dr. McClane's notes: Tommy told him *everybody* in his family had a problem. However, Mr. Colon never sought Dr. McClane's notes and had only a perfunctory phone conversation with Dr. McClane. Based on the information that was available to Mr. Colon *but which he unreasonably failed to become aware*, he should have conducted further investigation, including consulting with an expert, to assess the impact of alcoholism and substance abuse on Tommy and his extended family.

When trial counsel had a chance in 2003 and 2004 to investigate and improve upon his sentencing presentation, counsel unreasonably conducted no further mitigation investigation, spoke to no new witnesses, and failed to consult with any additional experts. The post conviction court's findings are squarely supported by the facts and law.

This Court has held that in a re-sentencing, trial counsel's decisions must be viewed in light of the fact that counsel had the benefit of analyzing the failures of

the first penalty phase. Derrick v. State, 983 So. 2d 443, 458 (Fla. 2008). "[T]he failure to obtain a life recommendation in an initial penalty phase proceeding should not be the sole factor in counsel's decision not to present the same mitigating evidence at a re-sentencing. Our focus is on 'whether counsel's decision not to present such evidence was a reasonably informed, professional judgment.'" *(citing* Wiggins v. Smith, 539 U.S. 510, 522-23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).) *See also* Henry v. State, 862 So.2d 679, 686 (Fla. 2002)(retrial counsel had the advantage of knowing that the strategy presented at the first trial failed and the jury unanimously recommended death. Counsel's decision to reject this strategy after "investigating and carefully considering the failed alternative," was reasonable strategy.) These cases support the post conviction court's analysis and conclusions of law.

In light of the profound failures and deficiencies of the 1998 mitigation, Mr. Colon's decision to forego any additional mitigation investigation or to consult with specialist experts to prepare for the 2004 penalty phase, fell below prevailing norms. Based on the quantum of evidence known to Mr. Colon, his decision to not investigate was objectively unreasonable. "Counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision because counsel had not fulfilled their obligation to conduct a thorough investigation of the defendant's background." Williams v. Taylor, 529

U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The lower court correctly found Mr. Colon's investigation was deficient.

The State's argument that trial counsel made a reasonable decision not to investigate any additional mitigation prior to the 2004 trial (even though his client had received a unanimous death verdict in 1998) because he was "comfortable with the mitigation package" and considered it to be "honest and straightforward," lacks merit. (Initial Brief at p. 107). Simply because an attorney feels subjectively "comfortable" with a losing mitigation presentation does not excuse him from investigating his client's background and case according to prevailing norms. The State's argument is akin to arguing that a surgeon functioned within the standard of care when, after performing a botched operation, decides the same operation should be repeated in the same way because the doctor is comfortable with the procedure. No person faced with undergoing surgery would want to be cared for by such a surgeon. Likewise, the Constitution does not envision such a lawyer representing a person facing the death penalty. The same could be said for the State's argument that Mr. "Colon's style places quality over quantity." (Initial Brief, p. 113). Even if it was reasonable to make an investigative decision based on "style," a reading of the penalty phase demonstrates a lack of quality in trial counsel's presentation, including the presentation of false testimony about Albert.

The State also argues that counsel's investigation met prevailing norms because it was "comparable to that found constitutionally adequate" in Bobby v. Van Hook, — U.S. — , 130 S.Ct 13, 175 L.Ed.2d 255 (2009). The State is mistaken in its reliance on Van Hook. First, Van Hook doesn't stand for what the State suggests it stands for. Van Hook stands for the proposition that counsel's performance should be judged by the standards in effect at the time of the trial, including the ABA Guidelines, and that a federal court, sitting on habeas review, improperly applies the 2003 Guidelines to assess the performance of counsel in 1985. "Judging counsel's conduct in the 1980s on the basis of these 2003 Guidelines - without even pausing to consider whether they reflected the prevailing professional practice at the time of trial - was error." Bobby v. Van Hook, — U.S. — , 130 S.Ct. at 17. Second, Mr. Woodel's trial was in 2004. The prevailing norms of 2004, and the standards of counsel's performance, have changed markedly since 1985. What may have been constitutionally adequate in 1985, at the time of Van Hook's trial, would be below 2004 norms and is an improper metric with which to compare counsel's performance. Further, Mr. Woodel presented extensive and uncontradicted testimony that counsel's investigation fell below prevailing norms in 1998 and 2004.

Further, this Court's standard of review on direct appeal of the State post-conviction court's Order is completely different of that of a federal court reviewing

a State court decision under the constraints of AEDPA. Jennings v. McDonough, 490 F.3d 1230, 1236 (11th Cir. 2007) The persuasive value of any federal court decision denying relief under AEDPA is of limited value to the State in arguing that a state court should likewise deny relief.

The State also relies on Grayson v. Thompson, 257 F.3d 1194 (11th Cir. 2001) for the holding that counsel was not ineffective in failing to obtain a mental health expert on intoxication. However, Grayson is distinguishable on a number of factors. Most significantly, the planned burglary and subsequent murder and rape of the elderly victim in Grayson occurred in 1980 Alabama. The trial occurred in 1982, also in Alabama. At that time, the State of Alabama *limited expert funding for indigent capital defense to $500 and counsel was therefore unable to retain an expert*, even though he testified in post conviction that he needed a number of experts, including an expert on the effects of alcohol due to his client's excessive alcohol consumption. Therefore, the prevailing norms in effect at the time of Grayson's trial would have been markedly different than the prevailing norms in effect in 2004 in Florida – the time of Mr. Woodel's sentencing proceeding.

The State also argues that Dr. Dee functioned as a mitigation specialist. (Initial Brief p. 112). There is no basis in the record for such an assertion. The record squarely supports the fact that Dr. Dee did not see his role as that of a mitigation specialist and that trial counsel needed to hire a mitigation specialist. In

fact, Dr. Dee's fax to Mr. Colon on the eve of trial makes clear that Dr. Dee felt strongly that a mitigation specialist was urgently needed. ROA at 529-30. Further, the State's assertion, without any support in the record, that a neuropsychologist such as Dr. Dee functioned as a mitigation specialist, evidences a keen lack of understanding of the work of investigating mitigation in preparation for a capital sentencing proceeding. See also, Toni Maloney, ROA V. , pp. 159-161(role of mitigation specialist); Dani Waller, ROA V, p. 216-220 (role of mitigation specialist); Dr. Cunningham, ROA V. p. (role of defense psychological expert compared to that of mitigation specialist) V. p. 675-79 and June, p. 48).

The post conviction court also correctly found that Mr. Colon's failure to file a motion in limine to prohibit the testimony of Mr. White about "fondling" was deficient performance. Prevailing norms require trial counsel to prepare for the prosecutor's case at the penalty phase and move to exclude evidence used in aggravation when possible. American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 10.11 (Commentary, p. 115) (2003). Counsel should also "blunt certain intangible factors that can be damaging to a capital defendant at sentencing." Id. at 118.

Trial counsel failed to file a motion in limine to exclude Arthur White's false testimony about Mr. Woodel fondling Mrs. Moody. EHMarch, V.6 p. 1020-21. He also failed to raise a contemporaneous objection at trial. Mr. Colon offered no real

explanation despite admitting that the evidence provided the "yuck effect," and that he and Mr. Smith had thought it was horrible when it came in the 1998 trial. Mr. Colon's failure to do so appears to be based on a failure to recognize a legal argument to keep the evidence out.

This was deficient performance as counsel could have objected under Fla. Stat. 90.403 and made a federal Due Process argument that the evidence, under the facts of this case where no sexual battery or sexual crimes were charged, amounted to an improper non-statutory aggravator and any probative value it had was outweighed by its prejudicial effect . Fla. Stat. 90. 403. The statement was of the type that had "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." McDuffie v. State, 970 So.2d 312, 327 (Fla. 2007) (citing Brown v. State, 719 So. 2d 882, 885 (Fla. 1998), relying on Old Chief v. United States, 519 U.S. 172, 180, 117 S.Ct. 644 (1997)); *see also* Ellis v. State, 622 So. 2d 991, 1000 (Fla. 1993) (testimony offered by the State linking the capital defendant's popularity at school to his hatred of blacks was inadmissible under Fla. Stat. 90.403 as inflammatory, irrelevant and an impermissible comment on character.); Brown v. State, 719 So. 2d 882, 887 (Fla. 1998); State v. McClain, 525 So. 2d 420 (Fla. 1988). When marginally relevant evidence is "dragged in by the heels" for the sake of its prejudicial or emotional

effect, it is properly excluded. Such was the case here yet counsel offered no reasonable explanation for his failure to attempt to exclude the evidence.

And, even if this Court were to find the lower court's decision was incorrect in this regard, this Court would then have to assess, or remand to the post conviction court to assess, whether Mr. Colon likewise failed to conduct a background investigation into Arthur White in preparation for cross-examination.

Mr. Colon did not obtain certified copies of Mr. White's prior felonies. This is *per se* ineffective. Under Florida law, an attorney is not allowed to impeach a witness about his prior felony convictions absent having a good faith basis to do so. Fla. Stat. 610.6. The Florida District Courts of Appeal have interpreted a good faith basis as **requiring that counsel possess certified copies of convictions.** Brown v. State, 787 So. 2d 136, 139 (Fla. 4th DCA 2001); Peoples v. State, 576 So. 2d 783, 789 (Fla. 5th DCA 1991); Cummings v. State, 412 So. 2d 436 (Fla. 4th DCA 1982); Brakeall v. State, 696 So.2d 1246 (Fla. 5th DCA 1997). Once impeached, counsel may not ask about the nature of the convictions, but the impeachment is established by introducing the certified copies into evidence. Waggoner v. State, 800 So. 2d 684-685-86 (Fla. 5th DCA 2110). Absent investigating and obtaining certified copies, Mr. Colon would not even have been allowed to impeach Mr. White.

Likewise, in investigating whether Mr. White had received a "deal," Mr. Colon simply relied on the assertions by the prosecutor and Mr. White that there was no deal. Mr. Norgard explained that this fell below prevailing norms. First, he explained that particularly in Polk County, the prosecutors have gone out of their way to not provide an obvious deal in cases where informants are clearly getting a benefit. In Polk County some prosecutors have been known to use a "wink, wink" as to whether an informant is getting a deal. He explained that some prosecutors in Polk County have failed to fully understand Brady. *See* (Paul Beasley)Johnson v. State, 44 So. 3d 51 (Fla. 2010). It is a significant "red flag" when an informant receives a substantially less sentence than what he is facing. Regardless of what the prosecutor and witness say, a jury can draw an inference from favorable treatment.

Law and Argument on Prejudice

The post conviction court also properly found that Mr. Woodel had established prejudice under the standard set out in Strickland v. Washington, 466 U.S. 668, 80 L.Ed. 2d 674 (1984). Mr. Woodel presented a wealth of mitigation of which the trial judge and jury were not aware. The post conviction court found that counsel's deficiencies prejudiced Mr. Woodel in that, had counsel presented the multigenerational history of the pattern of abuse, abandonment, neglect and alcoholism presented at post conviction, there is a reasonable probability that the result of the proceedings would have been different. The post conviction court also

found that had counsel presented expert testimony on deaf culture and the psychological ramifications of growing up CODA, such as that of Dr. Marcus, and expert testimony on alcoholism and the effects of alcohol on Tommy, as presented by Dr. Buffington and Dr. Cunningham, there is a reasonable probability that the results of the proceeding would have been different. (Order p. 77-78). In so doing, the Court expressly stated that it had reviewed the trial testimony, in particular that of Dr. Dee, in reaching its conclusion. There is nothing in the post conviction court's Order that suggests it applied the wrong law or legal standard in reaching its conclusions. Further, the post conviction court's extensive factual findings contained in its 87-page Order support its finding of prejudice.

The State argues that "there is no indication that the court below considered the extent to which the post conviction evidence simply repeated much of what the jury had already heard." (Initial Brief, p. 116). The State is mistaken. The post conviction court expressly referenced the findings regarding the aggravating and mitigating factors, this Court's factual findings and that it had reviewed the testimony at trial, in particular, Dr. Dee's testimony. (Order at p.3-5, and 77). There is nothing to suggest that the post conviction court didn't carefully consider the evidence presented at the prior trial. In fact, at the hearing, the post conviction judge repeatedly stated that he would have to read the transcript prior to ruling and requested and was given a copy of the entire transcripts of both trials.

The State also argues that much of the background evidence presented was cumulative and suggests that because counsel presented some mitigation, including expert testimony from Dr. Dee about being a CODA, that this precludes a finding of prejudice. The State is likewise mistaken as to this argument.

The fact that Mr. Woodel's counsel presented mitigation from three family members, and Mr. Woodel and Dr. Dee, does not preclude a finding of prejudice. "We have never limited the prejudice inquiry under Strickland to cases in which there was 'little to no mitigation evidence presented.'" Sears v. Upton, 130 S.Ct. 3259, 3265-66 (2010). The Court has,

> "also found deficiency *and* prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase. *E.g.* Williams[v. Taylor, 529 U.S. 362] at 398, 120 Sct. 1495 (remorse and cooperation with police); Rompilla v. Beard, 545 U.S. 374, 378, 125 S.Ct. 2456 (2005) (residual doubt). We did so most recently in Porter v. McCollum, 558 U.S. —, 130 S.Ct. 447, 449, . . . (2009) (*per curiam*), where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that came to light only during post conviction relief. . .")

Sears, at 3266 (emphasis in original). "Counsel's effort to present some mitigation evidence" does "not foreclose an inquiry into whether a facially deficient mitigation investigation" may have prejudiced Mr. Woodel. Id. *See also* Johnson v. Secretary DOC, 643 F. 3d 907, 936 (11th Cir., 2011) ("The description, details and depth of abuse in [the defendant's] background that were brought to light in

the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told. The picture [trial counsel] painted for the jury was of [the defendant] having cold and uncaring parents, something in the nature of the 'American Gothic' couple. With a reasonable investigation, though, he could have painted for the jury the picture of a young man who resembled the tormented soul in 'The Scream.'").

The State claims that "much of the post conviction mitigation was heard by the jury. Woodel's dysfunctional family life, his long history of drinking, and the implications of being raised a CODA were well substantiated to the jury." (Initial Brief, p. 116). The State's argument fails upon a comparison of the trial transcript and the post conviction transcript. There was testimony about Woodel's dysfunctional *immediate* family but it was incomplete and, especially as it relates to Albert, inaccurate. There was no testimony about the grandparents and their dysfunction, even though Albert was raised by his grandmother, Ella, who also raised Tommy and Bobby until she became ill with cancer. There was testimony by Tommy about his drinking, but no expert testimony to explain why Tommy had a drinking problem or how the beer that he drank on the night of the murders would have affected him.

Overview of Evidence at 2004 Trial

In 2004, the trial court found statutory and non-statutory mitigation in its Sentencing Order as set out *supra.* Trial counsel presented essentially the same evidence and witnesses as presented in 1998, with the exception that Mr. Woodel testified on his own behalf in 2004.

Bobbie, Albert, Aunt Becky and Tommy testified to Tommy's childhood and background. The focus of the penalty phase was on Jackie's drinking and neglect, her failings as a parent and Tommy's drinking on the night of the crime. Bobbie also testified to her own sexual abuse and the suspected sexual abuse of Tommy. In addition, there was testimony that Jackie was an alcoholic who fought often with Albert when the children were small. There was some testimony that Albert drank, but Albert himself testified that he was merely a "social" drinker who stopped drinking after the children were born. There was also testimony that there was instability in Tommy's residences, including being dropped off at the Children's Home, although the timing and details were unclear.

Tommy testified to his childhood and his drinking, including on the night of the crime. He also testified that Albert hit him and threw him around the room once and destroyed his bike with a sledge hammer. He testified that Jackie favored his half-brother Scott and he did not know if he had been sexually abused. He also testified that he had only one DR in prison.

Dr. Dee testified as a general mental health expert and opined he had no idea and could offer *no explanation* for why Tommy committed these crimes. There was testimony that Tommy's parents were deaf and "mute." Dr. Dee gave a general description of what he had learned about CODAs from his reading of Mother/Father Deaf and generalized about some of those principles and how they would apply to Tommy. Dr. Dee also said that the neuropsych testing he did was not instructive and the MMPI he gave was unreliable, although he did not know why.

There was *no expert testimony* on the effects of alcohol and alcoholism, aspects of multigenerational family dysfunction including the genetic risk for alcoholism, Tommy's low-risk for violence in prison, deaf culture, or the statutory mitigators. Tommy's drinking and the statutory mental mitigators were given *little weight.* [3] The court did give moderate weight to mitigation about Tommy's background of neglect, the fact that his parents were deaf and that he moved a lot as a child, including being dropped off at the Children's Home. All the other non-statutory mitigators were given little weight.

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3. As to the defendant's ability to conform his conduct to the law, the court gave it moderate weight in one part of the paragraph and little weight at the conclusion of the paragraph. It is somewhat unclear what weight the court intended, although it appears more likely than not that the court intended to give it little weight as that is the weight indicated at the end of the paragraph and the court indicated the weight for all the other mitigators at the end of their respective paragraphs.

By contrast, at the post conviction hearing, Mr. Woodel presented extensive background mitigation that the sentencing judge and jury never heard.

Overview of post conviction testimony

1. Multigenerational Dysfunction and the Psychological Ramifications

Post conviction counsel presented expert testimony from Dr. Cunningham, records, and lay witness testimony that revealed significant and ongoing dysfunction through three generations.

Aunt Becky, who had testified previously, offered testimony not heard by the judge or jury. She testified that Albert's parents, Davis Woodel and Mary Young, separated when Mary abandoned the family after getting pregnant by another man while Davis was in the military. She never saw Mary again until she was about 16 years old and went to find her. Mary was a manipulative liar and Becky eventually broke off all contact with her. Davis was an alcoholic who left Albert and Becky to be raised by his mother, Ella. Albert and Becky's grandfather was also a violent drunk, and Davis was also violent. Neither Davis nor Becky can sign. Aunt Becky also testified to the details of Tommy's first five years of life when Jackie sent him to her, and back, and back again. Great-grandmother Ella also cared for him as a young child, as did one of Albert's girlfriends. Jackie sent her a letter asking her if she wanted to keep Tommy or Bobbie when Tommy was a toddler.

Robert F. Alward, who had not testified at either trial, testified that Jackie's parents, Robert C. and Edna Alward were also drinkers and liked to get drunk. Robert C. Alward was violent and hit Jackie in the ear on her hearing aid and tried to stomp on Edna during a fight. Edna shot and killed an Indian man when she was 16 years old. She was ashamed of it. Neither of his parents learned to sign. He was ashamed and embarrassed of Jackie. She acted awful, drank in church and went out without her false teeth. Jackie skipped school and went to downtown Flint as a teenager. It was a rough part of town where hearing people were known to drink and use drugs. Albert was a peddler.

Scott Sisk, Tommy's half-brother who had not testified at trial, testified at post conviction about repeated instances of homosexual sexual abuse as child while under Jackie's care. He also admitted to having a drug and alcohol problem. His brother Charles died in an alcohol related accident at 16 years of age. Trial counsel presented the fact that Charles died, but failed to present evidence it was alcohol related. 2004Trial V. 16, p. 2436.

Dawn Perdue, Tommy's house mother at the Children's Home, who had not testified previously, testified about Tommy as child at the home, his language deficits and the failure of his parents to come visit him. Tommy's speech sounded like a deaf adult trying to talk. She also testified that under current law, Tommy and Bobbie would not have been placed in a group home as they were too young.

Gene Bowen, a childhood friend at the Children's Home, who had not testified at trial, described Tommy as little boy who "just couldn't get it" and thus was in a constant state of "demerit." He was low on the social hierarchy of the boys in the cottage. He needed speech therapy and sounded like a deaf person trying to talk. He would sneak away to see his sister Bobbie and they would sign to each other. It was an amazing thing to watch. When he signed he was full of emotion and animated. Mr. Bowen also painted a vivid picture of his own life as the child of alcoholics.

Tom Kerwin, whose counseling records had been obtained by Toni Maloney in 1998, and who had never testified previously, testified. The counseling was free to the poor. Tommy qualified for free counseling. Tommy was doing well in light of the circumstances and Tom Kerwin couldn't understand why he was there. He came to realize Tommy was in counseling because Jackie was trying to get him out of the home. He had not been referred from the school. Mr. Kerwin said Tommy never really smiled or laughed. He came to counseling sessions barefoot, covered in mosquito bites and, once with a black eye. The counseling sessions ended abruptly when Jackie announced she was displeased with the services and was going elsewhere, but Kerwin knew she didn't have the resources to go elsewhere.

Dr. Cunningham, who had not testified at trial, explained the significance of this neglect and abandonment on Tommy and the nexus it had to the crime. A

capital defendant's childhood is important and relevant because, "childhood is profoundly formative . . . this is when the concrete is wet and the things that happen to you in childhood leave an indelible imprint on you and may even change the shape of who you become." Id. at 465-66. Even though a child may not remember events that happened to them when they were 2,3, or 4, those events are still profoundly formative. Id. at 465. The most important and significant event in psychological development occurs in the first years of life when a child needs a consistent, stable relationship with a single human being, usually the mother. Id. at 465 -68. When that primary attachment is disrupted, "the effects are shattering in nature and have a profound effect." Id. at 468-69.

The damage to attachment in childhood has a direct nexus to criminality in adulthood because early and persistent exposure to parental rejection and deprivation impairs a child's ability to form subsequent relationships. Most abused children are unable to achieve basic trust and learn to regard violence and rejection as the major ingredients of human encounters. Id. at 569.

Numerous forensic scholars view violent criminal behavior as "attachment damage all grown up." ROA V. 3, p. 562. Dr. Cunningham explained:

> So while Dr. Dee said that he couldn't figure out why this happened, as I look at Tommy's history, the only thing that surprises me is that there was not more criminally violent behavior, more repetitively [and] earlier.

Id. at 562. Tommy was having troubles and showing some effects but was also at times behaving in a caring way. That, however, doesn't mean that the experiences and damaging developmental factors didn't affect him and create a "grave chasm inside.' Id. at 564. With Tommy, the damage was like radiation or rheumatic fever, it finally came out. Id. at 570-72. Abuse can leave immediate effects, interim effects and delayed effects. Id. at 614.

It is also important to explain to the jury the generational history to show it's not just Tommy but that "he's the product of a family system that has been disturbed for a long time." Id. at 527. Family scripts, modeling and sequential damage are significant factors in the development of a child growing up in a dysfunctional family system. "If you really want to try and get a sense of who Tommy Woodel is and how he got here, you really need to see this family system and look at all of the stuff that's going on maladaptively in this system." Id. at 538.

Tommy's family script included sexual irresponsibility, out of wedlock parenting, substance abuse, violence, emotional neglect and abandonment and interpersonal exploitation. Id. at 55051. Modeling is when you imitate the behavior of your parents, whether you want to or not. Id. at 532.

Sequential damage in this family existed even with Albert and Jackie. Albert was damaged when he was abandoned by his mother, sent to deaf school and functionally abandoned by his father. He is damaged and he goes about parenting

in the same way. Id. at 532 and 547. Id. The same is true for Jackie. Edna's killing of a man of Indian descent when she was 16 years old is an example of sequential damage. Edna was ashamed: "To kill someone as an adolescent is a developmental injury" whether you acted in self-defense or not. Id. at 541. That's "not a vitamin for your life and development and how you perceive yourself from that point forward." Id. at 541. That's a damaging event that would point to personality pathology in her. Id. Edna also drank to excess a few times a year and carried a flask of whiskey. Id. at 542. Jackie's parents also never learned to sign even though they had two deaf children. That is demonstrative of the emotional detachment between them. Id. at 542-43. Jackie's damaged parents damaged Jackie who had her own limitations of a low I.Q. and fractured development. Id. at 539. Jackie wasn't just deciding to be an evil, neglectful, abusive mother, she was damaged also. Id. at 540.

All of the siblings in this family have had problems – even the ones with different fathers. Id. at 548. They are all affected, much like exposure to radiation leads to different types of cancer. Id. at 549.

Tommy was also in a zone of risk for sexual abuse. At trial Tommy testified he may have been sexually abused but was unsure. In post conviction, Scott's testimony of sexual abuse and the scene described by Annie Swann of Tommy at age 6 or 7 struggling to move his bowels for hours at a time when Roberto was

present and living in the home raises the suspicion. "Anal related difficulty in a household with a pedophile that is actively abusing the other children on either side of him . . . adds to the index of suspicion." Id. at 537. Boys are more damaged by sexual abuse than girls. ROA V. 4, 613. They exhibit higher rates of depression, low self-esteem, sexual problems, alcoholism and substance abuse, and violent acts. Id. In addition, both of Tommy's siblings were damaged and are thereby less available as healthy emotional support for Tommy. Id. at 609-11.

Parental neglect is more damaging than abuse. Id. at ROA V. 4, p. 586. It can be likened to "chronic emotional malnutrition." Id. Children who are emotionally neglected have a fear and sense of terror that their world is out of control. Id. At 590. They think they are incompetent and unlovable. Id. This is relevant to the crime, because Tommy responds to Mrs. Moody as if "she is some grave threat to him" based on his childhood of experiencing the "external world being out of control." Id. at 590-91. Years of Department of Justice research supports this and show there is a "specific nexus to aggression." Id. at 592 and 595.

Dr. Cunningham also addressed alcoholism and Tommy's drinking and concluded that all of these factors contributed to the murders and affected Tommy so that the statutory mental mitigators would apply. Dr. Cunningham provided a persuasive narrative that linked Tommy's horrific childhood directly to his irrational reasoning and thought processes at the time of the crime thereby

lessening his moral culpability. "Evidence about the defendant's background and character is relevant because of the belief, long held by society, that defendants *who commit criminal acts that are attributable to a disadvantage background ...* may be less culpable." Porter, 130 S.Ct. at 454 (emphasis added).

Prejudice is demonstrated by the fact that the court gave the statutory mental mitigators little weight and the childhood background moderate weight. Had the judge and jury heard this additional testimony they would have given those mitigators greater weight and the balance of aggravating and mitigating factors would have been changed. Further, the jury vote for death was a mere seven to five, the narrowest of margins. Counsel needed to persuade only one more juror.

Further, due to trial counsel's failures, the State was able to argue to the jury in closing that while proven, none of the background evidence of physical abuse, neglect, and instability in residences matters *because it doesn't relate to the murders*. 2004Trial, V. 16, p. 2543 to 2582. The prosecutor argued, "How does that relate to the murders the defendant committed? What does the fact that he moved around 23 times as he was young, how does that relate to where he makes that purposeful decision to inflict those severe and great wounds upon Bernice to take her life?" Id. at 2581-82. "There's simply no relation between the two. . . . The fact that he was passed around, communicated to only in sign...? What does that have to do with him almost twenty years later? . . How does that relate to the

crime itself? It simply doesn't." Id. Had trial counsel conducted a constitutionally effective mitigation investigation, the prosecution would have been unable to make this argument.

Prejudice is also demonstrated in that the court in its Sentencing Order gave Tommy's background of physical abuse as a young child only moderate weight based on the court's finding that after he no longer lived with his father, he moved in with other relatives who loved him and provided a home for him. The trial court's finding was erroneous because trial counsel failed to accurately describe who Tommy lived with, what his life was like and what Albert was like. In reality, Tommy lived with his mother in Michigan where she continued to neglect him and tried to have him placed outside the home when he was 12. He then lived with his father at age 15-16. Albert, as was shown in post conviction, was a violent drunk, who stole Tommy's girlfriend during this time. And Tommy and Albert then went to live with Aunt Becky where Albert ignored him to live the college life with Beverly.

Second, because trial counsel failed to present expert testimony on the lifelong effects of physical abuse and neglect – including that neglect is actually more damaging than physical abuse – neither the judge nor jury was given the information to fully evaluate the weight of this mitigation. The trial court was

operating on an incorrect assumption that the effects of childhood abuse diminish over time. This is simply not true. Porter v. McCollum, 130 S.Ct. at 451.

2. False Picture of Albert Woodel

In addition, post conviction counsel established that the judge and jury were given a false picture of Albert. Prejudice is demonstrated when counsel presents a picture of a capital defendant's life that is shown to be inaccurate and substantial mitigation unknown to the judge and jury is presented in post conviction. Sears v. Upton, 130 S.Ct. 3259, 3262-63 (2010). Accurate sentencing information is an essential element of a fundamentally fair sentencing determination. Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion).

At the 2004 trial, Albert testified that he was only a social drinker and stopped drinking when the children were born. 2004Trial, V, p. 2107. He claimed he visited them frequently at the Children's Home. Id. at 2110. At one point during Albert's testimony, trial counsel showed him a picture and suggested that the children "loved to be," "hanging around him," a suggestion to which Albert readily agreed. Id. at 2111. He said that he and Tommy got along fine and did father and son things together. Id at 2117-18. He also said that Tommy was "very polite," because he "takes after his father. No problems whatsoever." Id. at 2121. Albert also glossed over the description of his second marriage. He failed to mention his relationship with Beverly or the fact that he *and* Tommy moved in with Aunt

Becky after the end of his second marriage. Id. at 2120-2123. He also claimed he forced his son to attend school. Id. at 2124.

In post conviction, Mr. Woodel established that Albert was a liar, a thief, a drunk, a violent bully who preyed on other deaf people. He was a neglectful, disinterested father who repeatedly abandoned his children, a drug dealer, womanizer, "deaf peddler" and human trafficker. Albert's school records confirm that he was a high school dropout, who was "lazy" and "unable" to take "advice." He started a relationship with Tommy's teenage girlfriend, Beverly, while he was still married to his second wife, Linda.

Jesse Church and Bobbie testified that they were afraid would kill them or hurt them if he knew that they testified about him. Linda Mattson, Albert's second wife, obtained a restraining order against him because she was so afraid of him and enlisted the help of her brother and parents to get away from him.

Bobbie testified that Albert always carried a gun under the seat of his car, was known to have pistol-whipped deaf people and beaten others with a crowbar. He was engaged in human trafficking of deaf Mexican Nationals when she was a child. Roberto, the man who raped her as a child was one of the deaf Mexicans who Albert smuggled into the country and who then joined Albert's criminal enterprise.

In a similar case, Johnson v. Secretary, D.O.C., 643 F.3d 907 (11th Cir., 2011), the Eleventh Circuit found deficient performance and prejudice. In Johnson, a case which *was tried in 1980*, trial counsel presented the defendant's father who testified he and his wife were just social drinkers and that he was home on weekends. Id. at 912-13. Trial counsel did not ask about any physical or emotional abuse he inflicted on his son or others in the home, nor did he ask the father about his criminal record. Id. The father also testified that his youngest son and his wife had died but he did not testify as to how they died. Id. The defendant's girlfriend testified that both the defendant and his father had drinking problems. Id.

Trial counsel also presented testimony from a clinical psychologist, who counseled the defendant in an alcohol rehabilitation program, who testified that the defendant's childhood of being placed in an orphanage at an early age contributed to a character disorder, and his drinking was secondary to that. Id. at 913-14. She further explained that after the orphanage he was placed in different settings with relatives and as a result he felt he was a "bad and evil" person. Id. The defendant also testified and described how he and his siblings were separated in the orphanage, how he was returned to his parents when he was 11 and both parents were heavy drinkers who abandoned and neglected their children. Id. Trial counsel did not ask the defendant if his parents physically abused him. Id.

The prosecutor argued that the defendant's drinking, his problems with his parents and feelings of isolation and loneliness didn't "cause [t]his murder." Id. at 915. He further argued that the defendant's "unhappy childhood" and "drinking problem" don't supply a "shred of legal or moral justification." Id.at 915-16.

At the state post conviction hearing, counsel presented the fact that the father was an abusive alcoholic who was always drinking and that the reason the children had been placed in the orphanage was due to the fact his father was on a bender. They also heard that the defendant's sibling died of a drug overdose. The court relied on Williams v. Taylor, in finding prejudice, noting that the murders in that case were no more brutal than the murder before the court.

Likewise, the sentencing judge and jury heard none of the mitigating evidence of Albert. The new mitigation evidence presented in post conviction, was "consistent, compelling, unwavering and wholly unrebutted." Ferrell v. Hall, 640 F.3d 1199, 134 (11th Cir. 2011). Counsel's failure to present an accurate portrayal of Albert unconstitutionally deprived Mr. Woodel of presenting factors in mitigation. "Had [Woodel's] counsel been effective, the judge and jury would have learned of the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability." Porter, 130 S.Ct. at 454.

3. Comprehensive and Meaningful Description of Deaf Culture/Coda

During the 2004 trial, Dr. Dee testified about CODAs. He offered no real testimony about deaf culture although he did mention deaf clubs in passing and did comment on deaf children being sent to deaf schools. There was no discussion of deaf peddling, even though there was testimony in 2004 that Jackie was a peddler, and no discussion of human trafficking of deaf people. The only deaf person who testified in 2004 was Albert.

In post conviction, Mr. Woodel presented the expert testimony of CODA Dr. Marcus, the testimony of CODA Nancy Mckenzie, and four deaf people, including Jackie's brother. Such a presentation is consistent with prevailing norms which recommend that counsel consider using expert and lay witnesses, along with supporting documentation, to provide "sociological [and] cultural" insight. American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 10.11 (F) (2) (2003). Counsel should use lay witnesses as much as possible to provide a factual foundation for an expert's conclusions as they can provide vivid firsthand accounts. Id., Commentary, p. 113.

Dr. Marcus painted a vivid picture of deaf culture and growing up CODA, using examples from his own life, and offered a critique of Dr. Dee's testimony. He noted that Mother/Father Deaf is an anthropological study and does not address psychological issues of growing up CODA. He indicated there were numerous

studies available in 2004 and earlier about CODAs and the effect of growing up CODA.

Dr. Marcus explained deaf culture, the phenomena of peddling, and the notion of Tommy being a deaf person in a hearing person's body. Dr. Marcus also explained how Jackie and Albert fit or didn't fit within the deaf community. Jackie was rejected and was probably filled with self-loathing about her deafness. Her practice of going to downtown Flint as a teen to drink with a rough crowd of hearing people was indicative of her self-hatred. Jackie's low IQ was significant also. Albert was an exploitative top dog "peddler" who preyed on other deaf people. The issue with Jackie and Albert wasn't just that that they were deaf but they were also terribly broken themselves which resulted in a "perfect storm."

Tommy has the mannerisms of a deaf person and a very deep love for the deaf people but also a great hurt and rejection. He communicated with Tommy in sign language and when he did so there was a depth of expression and emotion that "overwhelmed the room." He was like a different person, much more in touch with his feelings, crying about the murders.

Dr. Dee's example of the stigma of growing up CODA did not explain the ramifications and long term effects that has on a person. Further, Dr. Dee should not have administered the MMPI to Tommy because it is not reliable on deaf people or CODAs. Dr. Dee never used a sign language interpreter or teamed up

with someone who knew sign language in order to fully assess Tommy. Tommy needed to be evaluated as both a hearing person and as a deaf person in a hearing person's body, especially in light of the shame and lack of pride he would have experienced based on the way he grew up.

Nancy McKenzie testified about her experiences growing up CODA and her observations of Jackie and the children when Jackie sought interpreter services through the deaf access center in Flint, Michigan. She confirmed that Jackie was an outsider in the deaf community because of her embarrassing behavior and inability to carry on an adult conversation. She remembers feeling for the children because as a CODA herself she identified with the embarrassment CODAs feel about their deaf parents, but with Jackie it must have been even more so because she was so dysfunctional.

She also knew Jackie's brother, Robert Alward, who was the opposite of Jackie. Robert was a well liked member of the deaf community who had been married for many years, worked at GM for many years and was an active person who skied. Robert Alward, Jesse Church, Linda Mattson and Annie Swann also testified and presented a meaningful picture of the varied lives and abilities of the deaf.

4. Expert testimony on effects of alcohol

At the 2004 penalty phase, defense counsel failed to offer any expert testimony on the effects of alcohol, Tommy's level of impairment on the night of the crime or genetic predisposition to alcoholism. Prejudice is established when counsel fails to present expert testimony regarding a defendant's acute alcohol intoxication. In Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003), the court found a capital defendant was prejudiced when trial counsel failed to present expert testimony on drug and alcohol intoxication at the sentencing phase. The expert testimony presented at post-conviction supported a finding that the manner of killing, which involved shooting, then striking the victim with a tire iron and then trying to drown him and shoot him again, "reflected erratic behavior," and thought processes. Id. at 1169. The defendant's "cloudy" memory also evidenced diminished cognitive functioning. Id. Ironically, another expert called at post conviction in Hardwick, Dr. Dee, offered his opinion that the defendant was "acutely intoxicated" at the time, that the manner of death was consistent of an individual under the influence of drugs and alcohol, and that the defendant's ability to form "specific intent was diminished." Id. at 1170. Evidence was also offered that the defendant had a history of blackouts. Id. at 1174. The court also found that, "although the [expert] conclusions as to mitigation factors under the Florida statute were essentially the same in [the post conviction] proceeding, the judge and jury heard none of this testimony." Id. at 1172. Basing its holding on Williams v.

Taylor, 529 U.S. 420 (2000), the court found that trial counsel's failure to understand the need for background testimony from additional family members and the failure to present evidence of the defendant's drug and alcohol use, undermined confidence in the outcome. Id. at 1174.

Likewise, the post conviction court reasonably found that counsel's failures to present expert testimony prejudiced Tommy. Tommy testified that he was drunk and had had up to 24 to 30 beers. He also explained that he had difficulty remembering the crime and he vomited while walking back to the Outdoor Resorts of America community. The prosecution also presented his statement to the police where he said he couldn't remember much of the crime because he had been drinking but said he had only 7 to 8 beers. Counsel conceded his theory was that Tommy was very, very drunk, had been drinking extensively and was in an alcohol induced "coma." Yet, counsel offered no expert evidence to explain this theory.

Counsel's failure prejudiced Tommy because he failed to give the jury a scientific and informed basis to evaluate the significance of Tommy's drinking in relation to the crime and to assess his mental status. The prosecutor was able to argue in his closing that Tommy's "drinking of alcohol was not impairing him." 2004Trial, V.16, p. 2586. He further argued that it was "obvious and clear" that whatever he had to drink was not impairing his ability to remember how he was thinking. Id. at 2588. He also said that Tommy chose to drink and that his drinking

did not cause what he did. Id. at 2589. He also said that someone who is so intoxicated would not be able to navigate a busy thoroughfare. Id. at 2586.

Had counsel presented expert testimony he could have offered a science based alternative to the prosecutor's argument. Dr. Buffington testified that Tommy was in a partial blackout which "is a cognitive phenomenon" where the individual can be functioning, talking, walking, having thought processes, having behaviors and have no memory of them. He also explained that "behavior disinhibition and violence" are common with high blood alcohol levels. Observers may think the person is behaving in a way that involves cognitive thought processes but the person is acting in a way that he would not normally act and his brain is unable to lay memory foundation. Alcohol affects the cerebral cortex which is responsible for judgment, thought and perception. It also affects the limbic system which regulates emotion and behavior and other parts of the brain. Dr. Buffington calculated Tommy's BAL and felt it was probably under a .4 at the time of the crime. Tommy would have vomited at a .18 or .20. The blood alcohol levels in this case are so significant that the statutory mental mitigators would apply.

Without this testimony, Mr. Colon was left to argue that that there might be some mental health issues that caused the drinking but *he didn't know*. 2004Trial, V.16, p. 2606. He also told the jury, even drunk people know what they're doing

and as a heavy drinker, Tommy was affected less. Id. at 2615. This was not a persuasive argument but it was all trial counsel had due to his failure to investigate. And, it was simply scientifically inaccurate and evidenced a lack of understanding of the effects of alcohol on the cognitive processes of heavy drinkers.

Both Dr. Buffington and Dr. Cunningham addressed Tommy's risk factors for alcoholism. As Dr. Buffington explained, Tommy wasn't controlling the alcohol, it was controlling him. As Dr. Cunningham explained, while Tommy had a choice to start drinking, his moral culpability was lessened due to external factors beyond his control, including genetic factors, a history of abuse and neglect, being a CODA and being born with an alcoholic metabolism. Tommy's acute intoxication, combined with his background was a significant factor contributing to the crime. The post conviction court's finding is supported by the facts and the law.

5. Arthur White

Prejudice is established by the fact that, had counsel moved to exclude Arthur White's testimony, evidence that suggested the crime was purposeful and of a sexual nature would have been excluded. This is especially so in this case where the State did not charge a sexual battery. As Mr. Norgard explained, the cutting and tying of the underwear was very bizarre and consistent with acute alcohol intoxication. The only other case he's seen where clothing was removed and tied in

a knot, the defendant was found NGRI. If Mr. White's fondling testimony had been excluded, not only would the "yuck" factor been removed, but trial counsel would have had additional evidence to argue in support of statutory and non-statutory mental health mitigation.

The post conviction court's ruling is supported by the facts and law. Even if this Court should find the post conviction court was incorrect as to the motion in limine, this Court would still find that Mr. Woodel was prejudiced by counsel's failure to adequately cross-examine Mr. White as to his prior felony convictions, the "sweet deals" he got from the prosecutor, the nature of his relationship with the prosecutor and his horrific prison record that he expressly lied about.[5]

Summary

Trial counsel's failures were so sweeping in the penalty phase as argued above that confidence in the outcome is undermined. When comparing the totality of evidence presented at trial and at post conviction, including the additional mitigation of Tommy's desire to be a bone marrow donor for his daughter who died of leukemia, his lack of a prior violent record, his cooperation with police and the bizarre, irrational nature of the crime, there exists a reasonable probability that the judge and jury would have recommended a sentence less than death. This is

[5] This would have been not only helpful in demonstrating Mr. White's lack of candor but also would have provided an excellent contrast with Tommy's exemplary prison record and would have helped put Tommy's record in context.

especially so in light of the jury's seven to five death recommendation. The post conviction court's ruling should be upheld.

ARGUMENT II/CROSS-APPEAL ISSUE I

THE LOWER COURT ERRED IN FINDING THAT COUNSEL'S DEFICIENT PERFORMANCE IN FAILING TO CONSULT WITH AN EXPERT ON THE EFFECTS OF ALCOHOL AND FAILING TO OBJECT TO ARTHUR WHITE'S TESTIMONY DID NOT PREJUDICE MR. WOODEL IN THE GUILT PHASE.

Expert on Effects of Alcohol

The post conviction court found that trial counsel rendered deficient performance when counsel failed to consult with an expert on the effects of alcohol on Tommy's cognitive functioning. However, the court found that counsel's deficient performance did not sufficiently prejudice Mr. Woodel to undermine confidence in the outcome. Deficient performance is established when counsel fails to consult with a qualified expert on alcohol's effects on cognitive functioning and specific intent; prejudice is established when counsel fails to present expert testimony regarding a defendant's acute alcohol intoxication. Miller v. Terhune, 510 F. Supp 2d 486 (E.D. Cal. 2007). In a non-death case, after having found trial counsel performed deficiently in failing to consult an expert qualified to assess the effects of alcohol on cognitive thought processes, the federal district court found prejudice in the guilt phase of a trial. Id. at 506. The Court reasoned that the prosecutor had been able to discredit the defendant's version of events as not

credible because counsel had failed to explain the effects of alcohol. The expert calculated the defendant's BAL to be above a .30 at the time of the offense. The expert explained that the defendant, especially if he was alcohol-tolerant, could still walk and talk but still be experiencing significant impairment in his ability to reason and make decisions and judgments. Id. at 504. He would also be able to call 911, as the defendant did in this case. If a sober person points a gun at someone and shoots them, a finder of fact could reasonably conclude that the shooter was making a rational decision. Id. The same cannot be said of someone with a BAL of .30. Id. He further explained that an accurate evaluation of the defendant's state of mind was not possible without specific consideration of his intoxication. Id. at 505. The defendant could not have formed the specific intent necessary to commit first degree murder. Id.

Likewise, in Tommy's case the theory of the guilt phase was that Tommy was extremely intoxicated. Trial counsel obtained an instruction on voluntary intoxication and argued in closing that Tommy was very drunk. However, they presented little evidence in support of their theory, despite being told by their client he had "upwards of 30 beers." The crime itself was irrational and illogical and suggestive of irrational thought consistent with an alcoholic blackout.

At post conviction, Mr. Woodel presented the testimony of Dr. Buffington who calculated Tommy's BAL to be just under a .4. He further opined that Tommy

was in a partial alcoholic blackout and at those levels, the effects of alcohol would be so profound that Tommy would not be able to form the requisite intent required under Florida law or that the mental state would not exist.

The post conviction court rested its ruling on the fact that Mr. Woodel would still be found guilty of felony murder due to the fact that he committed an armed burglary. However, such a fact is not a foregone conclusion. Counsel's performance prejudiced Mr. Woodel so that confidence in the outcome is undermined. This Court should reverse and grant Mr. Woodel a new guilt phase.

Arthur White

The post conviction court correctly found trial counsel's failure to file a motion in limine to prohibit the testimony of Mr. White about "fondling" during the guilt phase was deficient performance. However, the court found that Mr. Woodel was not prejudiced. This was error.

Prejudice is established by Mr. White's testimony and evidence introduced at the post conviction hearing. McDuffie v. State, 970 So.2d 312 (Fla. 2007) supports Mr. Woodel's argument that the statement was unduly prejudicial. The statement was of the type that had "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." McDuffie v. State, 970 So.2d at 327 , (citing Brown v. State, 719 So. 2d 882, 885 (Fla. 1998), relying on Old Chief v. United States, 519 U.S. 172, 180, 117 S.Ct. 644 (1997)).

The testimony was so prejudicial and essentially provided evidence of an uncharged crime. This Court should reverse and grant Mr. Woodel a new trial.

Summary

Prejudice is established by the fact that this crime was so bizarre and irrational that if the jurors had been given a meaningful scientific explanation of the extent and effect of alcohol on Mr. Woodel's functioning on the night of the murders so they could apply the voluntary intoxication instruction, there exists a reasonable probability that the results of the proceeding would have been different and confidence in the outcome is undermined. Likewise, Arthur White's testimony was so prejudicial, providing a false motive to an otherwise completely illogical crime, that it deprived Mr. Woodel of a fair trial.

ARGUMENT III/CROSS-APPEAL ISSUE II

THE LOWER COURT ERRED IN FINDING THAT THE PROSECUTOR DID NOT VIOLATE BRADY/GIGLIO IN ITS PRESENTATION OF ARTHUR WHITE.

The State violated Mr. Woodel's Due Process rights under Brady and Giglio by withholding evidence of the benefit Mr. White received for his testimony and allowing him to testify falsely that he did not receive a benefit and that he had only five or six prior convictions. The Supreme Court has held that both the withholding of exculpatory evidence from a criminal defendant by a prosecutor and the knowing use of false testimony violates the Due Process Clause of the Fourteenth

Amendment. Brady v. Maryland, 373 U.S. 83, 86 (1963); Giglio v. United States, 405 U.S. 150, 153-55 (1972). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violated Due Process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. "Evidence is 'exculpatory' and 'favorable' if it 'may make the difference between conviction and acquittal' had it been 'disclosed and used effectively.'" United States v. Wilson, 624 F.3d 640, 661 (4th Cir. 2010)(*citing* United States v. Bagley, 473 U.S. 667, 676 (1985)). In order to establish a Brady violation, a court must find that 1) the evidence is favorable to the accused because it is exculpatory in guilt or sentencing, 2) that it was suppressed by the State willfully or inadvertently, and, 3) materiality. Banks v. Dretke, 540 U.S. 668, 691 (2004). Evidence that is favorable to the accused includes both exculpatory and impeachment evidence. Id.

In analyzing materiality, courts must determine whether there is a "reasonable probability" that the result of the proceeding would have been different if the evidence had been disclosed. Kyles v. Whitley, 514 U.S. 419, 434 (1995). This showing "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have ultimately resulted in the defendant's acquittal." Id. (*citing* United States v. Bagley, 473 U.S. 667, 682 (1985). Rather, a defendant can fulfill the materiality standard by showing that the

cumulative effect of the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.." Id. at 43-45. This cumulative effect analysis emphasizes the fact that when making a materiality finding, courts should consider the suppressed evidence collectively, rather than judging the materiality of each item of suppressed evidence. Id. at 436; *see* Id. at 437, n. 10.

Knowing use of false testimony violates due process. Giglio v. United States, 405 U.S. 150, 153 (1972). This rule applies regardless of whether the false testimony is solicited, or merely allowed to stand uncorrected after it appears. Napue v. Illinois, 360 U.S. 264, 269 (1959). Non-disclosure of evidence affecting credibility also falls within this rule "when the 'reliability of a given witness may well be determinative of guilt or innocence." Giglio v. United States, 405 U.S. at 154. In order to establish a Giglio violation, a defendant must demonstrate that 1) a state witness gave false testimony, 2) the prosecutor knew the testimony was false, and 3) the statement was material. Id. Under Giglio, where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of [the finder of fact]." The Giglio standard has also been explained as a "materiality standard under which the fact that the testimony is perjured is considered material unless

failure to disclose it would be harmless beyond a reasonable doubt." United States v. Bagley, 473 U.S. at 679-80. The State bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt. Id. at 680, n. 9.

In Mr. Woodel's case, the State committed two Brady violations which resulted in two Giglio violations. First, the State withheld evidence that Mr. White received a deal and allowed him to testify he received no benefit. The post conviction record demonstrates that in 1997, after he offered himself as a witness and was listed as a witness in Mr. Woodel's case, Mr. White received a 15 month sentence, concurrent and co-terminus with his parole violation when he was facing 30 years as a habitual offender on a burglary and extortion case. In 1999-2000, after he had testified as required in Mr. Woodel's case, he received a five year sentence after again being noticed as an HFO and facing 30 years each in prison on two robbery cases. Like before, Mr. White had barely been out of prison when he reoffended with a violent crime.

The State offered no credible evidence to explain how an infamous defendant with Mr. White's horrendous record would get such a deal absent as a benefit for his work in being a "good witness." Further, the same prosecutor who gave Mr. White the deal in 1997 and 1999, Mr. Kirkland, said at a deposition one of the 1999 cases, that Mr. White had in fact testified at a murder trial. Mr.

Kirkland made the statement when the witness, Corporal Henry, was explaining to Mr. White's defense attorney, that Mr. White, in seeking "substantial assistance," was telling him that Paul Wallace knew he was a good witness and did "good work." Mr. Kirkland was obviously aware of Mr. White's work and could only have been told about it through Mr. Wallace. In the 1999 cases, Mr. White's defense counsel was unaware of Mr. White's prior knowledge and contact with Mr. Wallace. Mr. Kirkland, however, was aware of Mr. White's special status. Mr. White had such a close relationship with Mr. Wallace that he knew Mr. Wallace's secretary's name, Pat, and had called him many times from the jail.

Mr. White testified at both the 1998 and 2004 trials that he had received no benefit and that, in fact, he was being hurt by losing gain time by coming to court. The prosecution never corrected these false statements.

Likewise, the State withheld evidence of Mr. White's prior record, or, in the alternative, failed to correct Mr. White's testimony when he lied about the number of prior convictions he had. At the 1998 trial he testified that he had been convicted "about five times." 1998Trial, V. 12, p.1654. At the post conviction hearing it was established that Mr. White had eight prior felonies at the time of his testimony. Trial counsel said he relied on the prosecutor's representation to him of the correct number of felony convictions. If so, the prosecution, either through negligence or willful ignorance, affirmatively misled defense counsel.

As explained by Mr. Norgard, Mr. White's testimony was especially material in the 2004 penalty phase because his testimony elevated Mr. Woodel's behavior on the night of the crime to conduct involving sexual behavior which amounted to an uncharged aggravator. Particularly under the facts of this case, where Mr. Woodel's behavior was so irrational and so bizarre, the testimony was hurtful. It precluded defense counsel from arguing that the removal and tying of the underwear was consistent with an alcoholic blackout and irrational thought processes.

In denying this claim, the post conviction court found that Mr. Woodel did not establish Mr. White had an agreement. This is incorrect. Further, the post conviction court found that the State didn't "knowingly" allow Mr. White to testify falsely. However, the State had to have known that Mr. White was misrepresenting his record because Mr. White testified that it was the State told him the number of his felony convictions. Mr. Woodel has met the low materiality standard of Giglio and the slightly higher materiality standard of Brady. The State has failed to prove the false testimony was harmless beyond a reasonable doubt in the 2004 penalty phase and the 1998 Guilt Phase. This Court should reverse.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court properly granted Mr. Woodel a new penalty phase proceeding. This Court should affirm that Order. The lower court

erred, however, in not granting Mr. Woodel's claim that his attorneys rendered ineffective assistance of counsel in the guilt phase and that the State violated his rights under Brady/Giglio when they presented the snitch, Arthur White. This Court should order that his convictions be vacated and remand the case for a new guilt phase trial, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to Carol M. Dittmar, Assistant Attorney General, Concourse Center 4, 507 East Frontage Road, Suite 200, Tampa, FL 33607 and Thomas D. Woodel, DOC #H06832, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026 on this 1st day of November, 2012.

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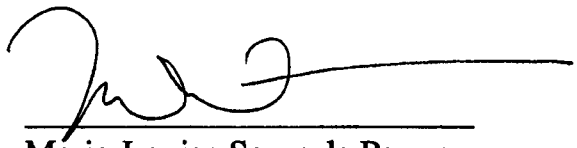
CERTIFICATE OF COMPLIANCE

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



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