Filing # 15287151 Electronically Filed 06/26/2014 03:07:26 PM

RECEIVED, 6/26/2014 15:16:06, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-142

TAI A. PHAM,

Appellant

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, STATE OF FLORIDA
Lower Tribunal No. 2005CF4717A

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of a final order by the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County denying the Appellant, Tai A. Pham[1]'s Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851("Motion"). The record on appeal for the trial proceedings consists of 18 volumes. The record on appeal of the post-conviction proceedings also consists of 18 volumes. References to the record on appeal will be referred to as "(R ___)" followed by the appropriate volume number and then page number(s). The post-conviction record on appeal will be referred to as "(P ____)" followed by the appropriate volume number and then page number(s). All other references will be self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Pham is incarcerated at Union Correctional Institution, Raiford, Florida, under a sentence of death. The resolution of these appellate issues will determine whether he lives or dies. This Court has allowed oral argument in other capital cases. A full opportunity to air the issues would be appropriate given the seriousness of the claims involved and the fact that a life is at stake. Mr. Pham accordingly requests that this Honorable Court permit an oral argument.

[1] The Appellant will hereinafter be referred to as ("Tai") throughout this Brief.

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STATEMENT OF THE CASE

(I) Procedural history of the trial proceedings

A grand jury indicted Tai for 1 count of First Degree Murder of Phi Amy Pham, for 1 count of Attempted First Degree Murder, for 1 count of Armed Kidnapping, and for 1 count of Armed Burglary of a Dwelling. R1/21-3. The Public Defender's office was appointed to represent Tai, specifically attorneys James Figgatt and Timothy Caudill ("Caudill" & "Figgatt"). The investigators were Jeff Geller ("Geller") and Dave McGuiness ("McGuiness").

The guilt phase was conducted from March 3, to March 7, 2008. R4-11. On March 7, 2008 Tai was found guilty of all counts. R25/1469-70. The penalty phase was conducted from May 20, to May 22, 2008. R12-14. On May 22, 2008, the jury recommended death by a vote of 10 to 2. R3/501. A *Spencer* hearing was conducted on August 18, 2008. R18/1100-1272. On November 14, 2008, Tai was adjudicated guilty and sentenced to death on the murder count and to life as to the remaining counts, to run concurrently. R18/1293-95 & R3/569-75. The Sentencing Order listed 4 statutory aggravators and 6 non-statutory mitigators. R3/558-68, R18/1273-96 & *see Pham v. State*, 70 So.3d 485, 491 (Fla. 2011).

(II) Procedural history of the direct appeal proceedings

Tai appealed his convictions and sentences, but was denied relief on June 16, 2011. *See Pham*, 70 So.3d 485. Thereafter, Tai filed to the United States

("U.S.") Supreme Court a petition for writ of certiorari which was denied on March 19, 2012. *See Pham v. Florida*, 132 S.Ct. 1752, 182 L.Ed.2d 541 (2012).

(III) Procedural history of the post-conviction proceedings

Tai filed his Motion on February 25, 2013. P1/33-171. At the Case Management Conference the court granted an evidentiary hearing ("hearing") as to claims 4, 5, 6, 7, 9, 10, 11, 12, 13, and 15. P17/990-1048 & P3/558-59. The court reserved ruling on the legal claims 8, 16, 17, 19, 20, and 21 and denied a hearing as to claims 2, 3, 14, and 18. P3/558. The hearing was conducted on October 8, and from 28 to 31, 2013. P12-6. Tai filed an Appendix of Case Law and Authorities in Support of his Motion. P9/1669-1759 - P11/1962-2059. On December 20, 2013, the court entered an Order denying relief. P11/2060-74. This appeal follows.

STATEMENT OF THE FACTS

(I) Summary of the facts of the trial proceedings

The evidence presented at the guilt phase was summarized as follows:

> On March 7, 2008, Tai Pham was convicted in Seminole County for the first-degree murder of his estranged wife Phi Pham, the attempted first-degree murder of her boyfriend Christopher Higgins, the armed kidnapping of his stepdaughter Lana Pham, and armed burglary. Pham entered Phi's apartment where her oldest daughter, his stepdaughter Lana, was alone and awaiting Phi's return. After binding Lana, Pham hid in her bedroom for an hour, then stabbed Phi at least six times as she entered the room. Prior to returning to the apartment, Phi and Higgins were together at a party and returned in different vehicles. Phi's stabbing occurred while Higgins secured his motorcycle outside. Once Higgins entered the apartment, he struggled with Pham. During the struggle, Lana was able to get free and call the police. Higgins was

> severely injured during the struggle, but was able to subdue Pham until the police arrived. Both Lana and Higgins testified at trial. Pham was the sole witness for the defense.

Pham, 70 So.3d at 491 (internal parenthetical short-forms omitted).

The court summarized the State's evidence at the penalty phase as follows:

> The State's presentation on aggravation was relatively brief. The medical examiner[2] testified as to the specific circumstances of the victim's death for purposes of the HAC aggravator. Then, victim impact evidence was presented by the guardian of the victim's children and from Mr. Higgins. Other than that, the State relied on evidence presented at the guilt phase.

P11/2067 (footnote added). Deputy Csisko testified as to the violent crime aggravator. R18/15-34. Dr. William Riebsame ("Riebsame") was presented at the penalty phase to rebut Dr. Deborah Day ("Day"). R13/380-99&14/404-82. He was also presented at the *Spencer* hearing to rebut Dr. Jacquelyn Olander's ("Olander"). R18/121-61. The mitigation evidence from the penalty phase was not summarized in the opinion. The relevant mitigation presented from the penalty phase is discussed in Argument I.

(II) Summary of the testimony at the post-conviction hearing

Tai's mother, Nho Thi Nguyen ("Mama"), his sisters, Kim Oanh Pham ("Kim") & Thuy Thi Nga Hang Pham ("Hang"), and his brother, Anh Tuan Pham ("Tuan"), all live in Vietnam and testified at the hearing[3]. Tai's sister, Thi Ngoc

[2] Dr. Pedrig Bulic's ("Bulic") was presented in lieu of medical examiner Dr. Thomas Parsons' ("Parsons"), who conducted the autopsy. R9/1165&R12/56.

[3] The siblings are Hang, Tuan, Thuynga ("Thuy"), Anh Tu ("Tu"), Ngoc, Anh Vu

Anh Pham ("Ngoc") who lives in Paris, France, also testified. Mama, Kim and Hang met Phi and her mother after Zena's birth in Vietnam. P12/77-8, 36&157. Tai paid for their trip, but he did not come so that he could work and buy a house. P12/78&157. In 2005, the family learned about Tai's arrest from Thuy, who called Mama. P12/37, 79, 103-4, 109&129. The family could have been reached by telephone from 2005 to 2008, but none of them were contacted. P12/37-8, 104, 109-10&129. All of the family members would have spoken to counsel, investigators, or experts. P12/39, 79-80, 111-12&130.

Kim is 12 years older than Tai and was born in the same house as Tai. P12/41&17. Kim took care of her siblings because her father was in the military and Mama was away selling vegetables. P12/17&50. She described the family and Tai's frightful experiences in Vietnam. Their father fought in the South Vietnam Army against the Communists and would leave home and periodically return. P12/17-9. As children of a South Vietnamese soldier, they were in danger of being killed by the Communists. P12/17-9. The Pham children were "very scared" of the Communists. P12/19. Their grandfather died while in a North Vietnamese jail/ prison. P12/42. Kim testified

> "[a]t the time, near our house, there's cathedral and on top there's people . . . surveying. And if there's Communists coming or something happen, they will ring the bell we all go to the neighbor to go under the basement. Whenever come down, we will go back and

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Thuy, and Thi Vu Vi. P12/15-6.

it's like that continuing over and over."

P12/29. She was "afraid of gun" and she saw people being killed. P12/29. Mama corroborated that Tai was with them "when they were fighting we run to our neighbor, there's a basement, we run over there. When everything calm down, we get back home and we got to bed." They were frightened and "shaken." P12/51-2.

Tai had several problems as a new born. He weighed 2 kilograms at birth and was the smallest baby among all of the siblings. P12/21-2. Mama corroborated that Tai weighed about 2 kilos while her others weighed over 3 kilos. P12/56. Tai had a "real big" tumor on the right side of his head when he was a few months old. P12/21. They tried to treat it with a patch but it burst and bled "on the pillows." P12/22. He was taken to the emergency room where he was treated with a band aid and a pill for the fever. P12/21-2. Mama was frightened that he would die. P12/58. Tai was the only child to suffer from this and it took a long time for him to recover. He cried every night for Mama, who kept carrying him. P12/58-9.

Kim detailed problems from Tai's infanthood and childhood, which included "lots of fever," "nose bleeds," falling more often than other children, and problems defecating and urinating in appropriate places. P12/22-3. Kim cleaned up after her brother, who despite being told how to go properly to the bathroom, kept "forgetting" and defecated "all over." P12/22-23. This happened even when he was 4 or 5 years old. P12/23. Tai wet his bed until he left Vietnam. P12/23. Tai wet his

pants when he was at school. P12/23. Tuan and Mama corroborated this. P12/60-2. Tai cried a lot and he "used to bang his head on the floor" when he cried. P12/23-4.

In comparison to his siblings, Tai was "a little bit slower." He did not start talking until he was "around fourteen, fifteen months" and he did not start walking until he was "around two years old." P12/24. Mama corroborated this. P12/57. Kim testified about problems that Tai had at school and with other children. He was very slow in school, he "can't study that well," "[h]e has ugly handwriting," and he was not really good at reading. P12/24-5. He was teased at school and called a "dummy" or "a stupid dummy." P12/23&26. He had to repeat a grade "sometime three years in one grade." P12/25. These failures made him "sad" and the children made fun of him. P12/25. He did not have a lot of friends, and preferred to stay at home a lot. P12/24. Tuan and Mama confirmed this.

Kim detailed memory problems that Tai had from the age of 5 or 6 to about 9. P12/26. Tai was quite forgetful and he would forget "whatever [they] taught him the day, the next day he would go to school and he couldn't remember. Like the house work, like we say please do this and he just couldn't remember." P12/25. Tai would "sometimes [he] remember, sometime [he] not" remember to change his clothes. P12/25. Tai forgot his books and to do things in school. P12/26. He skipped school occasionally[4] because "he couldn't remember the lessons." P12/26.

[4] This behavior was commonplace for Tai and continued in foster care in Illinois.

Their father disciplined Tai by whipping him on the butt with a long stick that he kept in the corner. P12/27.

Kim detailed that from a young age Tai had an innate ability to fix things. P12/28. Tai "usually go to the next door neighbor that man he work on the auto and he watch him to put the light in and he would go home and try to do it." P12/28. She recalled that Tai "used to get the stick, tie together and put the battery and then he would put it down and make it like a boat. He used to buy the cover and he like to do the flashing light for Christmas." P12/28. Tai was better at fixing things than he was at school. P12/28.

As military children, they were not allowed to move up to the next grade in school thus people left "to find the freedom." P12/32. All of the Pham family tried to escape. Families left in small groups to avoid detection by "the undercover." P12/31-2. They had to travel far to the closest port of Vung Tran. P12/32. Tai was about 8 or 9 years old when he was forced to escape. P12/32. Tai's first failed attempt was with his older sister Hang. P12/32. Hang was imprisoned for 3 years while Tai was imprisoned for 3 months because he was a child. P12/32. Kim was present when Tai returned home from prison. P12/32-3. Tai was "very scared" and "[v]ery happy" to be home. P12/34. Tai told her that he "never want to escape again." P12/34-5. However, unbeknownst to him, in about 2 or 3 days, Tai was tricked again to escape with Thuy. P12/35. This was the last time that he saw his

home and Kim. P12/35-6. Despite the promise of freedom, Tai never wanted to leave; he "just want to stay home with mom." P12/35.

During this time, Tai suffered the tragic loss of his brother, Tu. P12/30-1. Tai and Tu were very close and loved each other. P12/30. Tu was killed on the way back from dropping off their youngest sister at school. P12/31. While on a bicycle, Tu "tried to move over and another car came up, ran over him, ran over his throat." P12/31. Tai was frightened when he saw Tu's body in a casket. P12/31. He was told to go up to the casket and apologize for what he bad he had done. P12/31-2.

Mama was 17 when she married Tai's father, who passed away in about 1997. P12/46-7. The father fought in the battlefield until a surgery for his intestines forced him to leave, but he continued to work in the office. P12/87-8. Tai's father was "always on the go" and Mama would "stay home by [her]self." P12/50. Tai's father was fighting in the war when he was born. P12/50&55. At the time, there was an armed military presence in their village, and they heard gunshots and saw dead bodies and guns all over the streets. P12/51. It was dangerous for the family that the Communists knew Tai's father was Anti-Communist. P12/52.

Mama detailed her difficult pregnancy with Tai. He was her 6th child and pregnancy with him was "the most complicated." P12/52-3. Mama testified that she was very weak, sick, and threw up. Tai was the most difficult child to carry of all of her children under the same health care conditions. P12/53-4. There were

problems with the delivery. P12/54. Mama delivered most of her children in a day but it took 3 days to deliver Tai. P12/54. Mama testified that:

> "[a]fter the three days, [she] was in pain and they wanted to transfer [her] into a hospital in Saigon, okay. [She] was laying there is pain and the two nurses keep talking that should move me in a bigger hospital to Saigon, but then finally, he came out, [she] was bleeding, and they never transport [her] to the other hospital."

P12/54. Mama believed her baby was going to die. P12/54.

Mama gave additional details about Tai's schooling problems. P12/62. Mama and her husband had to go see Tai's teachers to discuss the problems he had at school. P12/62. They begged the teachers to not to kick him out. P12/62. Tai failed all the time and he could not study. P12/62. Mama testified that "it was too difficult to teach him. "P12/63. Unlike school, her son was good with "electricals." P12/64. Tai was bullied by the other children and was called "dumb" and made fun of because he failed at school. P12/62-3. Mama loved Tai the most and she protected him from the children who picked on him. P12/64. They had a very close relationship. P12/64. Tai wanted to grow up to be a soldier like his father. P12/64-5. Tai heard from the maternal grandmother about the death of his maternal grandfather at the hand of the North Vietnam Communists because he was Catholic. P12/65. Tuan corroborated this traumatic event. P12/94.

Mama detailed the discipline that Tai received from his father. P12/65-66. She testified that this is how "[t]he good family" disciplined their children. P12/66.

Mama confirmed that when Tai would get angry and he would "cover his head to the ear and bang down on the floor until his forehead all scratched." P12/67.

Mama detailed her family's experiences trying to escape from Vietnam. Mama and her husband "thought was because of the children of the military person, they didn't get to be treated good, so we told them to let them go, escape to another country, that way they will have their future and freedom." P12/69. She was afraid for her boys because they could get drafted. P12/70. Also, there was gun fighting "[p]retty close to their home and they were "pretty scared." P12/85.

Their family's intention was to build a boat so that the whole family could escape but when the owner of the boat went to jail, they had to send their children separately. P12/70. They had to pay "two sticks of gold" to someone to take their children separately. Tuan tried several times to escape but was captured. P12/70. Kim tried to escape once with the family. P12/70. Hang tried to escape with Tai but they were captured. P12/71. Hang was afraid to try to escape again. P12/71-2. Ngoc and Tuan also unsuccessfully tried to escape. P12/73.

Mama had to lie to Tai twice because he did not want to leave her. Before the first escape, Mama lied to Tai and told him to go play with his sister. P12/74. He did not want to go and he "couldn't understand why [she] kept wanting him to go far away." P12/74. Three months after his capture, Tai returned home and was "shocked but happy. And he kept holding [Mama] and cry." P12/74-5. Tai was

"afraid that [she] abandoned him." P12/75. He was happy to be home and he held Mama as they both cried. P12/75-6. However, Mama made the difficult decision to send Tai away again because she wanted him to have a future. P12/76. Tai was sent away in less than a week. P12/76. She lied to him again told him that he was going to the zoo because he did not want to go. P12/76. This was the last time that she saw her son. P12/77.

Tuan is 8 years older than Tai. P12/82&90-1. The children of anti-Communist fighters were treated differently and were not allowed to go to college. P12/91. Around the age of 18, the boys would be drafted into the Communist Army. P12/92. Tuan witnessed Tai being bullied by other children and being called "moc, moc" which meant "a little crazy." P12/96-7. Tai reacted angrily to being bullied. P12/98. He recalled when a child threw a rock at Tai's forehead causing it to bleed. P12/97-8. The children stole Tai's marbles. P12/98.

At the age of 4 or 5, Tai smoked cigarettes that he stole from his father. P12/98. His father disciplined Tai by tying him up because he would not listen. P12/98. It was normal to discipline children by hitting them with sticks. P12/99.

Tuan tried to escape at least 7 or 8 times but was caught each time. P12/100-1. He tried to escape because "in Vietnam the life was pretty tough business or anything so we just want to escape a better future, education and everything." P12/100. He was arrested and imprisoned for 3 to 4 months when Tai escaped with

Hang. P12/100-1. The last time he saw his brother was at Tu's funeral. P12/102.

Prior to France, Ngoc lived in Vietnam. P12/108-9. Ngoc tried to escape around the same time. She was not successful in her escape and was captured with Tuan. P12/112. She was released early because of her age. P12/112-3. Ngoc was 8 or 9 years old, when her family convinced her to go to another country because they were scared. P12/114. Ngoc testified there "was no food, no good life in Vietnam so they wanted to leave the country, go to another one, a better education, the better life." P12/114-5.

Ngoc and Tuan left home and went by bus to Vung Tau. P12/116-7. Once they got there, the police spotted them and they all scattered and went through the woods to hide for a while. P12/117. They made their way to a small boat to take them to a big boat. P12/117-118. There was a leader who directed them. P12/118. They were eventually captured a week later on the big boat along with 63 people. P12/117-118. They were all stuffed "underneath of the boat and they shut the top" and she could not breathe. P12/119. She cried and was looking for her brother. P12/119. Two days later, they were out in the open water and the top was opened and they had air. P12/119. For a week "they had no drink, no food, no toilet, nothing." P12/119. The people were on top of each other in the boat. P12/119. During a storm at night, the boat was turned upside-down and she was hanging on the side of the boat when she heard someone say they were going to die if they

continued. P12/120. So, they decided to all go back to an island. P12/120. Then, they were captured and were divided into two groups, male and female. P12/121-2. She lost her brother at the time and was really scared. P12/121-2. She ended up in a prison, where she met a woman who took her in as a daughter and let her sleep next to her on the floor. P12/122. She recalled that there was some water on the island and each day they got a half-bowl of rice. P12/123. Ngoc was very hungry and picked leaves and fruit. P12/123. Ngoc was imprisoned for 2 months and then was able to go back home and she "never again" tried to escape. P12/123. She got married and her husband provided her with emotional and familial support. P12/124-5.

Hang and Tai grew up in the same house. P12/128&130. She testified about the harsh poverty conditions that they grew up in. P12/131. It was very hard to get food and the government gave them a certain ration a month. P12/131. They had to stand in long lines to get their food, which included Tai who helped carry food back. P12/131. Hang described the food as "terrible." P12/132. They also stood in line for 1 meter of clothing material a year for each family member. P12/132-3. They obtained their water from a well which they had to boil. P12/133. Hang was present when Tai saw dead bodies all over in the village. P12/158.

Unlike Tai, Hang wanted to leave Vietnam because she wanted "to move up to college, but because [she was] a daughter of an ex-military, so they wouldn't let

[her] go to college." P12/133. Hang asked her father so that she could "come to the states to study." P12/134. It was Tai's parents who made the decision that Tai was to leave with her. P12/134.

Hang provided a first-hand account of the attempted escape and all of the harrowing details of the suffering that she and Tai endured. Hang testified that they left in July of 1982. P12/134. Mama gave Hang "a little money" and "a gold ring" and told her to take Tai into town. P12/134-6. Hang was about 19 or 20 years old and Tai was 9. P12/135. They lied to Tai and told him that they were going out to play. P12/135. He had no idea that they were going to leave home and he never said good-bye. P12/135-6. They left at 4 a.m. and walked to a bus station. P12/135-7. There was a leader who directed them and others. P12/136. Hang recalled there were 7 or 8 people with them. P12/136-7. They got on to the bus headed to town where they arrived at 7 p.m. P12/137. The leader took them to a house to hide from the soldiers. P12/137-38. There were a total of about 20 people. P12/137. They were instructed to stay and that later they would be taken to the boat. P12/137.

Unfortunately, the soldiers found them hiding. P12/138. The soldiers "first came in with the gun, they said, you all stand against the wall and throw all the money, all the gold, whatever valuable thing you have, put them down on the floor." P12/138. They pointed the guns at all of them including Tai. P12/138. The soldiers were screaming at them when they first came in about being escapees.

P12/139. They took the valuables and moved them into a temporary cell where they interrogated them about their ages and names. P12/139. They tied about "ten-ish" prisoners to each other and transported them to the cell. P12/140. Tai was with her throughout this ordeal and he was "so scared" that "he just hang on to [her], grab [her] sleeve, [her] blouse." P12/137-9. Hang told Tai, who turned pale from fear, "don't worry, just stand right here with me." P12/140.

The jeep transported them to another house, where they were held captive for a month. P12/141. There were about 20 people in a divided room. P12/141. It was crowded and they slept on the floor. P12/141-142. Neither Hang nor Tai wanted to eat the little food that was provided. P12/142. They had a pot of unclean water to drink from. P12/142. If they wanted to go to the bathroom, they had to go in a pot "right there." P12/143. Two persons had to share the pot. Tai was very sad and kept crying. P12/143. Hang tried to comfort him and tell him that when their parents find out that they will come and take them home. P12/143. She tried to tell Tai to go to sleep. P12/143. He usually closed his eyes, not completely, and he always looked down because he was scared and sad. P12/143-4. Hang did the best she could do to calm Tai. P12/144.

A month later, they were transported to a prison in Ca Mau. P12/144. Hang and Tai were transported in a car with the other 20 people. P12/144. Armed soldiers were present during the transport. P12/144. Hang described Ca Mau "like

a house they build by the bamboo around there and we just laid there. And they have the wall around the camp and we just sit around there." P12/145. Hang and Tai were in the same cell. P12/145. There were soldiers with guns and weapons who walked around the prison. P12/152-153. Since Hang was older, she had to walk out into the field at 4 or 5 a.m. P12/145. They gave her a small handful bowl of rice, but they would not give Tai any food, so she gave her ration to him because she would get another handful out in the field. P12/145-6. Tai would not get any. In the evening, Hang got a whole bowl and Tai only got a half bowl. P12/146. Hang was fed more to give her energy to work. P12/146. Hang encouraged Tai to get burned rice from the kitchen, but he never did and would just go hungry. P12/147. Water came from the rainwater that was dirty and had mosquitoes. P12/147. She and Tai got sick at the prison. P12/148. In the evening, when Hang returned from work, Tai "usually go try to collect water so [she] can take a bath." P12/148. He tried to look after his sister. P12/148. He slept halfway in the bed so to make space for her. P12/148.

Hang was forced to work in the rice paddy fields bare foot on the rainy day and during the dry days they made them work until they fainted. P12/148-9. Hang almost drowned a few times. P12/149When she came back she had swollen feet and would tell Tai sometimes what happened. P12/150. Hang knew that Tai did not like the soldiers because they encouraged the children to fight. P12/156. Hang

suffered injuries from working in the fields from when she was beat up. 12/155. Her elbow was broken, she had a bruise on the side of her leg, and she has a problem with her right arm to this day. P12/155. Eventually, Tai was separated from her and she was alone. P12/155-6.This was the last time that she saw her brother. P12/156. Once Hang was released in 1984, she returned home and she never tried to escape again because she was "so scared." P12/156. Unlike Tai, Hang had her family's support when she returned from prison. P12/159-60.

Next, the Illinois Department of Children and Family Services ("Illinois DCF") records for Child Tai, Tai's FSH records, and certified copies of Christopher Higgins' ("Higgins") convictions from the Office of the Clerk of the Superior Court for Rutherford County, North Carolina were introduced. P12/164-6. All of these records were readily available from 2005 to 2008. P5-P7/1230-1349.

Dawn Saphir-Pruett ("Dawn") has worked since July of 2004, as an Illinois DCF closed file information search and connection program supervisor at Midwest Adoption Center in Des Plaines, Illinois. P12/167-8. She explained that "Midwest Adoption Agency is a small agency that contract with the State of Illinois to provide closed file information and search and connection services to adopted, non-adopted and current former wards." P12/167-8. Dawn received a request for services from collateral counsel for Tai's closed file information. P12/169-70&178-9. Upon receipt of the request and an e-mailed signed release, Dawn sent

the redacted records to collateral counsel in less than a month. P12/170-3. These records could have been requested back in 2005 to 2008. P12/175.

Susan Otteson ("Otteson") is currently a teacher in Louisiana, and was a school psychologist in Illinois. P12/180-1. She worked for Catholic Social Services in Peoria for four and a half years and then worked for them on a continuing contract for another 9 years as a public school psychologist. P12/181. Otteson exclusively evaluated children which included Vietnamese unaccompanied minors. P12/181. She has evaluated approximately 75 to 100 children from 1983 to 1986. P12/182. Soon after the Vietnamese unaccompanied minors arrived in the U.S., Otteson would evaluate the child's level of education, needs, social, and emotional development. P12/182.

Otteson had access to her evaluation report of Tai that was in the Illinois DCF records and that was written *shortly after the evaluation in 1984*. P12/183-4. *It was important for Otteson to provide as much detail as possible*. P13/209-10. She evaluated Tai on December 21, 1984, when he was 12 years and 3 months old. P12/183. It was approximately a 90 minute evaluation. P12/198. In coming to her recommendations, Otteson not only conducted an interview with Tai, she also relied on collateral information from case worker, Mr. Sundo, and Dr. Tam Thi Dang Wei's ("Dr. Wei") evaluation of Tai, and a school report. P12/185. She testified that collateral sources are important because "it gives [her] a basis for, if

[she] see[s] a particular pattern of behavior, it gives [her] something to confirm or deny what people have said to get a better picture of the individual." P12/186. Furthermore, "[m]any times children have a different understanding of circumstances than what adults might. So the collateral information is helpful to see what other people have observed about a child." P12/186.

At the time of the evaluation, Tai was living at Tha Huong, which "was a program for unescorted minors coming into the United States from either the Philippines or from other sources after they left their countries. [The minors] came into the program to provide them acculturation to get them ready to go into the foster care and into the family homes." P12/186-7. It was also a temporary placement for Vietnamese children. P12/187. The goal was to prepare the children to either go into a relative's home or foster care. P12/194. The goal was generally not for the child to remain. P12/194.

Tai was evaluated at the Catholic Social Services facilities. P12/187. Otteson observed Tai to "be easily frustrated when he was trying tasks that were difficult for him" and she "felt that he was somewhat unengaged in some of the activities that we did. Somewhat hesitant, somewhat tense at times." P12/187. He was described by school people "as having difficulty with getting along with the other children" and that "[h]e had been aggressive." P12/187. Tai was reported as a runaway, as engaging in hiding, and as having outbursts of anger, temper tantrums

in conflict situations. P12/188. Tai received counseling, but "he still had great difficulty getting along." P12/189.

Otteson looked into Tai's academic performance "[a]s part of the school programs so they could better meet his needs." P12/190. Tai was "described as, at time he could be an enthusiastic student and would do what he was assigned to do. At other times, he would be very easily frustrated and avoidant of his work, didn't want to do the work." P12/190-191.Otteson conducted a number of tests on Tai. P12/191. Tai's academic skills ranged from a second to fifth grade level, with reading being lower than math. P12/191. Tai did well in non-verbal tasks, but did poorly in expressive vocabulary, possibly due to the language barrier. P12/192. It was also difficult for Tai to make eye contact and to converse. P12/192.

Otteson noted that the problems that Tai was suffering were not typical of other Vietnamese unaccompanied minors. P12/188&199. She testified that "[from] her experience in working with the children, they were very often very eager to please, they would be compliant and would be motivated seemingly to do the best they could to please the examiner, the person working with them." P12/188. She noted that Tai "seemed to have a difficult time accepting" praise from others. P12/191. The school people "described that once [Tai] was given praise he seemed to do better even though he seemed not to know how to accept the praise." P12/191.Otteson opined that Tai had low self-esteem. P12/197.

Otteson made recommendations that included keeping Tai at Tha Huong "until he can learn to work cooperatively with his peer and with authority figures." P12/193-4. This was not generally the goal for the program. P12/194.She also recommended that Tai continue to be involved in individual counseling "to help him identify his feelings about himself and others and to deal effectively with his anger and frustration." P12/194-5. She recommended that once Tai was ready to enter the public school that he should be placed in sixth grade with supportive ESL services and tutoring. P12/195. This is so that he could be "most comfortable when he's placed with peers of his own age" than if he was placed lower. P12/195-6. She recommended "that once Tai is ready to leave Tha Huong, he and his foster family may benefit from family counseling to facilitate communication among family members and to help Tai to make a successful transformation into the new living arrangement." P12/196. Finally, Otteson recommended that Tai should be involved in non-competitive peer activities to help his self-confidence and social skills because "he seemed to have a low frustration tolerance and if it were to be non-competitive that would allow him to engage with others without feeling that he had to compete against someone else for attention or any kind of, reward of any kind." P12/196-7. This concluded her job responsibility. P12/189.

Verl Johnson-Vinstrand ("Verl") is a case worker for the Center for Youth and Family Solutions in Galesburg, Illinois, which was formerly Catholic Social

Services. P13/211-2. It is a private agency that is contracted with Illinois DCF. P13/213. Verl is familiar with Tha Huong that was developed for Vietnamese refugee minors. P13/214. She has worked with unaccompanied refugee minors from 1984 to 1991. P13/215. She gets involved when the child is in foster care, and her goal is to make sure the child is safe and is stable. P13/215&218. Verl documented her observations in handwritten case note form and she also wrote a client service plan every 6 months. P13/213-4. The notes and client service plans for Tai's case were part of the Illinois DCF records. P13/237-9. The hand-written notes were created contemporaneously with the events (within 24 hours). P13/237-9. These notes were submitted to the court in Peoria. P13/214.

Verl recalled Tai and she "just remember[s] spending a lot of time with him and his aunt and uncle and sister" in Rock Island, Illinois. P13/215-6. Verl noted that in comparison to the other children that she worked with, Tai "*was the worst*" within the unaccompanied refugee minor population. P13/236-7. She started supervising Tai in September of 1985, when he was about 14 years old, until May or June of 1990. P13/216. When Verl first met Tai, he was living with his aunt, uncle, and cousins and they were doing okay. P13/216. Eventually, she realized there were problems and conflicts in the home. P13/216-7. Tai got upset when he was unfavorably compared to his cousins and he "would become angry and he would do one of two things. He would tense up and have some kind of an angry

outburst like pushing something, running away or whatever or he would hide and not come out. Like he would hide in the closet or something and not come out." P13/217-8 & 222. She witnessed a consistent behavior of outburst of anger, running away, and hiding. P13/220. Tai eventually opened up to Verl approximately in 1989. P13/218-9.

Verl recalled that Tai would not look at her and she did not look at it as disrespect but as a cultural thing. P13/219. She had no problems being a female around him. P13/219-20. Tai opened up about his escape from Vietnam and he seemed very sad when he spoke about it. P13/222. She remembered seeing the sadness in his eyes. P13/222. Eventually Tai became part of the Upward Bound summer program that helped children with interactions with their peers along with an educational component. P13/222-3. He did well in the program but did not return the following summer because he chose to work instead at an auto garage, which he enjoyed and "[h]e seemed to do well at it." P13/223. Tai was never aggressive towards his case worker, other children or adults. P13/240-1&245-6. Tai had a few criminal incidents; where he stole a battery from a drug store; where he stole his aunt's car to run away to North Carolina; and where he and another child from the program stole an older model agency vehicle. P13/235-6.

Unfortunately, things started to get bad at the relative placement. P13/223-4. There "were more confrontations, a lot of yelling. Tai started to run away from

home. He had a couple of events where he ran away and then he was placed with another relative and then in a traditional foster home after that, and it just, it progressively went bad." P13/223-4. Tai was eventually removed from his relative placement on August 31, 1988, into a non-relative foster home because the confrontations were becoming more frequent and disruptive. P13/224-5.

The new placement was "okay" at first but then there were confrontations about school attendance. P13/225. Tai was going to school, but then he did not want to go to school or do his chores. P13/225. There was a confrontation about this that led to Tai running away. P13/ 225. On December 29, 1988, Tai called Verl and asked her to stop by because he wanted to talk about some problems. P13/225-6. Verl witnessed Tai being confronted by his foster mother about not doing his chores and not attending school. P13/226. The foster mother was blocking the doorway. P13/226. Tai tensed up and became angry and took a trophy and slammed it on a table and broke it exposing a rod that he then slammed on a desk. P13/226. He then turned and punched a window with his hand and he went out the window and refused to come back. P13/226. Verl ran after Tai outside and asked him why he was so upset, to which Tai responded that "he felt *trapped* because he couldn't get out. The door was blocked and he felt like maybe she didn't want him to leave, so *he just felt trapped and reacted to that*." P13/227-8. Verl tried to get medical attention for Tai's hand but he refused and ran away. P13/228-9. She

contacted the police and made an incident report because of the runaway situation. P13/229. Tai eventually called his foster mother and said he was okay but he would not say where he was. P13/229. Verl recommended counselling after the incident, but it was it was not given until a later time. P13/230-1.

Tai was eventually located and placed back with his uncle in Illinois. P13/229. He did okay for a while but all of the problems started again. Tai ran away to North Carolina to be with another uncle in October of 1989. P13/229-30. He was eventually returned back to Illinois and Verl worked on placing him with his North Carolina uncle. P13/232. He was placed in North Carolina in February 1990, but Tai then called to say he wanted to come back to his aunt and uncle. P13/233. A determination was made that the placement was no longer positive. P13/233. Tai was returned to his aunt and uncle's home but the placement fell through because of truancy and because he was not relating well with the family and was not fitting in with the siblings. P13/233-234.

Tai continued to have moments where he would get upset and tense up. P13/234. Eventually, he was returned to Tha Huong in March of 1990, and it was agreed that "it would be more positive for Tai not to have to make family commitments." P13/234. This went against her goal not to return him to Tha Huong, but to find him a stable family and environment. P13/234-5. They were never able to establish stability in Tai's case. P13/235. Upon his return, Verl

stopped being his case worker because he was with Peoria. P13/249-250.

Dr. Wei's lengthy career, expertise, and education were presented at the hearing. P13/269-72&280-4. The State agreed that Dr. Wei "has more expertise than the average layman on the street" and she was able to render expert opinion as to school psychology. P13/284. With regard to Tha Huong, Dr. Wei would *only* be contacted "when they needed counseling or they need some kind of help how to manage a difficult child." P13/273. Upon being called, Dr. Wei would "usually talk to the staff before to know the background of the child, of the person. Then [she] would go spend the whole day with that child because [she] trained as a clinical observations, so [she did] a lot of [her] observation and see that child in as many situation as [she] can, then suggestion what think is the best." P13/273-274. She puts her observations, evaluation, and conclusions in writing, which she provides to the Tha Huong case workers. P13/p.274-275.

Dr. Wei saw Tai, who was 12, on November 10, 1984, two months after he came to Tha Huong and she wrote a report for his case (Defense Exhibit 2). P13/275-7&294-5. She was called to see Tai because "he had problem with dealing with frustration situation. He had much anger by sometime he run away or he hiding. He doesn't adjust too well with the program." P13/277. Dr. Wei spent the whole day at Tha Huong, where she met with the staff, his teacher, two older boys from the program, counselors, case worker, the education coordinator, and she

interviewed Tai in Vietnamese. P13/278 & 289-90. This background information is important "to understand the problem. Especially with refugee. There's so many problems, so many things that can happen in the past that affect the behavior of the person." P13/278. Dr. Wei learned that "Tai have many, many difficulty and very traumatic experience." P13/285. Dr. Wei reported in 1984, Tai's experience of escaping from Vietnam. P13/284-5. She reported that during one incident at the Malaysia prison, Tai got in trouble with authorities when he tried to "get some food ration for his sister who was sick." P13/287. Tai was put in jail and his hair was cut short, "which is probably very humiliating to him." P13/287-88. Dr. Wei opined that

> "in Malaysia, when he [Tai] do some good thing, he try to do something to save his sister and he really strongly punished. So think that he remember very strong if right or wrong, going good thing and receive bad thing that may affect his behavior and his frustration to a new situation."

P13/289. Dr. Wei learned that Tai "really doesn't want to leave his family, doesn't want to leave Vietnam so that's why he have a hard time to adjust to new situation." P13/288-9. Dr. Wei opined this contributed to his inability to adjust. P13/289.

During her interview, Dr. Wei "first notice[d] his frustration, his anger." P13/291. Dr. Wei opined that this was not normal, but understandable. P13/291. Dr. Wei tried to address Tai's feelings of anger and frustration and she tried to

explain to him why he was sent away by his parents. P13/291. Dr. Wei noted that Tai usually would not look at her. P13/291. Dr. Wei tried to talk to Tai about changing the way he looks at people so that he can assimilate into the U.S. culture. P13/291-2. *Dr. Wei told Tai that he had to change everything he knew in Vietnam so that he could assimilate in the U.S.* P13/292.

Dr. Wei laid out a number of goals and recommendations for Tai. The short term goal was to help Tai control his anger with the help of his friends. P13/292-3. The long term goal was to help Tai make a life for himself in the U.S. P13/292-293. Dr. Wei opined that "Tai is at a very young age he goes through so many traumatic experience that escape, twice fail, the stay in the camp, the jail, the hair cut." P13/294. In particular, "the escape in the boat is a tremendous traumatic experience." P13/294. Dr. Wei made the following recommendations to the staff:

> "to give counseling and support by all means, by whatever means they have, they have at the program." P13/298.
>
> "we need to try to not get back like refugee center. We have a newsletter come out telling the different rules in the U.S. that you need to follow. That I furnish. Need to explain to them what is expect of the society that the children need to know." P13/298-9.
>
> "to make a chart with Tai to see to have his good behavior and try to show evaluation, what he do good and he maybe get encouragement and try to kind of support for that." P13/299.
>
> "general recommendation because [Tai] had a lot of tension, a lot of anger, so I would ask that maybe some outlet of that by sport or something physical. . . . I think that one priest there asked him to do something to bring him self-confidence up at that time." P13/299-300.

> "Because Tai is twelve years old, peers are very important, so I think I learned by reach him by peer to get to him quicker. So I remember I asked to all the boy to kind of keep an eyes on Tai and prevent his anger and do something to support him." P13/301-2.

She does not know if these were followed, but she hoped so. P13/297.

Otteson (lived in Shreveport, Louisiana, from 2005 to 2008), Verl (worked at Catholic Charities in 2005 to 2008), and Dr. Wei (lived in Champaign-Urbana, Illinois, from 2005 to 2008) were all available to speak to counsel, experts, and to testify in Tai's case. Unfortunately none of them were contacted by counsel. P12/197-8, 239-40&302-6.

Chief investigator McGuinness testified next. P13/310-12. McGuinness testified that the initial investigator on Tai's case was Douglas Harris ("Harris"), who concluded his employment in early 2007. P13/313. It is unknown what work was done by Harris as he shredded his work product. P13/313. Thereafter, Geller was hired as an investigator. P13/313. There was a period of time of about 2 to 3 months where there was no investigator assigned to Tai's case. P13/313-4.

McGuinness explained that it was the office's policy that all investigative requests must be in writing from the attorneys. P13/314-5. There were investigator logs created by each investigator, as a regular course of business, and generated by a computer. P13/315-6. McGuinness testified that Geller "was very meticulous and he really, really did a great job. He's got a great background, great experience

and he was very, very anal about his cases and he kept paperwork and kept paperwork and kept paperwork and more paperwork." P13/317. These logs were "very, very important because of, you know, days like today" P13/317-318. McGuiness confirmed that investigator logs existed in Tai's case. P13/317.

McGuinness recalled that they did not receive or do an investigation in Tai's case because of financial constraints. P13/318. McGuinness testified that

> "Mr. Geller and I believed that somebody should go to Chicago and if it's some people there that were developed throughout the case. Also thought that a trip to Vietnam to speak with Mr. Pham's mother and brother, sister, and also he had a sister in Paris that we wanted to be able to talk to. And Mr. Geller was under the same opinion I am as far as you don't investigate somebody on the telephone because they don't know you, you don't know them. You can't read body language, you can't, you know, interview them successfully by telephone as you can in person."

P13/318-9. McGuinness was "[a]bsolutely" sure that they knew about the family in Vietnam and France before the trial. P13/320-1. McGuiness recalled conversations with the counsel about the travel and he was told "[b]asically that we couldn't afford it. Bottom line." P13/322. Counsel did not enlist the help of the investigators to determine the costs in Tai's case for the cost approval process. P13/322. McGuinness testified that Geller "told Mr. Caudill in one of the meetings that if he can get approval for two weeks vacation, paid vacation that he would go to Vietnam on his own dime." P13/322-323. Geller had spent some time in Vietnam when he was in the Army. P13/323.

McGuinness testified about the importance of interviewing people from client's childhood, teachers, schoolmates, principals, employers, co-workers, family members for mitigation investigations. P13/319. He confirmed that sometimes travel is involved to conduct the interviews. P13/319-20. He confirmed that they had the capability to make long distance phone calls. P13/320. He did not recall obtaining the Illinois DCF records, the FSH records, or Higgins' certified criminal convictions. P13/325-6. They had access to out-of-state criminal records. P13/326-327. Tai never gave them difficulty in signing releases. P13/326-7.

Caudill, the second chair counsel, testified next. P13/337. Caudill distinguished his role versus Figgatt's as follows:

> "*First chair always made the ultimate decisions about the case*, what our actions were in a case, *defense strategies*, how we would present them. First chair was the primary lawyer that the Court would address when we got to trial or in pretrial hearings. And beyond that whoever was first chair in a case would - - there never was a formal kind of telling each other you're going to do this, there was always conversation, but *ultimately first chair made final decisions* and would often ask other person to do certain things in a case."

P13/337-8. In a disagreement, the first chair made the ultimate decision. P13/338. They worked on both phases and they "would just discuss the cases as they went along and before trial and during trial." P13/338. Caudill was not familiar with any "particular investigations that [the initial investigator Harris] did on this case." P13/339-40. *Caudill acknowledged that most of the penalty phase investigations took place after Tai returned from the hospital*. P13/347. There were no financial

constraints and the office had the capability to make international calls. P13/341. Caudill *does not take* notes in capital cases and he is relying on his memory. P13/334.

Caudill had very little contact with Tai prior to his going to the FSH *Figgatt had most of the contact*. P13/341. Caudill *could not "say that there was anything in particular that continued in the way of investigations while he was at the state hospital*." P13/342. He felt that "*the case was sort of fast tracked*" to trial after Tai came back from the hospital. P13/343. Caudill testified that after Tai returned that he was not very cooperative because of the shame he felt. *However, Caudill specifically could not recall a specific instance of "Mr. Pham saying, I'm going to tell those people to not talk to you."* P13/381.

Caudill testified about the importance of obtaining collateral sources, looking for family witnesses in particular, and obtaining institutional records, especially when it comes to expert opinion. P13/348-50. Caudill knew about Tai's sister in France *before* Tai went to the hospital P13/353. He acknowledged that he may have gotten that information from Tai. P13/353. Caudill did not meet with Thuy, who lived in Orlando, until *after Tai returned from the hospital*. P13/350. Thuy provided him with information about Tai's family in France and Vietnam and that Tai was a ward of Illinois and had an uncle there. P13/352-4&360. Yet, Caudill did not know if they ever asked an investigator or made any efforts to

locate the sister in France. P13/353-4. He acknowledged that at some point they had the names of the family members in Vietnam. P13/354. Caudill did not recall if he asked Thuy for contact information for the family. P13/355. Caudill did not "know that *we actually ever made an effort* to contact the family that was still in Vietnam." P13/356. He did not recall any attempts to get the Illinois DCF records or the complete FSH records. P13/360-363.

Caudill testified that the CBC video that was introduced at trial was found by him on the internet at the website depicted in Defense Exhibit 6. P13/357. Caudill was looking for a video that showed information about Saigon at the time of the fall and the experience of boat people leaving Saigon and also including the experience of *those people* once they got to other places such as refugee camps. P13/357-8. *He acknowledged that he never found a video depicting the camp Tai was at. P13/358.* He did not recall finding anything on the internet "*that was specifically about Mr. Pham's background and experience*." P13/378. Caudill tried to get a cultural expert to give the jury "*broader information* that didn't just come from family about that experience which was our client's experience." P13/358. The cultural expert, Foshee, did not have any personal knowledge of Tai's life before he came to Orlando. P13/360. Caudill believed they tried to get a Vietnamese mental health expert, but never found or contacted one. P13/360.

Caudill did some internet research on Angel's Trumpet flowers that Tai

mentioned to him, and he had records about Tai's possession of cocaine charge from July 2005. P13/364. Yet, he never considered hiring Dr. Daniel Buffington ("Dr. Buffington"), a forensic pharmacologist, to look into substance abuse. P13/364. Caudill was present during his expert, Day's deposition on April 4, 2008, and he acknowledged that *she testified that she was not aware of Tai's history of drug or alcohol abuse*. P13/366-367. After the deposition, Caudill did not provide her with additional information regarding substance abuse. P13/367. *Caudill acknowledged that Day suspected Tai suffered from bipolar disorder and that that Tai may qualify for a Diagnosis of Post-Traumatic Stress Disorder* ("PTSD"). P13/367-8. Day testified in that same deposition that *she did not have enough information again to make a formal diagnosis of PTSD*. P13/368. Caudill did not recall providing additional information to aid her to make definitive diagnoses. P13/368. Caudill reiterated that *Figgatt was ultimately responsible for making decisions on how to proceed in penalty phase* and all he knows is that they didn't use it. P13/368&384.

Caudill testified that part of their mitigation theory was that Tai was not intelligent. P13/379. The State during its cross had Caudill analyze the records provided by collateral counsel and pull out only some of the bad information or information that was inconsistent with the lack of intelligence theory of mitigation. *It should be clearly noted that this analysis was never done by Caudill because he*

never even tried to get these records. P13/397-399. Caudill said he wanted a more substantial prior criminal record, but later clarified that he would have *liked* convictions for more serious or substantial crimes but that he was not saying that Higgins should not be impeached. P13/390-6. Caudill acknowledged that you cannot go into the nature of the crimes so long as the person gets the number right. P13/397. Upon being confronted with the lengthy criminal history of Higgins, he acknowledged it was significant. P13/397.

Caudill had information that Tai did not have a good relationship with the uncle in Illinois or North Carolina, but he never even called them. P13/395&P14/408. Caudill *believed* that Tai stole of the uncle's vehicles but offered nothing about the circumstances. P13/395. *Caudill acknowledged that a strategic decision could not be made if he did not have the information at the time*. P14/408. *So, the Illinois DCF and complete FSH records did not play into his strategic decision making because he did not have them*. P14/408.

Caudill clarified that Thuy and Tai were separated at the camp and once they came to the U.S, they were again separated. P14/409-10. He acknowledged that he did not have information about Tai's time as a ward of Illinois. P14/410. *He also acknowledged that it is important to humanize the client and that the source of the witness information is important as well.* P14/411. *He relies on his experts to make diagnoses and it is important to provide them with as much information to come to*

an accurate diagnosis. P14/411-412.

Dr. Buffington, an expert in the field of clinical pharmacology, testified next. P14/426-435&P14/435-436. He was retained in Tai's case to investigate his substance abuse history and psychiatric history as it relates to *mitigation*[5]. P14/436. Dr. Buffington reviewed several expert reports, depositions, Tai's medical records from Orlando Medical Center, and interviewed Tai, Thuy, and Ngoc. P14/438-439. Tai consumed alcohol and cigarettes at an early age and that he abused alcohol, crack cocaine and Angel's Trumpet as an adult. P14/440. Tai was introduced to the highly addictive cocaine and Angel's Trumpet by other inmates in 2005. Tai self-medicated with these drugs to cope with the pain and depression. P14/445-8&450. Tai abused drugs from July 2005 until October of 2005. P14/452-3. In brief, Dr. Buffington opined that Tai suffered from substance abuse[6]. P14/439-40&453-6.

Next, Figgatt testified that he was the lead counsel in the case and made the final decisions in terms of trial strategy, what would be investigated, the theory of defense, final legal decisions, and final decisions as to what mitigation would be put on. P14/471-474. Figgatt testified that *Thuy contacted his office very early on, within 6 to 8 weeks after they were appointed*. P14/476-7. She even showed up at

[5] Dr. Bruce Goldberger's testimony is not relevant in this case and will not be addressed because there is no claim that Tai was voluntarily intoxicated at the time of the crime. Claim 13 of the Motion only referred to substance abuse. P16/864. It the Appellant's position that at the time of the crime Tai was under the influence of extreme mental or emotional disturbance (PTSD and Bipolar II).

[6] Dr. McClaren also found a history of substance abuse. P16/898-9&913-6.

their office but they needed an interpreter to effectively understand her. P14/476. Eventually with the aid of a proper interpreter, Figgatt learned "about a number of different siblings [Tai] had, one of whom was in France." P14/478. Unlike Caudill, Figgatt had notes from his computer that he referred to. P14/478-80. Figgatt had the names of Tai's parents, Si Pham and Nho Nguyen; the names of his siblings Oanh Pham, Hang Pham, Tuan Pham, Anh Pham from France, Thu'y Pham, Vi or Vl Pham, and the deceased brother Tu Pham. P14/480-1. Figgatt's notes were confusing as to the circumstances surrounding Tu Pham's death. P14/481. *Figgatt did not know if he asked Thuy or Tai for any contact information for the family*. P14/481-484. *Figgatt clearly stated that it appears that after he received the information about the family that he did not do anything*. P14/484. *He did not make a strategic or informed decision not to contact the family and he stated "why would one make an informed decision not to contact a potential witness."* P14/486.

Figgatt testified that Tai was cooperative for the most part and he never hindered them in their investigations, and Thuy was extremely cooperative. P14/488-9. *Figgatt had no concerns that Tai would tell his family not to cooperate and they were never rebuffed by any family members*. P14/554. Figgatt testified as to the importance of collateral evidence, family interviews, and other records because *"there's no way that a client can provide a history that's accurate and complete even as an adult" and "reliance upon historical records is often more*

reliable than relying upon current information about what historical record say." P14/491-92. There were no financial constraints on getting out-of-state records, making international calls, or bringing relevant witnesses to Florida. P14/505-6&560. In capital cases, Figgatt has to "humanize an individual who has committed in most situations a very bad crime in the eyes of the jury. We're at a point where we were deciding whether he lives or dies. Nothing that he's provided is necessarily going to be useful as something that was recorded decades before this offense happened." P14/492. Figgatt testified that regardless of whether records contained good or bad information, he would have given them to his experts because they are valuable to them and they can get more out of them. P14/493. He testified that records that he may see as bad may be seen by an expert as an indication of an emotional problem early on in a client's life. P14/493.

Figgatt knew that Tai was a foster child in Illinois, and he may have learned this information possibly from Tai. P14/493-5. He did not make any requests to the State of Illinois or to Catholic Social Services and in effect did nothing with this information. P14/496. Figgatt has requested records in other capital cases and has even gone to other states to obtain records. P14/496. Figgatt knew that Tai and his sister were in Peoria. P14/498. Figgatt did not make a decision not to get any records in this case and he could not explain why he waited so long to get the Florida DCF records in late 2007, or early 2008. P14/499-500.

Figgatt looked over the Illinois DCF records, provided by collateral counsel. P14/501-3. He learned new information about Tai from the records that he did not know before the trial. P14/503-4. Figgatt would have given these records to his experts. P14/504-5. Figgatt testified that the fact that these records were written close to the event was important because Tai had not killed anyone and he was only twelve and that sympathetic figure was not on trial nor was the jury truly aware of it. P14/563-4. Figgatt looked over the complete FSH records that he had not requested either. P14/506-7. There was no decision to not get the records. P14/507. Figgatt testified that he needed the records to follow-up on Tai's conduct of hiding under a bed like a child. P14/507-8. Figgatt was aware from Day's deposition that she suspected Tai was bipolar and suffered from PTSD, and he was aware that she did not have enough information regarding Tai's history to make a diagnosis, but no additional information was provided to her. P14/537-9.

Figgatt agreed that the records had some information that is good and some information that is not so good, but he testified "[t]hat's always true of those records." P14/509. The simple fact that the records contained bad information would "[a]bsolutely not" stop him from giving it to the expert. He explained that

> there's a theory in the defense bar that's held by a very small minority, that you need to work your expert in a certain way. I really think that's professionally disingenuous. I've practiced with attorneys who are not with the Office of the Public Defender, who actually exclude stuff in their transmissions to the - - I mean, they go through material and they delete pieces. I think that's just ethically wrong. If

> you're going to have an expert, an expert can take things I think that are awful and make them into something that's mitigation valuable.

P14/509. Furthermore, he would rather know about bad information rather than learn about it from the prosecutor and that is why he got the Florida DCF records. P14/510. When cross-examined about facts from the records that would have contradicted his trial theory of mitigation, Figgatt stated that Tai's issues with authority or juvenile criminal behavior could be a sign of an undiagnosed mental illness such as schizophrenia or bipolar disorder. P14/547-8. He testified that the traumas in the records and even the bad stuff could have helped him understand Tai, who had acted out in some way or another since he came to the U.S. P14/561. He needed all of the information in the records, but he failed to get them. P14/561. Figgatt also stated that he did not search outside of Central Florida for a Vietnamese mental health expert. P14/510-1.

Thuy could never tell Tai's complete story because she was not there for most of it. P14/511-2. Figgatt knew about the first failed escape attempt but he did not contact the sister who was with him. P14/513-4. Figgatt put on general information about the boat people and the experience of his sister. P14/513-4. The purpose of Foshee was to put a human face to a TV show that was presented. P14/514. Figgatt acknowledged that the CBC documentary and Foshee's life were not Tai's life. P14/515. Foshee was not a boat person or a refugee. P14/541.

Figgatt admitted that he did not ask Higgins about his prior felony

convictions or arrests and that there was no strategic decision behind it. P14/519-520. Figgatt agreed that Higgins' credibility was at issue at trial and the fact that he had 9 or 10 felony convictions would be of importance. P14/520.

The guilt phase was conducted from March 3, to March 7, 2008. P14/516. The penalty phase was initially set for *March 31, 2008*, but was reset to April 28, 2008, because Figgatt's mother was gravely ill and then it was continued to May 20, 2008, when she passed away. P14/516-7. The basis of the continuations was not that they needed more time to do the investigations. P14/518.

Next, Geller testified that he has worked as an investigator in death penalty cases for a total of 20 years. P15/622&626-7. Geller became involved in Tai's case when he just read his case file, late 2007. P14/568. He was not officially assigned to the case. P14/568. Geller spoke to counsel about some investigative areas of importance. P14/569. Geller relayed to counsel that he wanted to find the sister who attempted to escape with Tai and the sister who he escaped with. P14/570. Geller contacted Thuy at her home and asked her to come to the office which she did almost immediately. P14/571. Geller was aware that there was a sibling in France and some still in Vietnam. P14/571.Per the office's policy, Geller never contacted any of the out-of-state siblings because he was never assigned the task. P14/572-3. He requested to visit Illinois when he was not having luck trying to find someone or records about the orphanage but he was never given authorization.

P14/574&599 & P15/608&618-9. Geller tried to double up a trip to Indiana and Illinois as presented in a memo dated April 8, 2008, but he was not authorized. P15/608-9. He offered to go to Vietnam to speak to Tai's family on his own dime, but nothing came of that request. P15/618.

Geller testified about his personal voluminous investigator logs, his memos, and e-mails that were kept in the course of his business and were introduced as Defense Exhibits 10 to 30. P14/575-578, P8/1413-1557 & P9/1558-1648. These logs, emails, and notes are summarized in Argument I as a timeline that clearly show a lack of due diligence.

Dr. Daniel Lee ("Dr. Lee") is a Vietnamese licensed psychologist specialized in clinical psychology, neuropsychology and forensic psychology. P15/633-4&655-6. His extensive experience includes the treatment and diagnosis of Vietnamese unaccompanied children refugees and adult refugees. P15/633-660&665-6 & P9/1649-54. He has testified in 12 death penalty cases that all involved Vietnamese refugee defendants and he has been involved in over 20 civil cases involving Vietnamese refugees. P15/662-3. Dr. Lee does not always diagnose every Vietnamese refugee with a mental illness. P15/663-664.

Dr. Lee was retained to consult with Dr. Francis Abueg ("Dr. Abueg"). P15/667. In coming to his opinion, Dr. Lee relied on records from Illinois DCF, FSH, jail, and other experts. P15/667-70&673-4. Dr. Lee learned about the traumas

and their effects on Tai, when he came to the U.S. as a child, through his interviews with Dr. Wei and Otteson. P15/670-673. He interviewed Mama, Tai's older and younger sisters, and oldest brother over the phone and again in person. P15/674-8. He interviewed Tai over the phone and also in person. P15/675. Even though Dr. Abueg conducted interviews, Dr. Lee wanted to personally interview the witnesses because of his ethics and so that he can formulate his own opinion and not totally depend on another professional. P15/675-6.

Based on his interviews and record research Dr. Lee had a number of opinions. He opined that Tai suffered from perinatal anoxia due to lack of oxygen during his birth and delivery and that can affect brain functioning[7], which led to many problems during the early years. P15/678-81. He opined that the evidence of the boil on the head, the fevers, the toilet-problems, the angry outbursts, and the learning problems all are evidence of brain impairment onset from early infanthood which affected Tai's growth and behavior. P15/678-84. He opined[8] that Tai suffered from PTSD, which is a severe mental health condition. P15/689-90.

Tai suffered from numerous traumatic experiences in his young life, which included seeing the horrific bloody dead body of his brother Tu; learning about the decapitation of his grandfathers at the hands of the Communists because they

[7] Brain impairment indicates that the person's brain is not functionally normally. P15/681.

[8] Dr. McClaren, the State's expert, and Dr. Abueg all agree that Tai suffered from PTSD.

Catholics[9]; exposure to the bombing and shouting when he and his family rushed to an underground shelter in fear for their lives; his severely traumatic experience at the age of nine without his family in a prison camp during the first escape; suffering from physical and emotional abuse from the guards at the prison camp; his fearful journey from the prison to his home; the punishment he received for trying to steal food for his sister; the second forced escape which again severed Tai from his family at a young age; his harrowing experience on the boat[10] during the second escape with severe lack of food, water, jamb packed with a hundred and fifty people, and the lack of oxygen when he was underneath; his fear of the darkness while in the middle of the high sea or ocean; his feeling of loneliness in the high seas; his fear for his life and not being able to return to his family; separation from his sister when they reached the refugee camp which led to depression, loneliness, and other emotional problems; and almost drowning at the refugee camp[11]. P15/683-702&742-4. These traumatic experiences caused Tai to have recurring nightmares. P15/701. The fact that Tai went through these traumas

[9] Dr. Abueg testified that the vicarious knowledge of a close loved one or friend also qualifies as a traumatic stressor under the DSM-IV-TR and DSM-V definitions. P16/850.

[10] Dr. Abueg testified that it does not matter how long Tai was on the boat for one night or ten nights, what matters is whether there is some "real objective threat to life." P16/851. Evidence of this was in the records from Illinois that were written close in time to when Tai entered into the U.S. P16/851.

[11] Dr. Abueg testified that drowning scared Tai the most and that he rather be shot than drown. Dr. Abueg elaborated that Tai almost drowned in Vietnam at the beach, and then almost twice in Malaysia at the camp. P16/830.

at a young ago is significant because he faced his fears alone, the traumas were severe, and there was no familial support at the time. P15/702.

Dr. Lee testified that Tai's PTSD did not just go away. P15/702-3. PTSD when untreated becomes worsens until a person can no longer cope with the condition and becomes psychotic. P15/703. Tai's childhood traumatic experiences contributed to Tai's abnormal behavior and criminal behavior. P15/702-3. PTSD is triggered by stress and environmental factors. P15/703. *A person with PTSD can hold a job and can function in his family until some unusual severe event or stressful event triggers the whole thing*. P15/703-4&710. This causes the person to lose control and impairs the person, insight, judgment and reasoning. P15/704.

Based on what he learned about Tai's life in Illinois, Dr. Lee found traumas and stressors due to Tai being uprooted, transferred to different environments, and living in different homes. P15/712-3. Tai's angry outbursts and acting out throughout his time in foster care are symptomatic of PTSD. P15/713. Dr. Lee has seen similar cases of unstable foster case lifestyles involving Vietnamese children. P15/713-4. Dr. Lee opined that Tai first suffered PTSD when he escaped from Vietnam by boat and that he continued to suffer from PTSD when he came to the U.S. P15/713-4. Tai suffered from PTSD while in foster care and he suffered from PTSD in Florida because he had never received any treatment. P15/714-5. In comparison to his other cases involving unaccompanied minors, Dr. Lee found that

Tai's case is the "*worse case among the cases [he] have seen*." P15/715-6.

Dr. Lee in his lengthy experience has seen PTSD reactions that are violent, suicidal, and homicidal. P15/704. Dr. Lee has seen Vietnamese unaccompanied minors suffering from PTSD, like Tai, who in their adulthood have violent reactions towards others and themselves. P15/704-9. Dr. Lee talked about a case in Santa Barbara where a Vietnamese defendant suffering from PTSD, very similar to Tai, stabbed his wife 17 times because he believed she was leaving him. P15/709. Dr. Lee has examined several former prisoners of war, who killed their wives as a result of untreated PTSD. P15/709-10. Dr. Lee testified that the treatment of PTSD is a lengthy process and can take a life time. P15/711-2.

With respect to the day of the crime, Dr. Lee opined that Tai was suffering from PTSD. P15/715. Dr. Lee opined that Tai's PTSD was triggered by his fear of losing his family and seeing no future. P15/716-7. This began when Florida DCF became involved in his family's life. P15/717. Tai began abusing drugs that included Angel's Trumpet and cocaine weeks or months before the crime as a coping mechanism for his depression, anxiety, and PTSD. P15/717-8. Dr. Lee stated that the drugs did not help but worsened the PTSD. P15/717-18. Dr. Lee opined that Tai was under the effect of his PTSD at the time of the murder. P15/719. Dr. Lee opined that Tai's mental condition was severe and that he was suffering from extreme mental disturbances/illness at the time. P15/719. He

opined that Tai's criminal behavior was a result of PTSD. P15/719&738.

Dr. Abueg is an experienced clinical psychologist who diagnoses and treats PTSD as part of his practice. P15/759-65 & P9/1655-68. His work includes Asian-American PTSD patients. P15/762. Dr. Abueg has also contributed to the DSM-V as a collaborator, whereby he offered up his practice in 2012, for many months and took consecutive intakes in his practice, since he mostly sees patients with PTSD. P15/763. He was retained in Tai's case to render a psychological evaluation for mitigation purposes. P15/766.

In reaching his opinions, Dr. Abueg consulted with Dr. Lee; he looked at the Illinois DCF records, the complete FSH records, and jail records; he conducted interviews with Tai, Dr. Wei, Otteson, Verl , Mama and siblings, Tai's employer, and Deputy Csisko; and conducted testing. P15/766-72. Dr. Abueg found all of the collateral sources, not previously obtained by counsel, helpful in coming to his opinions and diagnoses. P15/770-3. Dr. Abueg conducted a number of tests to determine an objective manner of testing for PTSD. P15/774-5. Dr. Abueg detailed the tests and their results. P15/775-85. The tests included the Wechsler Adult Intelligence Scale – Fourth Edition[12], the Personality Assessment Inventory (akin to MMPI-2), Trauma Symptom Inventory (traumas specific instrument), and the

[12] McClaren also administered this test and found Tai to be in the mild range of retardation, which in effect was consistent with Dr. Abueg's finding that Tai was intellectually compromised. P16/924&P15/776.

Morel Emotional Numbing test (parallel to the TOMM). P15/775-785. Based on the above, Dr. Abueg diagnosed Tai with Axis I[13]: PTSD with the dissociative subtype and Axis I: Bipolar II ("bipolar")referring to the current episode as being depressed severe with mood congruent psychotic features. P15/773&814-9 & P16/827-8. Dr. Abueg's diagnosis is the same under the DSM-IV-TR and DSM-V. P15/773.

Dr. Abueg detailed all of the criteria for PTSD under the DSM-IV-TR and the DSM-V and how Tai met those criteria. P15/786-99 & P16/808-12. It is clear from Abueg's analysis of each criterion for his PTSD diagnosis that he used the information from the above listed interviews and the records from Illinois and FSH[14]. P15/786-99 & P16/808-12. Dr. Abueg testified that patients with PTSD can hold jobs and that it is not unusual that Tai could fix televisions. P16/813. Dr. Abeug went through all of the symptoms that supported his diagnosis for bipolar. P16/815-7. He confirmed that Day suspected PTSD and bipolar, but she did not have enough evidence and historical background information. P16/817-820.

Dr. Abueg testified as to Tai's substance abuse use of Angel's Trumpet and cocaine, in particular after work hours and over the weekends. P16/820-3. He testified that it is very common for people with severe presentations of PTSD to

[13] It refers to a major mental disorder under DSM-IV-TR. P15/814.
[14] Drs. Lee and McClaren reviewed the same collateral sources and came to the diagnosis of PTSD.

get into self-medication. P16/821. The short-term effect is a relief from the suffering, but long term abuse worsens to addiction. P16/821.

Dr. Abueg is "certain" that Tai had severe PTSD during the days prior to the offense. P16/823. He opined that on the day of the offense, "[n]ot only was [Tai] suffering from severe PTSD and hypomanic part of the bipolar, but it was highly exaggerated." P16/823 & 829. He opined that Tai was suffering from his PTSD at the time of the offense and he described it as an extreme emotional disturbance. P16/823 & 839. He testified that Tai's account of the events leading up to the event showed "an extreme level of agitation that no matter how the story unfolded, you knew it was going to be not good." P16/823-4. He opined that some of the triggering affects were the purchase of the condoms and the phone call to the house when he found out that his younger daughter were not home, thus he speeds to the scene. P16/824. Dr. Abueg testified that the "Bipolar is really driving [Tai]. PTSD alone can account for this behavior, but bipolar, hypomanic perhaps manic at the moment is so, so driving in its intensity, it's, to me more adding dissociation to frenetic energy and so something awful is about to happen." P16/829.

Dr. Harry McClaren ("Dr. McClaren") is a forensic psychologist presented by the State. P16/877. He opined that based on his interview with Tai and hearing the testimony of the family, Tai "*does meet the criteria for post-traumatic stress disorder, which I think was detected, suspected the very least by Dr. Day during*

the sentencing phase of his trial." P16/889&906. He testified that he "*can't make*" a diagnosis for bipolar II because he *could not be sure* that Tai ever had a hypomanic episode. P16/889. He acknowledged that one of the doctors during the competency hearing suspected bipolar. P16/923. As to whether or not Tai suffered from an extreme mental or emotional disturbance when he killed his wife, Dr. McClaren testified that it is "ultimately for the Court" and when asked again, he opined that Tai "*had a degree of emotional disturbance*" but that he did not think it was extreme. P16/889-90.

Dr. McClaren testified that in 2005, Tai's depression worsened, as he was unhappy almost every day and having trouble sleeping. P16/916-7. He opined the presence of Florida DCF was a stressor that was aggravating Tai. P16/917. On the date of the offense the phone call between Tai and Lana upset Tai because Lana was home alone and Zena and Kimmie were not with Vietnamese kids. P16/918-9.

Dr. McClaren agreed that the Illinois DCF records were *helpful in coming to his opinion* and *understanding Tai as a child*. P16/903-4. He agreed that Tai did not have stability when he was in the custody of Illinois. P16/920. He made several attempts until he got the complete FSH records that he reviewed. P16/904. He also requested contact information from collateral counsel for Dr. Wei and for Tai's family, but due to time constraints of getting an interpreter, he thought it would be better to hear the family's testimony. P16/905. It was important to Dr. McClaren to

see the family live. P16/905. He would not have asked collateral counsel for all of this information if was not important to his *investigation to come to an opinion*. P16/905&933. *Dr. McClaren testified that the detailed information he heard from the family was something he did not have before*. P16/906. He obtained information about the traumas suffered from Tai and his family. P16/907-09. Dr. McClaren learned that Tai "clearly did not like the idea of being separated from his mother." P16/919-20. He testified that the fevers suffered by Tai and his developmental delay were important facts, and this information again came from the family. P16/909-10. He was able to get information of the traumas from Tai because of the questions he asked during his interview and by going through the criteria for PTSD. P16/907-8. Dr. McClaren agreed with Drs. Lee and Abeug, that Tai satisfied the criteria for PTSD. P16/907. He testified that Tai was being medicated at prison so he could sleep because he would have nightmares if the lights were off, which stemmed from his traumatic experience from the being on the boat in the darkness of the sea and the tipping and capsizing motion of the boat. P16/908-9.

SUMMARY OF THE ARGUMENTS

Argument I: The court erred in denying relief as to penalty phase claims 9 to 13. Counsel failed to competently and diligently investigate and follow-up on available information regarding Tai's out-of-state family, Tai's time as a ward of

Illinois, and Tai's complete FSH records. It is a capital attorney's highest duty to investigate and prepare a client's case, especially where a failure to fulfill that duty will affect the client's life. When the attorney does not fulfill that duty, the client is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. There was no informed decision made by Tai's counsel. The hearing demonstrated that a competent investigation would have led to a compelling and honest presentation of Tai's story and an accurate diagnosis of PTSD, bipolar disorder, and substance abuse. There was substantial mitigating evidence which was available but undiscovered due to counsel's failure. But for counsel's deficiency in their investigation, there is a reasonable probability that when the totality of the available mitigation adduced at trial and at post-conviction are reweighed against the aggravators that Tai would have received a life recommendation and sentence.

Argument II: The court erred in denying relief as to claims 7 and 16. The court found deficiency but erred in not finding prejudice as to claim 7. The jury never heard that Higgins was convicted of 9 felonies and 7 crimes of dishonesty. This failure to impeach prejudiced Tai and deprived the jury of the relevant knowledge that Higgins is a dishonest person and a multi-convicted felon. There is a sufficient probability to undermine confidence in the outcome of the verdict and for the jury to find the testimony of a multi convicted felon to be less credible. As

to legal claim 16, counsel failed to exclude Higgins' victim impact testimony because it did not demonstrate the victim's uniqueness as a human being and the resultant loss to the community. This testimony is not relevant and is highly prejudicial as it provides sympathetic testimony of a life that could have been. Counsel's failure undermined the outcome of the penalty phase.

Argument III: The court erred in denying a hearing on claims 3 and 14. There was sufficient legal basis to object or exclude Bulic's testimony based on hearsay and *Crawford v. Washington*. Tai was denied his 6th Amendment right to confront witnesses when Bulic testified as a surrogate for Parsons in both phases. Counsel failed to subject the State to their burden to show that Parsons was unavailable thus depriving Tai of a fair adversarial trial. A hearing was necessary to show there was no reasonable trial strategy not to exclude Bulic's testimony.

Argument IV argues that the court erred in denying claims 8, 17, and 19 as to the proper cumulative error analysis of the errors committed in the guilt phase, the penalty phase, and in both the guilt and penalty phase, which deprived which Tai of a fundamentally fair trial entitled under the 6th, 8th and 14th Amendments of the U.S. Constitution.

ARGUMENT AND CITATIONS OF AUTHORITY

ARGUMENT I

THE COURT ERRED IN DENYING RELIEF AFTER CONDUCTING HEARING ON PENALTY PHASE CLAIMS 9, 10, 11, 12 & 13.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process." Counsel has a duty to investigate in order to make the adversarial testing process work. *Id.* at 690. The *Strickland* analysis requires the petitioner to demonstrate deficient counsel performance and prejudice. *Id.* at 687-8. "To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Id. Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), held that "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Id*. at 2538. Moreover,

> 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. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness.

Id. at 2535. Mitigation investigation "should comprise efforts to discover all

reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Strickland*, 466 U.S. at 524.

As to the prejudice prong, the appropriate test is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

To uphold a court's decision of a *Strickland* claim, this Court must apply the following standard of review:

> When we review a circuit court's resolution of a *Strickland* claim, as we do here, we apply a mixed standard of review because both the performance and the prejudice prongs of the *Strickland* test present mixed questions of law and fact.

Sochor v. State, 883 So.2d 766, 771 (Fla. 2004) *citing Strickland*, 466 U.S. at 698. Moreover, "(a)s long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" *Blanco v. State*, 702 So.2d 1250, 1252 (Fla. 1997) *quoting Demps v. State*, 462 So.2d 1074, 1075 (Fla. 1984) *quoting Goldfarb v. Robertson*, 82 So.2d 504, 506 (Fla. 1955).

The denial of claims 9 to 13 of Tai's Motion will be argued in concert as they are related. It is clear from the evidence presented at the hearing that counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic

judgment." *Wiggins*, 539 U.S. at 526. The ultimate decision-maker regarding investigations and trial strategy is Figgatt, not Caudill. P13/337-338 & P14/471-474. Yet, the court did not refer to Figgatt's testimony and relied only on Caudill.

The court in its Order denying relief found that

> "Trial counsel *did not provide a satisfactory explanation for the failure to obtain much of this evidence*. While it is unclear whether a trip to Vietnam for face-to-face interviews would have been necessary or approved, there was certainly no impediment to making telephone calls to the family. The witnesses from the Illinois Department of Children and Families testified that they were available and willing to testify and that their records would have been provided had such a request been made. Similarly, there is little doubt that the records from the Florida State Hospital would have been provided."

P11/2066. The court held that

> "[e]ven if it is concluded by this Court that trial counsel was deficient in failing to obtain the evidence contained in grounds 9-12, that does not entitle the Defendant to relief. The Defendant must still establish the prejudice prong of *Strickland*. "

P11/2066. The court did not specifically address the deficiency prong, but the above finding tends to support the argument that counsel's conduct was deficient.

Figgatt was aware about Tai's out-of-state family and Tai's ties to Illinois, but he never explored any avenues that may lead to the development of mitigating evidence. *See Rompilla v. Beard*, 545 U.S. 374, 383 (2005); *Correll v.* Ryan, 465 F.3d 1006 (9th Cir. 2006) & *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003). It has been repeatedly held that capital trial counsel has the duty to investigate and prepare available mitigating evidence for the sentencer's consideration. *See*

Phillips v. State, 608 So.2d 778 (Fla. 1992); *State v. Lara*, 581 So.2d 1288 (Fla. 1991); *O'Callaghan v. State*, 461 So.2d 1154, 1155-56 (Fla. 1984); *Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989) & *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988). Also, "[c]ase law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Rose v. State*, 675 So.2d 567,572-73 (Fla. 1996). No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare. *See Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991); *Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991) & *Kimmelman v. Morrison*, 477 U.S. 365 (1986). A reasonable strategic decision is based on an 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 counsel's decision to not introduce mitigating evidence . . . was itself reasonable." *Wiggins*, 123 S.Ct. at 2536. In making this assessment, this Court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence *would lead a reasonable attorney to investigate further*." *Id*. at 2538. When evaluating claims that counsel was ineffective for failing to investigate or present mitigating evidence, this Court has phrased the defendant's burden as showing that counsel's ineffectiveness 'deprived the defendant of a reliable penalty

phase proceeding.'" *See Henry v. State*, 937 So.2d 563, 569 (Fla. 2006) *quoting Asay v. State*, 769 So.2d 974, 985 (Fla. 2000) *quoting Rutherford v. State*, 727 So.2d 216, 223 (Fla. 1998). Also, "along with examining what evidence was not investigated and presented, we also look at counsel's reasons for not doing so." *Sliney v. State*, 944 So.2d 270, 281-82 (Fla. 2006). Trial counsel has to do the work before he can make an informed decision as to trial strategy. He cannot make decisions that affect whether his clients lives or dies on a whim.

This is a case where the investigation did not begin until shortly before the initially scheduled penalty phase proceedings. Uncontroverted evidence from the investigator logs, notes, and e-mails[15], clearly demonstrated that the investigation done prior to trial was minimal and by the grace of a continuance, counsel was able to buy time to put whatever mitigation could be easily found. The timeline of the case is as follows:

- Date of Indictment: November 8, 2005.
- Tai was found incompetent: August 29, 2007.
- Tai was found competent: December 6, 2007.
- Guilt phase: March 3, to 7, 2008.
- Tai convicted: March 7, 2008.
- Penalty phase initially set: March 31, 2008.
- Penalty phase continued to: April 28, 2008.
- Penalty phase continued again to: May 20, 2008.
- Penalty phase of trial: May 20, to 22, 2008.
- Jury recommendation: May 22, 2008.

[15] The logs and testimonies of Geller and McGuinness' were not referenced by the court. This evidence showed how that counsel was not diligent.

- *Spencer* hearing: August 18, 2008.
- Sentencing hearing: November 14, 2008.

R1/21-23, R4/11, R25/1469-70, R12-14, R18/1100-1272, R18/1293-95, R3/569-575 & P14/516-18.

Prior to Geller's involvement, no investigations were done[16]. P13/339-340 & P14/568. The timeline of the investigations in Tai's case is as follows:

- November-December, 2007: No investigations. P14/580 & P8/1413-73.
- January 16, 2008: Investigative meeting called by Geller where the investigators were assigned to determine Tai and Phi's marital status at time of the incident; to conduct background investigation on Higgins and civilian witnesses; to *locate and interview Thuy for mitigation interview*; conduct Autotrack; and to locate and interview potential cultural expert. P14/580-588 & P9/1641-42.
- February, 2008: Computer work attempting to locate boat people or cultural witnesses. P14/89-590 & P8/1492-1500.
- March 3-7 2008: Attended portions of the guilt phase. P14/590 & P8/1501.
- March 10-31, 2008[17]: Researching Catholic Charities, Tha Huong, refugee camps, and interviews with Thuy, Xuan Nguyen, Foshee, Diamond, Ngan Nguyen, serving subpoenas, and ordering research books. 8/1501-1511.
- April, 2008: Researching video clips and newspaper articles about Vietnamese boat people[18], locate Tai's vehicle in impound, and locating witnesses for mitigation. P15/610 & p8/1512-29.
- *April 3, 2008: Email request by Caudill to obtain the CBC video.* P15/610-1 & P9/1646.
- May, 2008: Relocating mitigation witnesses so they can testify and serving subpoenas. P15/614 & P8/1530-9.
- June, 2008-August, 2008: No investigations. P15/615-6 & P8/1540-57 & P9/1558-97.

[16] Caudill was not familiar with any "particular investigations that [Harris] did on this case." P13/339-340. He acknowledged that most of the penalty phase investigations took place *after Tai returned from the hospital*. P13/347.
[17] The bulk of the investigations were begun after the guilty verdict.
[18] It was the first time he was doing "sort of the boat people investigation."

- September19, 2008: Search for N and Q Nguyen. P15/616-7 &P9/1607.
- October, 2008: No investigations. P9/1611-29.
- November 14, 2008: Attending sentencing. P9/1634.
- November 19, 2008: Obtained sentencing order. P9/1636.

In comparing the above timelines, it is clear that counsel failed to diligently investigate mitigation evidence. Counsel had the case since October of 2005, and inexplicably waited until two months before the guilt phase to begin the investigation process[19]. What is even more alarming is that counsel *would not have completed the mitigation investigation ahead of the initial penalty phase date of March 31, 2008*. The U.S. Supreme Court in *Powell v. Alabama*, 287 U.S. 45, 57, 53 S.Ct. 55, 77 L.Ed. 158 (1932), emphasized the importance of effective assistance of counsel in that period from arraignment to the beginning of trial "when consultation, thorough-going investigation and preparation were vitally important." The duty lies on counsel to make sure that the investigation is timely completed. *See Rompilla*, 545 U.S. 374; *Wiggins*, 539 U.S. 510; *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000); & *Glenn v. Tate* 71 F.3d 1204 (6th Cir. 1995). The timeline shows a lack of diligence, the inadequacy, and lack of thoroughness of counsel's mitigation investigation. Counsel was ineffective for failing to conduct

[19] Caudill acknowledged that most of the penalty phase investigations took place *after Tai returned from the hospital*. P13/347. He could not "say that there was anything in particular that continued in the way of investigations while he was at the state hospital" and he felt that "the case was sort of fast tracked" to trial after Tai came back from the hospital. P13/342-343.

an investigation sufficient to support a professionally reasonable decision as to whether to put it on or to make any reasonable strategic and informed decisions as to mitigation presentation. *Wiggins*, 539 U.S. 510.

There is no trial strategy that can excuse failing to contact a capital client's family, especially when counsel and their investigators know about their existence and have the ability to contact them. In preparing to try a death penalty case, counsel has the obligation to prepare for both the guilt and penalty phases of the trial. The Pham family provided a vivid and accurate description of Tai's life and the traumas that he suffered as a child. Furthermore, "the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated--this is an integral part of a capital case. . . counsel *must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision*." *State v. Lewis*, 838 So.2d 1102, 1113 (Fla. 2002) (footnotes omitted); *Ferrell* v. *State*, 29 So.3d 959 (Fla. 2010); *Henry*, 937 So.2d at 572; *State v. Larzelere*, 979 So.2d 195(Fla. 2008); *Wiggins*, 539 U.S. at 522-523; & *Ragsdale v. State*, 798 So.2d 713, 716-19 (Fla. 2001). It is well settled that the above identified issues are valid mitigation. S*ee*, *e.g.*, *Power v. State*, 886 So.2d 952, 959 (Fla. 2004)(family background and personal history are validly considered mitigation); *Hurst v. State*, 819 So.2d 689, 699 (Fla. 2002); *Ragsdale*, 798 So.2d at 718-19;

Rose, 675 So.2d at 571 *citing Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994); & *Holsworth v. State*, 522 So.2d 348, 354 (Fla. 1988)(childhood trauma recognized as a mitigating factor). Counsel, who had no excuse or reasonable explanation, failed his obligations and deprived Tai of his constitutional rights pursuant to the 6th Amendment of the U.S. Constitution.

The penalty phase evidence presented failed to provide first-hand evidence of Tai's earlier years, starting from birth, until he escaped from Vietnam and first-hand knowledge of the suffering and torture that was inflicted upon Tai. Inexplicably, only Thuy was interviewed. In *Gregg v. Georgia*, 428 U.S. 153, 206, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the U.S. Supreme Court emphasized the importance of focusing the sentencer's attention on "*the particularized characteristic of the individual defendant*." *See Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). Not a single effort was made to try to contact Tai's mother or the siblings in Vietnam or France. *See e.g. Luong v. State*, 2014 Ala. LEXIS 39, 41-42 (Ala. 2014)(Capital defendant came to the U.S. from Vietnam as part of the unaccompanied minors program when he was 13 years old. The trial court suggested that Luong's counsel conduct videoconferencing with Luong's relatives in Vietnam to determine what, if any, potential evidence the relatives could provide). This Court has held that counsel renders deficient performance when his investigation involves limited contact with a few family

members and he fails to provide his experts with background information. *See Sochor*, 883 So.2d at 772; *Ragsdale*, 798 So.2d at 718-719 (holding that inexperienced counsel rendered deficient performance when his entire investigation consisted of a few calls made to family members); *Stevens v. State*, 552 So.2d 1082, FN.7 (Fla. 1989)(Defendant granted a new penalty phase trial where counsel spoke with client's aunt several times, but never spoke with his family who lived in Kentucky); *Walker v. State*, 88 So.2d 128, 138 (Fla. 2012)(Counsel ineffective where he conducted 5 phone conversations with defendant's mother and sister and some mostly unidentified local people, but did not seek background information from any other immediate or extended family members prior to trial); *Robinson v. State*, 95 So.3d 171, 180 (Fla. 2012)(Counsel provided deficient performance where he presented the testimony of the defendant's mother during penalty phase, but did not attempt to investigate additional witnesses. Counsel's strategic decision to present the mother as the sole witness was not reasonable because counsel did not make a full investigation); & *Porter v. McCollum*, 558 U.S. 30, 39, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009).

Simply stated, trial "counsel abandoned their investigation of [the defendant's] background after having acquired only a rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U.S. at 524. Furthermore, the court failed to recognize that the evidence from the family is not only important

to the telling of Tai's story but it is vital as to the PTSD diagnosis by all of the doctors at the hearing. It cannot be emphasized enough that an attorney has a "strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." *State v. Riechmann*, 777 So.2d 342, 350 (Fla. 2000); *Haliym v. Mitchell*, 492 F.3d 680, 718 (6th Cir. 2007)(Counsel rendered deficient performance where they "failed to discover important mitigating information that was reasonably available and suggested by information already within their possession."); *Rompilla* (counsel provided ineffective assistance of counsel by failing to follow several available avenues of investigation that would have led to the discovery of compelling mitigation evidence); & *Wiggins*, 123 S.Ct. 2527. Even Caudill agreed that a strategic decision could not be made if he did not have the information at the time. P14/408.

The court summarized the mitigation presented at the penalty phase in its Order denying relief. P11/2067-8. The court stated that Thuy's "testimony was the most pertinent to the specific issues the Defendant faced because she encountered those same hardships contemporaneously, although she and the Defendant *were physically separated for much of the time*." P11/2067. In contrast, this same court at the hearing stated that "[t]he *psychological makeup of one individual and another can be totally different in their response to identical circumstance*." P12/124. This statement is in stark contrast to the court's finding that Xuan

Nguyen's ("Xuan") time at the refugee camp "although *predating* the Defendant's, were relevant because his treatment *would have been* similar to theirs." P11/2067. Moreover, the court sustained the State's relevance objections whenever a family member testified as to their experiences that were contemporaneous with Tai's.

The court attributed the penalty phase witnesses' experiences to Tai when in fact the jury never heard Tai's story. P11/2067. Tai requests that this Court look carefully at the testimony of the penalty phase witnesses presented and it will find that it is not as substantial or detailed as the court portrays. R12/77-118. Thuy testified generally as to life in Vietnam and Tai's early years:

- She and Tai were born in Vietnam; they were two of nine children;
- Her father was a soldier with the South Vietnamese Army and served the "whole way." Their father was put in prison but he escaped, and he would try to visit them when he was in hiding. Her mother was a housewife.
- Tai was born in 1972 during the war when Vietnam fell to the Communists;; the Communists took their land;
- Their family tried to escape because the Communists would not allow the children to go to school/higher education unless they followed them;
- In 1975, she recalled seeing people die on the street and that her father carried her on his shoulders because she was too young; she *thinks* Tai may have seen the people die;
- The family tried to escape several times and the one time they got a boat but were getting shot at and so they turned around;
- They had to secretly leave town and go to another town and live with somebody that you paid and they would get them to a canoe to the ocean and every time they had to come back because there was no boat[20]; parts of the family was caught and put in camps or prison;
- Tai and one of their sisters was caught and put in prison; she *believed* Tai

[20] "I don't know. I'm just a kid to follow, you know, everybody." R12/85. It is obvious that Thuy has limited information due to her young age.

was in prison for a year but she was not on this trip; and then one day Tai returned with the help of somebody on the street and that is when they got the story from Tai, who was eight, that all the adults went to work in the field and Tai had to do "a lot of thing" and "had to do labor work for them"[21]; the children were "just sort of released on the street in this town";

- Tai came home for a week and then the whole family who was not in jail tried to escape together[22];
- She, Tai and a cousin made it out only and she testified that on the boat that they had no food, water or bathroom, that the boat was packed with people, she and her brother were underneath, she sat next to a machine, her body was all white and oily;
- She was sick and she passed out later and she woke up in a home/hospital; she stated she was on the boat for probably two to three weeks and she ended up in Palau Bidong, Malaysia, a refugee camp which was like a prison with barbed wires;
- Tai got caught eating meat and was taken away by Thai force;
- The cousin stayed with her for a month and then was taken by Thailand people, while Thuy was accepted by the French people;
- She and Tai *were not living together* at the camp because women and men were separated; later she found out that Tai was taken to the hospital but she "*didn't know where he was or what happened*";
- She guessed there were 170 to 180 people on the boat; she said the CBC video fairly and accurately depicted the camp's conditions;
- She occasionally saw her brother at the camp but they were *separated*;
- Tai was crying and kept asking for his parents;
- She met up with Tai two years later on the last flight to Illinois; she did not know to eat on the plane because they did not have money;
- She and Tai spoke Vietnamese and she tried to learn to speak English; no real schooling in the camp; for six or seven years she and Tai did not know what happened to their family; the Communists would not allow contact;
- Catholic Services ran the orphanage and she and Tai stayed at different places and she saw him when they would eat;
- They were given schooling in the orphanage and eventually she was accepted by a foster family and she left Tai at the orphanage.

[21] The testimony of Hang gave more accurate and more graphic details about the journey, the capture, and what happened to Tai and her at the prison camp.
[22] This is not accurate as testified to by Mama and the siblings.

R12/77-102. After this testimony, Thuy talks about her life, reuniting with Tai, and his adulthood. R12/102-15. The evidence presented at the hearing was not cumulative because it provided details of an entire period in Tai's life that was referenced in passing during the trial. *See Sowell v. Anderson*, 663 F.3d 783, 789 (6th Cir. 2011) & *Neal v. Puckett*, 286 F.3d 230, 243-244 (5th Cir. 2002). Thuy did not have the personal knowledge to describe Tai's traumatic experiences in the prison, at the camp, and at the orphanage.

The court found that "substantial evidence about the conditions in the prison and the refugee camps in Vietnam and Malaysia *in that era*" was presented at the penalty phase through the testimony of Xuan, Foshee and a CBC video. P11/2067. Again, the court said "[t]he *psychological makeup of one individual and another can be totally different in their response to identical circumstance*." Xuan testified as to *his* plight when he wilfully escaped from Vietnam as follows:

- He lived in Vietnam before he left in 1979.
- In 1975, he was in his early to mid-twenties when he was first arrested by the Communists. It took his family 4 years to raise money to get him out of jail. He witnessed executions by the Communists. He was very scared in the jail/prison
- He served the South Vietnamese Navy for six years. He took care of electronics and security. He went to Catholic school from first to fifth grade and the he studied at a technical school in 1964/1965.
- He continued to work in electronics until he escaped on a boat, in 1979. He arrived in Washington, D.C./Virginia in 1980. Once there, he started to working in electronics.
- The boat he escaped on had 49 people. They all arrived to Malaysia and were robbed 6 times during the trip.

- He arrived at Palau Bidong, a refugee camp, where he stayed for 9 months. The "conditions were harsh" and they had to rely on aid from different organizations. They stayed behind some sort of wooded/wooden structure and not behind a fence. The YMCA sponsored him to go to the U.S.
- He was not in Palau Bidong at the same time as Thuy and he "left way before."

R12/145-159.Then, Xuan testified as to his life. R12/151-3. Unlike Tai, Xuan was an adult when he willfully left Vietnam. The psychological effects on Tai versus Xuan would be different. Unlike Hang's powerful and accurate testimony, Xuan's testimony failed to depict the prison conditions that Tai faced. Xuan's testimony did not provide evidence as to Tai's escape or his traumas. Furthermore, Xuan did not give substantial evidence as to the conditions of the camp short of it was "harsh." The jury heard about Xuan's experience and fears, which cannot be attributed to child Tai's experience.

Foshee gave a very general insight into Vietnamese refugees[23] and there were no specific details as to Tai and the camp he was at in Malaysia. Foshee testimony is summarized as follows:

- Foshee *is not a boat person*. She left Vietnam in 1969, after she married an American serviceman.
- She returned in 1976, to a refugee camp in Philippines and Thailand, but she "didn't get a chance to go to all of the other camps, like Malaysia." She learned *from other refugees* that Palau Bidong was one of the worst camps. She went to the camps to help the Vietnamese try to settle in countries that accepted them.

[23] Caudill testified that Foshee did not have any personal knowledge of Tai's life before Orlando. P13/360.

- Her brother escaped from Vietnam in 1984, and he was in the Philipines' Palawan camp for 4 or 5 years. He has been in the U.S. since 1990 and he has difficulty with employment. She went to Palawan where the conditions were very bad and she bought a well and pump so they could get water.
- She has come into contact with Vietnamese refugees from mid to late 1980s and she has worked to help them cope with their new life in the U.S. She came to know different Vietnamese refugees' stories and not all of them were lucky to have their whole family come to shore. Some of the refugees had family sponsors and some came through church sponsorship, or are sponsored by the Buddhist temple. She found people who had family in the U.S. were mentally better and the others live in foster homes or sponsors. They are confused between the two cultures. Not everyone who has come from Vietnam has done well in U.S.; most of them have done well. She does not "have much time to spend with them, only when they need [her]."
- She talked about difference in discipline between the U.S. and Vietnam and that it is stricter in Vietnam and she was beaten by her mother for failing a grade. Most of the Vietnamese people are still strict in the U.S. and try to maintain their culture.
- She does not know anyone who has been violent crimes or killed someone.

R13/260-281. When Foshee was asked about her experience in prison when she was captured, the court held that testimony regarding her experience was not relevant to Tai's case. The court stated as follows:

> "And I would have no problem if she was testifying as to conditions of a e(sic) camp that he [Tai] was in, but to testify as her conditions in Vietnam in a prison twenty plus years later, there's no nexus that they're the same as to the conditions that he was imprisoned in in Malaysia, and absent some nexus to show that those conditions are identical or very similar, I'll sustain the objection.
> . . .
> And there was no objection to her testifying that she was imprisoned for terrorism. The objection then, which was the question, which was sustained as to relevance were the conditions of the prison which she was in in 2005 in Vietnam and your client was in prison in the '70s in Malaysia in a refugee camp."

P13/271-272. Therefore, there was no first-hand account testimony as to the

conditions of the prisons that Tai would have been exposed to. Foshee admitted that she was not very involved in the community and that she helps when she can. Her description of the Malaysian camp was from hearsay. Once again, this is not Tai's story and a presentation particularized to his life and struggles.

Finally, the CBC video that was played did not depict Tai's plight. It did not give substantial evidence of Tai's prison experience like Hang's testimony. The video depicted the refugee camps and the stories of other refugees from 1979 (aired on September 11, 1979). P7/1353-1355. Tai was forced out of Vietnam about 2 or 3 years after this video. Caudill never found a video depicting the camp Tai was at and he could not find anything on the internet "that was specifically about Mr. Pham's background and experience." P13/358&378.

The jury was presented general testimony of the conditions of the refugee camps. There is no evidence at trial about the prison that Tai was in. The evidence presented at the hearing was not cumulative as there was no testimony as to the horrors of the first escape and what happened in Ca Mao. Moreover, the doctors at the hearing questioned Tai about his experience on the boat and in the refugee camp to determine the traumatic experiences to support the PTSD diagnosis. *See Williams v. Allen*, 458 F.3d 1233, 1245 (11th Cir. 2006); *Foust v. Houk*, 655 F.3d 524, 543 (6th Cir. 2011); & *Robinson v. Moore*, 300 F.3d 1320, 1347 (11th Cir. 2002). Thuy's testimony to the jury was *not Tai's story*. It was her story and any

sympathy from a jury would be towards her. The environment in Vietnam was similar, but their experiences are not similar. Unlike Tai, Thuy was successfully adopted by a family in Illinois. They did not suffer from the same traumas. *See Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1354 (11th Cir. 2011)("In the penalty phase of a capital trial, the major requirement . . . is that the sentence be individualized by focusing on the particular characteristics of the individual . . . Therefore, it is unreasonable to discount to irrelevance the importance of [a defendant's] abusive childhood . . . Background and character evidence is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to disadvantaged backgrounds . . . may be less culpable than those who have no such excuse."). The fact, that Tai before the age of 12 had suffered so many traumatic experiences is compelling mitigation. The information from the family was instrumental to the *defense and state experts who all found that Tai suffered from PTSD.*

It matters in a presentation when a client's life lies in the balance, who tells the story and how it is told. *See Cooper*, 646 F.3d at 1353 (concluding that post-conviction testimony was not cumulative of testimony presented during the penalty phase where penalty phase testimony by the defendant's mother "did not begin to describe the horrible abuse testified to by [the defendant's] brother and sister" during post-conviction proceedings). The presence of Tai's mother and his siblings

puts a human face to Tai's story. The Illinois professionals gave real time observations of Tai's instability when he came to the U.S. This is more effective than having Day and Olander give hearsay testimony from Tai's interviews. It is more effective than general stories about boat people. The family and Illinois DCF professionals told Tai's story.

The detailed and emotional testimony from Hang of that first escape was never heard by the jury and could never be captured by any of the penalty phase witnesses for the simple reason that they were not there. Hang described in harrowing details, their journey, their capture, Tai's fear, the emotional and physical torture they suffered, and the kindness that Tai showed to her while they were held captive. This is not cumulative but it is "additional information about specific challenges she and the Defendant faced." P11/2069.

The jury never hear the powerful details of was Tai's unwillingness to escape from Vietnam[24]. Tai was torn from his mother's bosom and his home not once but twice. He did not care for a better life; he was a 9 year old child who wanted to be with his mother. This evidence is powerful and humanizes Tai as a child that was abandoned and it explains his anger and outbursts later in the U.S. Tai was tricked into leaving not once but twice. The jury never heard about Tai's return and how he was so happy to be home with his mother after the first escape;

[24] There is a brief reference by Day that she learned that from Tai that he was told he was going to the zoo. R13/317.

only to once again be ripped away from his mother. The jury never got to hear Tai's mother's poignant description of her son's emotions. Kim corroborated the fact that Tai's demeanor upon his return as "very scared" and "[v]ery happy" to be home and that he "never want to escape again." P12/32-35. This fact is very important in light of Juror Kristen Appleman's testimony which is as follows:

> "I think just the comment of, you know, yes, everyone has a rough life in some cases, but you are - - this is the law, this is - - there is right and wrong, and, *you know, if you wanted to come to America, you have to live by American standards, American law*."

R13/241. Tai never wanted to leave home. *See Griffin v. Pierce*, 622 F.3d 831, 845 (7th Cir. 2010)(evidence introduced after sentencing is not cumulative if it corrects of rebuts an assumption of which the jury was inaccurately led to believe during sentencing) & *Johnson v.* Bagley, 544 F.3d 592, 603-604 (6th Cir. 2008).

The jury never heard about Tai's tumultuous journey through the foster care system in Illinois from those who were there. Once Thuy was adopted, Tai had no one from home. Tai was a sad and troubled child throughout his adolescence. Tai had great difficulty assimilating. He believed that his family had abandoned him. Tai's angry outburst, running away and hiding behavior continued into his adulthood. P13/217-8&222. Verl described Tai as "the worst" she has seen within the unaccompanied refugee minor population. P13/236-7. Illinois DCF was never able to attain stability for Tai. P16/920.

The court's finding that testimony relating to Tai's toddler years prior to the

escape attempts were of minimal probative value and would not have made a difference in Tai's moral culpability is incorrect because it mattered to the experts. Drs. Lee, Abueg, and McClaren's all opined that Tai suffered from PTSD. The court recognized that "*additional* areas of delayed development" were presented at the hearing but considers it "cumulative" even though it is additional. P11/2069. The court listed eleven bullet points[25] that was considered additional information from the family, all of which were probative to the experts at the hearing. P11/2068-69. The court failed to recognize the invaluable information that the family provided which led to the PTSD diagnosis and for expert Abueg, also a bipolar diagnosis. P16/907-8. The following additional family's information was probative to the doctors:

- They learned about the traumatic experience of hearing gunshots from the family's testimony.
- They learned that Tai did not want to leave home and to be separated from his mother.
- Dr. McClaren thought that the fevers suffered by Tai and the developmental delay were important facts to him.
- Dr. Lee opined that Tai suffered from perinatal anoxia due to lack of oxygen during his birth and delivery and that can affect brain functioning which led to many problems during the early years.
- Dr. Lee opined that the evidence of the boil on the head, the fevers, the toilet-problems, the angry outbursts, and the learning problems all are evidence of brain impairment onset from early infanthood which in turn affected Tai's growth and behavior.
- Tai suffered from numerous traumatic experiences in his young life, which

[25] The court noted that "this information could easily have been discovered." P11/2069.

included seeing the horrific bloody dead body of his brother[26]; learning about the decapitation of his grandfathers at the hands of the Communists because they were Catholics; and exposure to the bombing and shouting when he and his family would rush to an underground shelter in fear for their lives.

- Tai suffered trauma from near drowning experiences.
- Tai still cannot sleep in the dark due to his experience in the darkness he saw on the boat. It leads to nightmares and he had to be medicated for it. P16/908-909.

P15/678-685&786-99 & P16/808-12&905-921. It is clear from the experts that once they learned about the early years of trauma it led them to perform objective tests and to ask Tai questions as related to a diagnosis of PTSD and bipolar. Day was concerned about relying on childhood memories of Tai and Thuy, thus the family interviews would have been invaluable as well as the Illinois DCF records that recorded Tai's memories contemporaneously to the events. R13/314.

With regard to the records, the court found there was "very little information in those independent records that was not discovered by the experts from either the Defendant or Thuy." P11/2071. The court found that Caudill testified the failure to get the Illinois DCF records because "he was aware of most of the information contained therein from conversations with the Defendant and Thuy" and "[h]aving subsequently reviewed the records, they corroborated what he already knew and presented to the jury through Thuy." P11/2070. He testified he was reluctant to go

[26] Day testified that "no one [could] give the details" of the death of one of the brothers who dies in an accident. R13/313. The family testimony gave the details of Tu's death and funeral. This was a recognized traumatic event in Tai's life.

into greater detail on the Defendant's time in Illinois because utilizing the information in explanation as to underlying reasons for the Defendant's criminal behavior could have provided fuel for a diagnosis and argument that the Defendant had an antisocial personality."[27] P11/2070-71. The court forgets that Figgatt was the decision-making counsel in this case.

First, Caudill's statement is contradicted by the emails (March 12, 2008, March 31, 2008, and April 8, 2008) between counsel and the investigators to continue to look to investigate witnesses and records out of Peoria, Illinois. P14/573-4 & P9/1643-48. The courts finding is not supported by competent evidence because if counsel did not want to go into greater detail into Tai's life in Illinois, then why would there by investigative requests to look for witnesses and records from Illinois. P9/1643-48. Caudill is contradicted by Figgatt, who testified that he learned new information about Tai from the records (he did not know prior to the hearing) and that would have given these records to his experts. P14/501-505. Caudill, who is not as expert, unreasonably equates any bad act or acts by a child to antisocial personality. Alternatively, Figgatt testified that he would have provided these records to his experts and that regardless of whether the records contained good or bad information, he would give them to his experts because they

[27] Caudill testified that he did not have information about Tai's time as a ward of Illinois and he acknowledged that it is important to humanize the client and that the source of the witness information is important as well. P14/410-11.

are valuable to them. Figgatt recognized that records that he may see as bad may be seen by an expert as an indication of an emotional problem. P14/493. Figgatt recognized that the records showed a young child who was forced out of his home country, who constantly ran away, who had instability problems while in the foster care program and who had anger problems because he never fit in[28]. Also, Riebsame reported that Tai described his childhood as idyllic, which the testimony at the hearing showed was inaccurate[29]. R13/324. *See Griffin*, 622 F.3d at 845.

Furthermore, Riebsame's testimony during the *Spencer* hearing, in determining cognitive impairment, indicated that he did not have information to suggest that Tai did poorly in school, any evidence from other mental health professionals about Tai's schooling, or what kind of school he attended; he did not have evidence of poor behavior (such as problems with law enforcement, authority figures, and family members[30]); he did not have evidence of long periods of

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[28] Abueg found that the "Illinois data was important in post-migration adaption, which was not good and the beginning expressions of PTSD, actually the continuing expressions of PTSD . . . Mainly kind of establishing the succession of traumatic stressors and also the expression of symptoms over time." P15/771.

[29] Day testified that "[t]here was *no collateral information* to suggest his childhood was idyllic." R13/325. If counsel had provided her with the Illinois records and access to the family, there would have been sufficient compelling and credible evidence that Tai's childhood into adolescence was not idyllic.

[30] This evidence was in the Illinois DCF records and presented through Verl that the Court found to be "incorrigible behavior" that would have detracted from the picture painted by counsel. P11/2071. However, it is clear that based on Riebsame's testimony, that same behavior and long periods of instability can be attributed to cognitive deficits.

instability; and he did not have disciplinary or counseling records. R18/125,129-30&141-4. Riebsame testified that if Tai had cognitive deficits from the age of 10, that "the Illinois mental health professionals would have recognized it." 18/1228. The testimony of the Illinois professionals, Dr. Wei, Otteson, and Verl, and the Illinois DCF records showed credible evidence of concerns about Tai's behavior, schooling, instability in foster care, and issues with the authorities. The family's testimony also showed early onset trouble at school. These are factors that Riebsame showed interest in. Riebsame relied on Tai for vague information regarding his difficulties and behavioral problems in Illinois, but there was no detailed corroborative collateral evidence as to the accurate nature and extent of those difficulties, thus, he did not find evidence of cognitive impairment. R18/143&153. In contrast, Drs. Lee, Abueg and McClaren all found evidence that Tai suffered from some degree of brain dysfunction/cognitive difficulties as supported by the records and witness testimony. P15/678-84 & P16/895-6. It is clear that the records and the family's testimony were important in providing an accurate historical background in performing a competent mental health evaluation. Riebsame's testimony is testament to how something that can be perceived as negative may actually be an indication of mental health problems.

With regard to the FSH records, the court found that Caudill "had seen *some* of the reports and he was aware that the Defendant was not well behaved while in

the facility, including reported violence against the staff." P11/2071. The court found Caudill's decision not to obtain the records "because of his knowledge of negative information contained therein was reasonable." P11/2071. First, it is clear that Figgatt decision-making attorney and not Caudill. Upon reviewing the complete FSH records, Figgatt had a different analysis. P14/506-7. Figgatt testified that he needed the records to follow-up on Tai's conduct of hiding under a bed like a child and he would have given these records to Day, to Dr. Danziger, and to every other doctor that was involved in rendering opinion about Tai's mental health. P14/507-8. The simple fact that the records contained bad information would "[a]bsolutely not" stop Figgatt from giving it to an expert. P14/509. Furthermore, Figgatt would rather know about bad information rather than learn about it from the prosecutor and that is why he got the Florida DCF records[31]. P14/510. Figgatt recognized that Tai's issues with authority could be a sign of an undiagnosed mental illness. P14/547-8. Figgatt testified that the traumas in the records and even the bad stuff could have helped him understand Tai who had

[31] In death-penalty cases, those norms are reflected in the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines"). *See Bobby v. Van Hook,* 558 U.S. 4, 16, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009); *Rompilla,* 545 U.S. at 387; *Wiggins,* 539 U.S. at 524. Since 1989, the ABA Guidelines have directed counsel to investigate "*all reasonably available* mitigating evidence," as well as "evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 539 U.S. at 524 & 1989 ABA Guidelines, § 11.4.1(C).

acted out in one way or another since he came to the U.S. P14/561. He needed all of the information in the records. P14/561. Even Caudill admitted that he relies on his experts to make diagnoses and it is important to provide them with as much information to come to an accurate diagnosis. P14/411-2.

The court's finding that Olander and Riebsame had seen and considered the complete FSH records/reports is not supported by substantial and competent evidence. P11/2071. The court is speculating as to what the doctors reviewed. Counsel testified that they did not request the complete FSH records. When asked about the FSH records, Riebsame testified he reviewed "[t]he competency evaluation that was carried out there, yes, in 2007." R13/398. The court cited to R18/145 to support its finding as to what Riebsame reviewed, but the testimony referred to Tai's employment information in "only in the report from the state hospital" or the "state hospital report." R18/145. It is unclear from the trial record whether Olander even reviewed any FSH records. When asked about whether she reviewed the FSH records specifically the report by Dr. D'Agostino, Olander responded, "No." R18/1210. The court also cited to R18/118 to support its finding, but the exact testimony was as follows:

> Q. And that's the only additional information that you reviewed?
> A. I *briefly looked that the report this morning*.
> Q. Okay. The police report?
> A. No, the one from the hospital.
> Q. Oh, I see. The one from Dr. D'Agostino?
> A. I *believe so*.

R18/1217. The testimonies of Riebsame and Olander do not support the court's contention that they considered more records/reports outside the FSH competency evaluation in their opinion. Once again, these complete records were reviewed by Drs. Lee, Abueg and McClaren (who particularly sought out the complete records) and were considered in their diagnoses.

Counsel's strategic decisions are reasonable only *if based on information resulting from a reasonable investigation* conducted by counsel, which was not done in this case[32]. *See Wiggins*, 539 U.S. at 524 ("[C]ounsel were not in a position to make a reasonable strategic choice . . . because the investigation supporting their choice was unreasonable."). Caudill did not have the records at trial to make an informed decision. *See Walker*, 88 So.2d at 138 (Counsel was ineffective because he failed to seek medical, educational, criminal, drug treatment, or social service records.) There was no reasoned professional decision to limit the investigation of Tai's time in Illinois. It was limited because counsel performed a less than complete investigation. *See Wiggins*, 539 U.S. at 526. Once again, in evaluating the reasonableness of "a particular decision not to investigate," *Strickland* explained, a reviewing court must take into account "all the circumstances." *Id.* at 691. Since these circumstances are unique to each case, *Strickland* declined to

[32] Caudill admitted that the Illinois DCF and complete FSH records did not play into his strategic decision making because he did not have them. P14/408.

impose a set of mechanistic rules for evaluating counsel's decisions. *See id.* at 689; *Roe v. Flores-Ortega*, 528 U.S. 470, 478, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); & *Kimmelman*, 477 U.S. at 385-86. Instead, in determining whether counsel's performance was constitutionally deficient, a reviewing court must determine whether counsel's decision was reasonable under the circumstances, a determination guided by "prevailing professional norms." 466 U.S. at 688. In this case, the failure to obtain reasonably available records is certainly unreasonable. *See Rompilla*, 545 U.S. 374 & *Walker*, 88 So.2d at 141 ("Defense counsel's failure to attempt to obtain reasonably available mitigating evidence from available sources precludes the State's argument that counsel reasonably chose against advancing the potentially detrimental testimony presented at the evidentiary hearing."). Caudill's knowledge of some of the bad information did not end his duty to further investigate. This is a dangerous precedent whereby counsel could never be found ineffective so long as there is some bad information discovered.

The double-edge sword argument by the court does not end the prejudice argument. P11/2071. *Larzelere*, 979 So.2d at 207, disregarded this argument and stated as follows:

> "The State argues that we should not find that Larzelere was prejudiced because this 'mitigation' evidence would have been more harmful than helpful to her case. . . . While we agree the State could have presented rebuttal evidence during the penalty phase, this does not change our conclusion that Larzelere was prejudiced by counsel's penalty-phase performance."

The fact that collateral counsel uncovered some apparently adverse evidence is unsurprising, "given that [trial] counsel's initial mitigation investigation was constitutionally inadequate." *Sears v. Upton*, 561 U.S. 945, 130 S.Ct. 3259, 3264, 177 L.Ed.2d 1025 (2010). Furthermore, the *Sears* Court held that

> [c]ompetent counsel should have been able to turn some of the adverse evidence into a positive-perhaps in support of a cognitive deficiency mitigation theory. . . This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts-especially in light of his purportedly stable upbringing. Because they failed to conduct an adequate mitigation investigation, ***none*** of this evidence was known to Sears' trial counsel. It emerged only during state postconviction relief.

Id. (internal cites omitted and emphasis in original); *Porter*, 130 S.Ct. 447 (holding that evidence that defendant was AWOL was consistent with defendant's theory of mitigation and did not diminish the evidence of his military service); & *Robinson*, 95 So.3d 171 (Testimony from defendant's father that he was cruel, mean, and aggressive; seemed to enjoy fighting; got into the most trouble of all his children; and shot at a vehicle with his siblings inside would have been tempered by consistent accounts that his father was cruel, mean, and abusive). It is not a rarity that records contain good and bad information and just because there is bad information does not automatically render the records useless. It is counsel's duty to obtain those reasonably available records and to make an informed decision as to what to do with those records. Counsel could not make an informed decision in

this case because they failed to conduct an adequate investigation.

The prejudice is evident because all of the experts diagnosed Mr. Pham with PTSD, only after a complete and adequate investigation. Due process requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. *See Mason v. State*, 489 So.2d 734 (Fla.1986); *Sireci v. State*, 536 So.2d 231 (Fla. 1988); & *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53(1985). Meaningful assistance of counsel in capital cases requires that counsel pursue and investigate all reasonably available mitigating evidence. *Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003). Counsel renders deficient performance when he fails to ensure an adequate and meaningful mental health examination. *See Ponticelli v. State*, 941 So.2d 1073, 1095 (Fla. 2006) & s*ee Sochor*, 833 So.2d at 722. Prejudice is established when counsel fails to investigate and present evidence of mental illness. *See Ragsdale*, 798 So.2d at 718-19 & *Rose*, 675 So.2d at 571 *citing Porter*, 14 F.3d at 557. The bases of all of the experts' opinions came after an adequate investigation into all reasonably available mitigating evidence. The diagnosis of PTSD and Dr. Abueg's diagnosis of bipolar are not just a simple case of a "more favorable diagnosis."

Day could not make a conclusive PTSD diagnosis because she did not have enough information. P11/2072. Even though counsel was aware of this, they failed to investigate and provide the requisite information. P13/367-8 & P14/537-9. The

State's closing remarks appropriately criticized Day's poor mental health evaluation and compared it to a work of fiction. R14/520-1. The deficiencies were due to counsel's failure to provide reports of other trial experts, records from Illinois DCF, records from the FSH, access to the family witnesses and access to the Illinois witnesses. Day did not do any testing or analysis for the symptoms of PTSD. The State highlighted the grave deficiencies in Day's testimony as follows:

> She talked to the Defendant. That's pretty much all she did in basing her opinion. She didn't perform testing, she didn't do a report. He's seen by other doctors, she comes up with this opinion well before her deposition in April of 2008, and at that point in time hadn't looked at the reports from Dr. Danziger or Dr. Ballentine, hadn't looked at the report from the Florida State Hospital where the Defendant spent some time, hadn't reviewed any of the testing that was performed, and so she's relying on what the Defendant tells her to base her opinion.
> And basically what the Defendant told her is what he told everybody in the courtroom when he testified and when he told Riebsame, and we all know that that's not true. She talks about the fact that the Defendant is suffering from a major depressive disorder. Doesn't talk to any of his employers to see how he was doing before he committed the murder. . . So there's a contradiction between the two experts. And I'd submit to you that if you want to lace credibility on one expert over the other, you should place it on the expert that did the most work in the case.

R14/521-3. This is clearly due to counsel's failure to provide her with the necessary information. *See Walker*, 88 So.2d at 141. Counsel recognized their poor mental health presentation to the jury and retained Olander to perform neuropsychological testing and record review after the jury's death recommendation. Olander's testimony was *not beneficial* as mitigation as she

never opined that Mr. Pham suffered from an extreme mental or emotional disturbance. R3/558-568. Her opinion was limited to evidence of cognitive deficiencies and a borderline IQ. R3/558-568. There was no need to present Day at the hearing because her work was so severely criticized at the penalty phase. P11/2070. She clearly suspected PTSD and bipolar[33] but she did not have enough information to come to the diagnoses due to counsel's already discussed failures. R13/325-6 & P11/2072. The collective testimonies of Drs. Lee, Abueg, and McClaren demonstrated that there was substantial long-term historical information available to support the diagnoses of PTSD and bipolar. The evidence is indisputable at the hearing that Tai suffered from PTSD and this diagnosis came to be because a competent and reasonable investigation was done. Day and Olander could not provide a proper diagnosis of Tai because they were missing key pieces of information from Tai's life due to counsel's failure to follow-up on reasonably available information. *Pearce*, 994 So.2d at 1103.

The court found that the diagnoses were based:

> not only on the additional records and interviews with family members, but also on multiple intensive interviews with the Defendant, who had become more open and forthcoming since trial.

[33] Day testified that Tai had a bipolar spectrum "[b]ut because we didn't have family history, you need to corroborate that there are other manic episodes." Dr. Ballentine and Dr. Danziger suspected that as well. Day "just like the other doctors" could not come to a conclusion as to bipolar disorder because they "didn't have *historical information that supports the diagnosis over long-term*. . . . whether it was bipolar or not still remains fuzzy." R13/325-6&330-1.

> This is in contrast with the Defendant's reluctance at times to cooperate with the experts who visited him before trial and the penalty phase. Even without the Defendant's cooperation, Dr. Day testified that the Defendant has traits of these disorders, but felt she could not make a conclusive DSM IV diagnosis. Under the circumstances of this case, counsel was not ineffective simply because collateral counsel has discovered witnesses who gave more favorable diagnoses than Dr. Day.

P11/2072. The trial record does not support the court's finding that Tai was more forthcoming in post-conviction than at trial. At trial, Tai started to open up to Day over the course of time and the only time there was difficulty was when he was going through competency issues. Tai was "unable to effectively communicate" right after the arrest because of suicide concerns[34]. Less than a month later, Tai was "bit more responsive" and "[h]e was able to relay a little bit more information" and so they started gathering some additional information. R13/302. Tai relayed that "[h]e was *experiencing nightmares, flashbacks*, and was still very much in distress." R13/303. On July 2, 2006, Day was "able to communicate" with Tai and "get some family background" which included some information about his family, Malaysia, his marriage, his wife, and his escape[35]. R13/304-5. Tai intereacted with Day and asked her to repeat questions. R13/306. In January 2007, Tai had a manic episode and was unable to communicate which led to the subsequent competency

[34] Day went to the jail "to check on" Tai and to "assure him what was going on and make sure that suicide precautions were in place for him." R12/300-1.

[35] If counsel followed up on this information and attempted to locate the family and get the records, they could have given Day a full background.

proceedings. R13/307-8. Day learned from Thuy and Tai collectively some information about life in Vietnam, the escapes, the boat trip, Malaysia, his entry into the U.S.[36], being in a foster/group home, and their reunion. R13/311-22. Tai was able to relay his feelings to Day. R13/311-22. Tai never inhibited the mitigation investigation. *See Lewis*, 838 So.2d at 1113("Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision."). Tai was uncooperative with Riebsame during the competency proceedings, but in preparation for the penalty phase he cooperated with Riebsame's testing. R14/404-6. Olander was also able to interview and conduct testing. R18/1144-67. The defense trial experts' diagnosis and testimony was not competent because counsel failed to conduct a reasonable investigation of Tai's biological, social and psychological history and to provide it to them. Tai was not a bar to the experts' work except when he was going through his manic phase. If counsel had obtained the reasonably available collateral information, the experts would have had credible and detailed information of Tai's historical background. *See Robinson*, 95 So.3d at 180 (The fact that the client was not an adequate

[36] Day was unclear as to where Tai entered when he came to the U.S. This testimony is problematic as counsel knew that Tai was in foster care in Illinois. The Illinois DCF records would have been invaluable to Day.

historian should have prompted counsel to investigate other sources of information to obtain sufficient and accurate facts concerning the client's background).

Prejudice due to counsel's failure is evident from the testimonies of Drs. Lee and Abueg. Their collective vast experience diagnosing and treating PTSD unaccompanied Vietnamese minors and adults was presented[37]. P15/633-60&665-6, P9/1649-54, P15/759-65 & P9/1655-68. In their experience, people with PTSD can hold a job and can live a normal life *until their PTSD is triggered*. P15/703-4&710 & P16/813. Dr. Abueg testified that it was not unusual that Tai could fix televisions[38]. P16/813. Dr. Lee has seen similar cases to Tai's of unstable foster care lifestyles. P15/713-4. Dr. Lee has seen similar reactions of PTSD Vietnamese unaccompanied refugee minors, who as adults had violent reactions towards others and themselves. P15/704-9. Dr. Lee has examined former prisoners of war who killed their wives as a result of untreated PTSD. P15/709-12. Drs. Lee and Abueg's extensive experience clearly contradicts the State's implication that there are no cases of refugees/boat people who commit violent crimes or murder. Drs. Lee and Abueg are in a unique position due to compare and contrast Tai's case to other PTSD patients/defendants. Significantly, Dr. Lee found that Tai's case is the "worse case among the cases [he] have seen." P15/715-6. In contrast, Dr.

[37] Caudill believed that they tried to get a Vietnamese mental health expert but they never found one or contacted one. P13/360.

[38] It should be noted that Tai has been working with electronics since he was a child and it was the one function he seemed to enjoy and be able to do.

McClaren's experience predominantly dealt with the corrections department and state mental institutions. P16/878-81. Also, in contrast, Day and Riebsame were unfamiliar with the Vietnamese culture or background of these unaccompanied Vietnamese refugees and resorted to minimal article and internet research. R13/342 & R14/417. The perspective that Drs. Lee and Abueg provided was invaluable, relevant, and gave credence to their opinions as to the degree of Tai's mental disturbances. They could have educated the jury as to the reality of PTSD patients and to correct misconceptions that they cannot work. *See Griffin*, 622 F.3d at 845.

The only point of contention between the State and defense experts was whether Tai suffered from an extreme mental or emotional disturbance at the time of the crime. The court's order is silent as to this issue. Both Drs. Lee and Abueg testified that based on their evaluations and experience that Tai was under the extreme influence of extreme mental or emotional disturbance. Dr. Abueg opined that on the day of the offense, Tai "[n]ot only was [he] suffering from severe PTSD and hypomanic part of the bipolar, but it was highly exaggerated." P16/823&829. He opined that Tai was suffering from an extreme emotional disturbance. P16/823&839. Dr. Lee concurred with Dr. Abueg. P15/719&738. There is a reasonable probability that a jury would find that Tai's PTSD and bipolar was triggered on the night of the incident. It is a mental illness that is commonplace and has a nexus to the events that led up to the crime. The testimonies of Drs. Lee and

Abueg hold great credibility as their careers focused on situations similar to Tai's. The evidence at the hearing would have reasonably established this compelling statutory mitigator pursuant to Fla.Stat. §921.141(6)(b).

There was credible evidence that Tai had substance abuse problems[39]. The evidence of substance abuse is not irrelevant or speculative as to have no probative value. P11/2072. Evidence relating to a defendant's own long-standing substance abuse and addiction has been found to be an important non-statutory mitigator. *See Clark* v. *State*, 609 So.2d 513 (Fla. 1992); *Mahn* v. *State*, 714 So.2d 391 (Fla. 1998). Drs. Buffington and McClaren both found that Tai had a history of substance abuse. P14/439-40&453-6 & P16/898-899&913-916. Tai used the drugs to cope with his PTSD and stressors but it only made it worse. P14/445-8&450 & P15/717-8. The prevalent substance abuse was another aspect of the downward spiral of Tai from 2005, which is compelling non-statutory mitigation and should have been presented in concert with the mitigation.

It is clear that "there was substantial mitigating evidence which was available but undiscovered" due to counsel's failure. *State v. Pearce*, 994 So.2d 1094, 1103 (Fla. 2008) & *Deaton v. Dugger*, 635 So.2d 4, 9 (Fla. 1993)("In view of [the testimony of counsel] and other substantial evidence presented at the post-conviction hearing, including the testimony of two mental health experts, we

[39] Caudill knew that Day was not aware of Tai's history of drug or alcohol abuse. P13/366-367.

believe that counsel's shortcomings were sufficiently serious to have deprived Deaton of a reliable penalty phase proceeding."). Counsel's deficiency in failing to investigate and present the foregoing mitigation deprived Tai of a reliable penalty proceeding such that this Court's confidence in the outcome must be undermined. *See Henry*, 937 So.2d at 569. But for counsel's deficiency in their investigation, there is a reasonable probability that when considering the totality of the available mitigation adduced at trial and at post-conviction and reweighing it against the aggravators, there is *reasonable probability*[40] that Tai would have received a life recommendation and sentence. *See Porter*, 558 U.S. at 41 & *Strickland*, 466 U.S. at 694. A probability that is sufficient to undermine confidence in the outcome of the penalty phase.

ARGUMENT II

THE COURT ERRED IN DENYING RELIEF AS TO CLAIMS 7 & 16.

The court found that the first prong of *Strickland* was met as to claim 7. P11/2065. However, the court erred in finding that the prejudice prong was not met and holding that "[i]n light of the fact that the State's evidence was substantially consistent, these is *no possibility* that the introduction of Higgins' prior convictions

[40] The court in assessing prejudice held "there is *no possibility* that it would have altered the jury's recommendation or this Court's weighing of the aggravating or mitigating circumstance" with regard to the additional information presented. This is not the correct standard. The court held "there is not a reasonable probability that the result of the penalty phase would have changed as a result of her [Hang's] testimony." This is not the correct analysis in assessing prejudice. P11/2069.

for purposes of impeachment would have changed the result of the trial." P11/2065. The court cites to *Hunter v. State*, 29 So.3d 256, 271-72 (Fla. 2008) in support of its ruling. However, *Hunter*[41] is not on point. *See Tyler v. State*, 793 So.2d 137 (Fla. 2d DCA 2001)("[W]here the record does not indicate otherwise, trial counsel's failure to impeach a key witness with inconsistencies constitutes ineffective assistance of counsel and warrants relief."). The jury never heard that Higgins was convicted of 9 felonies and 7 crimes of dishonesty[42].

Counsel prejudiced Tai by failing to be an advocate and impeaching the credibility of a prominent witness. This failure deprived the jury of the relevant and damning knowledge that painted Higgins as a dishonest person and a multi-convicted felon. *See Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)("[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested" and a "cross-examiner has traditionally been allowed to impeach, i.e., discredit [a] witness."). Therefore,

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[41] In *Hunter*, the appellant asserted "that the circuit court erred in denying an evidentiary hearing on his claim that the State withheld favorable evidence in violation of *Brady* and presented misleading evidence in violation of *Giglio*. Specifically, Hunter claimed that the State threatened witness Tammie Cowan with a life sentence if she did not testify against Hunter and that this threat was not disclosed to the defense." *Hunter* held that "[i]n sum, although Cowan was otherwise impeached at trial, evidence that the State had threatened her with a life sentence if she did not testify against Hunter was not presented. However, even though it was not presented, the impeachment value is limited in light of the fact that Cowan was otherwise impeached in several respects." 29 So.3d at 269-271.

[42] Certified copies of Higgins' convictions were introduced at the hearing. Counsel failed to obtain these readily available records. P7/1230-1349.

"there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" and the jury would have weighed Higgins credibility differently in comparison to Tai's. *Strickland*, 466 U.S. at 694.There is a sufficient probability to undermine the confidence in the outcome of the verdict because a multi-convicted felon could be found to be less credible. *See id*. The court's finding of "no possibility" is not the correct standard. P11/2065.

Higgins' convictions play a crucial role in discrediting his victim impact testimony presented in legal claim 16. The court erroneously held that Higgins' victim impact testimony was proper. P11/2063. Fla.Stat. §921.141(7) states:

> Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence *shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death*. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Higgins knew the victim because he had been dating her for about 2 months, and he had met her children only once about a couple of weeks before October 22, 2005. R8/922-3. He had been to the victim's home only twice before October 22, 2005. R8/927. Counsel made no specific objections to Higgins' victim impact statement which was read by Higgins to the jury. R12/6&75. Higgins provided the

following victim impact statement:

> "Since the events have happened, I'm still single, all I do is work. When I met Amy it was the happiest time I had in my life. I believe we had a potential for a long term relationship, not just with Amy, but with the girls as well. I think of her often and still hear the sound of her voice. We had a wonderful relationship and now everything is gone. Certain things still remind me of Amy, like a song on the radio, or maybe a drive in the car. I had to come to terms that she is gone, and I have to go on with my life, which is extremely difficult to do. That's the biggest challenge I've faced in my life. I know what I need to do, but it will take a very long time for me to move on. And Amy will always be with me."

R12/75. Counsel failed to move to exclude this testimony as Higgins did not demonstrate the victim's uniqueness as a human being and the resultant loss to the community. Higgins had a very brief relationship with the victim prior to her death and only met her children once. Higgins' statement focuses on the effect on him and what he speculated would happen in the future. This testimony is not relevant and is highly prejudicial as it provides sympathetic testimony of a life that could have been. Counsel's failure undermined the outcome of the penalty phase.

ARGUMENT III

THE COURT ERRED IN DENYING A HEARING AS TO CLAIMS 3 & 14.

A court can deny a claim without an evidentiary hearing "where 'the motion, files, and records in the case conclusively show that the movant is entitled to no relief.'" *Mungin v. State*, 932 So.2d 986, 995 (Fla. 2006) *quoting* Fla.R.Crim.P. 3.850(d)(footnote omitted). Moreover, "[f]or all death case postconviction motions filed after October 1, 2001, Florida Rule of Criminal Procedure 3.851 requires an

evidentiary hearing 'on claims listed by the defendant as requiring a factual determination.'" *Id*. at 995, n.8 *quoting* Fla.R.Crim.P. 3.851(f)(5)(A)(i). In post-conviction a defendant has the burden of establishing a legally sufficient claim. *See id*. *citing Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000). The court must support its denial by either stating the rationale or by attaching to its order specific parts of the record that refute each claim. *See id.* at 995-996 *citing Anderson v. State*, 627 So.2d 1170, 1171 (Fla. 1993). Also "[t]he need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record." *Holland v. State*, 503 So.2d 1250, 1252-1253 (Fla. 1987).

When a court summarily denies post-conviction relief without conducting a hearing, this Court must accept the defendant's "factual allegations as true to the extent they are not refuted by the record." *Rose*, 774 So.2d at 632 *receded from on other grounds by Guzman v. State*, 868 So.2d 498 (Fla. 2003) & *Mungin*, 932 So.2d at 996. Moreover, "[w]hen a determination has been made that a defendant is entitled to an evidentiary hearing, denial of that right would constitute denial of all due process and could *never* be deemed harmless." *Holland*, 503 So.2d at 1253.

In denying a hearing as to claims 3 and 4, the court stated that:

> There was no legal basis upon which trial counsel could have successfully objected to Dr. Bulic's testimony because he was qualified to opine on the victim's cause of death . . . Trial counsel objected when he felt that Dr. Bulic strayed into areas where the

> witness was not qualified to offer an opinion[43]. . . However, as to Dr. Bulic's testimony in general, any objection would have been futile, and counsel cannot be deemed to be ineffective for failing to make a futile motion.

P11/2063 (internal citations omitted). The legal basis was stated in the motion:

> Trial counsel rendered deficient performance by agreeing to the admission of *hearsay* testimony by Dr. Bulic regarding the contents and findings of Dr. Parsons' medical examiner files and his deposition. C. Ehrhardt, Florida Evidence §801.2 defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Furthermore, by agreeing to allow Dr. Bulic to testify as a conduit for Dr. Parsons, trial counsel waived Mr. Pham's *right to confront the witness* pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)

P1/49-52&87-91. Tai was denied his 6th Amendment right to confront witnesses when Bulic testified as a "surrogate" for Parsons in both phases. Bulic testimony as to the contents of Parsons' files and deposition constituted inadmissible testimonial hearsay. Counsel inexplicably agreed to allow Bulic to "review Dr. Parsons' file, testify to cause of death, the injuries, [and] type of injuries" without subjecting the State to their burden to prove unavailability. R9/1171. Counsel must subject the State to its burden, especially when they were having difficulties with attaining the

[43] The court cited to R9/1162-90 to support that counsel objected to areas that Bulic was not qualified to testify to. The first objection in reference to discovery was withdrawn. R9/1166-7. Counsel then objected to Bulic's opinion testimony as to using term "interesting" and then as to testimony about the "amount of force." R9/1171-6. Counsel next objected to cumulative evidence and to the presence of an inflammatory photograph. R9/1183-85.The final objection was as to the manner of death which counsel stated was an ultimate issue for a jury. R9/1188-9. These objections are irrelevant to Bulic being a conduit to hearsay testimony.

Parsons' presence. Counsel should have objected or moved to exclude Bulic's hearsay testimony because it violated *Crawford*. It was the State's burden to prove unavailability of their witness and the admissibility of Bulic's testimony pursuant to Fla.Stat. §90.704. The Confrontation Clause provides that:

> [i]n all prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Testimonial statements of witnesses absent from trial are admissible "*only where the declarant is unavailable*, and only where the defendant has had a prior opportunity to cross-examine.

Crawford, 541 U.S. at 59. Autopsy reports are testimonial evidence subject to the Confrontation Clause. *See U.S. v. Ignasiak*, 667 F.3d 1217, 1229 (11th Cir. 2012) & *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)(holding that a forensic laboratory report constitutes testimonial evidence, which is subject to the Confrontation Clause). *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), rejected the use of "surrogate testimony", holding that when introducing testimonial forensic evidence, the 6th Amendment requires the prosecution to present testimony from a scientist who was actually involved in the testing. In *Ignasiak*, 667 F.3d at 1220, the Court relying on *Crawford*, *Melendez-Diaz*, and *Bullcoming*, reversed the convictions

> because the admission of autopsy reports and testimony about those reports, without live in-court testimony from the medical examiners who actually performed the autopsies (and where no evidence was presented to show that the coroners who performed the autopsies were unavailable and the accused had a prior opportunity to cross examine the witness) violated the Confrontation Clause.

The above case law shows that counsel's objection to Bulic's testimony would not have been futile and had a valid legal basis. Counsel's compliance effectively released the State of its burden to prove up the circumstances surrounding the victim's death. This error was so serious that counsel stopped functioning as the 'counsel' guaranteed by the 6th Amendment and prejudice Tai by depriving him of a fair adversarial trial. *See Strickland*, 466 So.2d at 687. A hearing was necessary to make a factual determination as to the out-of-court agreement and to show there was no reasonable trial strategy.

ARGUMENT IV

THE COURT ERRED IN DENYING CLAIMS 8, 17, & 19.

The court erroneously denied relief as to claims 8, 17, and 19 that argued the cumulative effect of the errors committed by counsel in the guilt phase, the penalty phase, and in both phases rendered the trial proceedings unreliable. Tai did not receive a fundamentally fair trial entitled under the 6th, 8th and 14th Amendments of the U.S. Constitution. *See Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991). The sheer number and types of errors in Tai's guilt and/or penalty phases, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective

assistance of counsel that significantly tainted Tai's trial included, but not limited to counsel's failure to competently and timely investigate reasonably available mitigation, failure to present that mitigation to experts and to the jury, failure to object to the Bulic's hearsay testimony, and failure to impeach Higgins' with his felony convictions and crimes of dishonesty. These errors are not harmless and their cumulative effect denied Tai his fundamental rights. *See State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986) & *Ray v. State*, 403 So.2d 956 (Fla. 1981).

CONCLUSION

Based on the arguments and the records on appeal, the court improperly denied Tai post-conviction relief by improperly denying his Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851. Tai requests that this Court reverse the court's order denying relief, vacate his conviction and grant him a new trial; or grant him an evidentiary hearing on claims summarily denied; or grant such other relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by United States Mail to Tai A. Pham, DOC# 953712, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 26th day of June, 2014.

I HEREBY FURTHER CERTIFY that a PDF copy of the foregoing was served via electronic mail to **Stacey Elaine Johns Kircher**, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com on this 26th day of June, 2014.

I HEREBY CERTIFY that, in compliance with this Honorable Court's Administrative Order *In re: Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal*, dated February 18, 2013, a copy of the PDF document of the foregoing brief has been transmitted to this Court through the Florida Courts E-Filing Portal on this 26th day of June, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14 point font.

Respectfully submitted,

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