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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

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

The Appellant, Tai A. Pham, relies on his Initial Brief for all purposes, and offers the following reply to the Answer Brief of Appellee dated October 4, 2014. As in the Initial Brief of the Appellant the references to the record on appeal will continue to be referred to as "(R ___)" followed by the appropriate volume number and then page number(s), and 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 the same as in the Initial Brief. In this pleading the Initial Brief will be referred to as ("IB __") followed by the page number(s). The Answer will be referred to as ("A__") followed by the page number(s). All other references will be self-explanatory or otherwise explained.

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STATEMENT OF THE CASE AND FACTS

The Appellant submits that the Statement of the Case and Statement of Facts presented in the Initial Brief are far more comprehensive than in the Answer. IB/1-51. The Appellant would rely on the facts of the penalty phase at IB/2-3&64-69, and the facts of the hearing at IB/3-51, and the comparative analysis. The Appellant will address the Answer's recitation of the post-conviction proceedings from page 18 to 53; specific facts that that were incomplete, missing, mischaracterized, or out of context.

At A/33, the following statement was made about Dawn's testimony regarding the website for the Midwest Adoption Center:

> "Her agency has a basic-information website in 2000, but the current website *with the ability to link to information became active in 2010*. (V12, R169, 178)."

This statement improperly implied that the records could not be obtained until 2010. The complete testimony was as follows:

> "Our basic website was set up in 2000, and then *we added some links for forms and information in 2009*, and then revised it to the current website in 2010."

P12/169. Furthermore, the complete testimony was as follows:

> "As they existed in 2004, it was a basic information site, so there really wasn't the ability to link through to anything at that time, *but they provided contact information for how to get in touch with us from the website*."

P12/178. The implication that trial counsel could not get the records from Midwest

Adoption Center from 2005 to 2008, because of the lack of certain links on their website until 2010, is misleading. Dawn testified that in 2004, the website existed with their contact information and that the records could have been requested with a signed release. P12/175&178.

The A/35 stated that "Pham had *unexplained* incidences of angry outbursts and running away" and citing to page 220 of the post-conviction record on appeal. This statement is not supported by the testimony elicited through Verl. The actual questioning was as follows:

> "Q. And during that period that you were trying to establish this relationship with Tai, you've seen these incidents of you explained of outbursts of anger running away and hiding.
> A. Yes."

P13/220. Verl then explained the circumstances that led Tai to have emotional outbursts, to hide in closets, and to run away. IB/22-5.

Moreover, at A/36, it stated the following:

> "Pham *had a pattern of violent outbursts*. (V13, R245). Pham was the *worst case on her caseload*, and the *worst behaved* in the unaccompanied refugee population." (V13, R236.)"

(emphasis added). The foregoing statements were taken out of context and were misleading in painting Tai as the worst *behaved* child ever on Verl's caseload. The actual questioning clarifies Verl's testimony:

> "Q. And you've talked about working with many unaccompanied refugee minors?
> A. Yes.

> Q. And Tai in comparison to those children, those other children that you worked with, how was he in comparison?
> A. He was more like if he felt trapped or felt confronted he would react in an angry way or he would hide. One of the two always. I didn't have that with all my other kids. At least not to that degree.
> Q. And you said not to that degree, was Tai, you know, middle of the range, more worse, or –
> A. Not the worst on my case load, but as far as the worst on my case load, but as far as the worst on my case load from the unaccompanied refugee minor program, he – his were the worst as far as that population goes."

P13/236. The characterization of Tai's "violent behavior" also needs to be clarified. While in the custody of the Illinois DCF, Tai was not aggressive towards other children or adults. The complete testimony was as follows:

> "Q [State]. Do you know if he was aggressive towards other children in the placement where he was?
> A. No.
> Q. You don't know or he wasn't?
> A. No, he was not.
> Q. Was he aggressive toward the adults?
> A. No."

P13/245-6.

The A/37 presented a brief summary of Dr. Wei's testimony. In contrast the summary of Dr. Wei's testimony in the IB/26-29 is more complete and comprehensive.

The Answer presented facts through McGuinness' testimony that were not complete and require context to be accurate. The Answer stated as follows:

> "Douglas Harris was the initial lead investigator on Pham's case for about two years before McGuinness hired Jeffrey Geller *to take over*.

(V13, R313). *McGuiness and other investigators would routinely assist with Pham's case*. (V13, R314)."

A/37-8. The testimonies of McGuinness and Geller contradict any implication that there was an active investigation, until Geller looked at Tai's file months before the trial. P14/568-9. There was no evidence from McGuinness regarding what work, if any, Harris or any other investigator, outside of Geller, did in Tai's case. McGuinness did not recall any investigative requests prior to Geller's employment. The actual series of questions and answers was as follows:

"Q. How long was Mr. Harris the investigator, the lead investigator on Mr. Pham's case?
A. If Mr. Pham was arrested in 2005, which I recall, Ms. Harris left our employment in 2007, end of 2006, I believe, beginning of 2007.
Q. Are you aware at all of any, what, if any, work Mr. Harris did on Mr. Pham's case before - -
A. I don't recall. Mr. Harris was terminated from employment and he got wind of his termination and *he shredded a lot of his work product. So I really can't say how much work he did in the case*.
Q. Did you personally assist Ms. Harris on any investigations with regard to Mr. Pham's case?
A. *No, I didn't. . .*
Q. Was there a period of time when there was no particular investigator assigned to Mr. Pham's case?
A. Yes. There was period of time, *I believe it was two or three months where we didn't have an investigator over here in Seminole County specifically*. So before Mr. Geller was hired, myself and two other investigators from Brevard would routinely, you know, come over. . .
Q. And before Mr. Geller was hired, while you were working on his case for those two or three months, did you - - what, if any, investigations did you personally perform?
A. *I don't recall any investigative requests I received from the attorneys*."

P13/313-4.

The Answer referred to McGuinness' opinion testimony that "Gellar was 'very, very anal about his cases' and 'he really, really did a great job' *on Pham's case*. (V13, R317)." A/ 38. This statement was taken out of context. McGuinness was not specifically commenting on Geller's investigative work in Tai's case, but on Geller's record keeping habits. P13/316-7. The exact testimony was as follows:

> "Q. Do investigator logs exist in Mr. Pham's case?
> A. I believe they do. I believe that after Mr. Pham's case was concluded, the *logs* were - - *Mr. 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. The A/38 went on to make the following series of blanket factual statements regarding the investigation requests that require further elaboration or correction:

> "Gellar and McGuinness *wanted* to travel to Chicago and to Vietnam to follow-up on leads and to meet with witnesses in person. They *did not want to interview them on the phone*. (V13, R319). The request for travel for in-person interviews was denied due to financial constraints. (V13, R319). Securing interpreters was subject to the approval of the attorney's cost request. (V13, R320). Gellar and McGuinness consulted Caudill and Figgatt regarding Pham's sister in France and family in Vietnam. They also discussed the possible leads in Chicago, *but the attorneys informed them 'that we couldn't afford it.'* (V13, R322). Gellar offered to go to Vietnam if Caudill could get him approved for two weeks of paid vacation, *even though he did not speak Vietnamese*. (V13, R232). *Gellar retrieved some of Pham's records from Illinois*. (V13, R323)."

The full relevant questioning at the hearing was as follows:

"Q. And as far as you know, were there any - - did the Defense team in this case experience any financial constraints with regard to investigation?
A. There's always financial restraints with the State of Florida, so, yes. Our office if the same was, is we're underbudget and budget has been cut in the last few years and so Mr. Russo as the Public Defender was very frugal and - -
Q. Can you specifically recall anything that you or anyone on your Defense team asked for in terms of investigations, but did not receive because of financial reasons?
A. Yes.
Q. What was that?
A. We believe, 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 their body language, you can't, you know, interview them successfully by telephone as you can in person. . .
Q. *And did the investigators or the attorneys in your office sometimes travel to speak with these people in person*?
A. *At time, yes*. . .
Q. - - phase investigation. Okay. And did you have - - I *know you said you like to speak with people in person and not over the phone, but did you have capabilities of making international telephone call back then*?
A. *I believe we did.*
Q. And *did the office allow you to hire interpreters in cases* where one was needed?
A. It *would be up to the attorney to put in a cost approval request* and have it signed off by the Public Defender.
Q. Back in -- you mentioned a sister from, Mr. Pham's sister from France. Back in 2005 to 2008, were you aware that Mr. Pham had a sister in France?
A. Yes.
Q. How did you become aware of that sister?
A. It's something Mr. Geller brought up.
Q. And is it something that he came to you about?

A. When I said when I used to come over once or twice a week, as I still do, we would talk about the case, what he's done in the case and which way he wanted to proceed, and would, you know, would make plans and *it would be up to the attorney to approve it or disapprove of what Mr. Geller wanted to do*.
Q. And did you also know that Mr. Pham had a family in Vietnam still?
A. Yes.
Q. And, again, was this from Mr. Geller?
A. Yes. And *I believe he received that information through Mr. Pham*.
. . .
Q. Do you recall any conversations with the attorneys about contacting his family and friends in Vietnam?
A. Yes.
Q. And what do you recall about these conversations?
A. Basically that we couldn't afford it. Bottom line.
Q. Did you speak with Mr. Caudill or Mr. Figgatt or both?
A. *I believe it was both*. We used to have meetings with them. Jeff and I would, Mr. Geller and I would have meetings with Mr. Figgatt and Mr. Caudill.
Q. *Do you recall specifically who told you that you couldn't, that the office could not afford it*?
A. *No*. . .
Q. *Did the attorneys enlist the help of the investigators in determining what the cost would be*?
A. *Basically, no*.
Q. Okay. Do you know of any – are you aware of any requests for funds for traveling to Vietnam to interview Mr. Pham's family?
A. No. As a matter of fact, Mr. Geller even said, *told Mr. Caudill* in one of the meetings that if he can get him approved for two weeks vacation, paid vacation that he would go to Vietnam on his own time.
. . .
Q. Did Mr. Geller speak Vietnamese?
A. No he didn't. *He spent time there in the Army*.
Q. Okay. So he had been to Vietnam?
A.Yes. *Since he got out of the Army, I know he went back there at least once*. . .
A. I *believe* there was some records *that Mr. Geller did get from Illinois*."

P13/318-25. The full portion of the testimony demonstrated that it was not about definite wants by the investigators, but their opinions and preferences in doing interviews with Tai's family in person. McGuinness testified that the office had traveled in other cases and he believed they had phone capabilities. It further demonstrated that McGuinness could not recall which attorney told them that there were financial constraints and that it was ultimately up to the attorneys to request the funds and not incumbent upon the investigators. The Answer's indication that Geller offered to go to Vietnam on his own time even though he did not speak Vietnamese, ignored the testimony that Geller's experience of being in the Army in Vietnam and having returned to Vietnam. Also, the statement that Geller got record from Illinois is a belief that McGuinness had and not a fact. What is important about the foregoing testimony is that it contradicts trial counsel's testimony that there was no financial constraint. Thus, we clearly have an office that had credibility issues when it comes to whether the reasonable investigations of following up on known information was hindered because of finances or because they were not requested.

The Answer's statement of facts elicited from Caudill was not complete. Some of the missing testimony was that Figgatt was the ultimate decision maker; that there were no financial constraints in Tai's case; that Caudill had very little contact with Tai prior to his going to the FSH and that Figgatt had most of the

contact; that Caudill could not say that there was anything in particular that continued in the way of investigations while Tai was at FSH; and that Caudill felt that "the case was sort of fast tracked" to trial after Tai came back from FSH. P13/337-8, 341-2&IB/31-2. Again, the initial brief is more comprehensive.

The Answer highlighted that "**Pham was 'not very' cooperative with trial counsel upon his return from the hospital. (V13, R343)**."A/39. The Answer goes on to portray Tai's words as evidence of non-cooperation. A/39. Caudill actually explained what he meant by a "not very cooperative client" as follows:

> "A. Well, *Mr. Pham was suffering from what I remember talking about at the time with a sense of shame that was deeper than the, I don't want to call it the normal, normal amount of shame,* but the way I thought if it was because *I have learned enough about people from Southeast Asia and from Asian cultures to know that they think often in a much more generational sense than we do and there is much more of a concept and a different concept of impact on your family including your ancestors than we have in our, in my Anglo-Saxon culture that I come from, and he was suffering from that and I think the way that it affected him that I saw was he constantly*, when you would go see Mr. Pham, every conversation was, you don't need to do that. Whenever I would go and talk to him about that particular aspect of the case at the time what we were working on or investigating at that time, what we were preparing for trial at that time, what we were preparing for trial at that time, you don't need to do that, it's okay. He would be sitting as he is now with his head down not making eye contact with me and that was something that I had to get used to.
>
> He would on a consistent basis, especially because my primary role in preparation after he came back from the state hospital was preparation of mitigation for penalty phase, if we had to have one, and any time I would discuss those matters with Mr. Pham, he would say, you don't need to do that, it's not necessary, give me the death penalty. I heard that from Mr. Pham in every conversation that I had with him. He also was he was willing at times to talk about his family

> and in particular the way he felt like the authorities had interfered with his family - -"

P13/343-4. Tai was not a client who was uncooperative or who prevented his trial counsel from their job. When read in context, Tai wass a client who returned from FSH, had issues with shame and cultural differences and did not want to bother his counsel. Caudill could not recall a specific instance of "Mr. Pham saying, I'm going to tell those people to not talk to you." P13/381&IB/32. Moreover,

> 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.

IB/32-3.The foregoing testimony demonstrated that Caudill confirmed getting information about the family and Illinois from possibly Tai as well as from Thuy. It is clear that trial counsel had the familial and orphanage information, but without explanation or strategy, failed to make any reasonable efforts to follow-up. Also, at

A/40, the statement that "Pham was reluctant to see the recommended doctors" needs to be clarified because Tai did see the doctors as indicated below:

> "Q. Did Mr. Pham agree to see doctors that you sent to see him?
> A. Reluctantly, yes." P13/345.

Another fact that is mischaracterized was as follows:

> Caudill's review of the records from Illinois showed a pattern of violence and criminal activity, including two car thefts and a gun charge. (V13, R387). Caudill explained that they made a choice not to present this information because it did not lend evidence to their theory of the case, and presented harmful information that mental health experts could have used to make an unfavorable diagnosis like explosive disorder; which is the "last thing [they] want to have offered as a diagnosis for [their] clients in a capital case." (V13, R388-389).

A/42. Aside from the obvious response that it would have been impossible for Tai's attorneys to make a strategic decision not to present the records from the Illinois DCF, due to the harmful information contained therein when they did not have the records and did not even have the records in the first place, the false assertion that Tai had a gun charge is contradicted by Caudill's later testimony. The testimony regarding the gun charge was as follows:

> "Q [State]. There were also repeated instances of criminal activity, weren't there?
> A. There were and we knew about those as well.
> Q. Two car thefts and a gun charge, wasn't it?
> A. Yes, sir."

P13/387. Later, Caudill conceded that he had agreed to a fact about which he had no personal knowledge because he basically trusted that the State knew what they

were talking about when they asked the question:

> Q. Mr. Nunnelley asked you about a gun charge in the DCF records. I wasn't, I wasn't sure if I was aware of that. Can you tell me where you saw –
> A. I can't in particular. It may just have been when Mr. Nunnelley said it, I thought I would not expect Mr. Nunnelley to mention a gun charge that our client didn't have for one thing, so I thought he knew what he was talking about.
> Q. Okay. So is it fair to say you don't have any personal knowledge of the gun charge?
> A. I don't recall specifically that – it may be there and it may not be.

P14/408-09. The testimony on cross examination was not cited by the Appellee, thereby leaving the false and misleading impression that Tai had a prior gun charge when he did not. Furthermore, Caudill's willingness to readily agree to a fact posited by the State when he had no actual personal knowledge of that fact demonstrated a bias toward the State and undermines the credibility of his testimony as a whole.

Caudill's also agreed with the State during cross regarding the "repeated incidents of violence by Mr. Pham at a young age during that time" from the Illinois DCF records. P13/387. The phrase "repeated incidents of violence" used by the Appellee needs to be clarified. A close review of the records and the testimony of Verl clearly showed that Tai was not violent or aggressive towards others. He would have angry outbursts, he broke a trophy and window, he would run away and he would hide. It is obvious that Caudill is trying to excuse his ineffectiveness.

The Appellant would submit to this Court that a more complete factual basis

of Figgat's testimony was presented in IB/36-41, versus the Appellee's rendition. A/44-6. In particular the following relevant testimony regarding trial counsel's knowledge was not in the Answer:

> 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.

IB/36. Moreover, the following statement at A/44 needs to be clarified:

> Once able to effectively communicate with Thuy, she *gave them* the names and *information of the Pham family*. (V14, R480).

The actual testimony was that Figgatt could not remember if he had asked Thuy or Tai for any telephone or any other contact information for the family. P14/481-4. Later, Figgatt stated that it appears that after he received the family's information that he did not do anything with it. P14/484. Figgatt did not make a strategic or informed decision not to contact the family.

The Answer in trying to establish Tai as uncooperative stated the following:

> Sometimes Pham would refuse to see his defense team, and he had difficulty communicating with them when he was depressed. (V14, R488). Figgatt did not feel he hindered their investigations in the case. (V14, R488) . . .
> 'Mr. Pham was not necessarily communicative' with Geller, the defense investigator. (V14, R515) . . .
> There was a period of time when trial counsel could not communicate with Pham. (V14, R557).

A/44-6. Again, missing is the following testimony by Figgatt:

> *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.

IB/37-8.

The Answer stated that "There were a number of incidences of violence against the staff and patients while at Florida State Hospital." A/46. This is not the testimony of Figgatt but part of a cross-examination question that tried to embellish the number of incidents of violence. The actual answer by Figgatt referred to one incident and was as follows:

> " Q [State]. *Incidents* of violence toward staff and other *patients*, isn't there?
> A. Yes, *I think an incident* that occurred like the day before or two days before they staffed him out and determined him to be competent to proceed and sent him back here."

P14/555. A review of the FSH notes indicated that there was one incident with another patient on October 20, 2007, where Tai hung up a phone on an inmate after a troubling previous phone call and then that patient punched Tai and a fight ensued. P6/968. Tai was later was in a fight with the staff during a transport on October 26, 2007. P6/968. After this incident, Tai was given an additional Axis I diagnosis of Intermittent Explosive Disorder by Doctor Wu and he was prescribed Risperadol. P5/947&958-9. These were the only two incidents in the span of a

week while Tai was at FSH. Also, it should be noted that these two incidents were known at the time of trial because they were mentioned in the report by FSH to the Court. P6/968-9. The follow-up diagnosis by Doctor Kao-Shun Wu and medication prescribed was in the complete FSH documents. P5/947&958. The Answer's facts were misleading as to the number of incidents again.

Again, Geller's testimony was not comprehensive at A/46-7. The Initial Brief gave a more complete and detailed rendition of Geller's testimony and investigations. IB/41-2&58-60. What is clear is that any efforts by Geller were undermined by trial counsel's failures as presented in their testimony.

The testimonies of Drs. Lee, Abueg, Buffington[1], and McClaren in the Initial Brief are evidently more comprehensive than the version presented in the Answer. IB/36&42-51 & A/42-51&47-53. The Appellant would submit to the Court to in particular look at the important role that the collateral sources played in the expert's diagnoses in Tai's case. IB/42-51. In particular, that with all of the collateral information into Tai's background, Drs. Lee, Abueg and McClaren all came to the diagnosis of PTSD[2] that was related to crime. P16/907. The only

[1] The Answer did not address in its Argument the Appellant's argument that trial counsel was ineffective for failing to present obvious non-statutory mitigation that Tai suffered from substance abuse as found by Drs. Buffington and McClaren. IB/36&91-2.

[2] McClaren testified that he "*can't make*" a diagnosis for bipolar II because he c*ould not be sure* that Tai ever had a hypomanic episode. P16/889.

differing opinion is whether the degree of emotional disturbance was "extreme" at the time of the crime, which would be something a juror may reasonably find. P16/889-90

However, one statement will be clarified. In summarizing the testimony of Dr. Lee, the Appellee stated "PTSD crimes are those where the murderer just snaps and commits the offense. (V15, R737). In this case, Pham laid in wait for his wife for approximately an hour. (V15, R738)." A/50. The section of the transcript referenced by the Appellee wherein Dr. Lee is attributed with testifying that Tai "laid in wait for his wife for approximately an hour" actually read as follows:

> Q [State]. And about how long did Mr. Pham remain in his wife's or almost ex-wife's apartment before she arrived?
> A. I *believe* it was an hour.

P15/738. Although Dr. Lee agreed with the State's statement that with "offenses committed that tie to PTSD, the person just sort of snaps and commits the offense," Dr. Lee did not characterize these types of offenses as "PTSD crimes", a phrase which appears to be the construct of the Appellee. Furthermore, at no point did Dr. Lee testify that Tai "laid in wait." The distinction is important to note.

ARGUMENT AND CITATIONS OF AUTHORITY
APPELLANT'S REPLY TO ARGUMENT I

The Appellee's main arguments are that (1) trial counsel was not deficient because "the record reflects that counsel conducted a reasonable investigation"; (2) the evidence at the hearing was cumulative to and less mitigating than the evidence presented at the penalty phase; and that (3) "Pham's own lack of cooperation undermines his allegations of ineffective assistance of counsel for failing to investigate additional mitigating evidence." A/69-77. It should be noted that the Answer does not cite to the record on appeal in the argument section.

This is not a case where counsel made efforts in a timely and diligent manner and failed; this is a case where trial counsel failed to even attempt to make reasonable efforts to obtain available free public records and to contact readily available witnesses. There was so much more that was learned and presented about Tai from the reasonable investigations in the collateral proceedings, which were attempted and completed under stricter time constraints.

The A/69&72 stated that Geller's investigations included "researching family members, records, and the information relating to Vietnamese refugees and the 'boat people' specifically" and "mitigation investigations into Pham's family and background." A review of Geller's testimony, e-mails, and logs painted a different story. IB/58-60. Uncontroverted evidence from the investigator logs,

notes, and e-mails, 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 together whatever mitigation could be easily found. P14/516-8&IB/58-60. Geller never attempted to contact the family members in France or Vietnam. He was limited by trial counsel to the local witnesses. P14/580-8&P9/1641-2. His research regarding Catholic Services was limited to internet research. P8/1501-1511. There was no meaningful investigation into Pham's background because Geller was completely hindered by trial counsel who failed to assign the follow-up investigative requests.

Argument I of IB goes into depth as to all of the evidence and case law in support of its argument that trial counsel was deficient in doing a reasonable and timely mitigation investigation into *Tai's life*. The implication that Geller had gone through an exhaustive investigative search and was unable to find the records is incorrect. This is not a case where the investigator or trial counsel made all reasonable efforts to obtain the records and they were unsuccessful. This is a case where reasonable efforts were not made due to the fault of trial counsel. Geller testified that he had requested travel to Illinois, but it was either never submitted by counsel, overlooked by counsel, or was denied for financial reasons. This highlights the disarray of the investigations in Tai's case.

As argued in Argument I of IB, the penalty phase failed to tell the jury Tai's

story; it gave you nuances of Tai's journey from Vietnam and very little about his life in Illinois. The "primary purpose of the penalty phase is to insure that the sentence is individualized by focusing on the *particularized characteristics* of the defendant." *Brownlee v. Haley*, 306 F.3d 1043, 1074 (11th Cir. 2002) (emphasis added) & *see also Debruce v. Commissioner, Alabama Dept. of Corrections*¸-- F.3d -- (2014). Moreover, "[b]y failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudice[s] ability to receive an individualized sentence." *Brownlee*, 306 F.3d at 1074 (internal quotation marks omitted). The differences between the predominantly generalized penalty phase presentation and the Tai-specific post-conviction presentation were laid out in IB/64-75. It shows that the post-conviction testimony was not cumulative.

The A/71-72&80 argued that Thuy was the "best witness to testify as to Pham's background." This is incorrect as Thuy, who was also a child, provided brief and general testimony as to her experiences in Vietnam and some of the conditions; she gave brief testimony of her and Tai's experience underneath the boat but she had passed out and awoke in a hospital; she was separated from Tai at the prison camp in Malaysia and only occasionally saw Tai; and she saw Tai only at meals at the Catholic Services orphanage, until she was adopted. IB/65-7&R12/77-102. In contrast, the families' testimony gave a detailed, complete, and

accurate picture of Tai's entire life in Vietnam and the first harrowing attempted escape with Hang. The testimony from the Dr. Wei, Otteson, and Verl also gave a detailed look into the difficulties and struggles that Tai suffered while in the custody of Illinois DCF. Thuy was not living "alongside" Tai in the orphanage. A/72. Thuy testified that they stayed at different places and she saw him when they would eat. R12/100-1. Every family and lay witness provided additional, non-cumulative, and accurate testimony of Tai's life.

A/69-70, referred to Foshee's testimony and the CBC video. It should be re-emphasized that Foshee was never boat person and that she could not testify as to the conditions of the refugee camp in Malaysia, where Tai was, because she *never* visited the camp. IB/68-9. The trial court acknowledged that Foshee could not testify as to her experience at the prison camp because there was no nexus to Tai's experience in the prison camp. P13/271-2. Therefore, the statement that she testified about "the experiences of the Vietnamese in the refugee camps" is misleading and too broad. A/70&IB/68. Moreover, the Answer stated that the CBC documentary "illustrated the hardships undergone *by Tai* and other refugees." Tai was forced out of Vietnam about 2 or 3 years after this video. The CBC video does not specifically show the hardships undergone by Tai or even the specific camp that he was at. Caudill testified that he never found a video depicting the camp Tai was at and that he could not find anything *on the internet* "that was *specifically*

about Mr. Pham's background and experience." P13/358&378. Foshee and the CBC documentary were too general and failed to relate specifically to Tai and to relate the jury to Tai's plight and traumatic experiences. The family that testified at the hearing gave complete, accurate and first-hand testimony as to the plight and experiences of Tai as a child forced not once but twice to leave everything he knew and loved behind.

A/70-1 further argued that the post-conviction court pointed out that "the experts did have the benefit of documents not specifically obtained by defense counsel, such as Illinois DCF records when Riebsame notes, '. . . The Illinois mental health professionals would have recognized them as well.'" This statement is found in a footnote in the post-conviction's order and stated as follows:

> There are certain indications in the transcript that these records were inspected by the experts, but those statements were *not corroborated* by the testimony at the evidentiary hearing. For example, at the *Spencer* hearing, Dr. Riebsame stated, 'You'd expect to see his cognitive deficits since the age of ten. The Illinois mental health professionals would have recognized them as well.' (ROA 18, P.129). This *implies* that he reviewed those records and found no such notation. While it is *undisputed that counsel did not obtain those records directly*, they *may have been* included in the Florida DCF record provided pursuant to counsel's Motion to Compel.

P11/2066, footnote 4. The court and the Appellee have taken Riebsame's quote out of context. At IB/77-8, the context of Riebsame's testimony is presented as follows:

> 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); he did not have evidence of long periods of 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.

(internal footnotes omitted). There is no credible evidence that the experts had access to any of the Illinois DCF records. The court without any evidence blatantly speculates that the Illinois record may have been in the Florida DCF records or that it implied that Riebsame had seen those records. This assertion by the Appellee and the court is contradicted by Riebsame's foregoing testimony where he clearly stated he did not have evidence of Tai's schooling, Tai's poor behavior, long periods of instability, or disciplinary or counseling records. Riebsame simply hypothesized that if Tai had a history of cognitive deficits that the Illinois mental health professionals would have recognized it. 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[3] all found evidence that

[3] Dr. McClaren agreed that the Illinois DCF records were *helpful in coming to his opinion* and *understanding Tai as a child*. P16/903-4.

Tai suffered from some degree of brain dysfunction/cognitive difficulties as supported by the records and witness testimony. P15/678-84&P16/895-6. None of the trial experts had this information because none of them had the Illinois DCF records. Furthermore, it is clear no one at trial obtained them whatsoever.

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. Dr. Day's testimony did not establish both mental statutory health mitigators because none was found by the trial court. Furthermore, the mental health picture presented by Dr. Day of Tai was an unintelligent depressed individual. She suspected PTSD and bipolar disorder but she did not have the necessary background information to make the diagnosis. In contrast at the hearing you have undisputed PTSD diagnosis, a major mental disorder, and the diagnosis by Dr. Abueg of bipolar. P16/827-8. This is a "significantly different" and comprehensive mental health picture of Tai.

When a jury is assessing the moral culpability of a person and recommending whether the person lives or dies, it is constitutionally imperative that trial counsel try to, through adequate investigation, present a profile that provides the "particularized characteristics" of the client and gives "an accurate life profile." *Johnson v. Sec'y, Dept. of Correc.*, 643 F.3d 907, 935 (11th Cir. 2011);

Williams v. Allen, 542 F.3d 1326, 1339 (11th Cir. 2008); & *see Wiggins v. Smith*, 539 U.S. 510, 538, 123 S.Ct. 2527, 2544, 156 L.Ed.2d 471 (2003). Tai's penalty phase was not a particularized sentencing; it was a general story about unaccompanied Asian refugees or boat people. A thorough reading of Thuy's testimony at the penalty phase[4] will clearly demonstrate that she did not provide details that included but are not limited to Tai's birth, Tai's infanthood, Tai's difficulties as a child, Tai's first attempted and traumatic escape, Tai's emotional trauma of his first attempted escape and the joy of his return home, and Tai's difficult life at Tha Huong and in the foster care system. Tai's trial "counsel abandoned their investigation of [his] background after having acquired only a rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U.S. at 524

Trial counsel failed to tell Tai's story because they failed to even attempt to contact the available family members and they failed to reasonably follow-up on Tai's life in Illinois. It is clear that the evidence at the evidentiary hearing provided an accurate and complete understanding of Tai's life history. *Williams*, 542 F.3d 1326. It was not cumulative and it was certainly a lot more mitigating and emotionally charged presentation. Tai's traumatic childhood and its effect were evident from when he first came to Illinois and all of those behaviors led to the

[4] The whole testimony was presented as a bullet-point at IB/65-7.

undisputed diagnosis of PTSD. Tai's extreme major mental disorder was left untreated and per the defense experts' opinions led to the circumstances of the murder. Regardless of how many experts were seen by Tai at trial, it is through the fault of trial counsel that none of those experts were provided the necessary background records and witness information or testimony that accurately explained and supported the undisputed PTSD diagnosis. A/71. The ultimate duty falls on counsel to make the reasonable efforts to provide his experts with the necessary background and collateral information. This is a case where the jury never heard Tai's story due to lead trial counsel Figgatt's admitted failure to thoroughly and effectively investigate his client's life. The ineffective assistance of counsel tipped the scales in favour of a recommendation and sentence of death.

The Appellee argued that the evidence presented at the hearing was less mitigating and less compelling than at trial. A/5, 74, 80&81. Yet, the Appellee also in the same pleading describes the hearing as the assembly of a "dream team" of hand-picked experts implying that the mental mitigation presentation was better. A/81.The IB detailed the compelling, emotionally charged, and credible testimony that was presented at the hearing and compared it to the penalty phase testimony. IB/64-75.

A/81 presented the following rhetoric that was not argued in the Initial Brief:

To say that defense counsel was deficient for not assembling a "dream

> team" of hand-picked experts from all over the country[5]; employing unlimited resources to obtain travel Visas[6]; securing family members from the far reaches of the globe[7]; and employing every individual that has ever seen the defendant, even if the last relevant contact from that person is over 20 years ago[8]; is simply not a workable standard. Such a standard ignores the practical reality that trial attorneys are necessarily limited by time and resources, which does not render their performance unreasonable.

The Initial Brief clearly argued the two prong *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) standard in support of the fact that trial counsel was ineffective in Tai's case. Trial counsel was deficient because he failed to begin with simple phone calls to the family and to make reasonable diligent efforts to obtain free and complete records from Illinois and FSH. There was no credible evidence of financial constraints. Figgatt testified that he never investigated travel to Vietnam, but that France "would have been no problem" and that the office "had brought people from the UK before and [he] didn't see an obstacle with France." P14/560. Furthermore, Figgatt testified that in a death penalty he did not need to justify a witness if he needed that witness. P14/560.

If it is the State's position that "the practical reality" of limited time and resourced hindered trial counsel from providing effective assistance of counsel as mandated by the Constitution of the United States and the State of Florida, then Tai

[5] Drs. Lee and Abueg both flew in from California.
[6] There was no testimony as to these "unlimited resources."
[7] The family came from Vietnam and France via plane.
[8] The assumption is that the Answer is referring to the historical testimony from Dr. Wei, Otteson, and Verl.

should be granted a new trial because the practical reality is that it is his life that lies in the balance. In this case, trial counsel had all of the information and failed to make even the most basic efforts to follow-up on the information. There were no financial constraints or request for "unlimited resources" from the Public Defender. The time constraints were due to trial counsel's failure to diligently investigate the case and to wait until right before trial to do almost all of the mitigation.

When a person's life lies in the balance, counsel has a duty to investigate in order to make the adversarial testing process work. *See Strickland*, 466 U.S. at 690. 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). 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* that Tai would have received a life recommendation and sentence. *See Porter v. McCollum*, 558 U.S. 30, 41, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) & *Strickland*, 466 U.S. at 694. A probability that is sufficient to undermine confidence in the outcome of the penalty phase. IB/89-92.

This Court in *Walker v. State*, 88 So.3d 128 (Fla. 2012) made it clear that trial counsel is not absolved of his duty to conduct a reasonable mitigation even if

the client objects. This Court held the following:

> In evaluating alleged deficiency during the penalty phase, this Court has recognized 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). "In the penalty phase of a trial, '[t]he major requirement ... is that the sentence be individualized by focusing on the particularized characteristics of the individual.' " *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1354 (11th Cir.2011) (quoting *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir.1987)). "Therefore, '[i]t is unreasonable to discount to irrelevance the evidence of [a defendant's] abusive childhood.' " *Id.* (quoting *Porter*, 130 S.Ct. at 455). We have specified that "investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.' " *Blackwood v. State*, 946 So.2d 960, 974 (Fla.2006) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). This Court has also specifically noted that "both *Wiggins* [, 539 U.S. at 524,] and the ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases § 10.11 (rev. ed. 2003) on counsel's duties mandate mitigation investigation and preparation, *even if the client objects*." *Henry v. State*, 937 So.2d 563, 573 (Fla.2006) (emphasis added).

Walker, 88 So.3d at 137-38. Moreover, it is clear that when trial counsel fails to even *attempt* to get available background records and contact available family members there is deficiency, even with a reluctant client:

> First, even if Walker was resistant to defense counsel's efforts, defense counsel's failure to *attempt* to collect background records and testimony from available family members and friends supports the conclusion that counsel's performance was deficient. *See Cooper*, 646 F.3d at 1354; *Henry*, 937 So.2d at 573 (noting that counsel must investigate mitigation "even if the client objects"); *cf. Peede v. State*, 955 So.2d 480, 493 (Fla.2007) (finding counsel not ineffective where "the record supports both the finding of lack of cooperation by Peede *and counsel's efforts notwithstanding Peede's recalcitrance* ")

(emphasis added).

Id. at 141.

A/72 stated as follows:

> Pham was alternatively, quiet and withdrawn or angry and belligerent[9], and did little to assist in trial counsel's mitigation investigation. *Trial counsel[10] testified at the evidentiary hearing that there was an indication that had they pursued additional members of Pham's family, they would lose cooperation of his sister Thuynga, who was crucial to the case.*

First, it is clear that Tai has mental health and cultural issues which led to some reluctance, but it does not absolve trial counsel of his duty to perform a reasonable investigation into Tai's background. *Strickland*, 466 U.S. 668. If anything, it highlights the importance of using collateral evidence such at the records from Illinois, the witnesses from Illinois and the familial witnesses from Vietnam to provide background information into Tai's life and also help carve the questions for the expert witnesses. This is what Drs. Lee, Abeug, and McClaren did. They all testified that the collateral evidence was invaluable to them. P15/678-84&P16/895-6. Secondly, there was no testimony that Tai was angry or belligerent towards his counsels or defense experts.

Furthermore, Caudill did not testify that they pursued the additional family members. Caudill did not "know that we actually ever made an effort to contact the

[9] This was during the competency evaluation with Riebsame.
[10] This reference is to *only* Caudill. The Answer does not cite to these assertions.

family that was still in Vietnam." P13/356. He did not recall any attempts to get the Illinois DCF or the complete FSH records. P13/360-3. Caudill testified that he had *a concern* that Tai would at some point tell family members not to cooperate, but he acknowledged that at no point did Tai tell people not to contact trial counsel. P13/381. In contrast, Figgatt testified that he had no concerns that Tai would tell his family not to cooperate and they were never rebuffed by any family members. P14/554. This is not a case where Tai made a knowing and intelligent waiver of mitigation evidence, which he could not do so prior to his attorney's thorough investigation of what mitigation might be possible and his clear understanding of what he was waiving. *See State v. Lewis*, 838 So.2d 1102 (Fla. 2002).

In support of their argument, the Appellee cited *Rodriguez v. State*, 919 So.2d 1252 (Fla. 2005); *Cherry v. State*, 781 So.2d 1040 (Fla. 2000); & *Rose v. State*, 617 So.2d 291 (Fla. 1993). These cases are easily distinguishable from the case at hand. In *Rodriguez*, counsel was not found ineffective for failing to investigate mitigation where the defendant "did not want his family involved and refused to offer information that would have helped in the presentence investigation." *Rodriguez*, 919 So.2d at 1263. In *Cherry*, counsel was not deficient in failing to investigate and present mitigating evidence because the defendant refused to communicate with trial counsel or provide him with names of witnesses to call for mitigation purposes. *Cherry*, 781 So. 2d at 1050. Finally in *Rose*, this

Court found that counsel did not render ineffective assistance where the client indicated that his family would not be helpful to him and the penalty phase presentation was limited by the defendant's insistence of presenting a defense that he was innocent and not present at the scene of the murder. *Rose*, 617 So.2d at 294. In contrast, Figgatt testified that although Tai had difficulty communicating when he was depressed, he did not hinder any of counsel's investigations and would not have stopped them from speaking with his family, whose names he obtained from either Tai or Thuy. P14/488-9, 480-1&554. Unlike the attorneys in the above cited cases, who had hit a veritable dead-end in the investigation and/or presentation of mitigation due to the actions of their clients, Tai's counsel possessed numerous leads (including the names of Tai's family in Vietnam and France, as well as the knowledge that Tai spent time in foster care in Illinois and FSH) that Geller was eager to pursue, but was never given the authorization to do so. P14/574, 599&618.

A/74-5 pointed to incidents to show that Tai was uncooperative, but it should be noted that the Answer *only* refers to the period when Tai was going through c*ompetency evaluations*. When McClaren, Lee and Abueg evaluated Tai in preparation for the hearing, they had the benefit of collateral witness testimony and background documentation and also a competent client. The Initial Brief from page 86 to 89 chronologically showed that outside the period right after the arrest and during the competency period, Tai was actually cooperative with Day, Riebsame

and Olander. The trial and post-conviction record does not support the lower court's finding that Tai was more forthcoming in post-conviction than at trial.

Finally, the Appellee asserted that "[t]he background investigation in this case was comparable to the mitigation preparation found constitutionally adequate in *Bobby v. Van Hook*, 130 S. Ct. 13 (2009)." A/75. No such correlation exists. In *Van Hook*, between indictment and trial, counsel spoke with his mother nine times, "once with both parents together, twice with an aunt who lived with the family and often cared for Van Hook as a child, and three times with a family friend whom Van Hook visited immediately after the crime." *Van Hook*, 130 S.Ct. at 18. In contrast, Tai's trial counsel not did even attempt to contact a single member of his family in Vietnam, his sister in France, Otteson, Verl, and Dr. Wei, all who evaluated or worked with Tai when he was in foster care. Instead they relied solely on witnesses who resided locally, not because they were better witnesses or because they knew Tai better, but out of convenience. Additionally, Van Hook's attorneys met with a representative of the Veteran's Administration and attempted to obtain his medical records. *Van Hook*, 130 S.Ct. at 18. There is no mention in the opinion of records that were presented in post-conviction, which trial counsel did not obtain. In contrast, Tai presented the Illinois DCF and full FSH records.

A/76 stated that the jury was "well aware that Pham had been *slower than his siblings as a child*" and on A/76 stated that the jury knew that Tai "had been

forced to leave his family and his home with his sister." The Answer does not cite to the record for these incorrect factual assertions. There was no testimony at trial comparing Tai to his siblings and there was no testimony by that Tai was forced by his family twice to leave his family and home. IB/65-73. There was only a brief reference by Day that she learned that from Tai that he was told he was going to the zoo. Finally, there was an error in footnote 12 on A/82, which stated that the "jury heard testimony from Dr. Jacquelyn Olander." Olander was hired after the jury recommendation and testified only at the *Spencer* hearing. R18/1134-1219.

APPELLANT'S REPLY TO ARGUMENT II

The Appellant had fully argued the issue of prejudice of the failure to investigate and impeach Higgins' credibility with his multiple felony and crimes of dishonesty convictions at IB/92-95. The court did find that deficiency prong was met. P11/2065.

APPELLANT'S REPLY TO ARGUMENT III

The case law presented in the Initial Brief is the appropriate applicable case law. IB/95-9. The autopsy reports were certainly prepared for purposes of litigation to determine the manner and cause of death and to prove up the HAC aggravator. P11/2067. The report was formulated after Tai was arrested, used to indict, convict and sentence him to death at a criminal death penalty trial. Therefore, *Williams v. Illinois*, 132 S.Ct. 221, 183 L. Ed. 89 (2012), and the accompanying case law cited

by the Answer is inapplicable. A/92-95. There was no testimony as to whether Parsons was unavailable for the trial proceedings (and a hearing was not granted as to this fact in question). Therefore, *Schoenwetter v. State*, 931 So.2d 857 (Fla. 2006), does not apply as well.

This is clearly a case where 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. *See Bullcoming v. New Mexico*, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011). Bulic was not forming his own opinion based on Parson's report; there was no raw data produced by scientific instruments that Bulic was relying on; and Bulic was not relying on a pathologist to come to an opinion. Bulic was strictly supposed to testify from Parson's hearsay report and files. IB/97 and 97, footnote 43. Therefore, *Smith v. State*, 28 So.3d 838 (Fla. 2009), *Geralds v. State*, 674 So.2d 96 (Fla. 1996), and the accompanying case law is again inapplicable. A/95-96.

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. 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.

APPELLANT'S REPLY TO ARGUMENT IV

The Appellant has fully argued and litigated this issue at IB/99-100.

CONCLUSION

This Reply has demonstrated that there are a number of discrepancies in the factual bases between the parties. The Appellant submits that the Initial and Reply briefs provide a more accurate and comprehensive rendition of the facts along with citations to those factual assertions. The arguments in the Appellants' briefs necessitate a careful assessment of the facts at trial and at post-conviction. Again, the Appellant requests that this Court reverse the court's order denying relief, vacate his conviction and grant him a new trial; or grant him a hearing on claims summarily denied; or grant such other relief as this Court deems just and proper.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply 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 14th day of October, 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 14th day of October, 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 14th day of October, 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.

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