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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 14-787

CHARLES GROVER BRANT

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, HILLSBOROUGH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Brant's motion for post-conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

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

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE

39-year-old Charles Brant, a devoutly religious, married father of two sons, with no prior criminal history, went on a methamphetamine-fueled- binge that raged out of control and resulted in the tragic rape-murder that is the basis of this case. Brant's court -appointed counsel's constitutionally deficient performance resulted in Mr. Brant pleading guilty as charged and waiving a penalty phase jury. Trial counsel's documented and specific failings, including but not limited to – failing to conduct any investigation about Brant's purported biological father, failing to follow up on a judge's recommendation to consult a specialist expert on the effects of methamphetamine, and failing to consult with a prison expert after identifying the need to do so – fell below the wide range of professional norms. Trial counsel's failure to adequately investigate Brant's family background and discover mitigating evidence was not a reasoned strategic decision but the result of inattention and neglect.

Trial counsel's superficially reasonable penalty phase presentation does not preclude a finding of prejudice. This is not a case where the additional mitigation information is merely cumulative. Post-conviction counsel presented compelling mitigation not presented at trial – including that Brant himself was conceived in a rape.

In denying relief, the post -conviction court misapprehended the performance and prejudice standards and misapplied the law to the facts. Due to trial counsel's substantiated deficiencies and compelling new mitigation, this Court should grant Mr. Brant a new trial where he can be represented by constitutionally effective counsel. Mr. Brant has the right to have his sentence determined by a jury who can make an accurate and individualized sentencing determination informed by the abuse, neglect, rejection, brain damage and addiction that framed his life from the moment of conception.

Procedural History

Charles Grover Brant was charged by Indictment on July 14, 2004 with one count of first degree premeditated murder, sexual battery, kidnapping, grand theft auto and burglary of a dwelling with assault and/or battery which occurred on July 1, 2004. Upon advice of counsel, Mr. Brant pled guilty to all crimes as charged on May 25, 2007. He received no negotiated benefit for his guilty plea and continued to face the death penalty. Jury selection began August 20, 2007 and ended the next day when the Honorable William Fuente struck the entire jury after jurors made comments about Mr. Brant's guilty plea and desire to sentence him to death. Trial counsel described jury selection as a "debacle." TR (Supp.) V. 18, p. 1958.

The next day, August 22, 2007, Brant waived his right to a penalty phase jury and proceeded to a bench trial. The court heard evidence over the course of two and a half days and ultimately sentenced Brant to death.

The trial court found only two aggravators -that the murder was committed during a sexual battery and HAC. The court gave both factors great weight. The court found 13 mitigating circumstances which are set out in this Court's Opinion on direct appeal, the trial court's Sentencing Order, and the Order denying post-conviction relief. *Brant v. State*, 21 So.3d 1276 (Fla. 2009); R V. 18, p. 3472-75.

Mr. Brant filed a timely 3.851 Motion which had to be amended several times after protracted public records litigation. The court held an evidentiary hearing. The court denied the 3.851 motion January 13, 2014, and denied rehearing February 21, 2014. This timely appeal follows.

STATEMENT OF FACTS

The State offered the following factual basis to support the guilty plea entered by Brant. TR V. 4, p. 644-45; 785-87. Brant and the victim, Sara Radfar, were neighbors. On July 1, 2004, Brant went inside Ms. Radfar's home after telling her he wanted to take some photos of the tile work he had previously done for her. Once inside, he raped her and then strangled her twice. He left the residence, driving her car. He returned home later and asked his wife to cut his hair. His hair, and

items belonging to Ms. Radfar, were found in Brant's garbage. Mr. Brant gave a statement to law enforcement admitting to the crimes.

Upon advice of counsel, Mr. Brant pled guilty to all counts in the Indictment, reserving his right to appeal the court's denial of his Motion to Dismiss Count 3 (kidnapping). TR V. 4, p. 644, 785-87.

Jury selection began on August 20, 2004. TR V. 17, p. 1651. (Supp). Upon being informed that Brant had been found guilty, Juror Brenda Ricci stated, "He's guilty, he's guilty and I'm really tired of the system being wasted, to be honest with you." TR V. 18, p. 1816-17. Ms. Ricci continued,

> Yes, I was upset just hearing what the judge described … *and the five guilty verdicts that were already decided*. I mean, this was three years ago. I don't understand due process to me. (sic).

Id. at 1817-18. Upon request by counsel, the trial judge inquired of the Panel if anyone else agreed with Juror Ricci. Id. at 1820. Approximately 19 potential jurors agreed with Ms. Ricci. Id. at 1828, 1830-1832.

As jury selection continued, some of the potential jurors continued to express similar views. Juror Parker stood up and told the prosecutor, "Seriously. I mean, I totally agree. *We all know*, I mean, I'm on your side. *I will put him to death*." Id. at 1952, 1954. The prosecutor thanked the juror. Id. at 1952.

Defense counsel renewed his motion to strike noting that the jurors had laughed after Juror Parker's comment. The trial judge agreed: "Then there was

laughter, yes." *Id*. at 1954. The court "reluctantly" granted the defense motion over the State's objection, determining that the jurors "starting with Ms. Ricci," created an "atmosphere" that warranted striking the panel. Id. at 1964-1966.

The very next day, Brant waived a penalty phase jury. TR V. 7, p. 1- 16. Brant told the court he had stopped taking his depression medication about two months prior to waiving the jury. Id. at 11-12. The next day, the State put on the record that in a recorded jail phone call made by Mr. Brant the night before, Mr. Brant told a friend that, "pleading guilty was a big mistake." TR V. 8, p. 244.

Penalty Phase:

The State presented a number of witnesses to establish aggravation, the details of which are set out in *Brant v. State*, 21 So.3d 1276, 1277 -1283 (Fla. 2009); *see also* TR V., 7, p. 21- 128; TR V. 8, p. 131-240 (Brant's ex-wife described Brant's drug-use and frequent and escalating pattern of acting out rape fantasies); TR. V. 9, p. 248. The defense presented witnesses in mitigation that testified about Brant's abusive step-father, Marvin Coleman, Brant's maternal family history of mental disorders, his borderline verbal intelligence and under-utilization of glucose in his brain, Brant's drug use which enabled him to work longer hours, his depression, his past history of hard work, his attendance at Bible College, that he was a loving father to his two sons, and that he was remorseful and cooperated with law enforcement. *See also Brant*, 21 So.3d at 1280 -82.

Midway through the trial, on Friday, August 24, 2007, Fraser told the court that Drs. Wood and Wu were to testify the following Monday. TR V. 10, p. 365 - 369. Fraser said he was "uncomfortable" because he had learned from "Mrs. Maloney … that the PET scan does not display well in court." *Id*. Fraser did not suggest Dr. Wu or Dr. Wood's opinions were "invalid," but that the PET "does not project for a layperson what it does for an expert." *Id.*

The record shows that Fraser was undecided about whether to present the PET scan images until the last day of the trial. Id. at 367; TR V. 11, p. 540 -582. He told the Court he had not seen the images and was going to do so before making a decision. But, because of a lightning storm and his admitted lack of computer skills, he never viewed the images. R. V 43, p. 549-51; V10, p. 1903. When he announced to the court that he was not going to present the images, the State asked the court to inquire if Brant had acquiesced in the decision, but Fraser refused to allow the court to inquire. TR V 11, p.581-82. "I don't care whether Mr. Brant agrees with the decision. It's my decision. It's my decision to make and he virtually has nothing to say about it Your Honor. So I object to the Court inquiring." *Id.*

The court conducted a Spencer Hearing on October 8, 2007. The court took additional testimony from Brant's ex-wife and the State introduced transcripts of Garrett Coleman's statements given to the State on August 27, 2004 and July 19,

2006. TR V. 7, p. 1181-1189. The court sentenced Brant to death. TR. V. 4, P. 640 – 683; TR V. 7, p. 1191-1212. This Court affirmed.

Post-Conviction Hearing:

At the evidentiary hearing, Brant presented testimony from lay and expert witnesses. The State presented no witnesses. The facts elicited at the evidentiary hearing are summarized as follows.

Trial Counsel's Investigation

The court appointed attorneys Rick Terrana and Robert Fraser, on July 19, 2004. Prior to that, Brant's mother, Crystal Coleman, had retained Jerry Luxenberg. Crystal told Luxenberg that Brant was a heavy user of methamphetamine. RV 43, p. 445. Luxenberg did not stay on the case because Crystal could not afford to pay him. However, Luxenberg gave Crystal a newspaper article about the effects of methamphetamine on a person's brain: "This is Your Brain on Meth, A Forest Fire of Damage." RV 14, 264-67; RV 43, p. 449. He gave her the article because it was "quite germane to this case" based on Brant's drug use *Id.* at 449. Had he stayed on the case, he would have investigated the effects of methamphetamine on Brant's brain. *Id*. Crystal gave the article to Terrana because she thought it was important. RV 50, p. 1508-09. Luxenberg never spoke to Terrana or Fraser but would have done so had they called him. RV. 43, p. 449.

Terrana represented Brant on the guilt phase. *Id.* at 445. He had never, prior to Brant's case, had a capital client plead guilty as charged without an agreement for a life sentence. *Id*. at 18. He also had never had a client plead guilty and waive a sentencing phase jury. *Id*.

Terrana focused his theory of defense in the guilt phase on trying to attack Brant's confession and on his methamphetamine use. *Id.* at 455-57. Terrana said that it was "obvious" that they needed a "drug expert." *Id*. at 458. Terrana sent out form letters to a "number of psychologists and/or psychiatrists and/or toxicologists seeing if they could help." *Id*. at 22. Terrana agreed that Brant's methamphetamine use could have been used as a mitigator in the penalty phase. *Id*. at 463. Any decisions on how to present Brant's methamphetamine use in the penalty phase would have been made by Fraser. *Id*. at 464.

Terrana stated that he and Fraser did not retain or file a motion for a jury selection expert. *Id*. at 471-72. Terrana "loved jury selection experts," had used them and thought there was no downside to using them. *Id*. Terrana did not remember the theories or discussions he had with Fraser about how to address the jury in light of the fact that Brant had already pled guilty. *Id*. at 471. The decision about the strategy of questioning the jurors was "left up to Fraser." *Id.* Terrana described Brant's jury selection as a "debacle. We had jurors standing up." *Id*. at 473. When the jurors found out Brant had already pled guilty, the "overwhelming response" of

the jurors was that "it looked like a riot was about to take place." *Id*. The jurors were angry and questioned why the court was "wasting their time." Since Brant was guilty, they wanted to "fry him. "*Id*. at 474. It was a "fiasco." *Id*. at 37.

Terrana did not recall the discussions between himself, Fraser and Brant after the striking of the panel. *Id*. at 475. He did not think they went to the jail to talk to Brant after the panel was stricken. *Id.* Terrana said he did not need to research Judge Fuente's history of decision-making in non-jury situations and had no concern about going non-jury before Judge Fuente because he was a great judge who followed the law. It was a "no brainer" for Terrana. *Id*. at 476-77.

Terrana recognized Dr. Frank Wood as the "guru of PET Scans." *Id*. at 481. He has "no idea" why Fraser didn't present the PET images. *Id.* Terrana stated that while he didn't recall the mitigation theory, his guess would be that it would have been Brant's drug usage, remorse and his childhood. *Id*. at 482. Brant was one of the "most remorseful clients," he had ever represented. *Id*. at 487.

Terrana stated that he always solicits about prison adjustment. *Id*. at 486. He does not know why Fraser did not present prison adjustment testimony in this case. *Id*. He also did not know why Fraser did not present any testimony about Brant's sexual disorder as mitigation. *Id*. at 487-88.

Terrana remembers having contact with Brant's mother, Crystal Coleman, but does not remember any contact with Brant's sister, Sherry Coleman. *Id*. at 481-82.

He does not remember much about Garret Coleman and did not know that he was a "snitch." *Id*. at 483. Terrana admitted that he was absent from the trial during the testimony of Gloria Milliner, Crystal Coleman and Sherry Coleman. *Id*. at 485.

As best as he could remember, Fraser found Brant to be a cooperative client. *Id*. at 507. He was aware Brant was depressed. *Id*. Fraser advised Brant that by pleading guilty Brant would be "less likely to incur the jury's ire," and that "having a full-blown trial on guilt would predispose the jury to impose death." *Id.* at 508-09.[1] Fraser did not do any research or reading of scholarly journals to see what the effect of pleading guilty would have on the jury. *Id*. at 510-11. He also did not consult with a jury expert. *Id*. The juror questionnaire prepared in this case addressed only the duration of the trial and wasn't used. RV. 9, p. 1112-1117; V. 19, p. 3608-12.

Regarding Brant's waiver of a sentencing jury, Fraser said that he and Terrana spoke to Brant in court after jury selection but does not remember what was discussed. Fraser did recall stating in court that it was the time that "rubber meets the road," which he explained meant that he felt it was time for Brant to make a decision about whether he was going to go non-jury. RV 43, p. 517. No one from the defense team went to see Brant the night between the striking of the jury panel and Brant's decision to waive a sentencing jury. *Id*. at 516-18.

[1] The October 17, 2006 letter details counsel's advice to Brant about pleading guilty. RV 10, p. 1880-83.

Fraser could not recall the mitigation theme in Brant's case. *Id*. at 523. His recollection was that there "really wasn't much mitigation to be found." *Id*. He conveyed that to Brant. *Id*. He thought there wasn't anything compelling about the mitigation. *Id.* at 524. The only lay witnesses Fraser spoke to were Brant, his ex-wife and mother, and maybe Brant's half-brother, Garrett Coleman.

Fraser did not remember much of anything about Brant's father, Eddie Brant, He said at the hearing that it was the first time he had heard the name. *Id*. at 524-25. No one on the defense team spoke to anyone in West Virginia or Ohio or went to there (where Brant lived as a young child and where his father, Eddie Brant lived until he died about a year after Brant's arrest). *Id*. Fraser did not know where Eddie Brant lived or when he died. *Id*. Fraser had no knowledge how Brant was conceived, other than that he imagined "he was conceived in the usual way." *Id*. at 528-29.

Fraser suggested the following explanation for his failure to investigate:

> So what I'm suggesting is, I didn't know about the father. If I did know about the father it was like too many cooks spoil the broth. I only needed a certain number of mitigation witnesses. I'm not going to parade his family tree through the penalty phase.

Id. at 526-27.

Fraser conceded that the ABA Guidelines stress the importance of investigating a client's life from conception, or earlier, and understanding the client's family background from *both* sides. *Id*. Fraser also conceded that as "a practical matter or

maybe as a legal matter [contact with Brant's father] *should have been done, could have been done*." *Id.*

Fraser said that he did not do anything to investigate evidence to mitigate or ameliorate Brant's sexual fantasies other than relying on his two experts, Drs. Maher and McClain. *Id*. at 529-30. Fraser agreed that if he could have offered an explanation of causes of Brant's rape fantasies beyond Brant's control that testimony would not have conflicted with his mitigation theory. *Id*. at 531-32.

Fraser stated that he did not consider Brant's methamphetamine addiction an important mitigating factor in this case because Brant used "methamphetamine so he could work more, not because he was an addict." *Id*. When asked if his investigation about methamphetamine stopped there, Fraser said he *could not remember what his thought processes were. Id*. at 532-33. Fraser said he didn't know if there was a genetic link to addiction but he thought that "some people, like alcoholics, have a predisposition to drug abuse or alcohol abuse and it runs in families." *Id*. at 533.

Fraser's had a conversation with Hillsborough Circuit Judge Debra Behnke about Brant's case. Judge Behnke gave Fraser the names of two experts on methamphetamine addiction. *Id*. at 564. Fraser indicated that Judge Behnke was "particularly impressed" with the experts' explanation of "how methamphetamine affects the brain." *Id*. at 537-38. As a result of his conversation with Behnke, Fraser sent a

letter to Toni Maloney, his mitigation investigator, with the experts' CVs attached and asked her to contact them. (RV 43, p. 534; V 10, p. 1875-79.). Fraser thought he spoke to one of the experts and they said they couldn't appear for reasons he didn't remember. *Id*. at 540-41. He had no other explanation for why they weren't retained and none was contained in his file. *Id*. Fraser agreed that it would have been helpful to find a person who had used methamphetamine with Brant within a week or two of the crime and had asked his investigator to find such a witness about two months prior to the trial. *Id*. at 542. No such witness was presented at trial.

Fraser also identified prison adjustment as a mitigating factor and asked Maloney to find a prison expert. *Id*. 538-39. As far as Fraser knew, Maloney never made contact with a prison expert. *Id*. at 541. Fraser had thought before that Maloney had too many cases. *Id*. at 546. Fraser said he never spoke to any of Brant's jail guards regarding his trustee status. *Id*. at 541-47. Fraser could not remember if he ever showed the jail records to the two mental health experts who testified at trial. *Id*. at 547. They were not asked to comment on Brant's jail record or his ability to remain safely confined.

Fraser conceded that no one from the defense team went to the evidence locker to look at the evidence seized by law enforcement. *Id*. at 543. Fraser was not aware

that there was a clump of Brant's hair in evidence. *Id*. He was not able to say whether hair can be tested for the presence of methamphetamine. *Id*. [2]

Fraser never looked at the PET scan images with Dr. Wu on the computer because Fraser's computer skills are poor. *Id*. at 549-51. Fraser said he decided to have Dr. Maher testify about the PET scan because he believed Maher was competent to understand the PET scan. *Id*. at 552; RV 10, p. 1900-03. (However, Maher had already testified on Friday afternoon, prior to any conversations with Wood and Wu. It was Dr. McClain that Fraser presented on Monday morning.)

Fraser lacked an understanding of the etiology, nature and severity of Brant's brain damage. Fraser further stated that in his mitigation investigation he did not uncover any potential causes of brain damage. *Id*. at 553. However, when asked about Brant ingesting plaster with lead paint and banging his head as a child, he agreed those events can be a risk factor for brain damage. *Id*. at 552-554. Fraser was unaware of Brant's head injury as an adult and had not tried to obtain medical records documenting the injury, even though the hospital was in Tampa. *Id*. at 554.

The witnesses Toni Maloney located and spoke to were: Crystal Coleman, Garett Coleman, Melissa McKinney, Gloria Milliner, the Lipmans, the Hardens, Steve Alvord, Pastor Jackson, Reverend Hess, Judy Sullivan and Tom Rabeau. RV.

[2] The hair tested positive for methamphetamine and MDMA in post-conviction.

44, p. 662-63. She didn't meet with the immediate family- Crystal, Sherry and Garrett - until January 14, 2007, two and a half years after Brant's arrest. *Id*. at 664. She met with Gloria Milliner in August of 2007, just before the trial. *Id*. As a result of an email from Fraser sent just before trial on July 18, 2007, Maloney made contact with the other witnesses – the Lipmans, the Hardens, Steve Alvord, Pastor Jackson and Reverend Hess. *Id*.

Maloney did not talk to any out of state lay witnesses. *Id*. at 668. Maloney did not have any contact with Eddie Brant or his widow, Mary Kay Brant. *Id*. Maloney admitted that a mitigation investigation should include obtaining information about the client's father, even if he is deceased. *Id*.

Maloney was asked by Fraser to find a prison expert. *Id*. Maloney claimed she contacted "James Aiken out of North Carolina." *Id*. at 669. Maloney admitted that there were no notes in her file documenting any contact with Aiken. *Id*. She does not know why Aiken was not retained or what his opinion was regarding Brant's adjustment to prison. *Id*. at 669-70. Mr. Aiken testified he had no recollection of ever being contacted about this case prior to post-conviction counsel contacting him. RV 47, p. 1132-34.

Maloney was aware of Brant's head injury and treatment at Tampa General Hospital but did not obtain the records. RV 44, p. 677-78.

As to the methamphetamine issue, Maloney stated that Fraser asked her to contact two experts, Dr. Khadejian and Dr. Piasecki. *Id*. at 675-76. Maloney stated that she spoke to both experts and Kahdejian told her he did not do forensic work. *Id*. Piasecki sent a CV and fee schedule for the lawyers to talk to her. Maloney did not know why Fraser did not retain her. *Id*. She was not asked to try and contact any other experts regarding methamphetamine. *Id*. at 677.

Dr. Valerie McClain was retained by trial counsel to assess Brant's neuropsychological functioning and address issues of competency and mitigation. *Id*. at 607. She testified at trial. She was not asked to address Brant's sexual urges or fantasies and was not asked to specifically evaluate or testify about Brant's methamphetamine use. *Id*. at 608-09. The only family member and/or mitigation witness that she spoke to was Brant's mother, Crystal Coleman. *Id*. at 613.

McClain testified that it was widely known in 2004-2007 among mental health professionals that meth use can cause brain damage. *Id*. at 609-10. McClain agreed that ingesting plaster and lead-based paint is also a risk factor. *Id*. at 610. McClain knew Brant had ingested plaster as a child but was not asked about it, even though she regarded it as relevant. *Id*. McClain was aware that Brant repeatedly banged his head as a young child but was not asked about it. *Id*. at 611. McClain testified that this was also a risk factor. *Id*. McClain's opinion "couched within the confines of a psychologist," was that Brant had "areas of very significant impairment in the brain

that would suggest he had memory problems, language problems, or other areas that had been affected by brain trauma." *Id*. at 611-12. McClain also diagnosed Brant with depression. *Id*. at 612-13.

Based on her testing which was suggestive of brain damage, McClain told Fraser that it would be important to obtain a PET scan of Brant's brain. *Id*. at 617; RV 11, p. 2026-34 (PET scan). She discussed the results of the PET scan with Wu, who was able to show her the PET images on the computer in real time. *Id*. at 614-15. She is unable to read the PET on her own but based on speaking to Wu, she concluded that the PET scan images were consistent with her findings. *Id*. at 618-19. The use of PET scans to corroborate or add further detail to a diagnosis of brain damage is an accepted practice in forensic settings. *Id*. at 619-620. Based on her experience testifying in civil and criminal trials, "the combined effect of the visual of neuro imaging" can help a juror understand the areas of the brain that are affected by the damage or dysfunction. *Id*. 619-21. McClain told Fraser she thought the PET scan images were helpful in Brant's case and that this was a case where the client had "significant brain damage." *Id*. McClain was not aware that the Fraser did not present the PET images at trial. *Id*. at 622.

Dr. Michael Maher is a psychiatrist retained by trial counsel to testify at Brant's trial. Maher was asked to evaluate Brant "with regard to general issues of

medical and psychiatric relevance related to the charges against him primarily related to mitigation … [including] competency to proceed and sanity at the time of the offense." *Id*. at 639. The only lay witness/family member he spoke to was Brant's wife, Melissa McKinney. *Id*. at 639-40; 650. The background information he was given was limited to depositions of law enforcement officers, legal documents describing the charges against Brant, and the depositions of Drs. Wood, Wu and McClain. *Id*. He was not asked to do a biopsychosocial history and was not given any information regarding Brant's psychological and social history other than from Brant himself, Brant's wife, and the above described sources. *Id*. at 641.

Maher agreed that it was widely known among mental health professionals in 2004-2007 that childhood abuse and neglect can have lifelong effects on an individual's emotional and psychological development. *Id*. Maher was asked at trial about Brant's meth use and how it affected him at the time of the crime. *Id*. Maher stated that he had "general experience as a physician" and "some specific knowledge" as a psychiatrist on "amphetamine use" but that he has not engaged in research on severe abuse "as was present in this case," and does not have special credentials in the area of substance abuse. *Id*. at 641-42. He also does not have research experience on the effect meth use has on the brain. *Id*. Maher "made it clear" to Fraser that he lacked

"specialized" knowledge and that he thought the case was "very much about amphetamine abuse and its effect on the brain," and suggested Fraser should find other experts with more familiarity with methamphetamine for this case. *Id*. at 642-43.

Maher came to have "a very high level of suspicion" that Brant suffered from brain abnormalities or dysfunction. *Id*. at 645. He concurred that it was appropriate to do a scan in this case. *Id*. Maher found out that Fraser was not going to present the PET scan in the case at "the very last minute . . . after the second phase had started." *Id*. at 647. He found the decision "surprising." *Id*. Maher never advised Fraser to not present the PET and had the "expectation that it would be presented and that it would be valuable in supporting my conclusions." *Id*. at 648.

Dr. Joseph Chong Sang Wu is an Associate Professor of Medicine and Neuro Cognitive Imaging Director for the Brain Imaging Center at the University of California, Irvine, College of Medicine. He did not testify at trial but did testify in post-conviction.

Wu was contacted by Wood and Maloney in January of 2007. RV 46, p. 965-64. Wu's role was to provide a second opinion on the PET scan abnormalities of Brant. *Id*. at 973. He was not sent any additional information about Brant's psychological or neuropsychological history or assessment. *Id*. at 974. He did receive prison records which showed Brant was prescribed Wellbutrin, Trazodone and Haldol, suf-

fered from depression and that he had used crystal meth, ecstasy, and methamphetamines. *Id*. at 977. Wu only spoke with the trial attorney once - on August 24, 2007. *Id*. at 978. He was scheduled to fly from California to Tampa but found out at the last minute that he would not be called as a witness. *Id*.

Wu is able to use an application on his computer in which he could show the trial attorney the PET images in real time. *Id*. at 982. Based on a review of his billing records and notes, Wu determined that he never reviewed the PET scan images with the trial attorney. *Id*. at 982-83; 1024.

Dr. Frank Balch Wood is a neuropsychologist and forensic psychologist with an emeritus appointment at Wake Forest University and a visiting honorary professorship at the University of KwaZulu-Natal in Durban, South Africa. RV 53, p. 1655. Dr. Wood has devoted his career to understanding the human brain and using neuro imaging as a central method for understanding the brain and behavior. *Id*. at 1660.

Wood was retained by trial counsel in late 2006 to conduct a PET scan of Brant's brain. The scan was administered in January 2007. *Id*. at 1662. Wood attended the administration of the scan, observed the reconstruction of the three-dimensional images and concluded that the images were sound and without any "artifact." *Id*. at 1662-63. He concluded that Brant's scan was a valid scan. *Id*. Wood then interpreted the PET scan and took measurements of the areas of the brain that were

behaviorally important in the case to assess whether those areas of the brain were showing normal or abnormal activity. *Id*. at 1664. Wood determined that there were "very striking abnormalities" in the "frontal lobes bilaterally right at the pole, right at the very tip of the frontal lobes on both sides, and in the middle of the frontal lobes where the two sides of the brain meet in the middle. . .." *Id*. at 1665.

Wood prepared a PowerPoint for Brant's trial. RV 14, p. 2676-83. The beginning of the PowerPoint includes a "timeline of major indicators." RV 53, p. 1667. This was based on the information from the lawyers. *Id*. Wood was not given any information about Brant ingesting plaster with lead-based paint as a child, head-banging as a child, nor was he told about Brant's work related head-injury as an adult. *Id*. at 1667 -68. All of those factors would have been relevant and he would have placed them on his Timeline if he had been aware of them. *Id*. Dr. Wood was not aware of the frequency and severity of Brant's meth use. *Id*. If he had been aware of the severity of Brant's drug use, he would also have included that on his time line. *Id*.

Wood recalled that a phone call to review the PET scan images via computer with Wu and Fraser was scheduled to occur after Fraser had finished selecting a jury. *Id*. at 1679-80. The phone call "never happened." *Id*. at 1680. He has no recollection of ever sitting down with Fraser and going over the PET scan images in any detail. *Id*. Wood does not know why he was not asked to testify. *Id*. at 1681-82. If he had

been called to testify, he would have given the same testimony he provided at the evidentiary hearing but would have also included the risk factors for brain damage he was not told about until post-conviction: the lead-paint exposure, the head-banging, the elevator accident, and the chronic methamphetamine use. *Id*.

The lay witnesses had minimal contact with the defense team. Crystal testified that she felt Terrana and Fraser were not interested in her life. RV 50, p. 1506. She met with Terrana once in Tampa. *Id*. at 1506-07. Crystal was subpoenaed to give a statement on August 27, 2004. She testified that she called Terrana's office to see what she should do and was told that Terrana spoke to the client, not the family. *Id*. at 1460-61. In August of 2005, Crystal wrote a letter to Terrana letting him know that no psychiatrist had called her yet, even though the case was more than a year old. *Id*. at 1507; RV 14, p. 2632-41. She met Fraser once in his office in Brandon for 30 minutes and once more to prep for the trial. *Id*. at 1511-12. He did not ask her about her life. Crystal spoke to Maloney on the phone several times. They were short calls, mostly updating her about the case. *Id*. at 1513.

Garett Coleman, who was a CI at the time of trial and did not appear for trial, testified that he did not have much contact with Chuck's trial lawyers. RV 46, p. . He confirmed he was subpoenaed by the State to come in and give a statement in August of 2004 and again in July of 2006 and did so. *Id*. at 468-469. His brother's lawyers were not present either time. *Id*. at 469-470. If Chuck's trial lawyers had sat

down with Garett and explained to him how important his testimony was, he would have appeared at Chuck's trial and given the same information he gave at the hearing. *Id*. at 486-487.

Gloria Milliner testified at the 2007 trial and at the post- conviction hearing. Milliner was only contacted once before trial, by Toni Maloney by telephone on August 10, 2007. RV 49, p. 1279-80. The phone call lasted 10 or 15 minutes. *Id*. She then gave a phone interview to the prosecutor. *Id*. She met the defense attorney (Fraser) at the court house right before she testified. *Id*. at 1280-81. He never sat down with her and asked her about her relationship with Crystal or other things that Milliner knew. *Id*. Maloney, likewise, did not ask her about what kind of a mother Crystal was. *Id*. She also knew, but was not asked. about Crystal's sad and neglected childhood. *Id*. at 1285-87.

Expert Testimony on Prevailing Norms

Terence Lenamon has been practicing law for 20 years. RV. 44, p. 684-85. He is board certified. *Id*. His work is almost exclusively capital court appointed work in state court. *Id*. Lenamon has tried over 100 jury trials. *Id*. at 686. He has been involved in 80 to 85 first degree homicide cases where death was a possibility and has tried 13 death penalty cases to verdict. *Id*. Lenamon was allowed to render opinions in the area of prevailing norms in Florida between 2004 and 2007. *Id*. at 699-70. The 2003 ABA Guidelines were in effect at the time of Brant's trial and are

a guide a court can look to in assessing counsel's performance. *Id*. Other guides include case law and seminars. *Id*.

Prevailing norms establish that capital lawyers should present an integrated defense and "front load mitigation" where possible. *Id*. at 700-05. Capital lawyers are to work together as a team with an integrated defense. *Id*. at 706-07. Mitigation investigation *at a minimum* requires counsel to investigate both parents and their multi-generational history. *Id*. at 708-09. The mitigation should include looking at the client's life prior to conception to the present day, including while he is incarcerated awaiting trial. *Id*. at 706-07. Lawyers should look for a family history of mental illness, alcoholism, addiction and other patterns of behavior.

You cannot rely on one parent for a family history because they are only half the story. It is important to talk to both sides so that the attorney can present an accurate and truthful family history. *Id*. at 710-11. It is also important to spend time with family members and other witnesses to develop rapport. This is particularly important when dealing with damaged people, including victims of sexual abuse. *Id*. at 712-13. If a mitigation investigator is not completing tasks, ultimately it falls on the attorney to make sure the tasks are completed. *Id*. at 715.

When a capital attorney is court-appointed, the attorney must file the appropriate motions with the court in order to obtain the resources they need in order to

constitutionally represent their client. *Id*. at 716-17. Capital attorneys should seek "specialist experts" when needed. *Id*. at 717-18.

Prevailing norms require capital defense attorneys to investigate favorable prison behavior evidence and present such evidence if it is helpful. *Id*. at 720-21. Lawyers should consult a jury expert when dealing with vulnerable victims who have had a lot of violence done to them. *Id*. Lawyers should familiarize themselves with the research on jury decision making. *Id*. at 723-24.

Florida lawyers have been taught that advising a client to plead guilty and waive a sentencing jury is a "really bad idea." *Id*. at 724-28. Such advice should only be given after a thorough investigation, based on identifiable facts. *Id*. Lenamon explained that the Commentary to ABA Guideline 10.9.2 instructs that when "no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should *be extremely reluctant* to participate in the waiver of the client's rights." *Id*. Prevailing norms also instruct lawyers that when they have a client who is depressed it is important to provide support to help the client from making poor decisions. *Id*. at 730-31. Prevailing norms also instruct that because brain damage is a weighty mitigator, lawyers should consider presenting brain damage through multiple experts and with visual proof. *Id*.

Toni Blake is a lawyer, jury consultant, professor of psychology, and mitigation consultant. RV 45, p. 760-63. She has consulted on more than 35 capital murder

jury selections throughout the South, including in Florida. *Id*. Blake was retained by post- conviction counsel to review the jury selection and waiver in Brant's case, and the mitigation investigation.

If she had been consulted in this case by the trial attorneys, she would have advised against entering a guilty plea based on the "research in the field about guilty pleas." *Id*. at 768-72. The research shows that jurors have a different understanding of the law than lawyers and judges and think that premeditated murder, for example, requires advance planning and do not understand that it can be based on a snap-second decision. *Id*. When a client has pled guilty to premeditated murder or kidnapping, the jurors do not have the benefit of the law to understand what the elements of the crime are. *Id*. The research also shows that when a juror spends time with a defendant in close proximity, they are more likely to find a similarity or factor in that defendant's life that makes it more likely that the juror will render a life verdict. *Id*. at 770-71. The longer a juror gets to watch a defendant in court – two days versus ten days for example – the longer the juror has to develop familiarity in a positive way. *Id*. Repeated exposure to bad facts is actually helpful in the jury context because the jurors experience "systematic desensitization." *Id*. at 771-73. Exposing a jury over and over to stimuli reduces the emotional impact. *Id*.

In terms of advising a client as to whether to waive a sentencing jury and be sentenced by a judge who has imposed the death penalty before, she would strongly

advise a client not to do so because *the research shows* that once someone has effectuated or voted for death, it is much easier to do it the second time than it was the first time. *Id*. at 774.

Blake also explained that prevailing norms provide that when advising a client about entering a guilty plea or waiving a sentencing jury in a capital case with a sex offense, it is important to consider a client's mental health and make sure "your client isn't attempting a slow suicide by just throwing in the towel." *Id*. at 775. This is especially true about sex offenders because they tend to have a great deal of remorse and shame. *Id*. The ABA Guidelines speak specifically about depressed clients and guilty pleas. *Id*.

In Brant's case, after the jury selection, Blake would have advised the lawyers to send whoever on the defense team had the most rapport with the client to go see Brant at the jail that evening and discuss the issues with Brant. *Id*. at 776. "This is not something that should be done in 15 minutes in a courtroom." *Id*.

Blake also explained that in a mitigation investigation it is important to get information from both sides of a client's family, and talk to multiple sources to discover the family rumors and mental health issues within the family. *Id*. at 778. It is important to go back multiple generations, if possible, and look at genetic issues and environmental issues. *Id*. This is true even if the father and the child never met. *Id*.

at 780. It is also important not to rely solely on a capital defendant's mother. Mothers of capital defendants often want to hide their own deficiencies or keep family secrets. *Id*. "So mom alone, obviously, or dad alone would never suffice." *Id*.

Lay Witness Mitigation Testimony

All of the witnesses said they would have been available for trial and would have given the same testimony. Many of them had lived in the same house for 30 years or longer.

Eddie Brant

Three witnesses testified that they knew Eddie wasn't Brant's father and had known so for many years. The fact was well known in both families.

Mary Kay Brant, Eddie Brant's widow, first learned that Charles Brant had been convicted of murder in a letter from post-conviction counsel on July 22, 2011. RV 48, p. 1262-63; V 13, p. 2556-58. She spoke to the post-conviction investigator by phone on August 3, 2011. Mary Kay said, without being asked: "Ed is not the biological father of Chuck. And that kind of stopped her for a minute. And I guess I opened up a can of worms about that." *Id*. at 1263-64. No one from the defense trial team tried to contact her or Eddie. *Id*. She and Brant lived in Uniontown, Ohio for 30 years. Eddie Brant died about a year after the crime on March 18, 2005. *Id*. at 1244.

She described Eddie as a "very good man, a very kind man but he was very private. He kept everything to himself. Not a very good conversationalist with people. ..." *Id*. Eddie was also "very good looking." *Id*. at 1246

She knew Eddie had children from a prior marriage. Eddie talked about Sherry and kept a big picture of Sherry on his dresser all the time. *Id*. at 1246-47. He never talked about Chuck and never wanted pictures of Chuck out. *Id*. Eddie told Mary Kay early on in their relationship that Chuck was not his son. *Id*. at 1254. Eddie thought Chuck's father was their next door neighbor in the twin-plex he and Crystal had lived in in Ohio. He never said the man's name. *Id*. at 1255. He never told Mary Kay any details about Crystal's relationship with the neighbor or what had transpired between Crystal and this man. *Id*. Aunt Jenny (Jenny McCutcheon) told Eddie that he wasn't Chuck's father when Crystal had her nervous breakdown. *Id*.

Mary Kay knew that Crystal went to Fallsview Mental Hospital after giving birth to Chuck. *Id*. at 1252. Eddie paid the bills for Crystal's stay at the mental hospital; he had a coupon book and he made payments every month for many years. *Id*. at 1254. He also paid child support for both children. *Id*. When Crystal had her nervous breakdown, Eddie called his mother to come get Chuck and take care of him. Eddie kept Sherry. *Id*.

Annice Crookshanks, Eddie Brant's younger sister, "was 13, 14 or 15" when Chuck was born. *Id*. at 1199; 1207. She remembered her "mother getting a call [on

New Year's Eve] to come to Ohio and pick up [Chuck]." *Id*. All Annice knew at the time was that Crystal was in the hospital. *Id*. She later learned that Crystal had been in a mental hospital having suffered a nervous breakdown after giving birth to Chuck. *Id*. at 1208. A few years after that, when she was 17 or so, she learned that Eddie was not Chuck's father. *Id*. at 1209. She never knew who Chuck's father was. *Id*. "Everybody" in her family knew that Eddie was not Chuck's father. *Id*.

Jerry Crane, Crystal's brother and Brant's maternal uncle, was "pretty sure" that Eddie was not Chuck's father. *Id*. at 1180. Aunt Jenny told him that Eddie wasn't the father. *Id*. Jerry doesn't remember exactly when he found out but he knew. *Id*.

In the Fall of 2012, post-conviction counsel contacted Sherry and asked if she would give a DNA sample to see if she and Chuck were full or half-siblings. It did not come as a total shock to her. She had received some pictures of Eddie from Mary Kay after Eddie died and had teased her Mom about the fact that Eddie and Chuck didn't look alike. Crystal had responded with an angry look. RV 50, p. 1445.

After the DNA results came back, Sherry wanted to be the one who confronted her mother.[3] *Id*. at 1446. At first Crystal was angry and insisted the DNA was wrong. *Id*. at 1447. A few days later Crystal told her that she had been raped and that the

[3] The DNA sibship testing confirms Chuck and Sherry are half-siblings with an 87% probability of accuracy. RV 52, p. 1588-1621.

rapist was Chuck's father. *Id*. "She said it was something that she had buried and just never ever wanted to think about. She spent a long time burying it." *Id*. at 1448.

Crystal testified to the following about the rape. It happened in Akron, Ohio where Eddie worked at a gas station owned by Aunt Jenny and her husband, Grover. *Id*. at 1491. Crystal and Eddie lived in a duplex. Another couple lived on the other side of the duplex. *Id*. at 1492. The man had spoken to Crystal before and brought her the newspaper. *Id*. One day, while Sherry was napping, the man knocked on the door with the newspaper. *Id*. at 1493. Crystal let him in, they chatted a bit and then:

> [H]e pushed me back on [the couch]. It shocked me. He pushed me back on that. And then he was holding me down. He put his hand on my neck, he cut off my breathing. I couldn't breathe. And he rapes me. He rapes me. I don't know how long it took. I don't know how long it took. And he raped me. And then he just got out. I don't know what he said and he left.

Id. She took a shower, scrubbed herself and cried. "I went and got my baby. And I cried and I didn't know what to do. And there was nobody. And I had no friends. I had nobody. I didn't know what to do. " *Id*. at 1494. Crystal didn't call the police and didn't tell Eddie. She was afraid and didn't think anyone would believe her. *Id*. "Nobody believed you back then. Nobody believed you. It's not like nowadays." *Id*. Crystal was "very ashamed," and blamed herself. *Id*. at 1495.

Shortly after that she realized she was pregnant and felt the baby was a result of the rape because she and Eddie had been using condoms. *Id*. at 1495-96. She was

sad throughout her pregnancy. She had nobody to talk to. "Eddie and I just didn't have a relationship." *Id*. at 1497.

Crystal chain smoked and drank coffee throughout the pregnancy. *Id*. "I quadrupled smoking." *Id*. She paced and cried all the time. *Id*. Aunt Jenny confronted her and Crystal told her she had been raped and was afraid to tell Eddie. *Id*. Aunt Jenny offered to tell Eddie for her. *Id*. at 1498. Shortly after that Eddie came to talk to her. "There wasn't any empathy. There wasn't a bunch of questions." *Id*. Eddie did not seem to be worried about Crystal and they never talked about the rape again. *Id*. at 1499.

After she gave birth to Chuck she made the nurses take him out of the room. *Id*. She felt "nothing" for him. *Id*. She sobbed when she told the Court, "I couldn't bond. I couldn't bond. Chuckie, I'm so sorry. I just didn't have any feelings for him. Only feelings I felt was I'm responsible, I have to take care of him, that's what I felt." *Id*. Eight weeks later, Crystal suffered a nervous breakdown and was sent to a mental hospital where she endured six shock treatments. *Id*. at 1500.

At trial, Crystal testified that Eddie Brant was Chuck Brant's father. *Id*. at 1068. That was not true. *Id*. at 1505. She didn't want to admit the truth because it was so "horrible" and she felt "so bad and so intimidated, that [she] just couldn't tell anybody." *Id*. She didn't want anybody to know what had happened to her because

she was so embarrassed. *Id*. at 1505-06. She had never told her children or her mother. *Id*.

Crystal stated that if trial counsel had confronted her with the fact that people in West Virginia and Ohio knew that Eddie was not Chuck's father, she would have told trial counsel the truth. *Id*. at 1515. She also would have testified to that at trial in 2007. *Id*. at 1516.

Gloria Milliner is Crystal Coleman's best friend and they are approximately the same age. RV. 49, p. 1272-95. They worked together for almost a decade and have remained close friends ever since. She testified at the 2007 trial. At trial she was asked if there was a distance between Crystal and Chuck. She was not asked details about that but at the hearing she explained more about it. Crystal told Milliner that she didn't like Chuck when he was born because he use to cry all the time and would kick her when she changed his diapers. Crystal also said that she wasn't close to Chuck and didn't like him being around. Crystal also said that, "she wished she had never had him." Milliner would say to her, "'How could you say that? This is your son. How could you say that about him?' It always bothered [Milliner] because [she] saw Chuckie as a different type person to what [Crystal] tried to display him as."

Milliner had a child out of wedlock when she was a young woman. Her family had wanted her to put her son up for adoption but she wouldn't do it. So when she

heard Crystal talking about Chuck, Milliner couldn't understand it, "because [she] knew how much her son meant to [her]. And [she] would have gone to the end of the world for him."

When Milliner testified in 2007, she believed that Eddie was Chuck's father. About three weeks prior to the post-conviction hearing, Crystal called her and told her she wanted to tell her a secret of which she was ashamed. She told Milliner that "she was raped when Chuckie was conceived." *Id*. at 840. Milliner and Crystal are about the same age. In 1965, when Crystal was raped, Milliner explained that things were different and young woman kept rape very quiet because "things like that just weren't accepted." In addition, in 1965, when a woman claimed rape but had no injuries, people would tend not to believe her.

Maternal Multi-Generational History

Jerry Crane is approximately one year older than his sister Crystal Coleman. RV 48, p. 1158. Their parents were Lawrence William Crane and Delphia Gertrude Cooper. Jerry and Crystal were both born in West Virginia. *Id*. The family had moved 12 times by the time Jerry was in fifth grade. *Id*. at 1159. The family lived in cheap rental housing, sometimes living in a one room house. *Id*. Larry Crane was an alcoholic who had trouble keeping a job and providing for his family. *Id*. Jerry's paternal grandfather was also an alcoholic who was "completely nasty," and chased Jerry trying to whip him. *Id*. at 1170-71. He died when Jerry was seven. *Id*. That

night, while the grandfather was in the hospital and about to die, Crystal slept with the grandmother, who died in the bed while Crystal slept next to her. *Id*. at 1172. Crystal was six years old. *Id*. The grandparents were well off and left an upholstery business and buildings worth "lots and lots of money." *Id*. at 1177-79. His parents squandered all of it so that the inheritance "got drinked up." *Id*. at 1179.

Jerry described a car accident the family had on the way to his maternal grandfather's funeral. *Id*. at 1170-72. Larry was driving and he had been drinking. They were on a country road taking a short cut from Beckley to Charleston and Larry was "going too fast and he had been drinking. [They came to a] little bridge [that] had a turn in it and he turned to make it through the bridge and he never straightened out and we ran down into the woods and hit a great big tree. And it broke my mother's hip and cut my Dad's chin and stuff. Hurt my chest, but I don't think my sister got hurt at all." *Id*. at 1163-64. An ambulance came and took Delphia to the hospital. *Id*. But Larry took Jerry to a beer joint where Jerry was made to "scuffle" with a live bear for the amusement of the adults. *Id*. at 1165. "[All the patrons and his father] thought it was funny." *Id*.

Jerry spent a lot of his childhood in beer joints. *Id*. at 1165-66. His father drank every day and drank anything he could get his hands on, from whiskey to shaving lotion and rubbing alcohol. *Id*. His mother was the same. *Id*. On at least three occasions she drank until she was in a coma and her father called an ambulance to come

get her. *Id*. Jerry and Crystal often went hungry. His parents spent the weekends drinking and driving and his father "drove like an idiot." *Id*. at 1167. If they told their parents they were hungry, their parents would give them "10 or 15 cents for a candy bar and a pop." *Id*.

Larry was cruel to Delphia. They fought constantly. Delphia was crippled from the car accident. *Id*. at 1169-70. Eventually, family members came and got the children and they were put in the care of their Aunt Hazel. *Id*. at 1171-72. While under Hazel's care, Jerry and Crystal went to the doctor for the first time, had plenty to eat anytime they were hungry and had new clothes. *Id*. Eventually Delphia came to be with her children; she had quit drinking so Aunt Hazel "set them up in house-keeping." *Id*. at 1173. Larry was in jail, probably for non-support, car wrecks and other stuff. *Id*. After Delphia divorced Larry, she was able to get surgery on her hip through Medicaid and walk again. *Id*. at 1175-76. She got a job working in the laundry at the Greenbriar Hotel. *Id*. Larry never quit drinking. *Id*. at 1177.

Crystal gave the same description of her childhood as Jerry Crane. Her father treated her mother badly, "like a monster actually." RV 50, p. 1461. When Crystal was young, her mother and father drank daily, including drinking aftershave and rubbing alcohol when they ran out of money. She only saw her father sober a few times. *Id*.

Crystal had a pet cat that she loved dearly. *Id*. at 1463. When she was eight or nine years old, her father took a gun and shot her cat and the cat ran underneath the house. *Id*. "And he told me if I were to get it out from underneath the house that he would take it to the doctor. And I called the kitty out and he buried the kitty live in front of me." *Id*.

Crystal recalled the car accident and the ambulance taking her and her mother to the hospital. *Id*. 1466-67. Like Jerry, she also remembered that father checked Delphia out against the doctors' orders. *Id*. Delphia had a broken hip and leg and couldn't walk. *Id*. She would lay in bed a lot and then Lawrence would force her to get up and then would start beating her. He knocked her into the heater which burnt "a perfect pitch fork on her face." *Id*. at 1467. Her father said it was the mark of the devil. *Id*. After that, Delphia would drag herself around, but Crystal was unsure how she ate or survived during that time because her father would leave for weeks at a time. *Id*. She and Jerry were not getting baths and went to school dirty and hungry. *Id*.

While her mother was still crippled and couldn't walk, her father tried to "get rid of her" by laying "her on the railroad for the train to run over her." *Id*. at 1476-78. Some people saw him doing it and they waited until he left and then took her mother off the tracks. They gave her bus fare to go to her mother's house in Beckley.

Id. Eventually her mother divorced her father, got surgery and regained the ability to walk, although she still limped. *Id*.

Crystal confirmed she was sleeping in bed with her grandmother when she died, as described by Jerry. Id. at 1472. She was devastated and terrified. *Id*. at 1471.

Even after her parents divorced, the family was still poor, on welfare, and Crystal and Jerry wore "raggedly" clothes and were teased about their appearance. *Id*. at 1480-84. Her mother had stopped drinking but her father never stopped. *Id*. Her father died while walking out of a bar in Fort Lauderdale. "He was drunk and got hit by a car and got killed." *Id*. at 1482-83. In her whole childhood, Crystal never remembers her parents telling her that they loved her. *Id*. at 1375.

Crystal Coleman's High School Years/Marriage to Eddie Brant

Sue Ann Berry was a friend of Crystal's when they both lived in Ronceverte, West Virginia and attended Greenbrier High School. RV48, p. 1187-96. Ronceverte is a small town in the mountains of Greenbrier County. There were 60 or 70 students in the school.

Crystal and Berry graduated in 1961. Berry also knew Eddie. He was quiet and didn't talk much but he was popular, very handsome and "all the girls liked Eddie." Id at 1190. Crystal and Eddie didn't date until their senior year. *Id*. at 1191. Eddie got a football scholarship to Marshall but the principal, teachers and coach talked him out of it because he lacked the educational skills. *Id.*

Crystal told Berry that she was pregnant the summer after they graduated. Crystal was "worried and scared." *Id*. at 1192. Eddie had already moved away to work in Washington, D.C.. *Id*. Eddie came back to marry Crystal when she was seven months pregnant. *Id.* Berry helped Crystal find a dress but she did not go to the wedding. *Id*. She "felt sorry for her, real sorry for her, you know." *Id*. at 1193. Other people did not know Crystal was pregnant because she wore a big jacket and "you couldn't tell she was pregnant." *Id*. Crystal said she tried to hide the pregnancy because, "it's disgraceful. It was a sad mistake we made. And all I could do was pick up the responsibility. . . . And I hid it." RV 50, p. 1487.

Crystal and Eddie were married on March 5, 1962; Sherry was born April 26, 1962. *Id*. at 1488; V 14, p. 2607-09. After they got married, Eddie went back to Washington, D.C. *Id*. at 1489. Crystal thought that Eddie did not want to marry her and only did so out of a sense of responsibility. *Id*. Crystal gave birth to Sherry at a clinic in Lewisburg. She was 18 years old. Her friends drove her to the clinic and dropped her off. *Id*. at 1489-91. Eddie eventually quit his job in Washington, D.C. and moved back to West Virginia to be with Crystal and the baby.

Had trial counsel made a single ten-minute phone call to Mary Kay Brant, they would have discovered Eddie was not Chuck's father. And, had they investigated Crystal's own tragic life, they would have been able to explain to a jury why

she had a nervous breakdown and endured shock treatments, why she rejected and refused to love her son, and why she married and stayed with Marvin Coleman.

Brant's childhood years with Marvin Coleman

Eddie never wanted custody of Brant and Crystal regained custody of Sherry by essentially kidnapping her. Crystal then married Marvin Coleman and had a third child, Garett. They left West Virginia, first moving to Baltimore, then the family settled in Florida.

Crystal "immensely" favored Sherry and Garett over Chuck. *Id*. at 1501. Even as the years passed and Chuck was growing up, Crystal continued to find it difficult to love him and bond with him. *Id*. She provided a house and clothes for him, things she didn't have, and tried to protect him from his stepfather. *Id*. at 1502. There were many times that she didn't protect him, however. *Id*. at 1065.

At trial she was asked about Marvin and stated that he mentally and physically tortured her until 4 or 5 a.m. *Id*. She was never asked to describe what that was like. *Id*. In post-conviction she described it. Marvin would drink at a bar until about 2 a.m. and then he would come home. Crystal would "shake" and "pray" when she heard him pulling up in the driveway. *Id*. at 1502-03. Marvin would demand food and then accuse of her being unfaithful. *Id*. He held knives to her throat to make her admit she had done "things." *Id*. The tirades ended with sex but Crystal never told

him "no" because she was afraid he would beat her or kill her and the kids. *Id*. at 1503-05.

Sherry was in second grade when her mother married Marvin. Chuck would have been about five years old. Marvin would not allow Sherry to maintain any contact with Eddie. Marvin also adopted her against her wishes.

Living with Marvin was difficult, he was unpredictable, one minute he could be nice and funny and laughing and the next minute verbally abusive. Marvin whipped Chuck so severely that he had bruises on his "lower back" and "down his legs." Delphia was horrified when she saw bruises on such a "small, little boy" during a visit to their house in Baltimore. *Id*. She recalled times when Marvin came home drunk and Crystal called the police. V. 13, p. 2561-2587. She recalls a lot of late night fights between Crystal and Marvin in the bedroom. She would stay in her room listening, unable to sleep.

Marvin sexually abused Sherry, *id.* at 1423-25, including acting out a rape scenario with her under the pretense he was helping her.[4] He attacked her by surprise - in her bed while Crystal was in the hospital after giving birth to Garret, when she was sleeping while her mother was out of the home working, and exposed himself to her and aggressively attacked her in the kitchen, although she was able to get away

[4] She testified at trial that Marvin molested her, but she was not asked to describe the nature of the attacks.

from him that time. *Id*. She didn't tell her mother because she was afraid it would "break her heart." *Id*. at 1423-24. Sherry eventually gained the courage to confront Marvin. The abuse stopped after that. *Id*. at 1425. Delphia later told Crystal. Crystal never took Sherry to get counseling. *Id*. at 1426.

Nita Meszaros, Marvin's first wife, married Marvin in 1964 when she was 18 years old and divorced him in 1969. Nita's testimony corroborated the description of the abuse and degradation that Marvin imposed on Crystal. Nita said that Marvin was a "very suave, very handsome young man." RV 49, p. 1298. After a coal mining accident where his hand became crippled, Marvin, who was "vain" and "athletic," became an "insanely jealous," controlling and emotionally and physically abusive alcoholic. *Id*. at 1299-1301.

In describing his jealousy, Meszaros said that as a young woman she would occasionally get a yeast infection and Marvin would "smell at her privates and say, 'Ain't nobody smells like that if they're not out cheating or doing something.'" *Id*. at 1302. He once tied her to the bed so she couldn't leave to go visit her mother and spread flour on the steps and walkway so he could see if she left. *Id*.

He would come home drunk and demand that she cook for him. When she refused, he would "smack [her] around." *Id*. at 1304. One night, shortly after she had left him, he entered her house after a night of drinking. She was asleep on the couch. He grabbed her by her crotch, said the men in the bar had been telling him he wasn't

"man enough to keep [his] wife," and then beat her "really bad." *Id*. at 1306. Marvin ended up in a mental institution during their divorce. *Id*. at 1307. The psychiatrist warned her that Marvin was mentally ill and could end up killing her. *Id*.

Dawn Masters is the daughter of Meszaros and Marvin. She is three years younger than Brant, her step-brother, she was eight years old when she found out that Marvin was her father. *Id*. at 1321. She was looking through a box of photos and saw a picture of her mother with her face "badly mangled and bruised." *Id*. at 1322. Her mother said, "'that's why I never stayed with your Dad because he hurt me really bad and he was a real bad drinker. And when he would drink, he would hit me. And he would hurt me real bad.'" *Id*.

When she was 15, she reconnected with Marvin's family. *Id*. That summer, she flew to Florida to meet Marvin and also see her brother Danny, who was living in Florida at the time. Garett, who was about 11 years. Could get away with whatever he wanted. The house was very tidy, nothing out of place. She and her brother started drinking margaritas by the pool. Marvin offered her marijuana. *Id*. at 1327-28.

During the trip, she became ill and was diagnosed with mononucleosis. Marvin offered her a joint to help her feel better. *Id*. at 1330. Her throat was sore so she had a bowl of chicken noodle soup. She left the bowl in the sink. When Marvin saw it, he became enraged and smacked and shoved Crystal around the kitchen. *Id*. at 1331. The fight seemed to go on all night, it was "really violent," and she was

"scared." *Id*. at 1331-32. Garett was home, watching "cartoons nonchalantly" as if it was, "no big deal." *Id*.

The next morning, Dawn apologized to Crystal. Crystal just said, "'Honey, it's not your fault. Your Dad is just under a lot of stress right now. It's going to be okay.'" *Id*. at 1332-33. And then Crystal "put on these big, dark sunglasses like an owl and wore them over her face and went on to work like it was no big deal." *Id*. The glasses concealed the bruises above her cheekbone and beside her eye, "where he hit her so hard that it broke the skin. . . " *Id*. After seeing that, Dawn called her mother and arranged to go home early even though she was still very ill. *Id*. at 1334.

Brant's school life/friends

Darlene Sloan knew Chuck as Charles Coleman when she and her family lived in the Pine Hills neighborhood. RV 51, p. 1535-40. Chuck was in elementary school and was in the same grade as her son Randy but was a year older because Chuck had been held back a grade. Sloan felt Chuck had an unhappy home life. He once looked at her sadly and said, "I wish you were my mother."

Sloan worked as a teacher's aide. She tutored students who had fallen behind in reading and math in a "learning lab." Chuck was in the program when he was in sixth grade. Chuck didn't mind being in the program like some of the other kids; he was eager to learn and was always polite.

The last time she saw Chuck was in 1999. He stopped by their house and told her that he had gotten into drugs but was trying to kick the habit and was doing pretty good. She and her husband tried to encourage him.

Meredith Carsella was a friend of Brant in high school. *Id*. at 1570-83. She knew him as Chuck Grover. They were in the chess club together. Neither of them were very good players. Chuck was very quiet. She felt Chuck had an abusive child-hood, as Meredith herself had an abusive childhood.

Brant's Drug Use Just before the Crimes

Bryan Coggins met Brant when Coggins was 16 or 17 years old. RV 48, p. 1227-42. Brant took Coggins in as a son, and Coggins looked to Brant as a father. Brant was a very caring and loving father to his sons, Seth and Noah. Brant took Coggins to do tile work, electrical work and home repairs in 2004. He "liked working with Chuck. He was teaching me. You know, he was trying to give me --- trying to evolve me into a man, I guess I would say, by work ethic. " id. at 1228-30.

Coggins stopped spending time with Brant shortly before the murder because Brant's drug escalated. *Id*. at 1231. Brant was using crystal meth on an "everyday basis," starting in the morning by drinking "it in his coffee," and eating it in "his pancakes." *Id*. He was using a few grams a day. *Id*. at 1232. Coggins had used meth and ecstasy with Brant, but not as much as Brant. *Id*. at 795-796. Shortly before the murders Brant was "not really being himself." *Id*. at 1234.

Charles Crites, who is 70 years old, was Brant's hunting buddy. V51, p. 1559-69. He last saw Brant a couple of weeks before his arrest. Brant told Crites he was working day and night. Crites was aware Brant was using drugs; he noticed that Brant had lost a lot of weight and looked "gaunt."

Brant's family day of arrest and effect on family if he is executed

Sherry and Garett both testified to the trauma and sorrow the family experienced upon learning what Brant had done. Brant went to a church and spoke to a priest. The family cried, hugged and prayed after agreeing Brant should turn himself in. Garret, who testified he was a CI for the Orange County Sheriff's Office at the time, and himself abusing drugs, testified that he spoke to OCSO Deputies who confirmed he was a CI working for an undercover agent named "Neil." After that conversation with the OCSO deputies, HCSO arrested Brant at his parents' home in Orange County.

Dr. Cunningham, a capital forensic expert, explained Chuck was turned in by his brother and family, even though Chuck was also trying to turn himself in, and this factor has a number of implications should Chuck be executed. This is a betrayal of Chuck by his brother, and there is a sense of guilt for Garett. But also there is a societal interest in supporting the integrity of the sanctity of family relationships and in protecting the community. So it is important for family members to have a sense

of a larger obligation to the community to turn in a family member who has committed a serious act of criminal violence to prevent future injuries on innocent victims. But, it is also important to foster family integrity and encourage people to come forward who might not otherwise do so upon learning that someone else came forward and the prosecution still sought death against their family member.

Mental Health Expert Testimony

Overview of Mental Health Issues

Heidi Hanlon Guerra is a licensed mental health counselor and a certified addictions professional in private practice in Tampa, Florida. RV 47, p. 1053-1100. She was accepted as an expert in the areas of forensic sentencing evaluations, substance abuse counseling, investigation of mitigation in capital cases and mental health counseling.

Hanlon conducted a biopsychosocial history on Brant and interviewed his mother, sister and half-brother. She also prepared a genogram of the family because it is important to consider the genetic issues that can be passed down, such as mental illness and substance abuse, and it is also important to look at the environment in which a person has been raised. RV 3, p. 2469-70; RV 47, p. 1062-63.

Hanlon learned that Chuck had been conceived in a rape. *Id*. at 625. Hanlon also determined that Chuck's mother and maternal grandparents had mental health and addiction issues, although Crystal's addiction issue was compulsive shopping

and gambling, not alcoholism. *Id*. at 1064-68. Chuck's maternal grandmother suffered from depression and had been prescribed Thorazine (an antipsychotic) and Elavil (an antidepressant). *Id*. She also drank excessively, had to be hospitalized for drinking rubbing alcohol, and smoked marijuana late in life. *Id*. Chuck's maternal grandfather was also violent and abusive. *Id*. [5]

Chuck's stepfather, Marvin, was an alcoholic, smoked marijuana and was violent and abusive. Chuck's half-brother, Garett, is bipolar and has substance abuse issues. Brant is also dually diagnosed - suffering from polysubstance dependence and depression. *Id*. at 1072-73.

Hanlon explained that when she is working with attorneys on a capital case, she recommends the attorneys retain an expert who can explain the genetic and environmental factors that place a person at risk for substance abuse and also an expert who can explain some of the behaviors that might be a result of the drug use and that some substances can damage the brain.

Hanlon also explained the difficulties people with a dual diagnosis face and how important that is to explain to a jury. It's important for a juror to understand

[5] That the family had a history of mental illness and substance abuse was presented at trial, see *Brant v. State*, 21 So. 3d at 1280 ("Brant's mother testified that their family had a history of depression and other mental health conditions," and Sherry Coleman testified that Marvin Coleman "was an alcoholic and a 'bully.'"). However, the connection between mental illness, substance abuse, brain damage and the genetic component of addiction was not fully addressed through expert testimony, nor were details of the abuse presented to the extent in post-conviction.

how a person's mental health affects their substance abuse, and how their substance abuse affects their mental health. "It's a key point in mitigation, so [a juror] can understand how the person was affected, how it made them think and behave." *Id*. at 1073. Hanlon also explained the increased risk a person faces when they have a first-degree relative with a substance abuse problem and also the risk faced when a person has a first-degree relative with a mental health problem. *Id*. at 1073-74. In Brant's case, there was a significant family history of both and he was genetically predisposed to both. *Id*.

Hanlon also described that Crystal had difficulty bonding with Chuck and that she did not have the same love and affection for him that she had for her other children. *Id*. at 1077. Crystal also described the snake bite that she suffered late in pregnancy, and for which she was treated. Hanlon explained that this was an environmental risk factor for Chuck. *Id*. at 1078. Other risk factors included Chuck's habit of eating plaster and his ingestion of fertilizer. *Id*. at 1079.

In addition, Chuck was teased by his peers, made fun of at the bus stop, and was made to wear a dunce cap at school while in first grade. *Id*. at 1070-81. Marvin punished Chuck by cutting off all his hair and making him wear plaid pants to school. *Id*. at 1087. When Chuck wet the bed as a first-grader, Marvin humiliated him by making him wear a diaper. *Id*. at 1082-83. Chuck couldn't read or write very well until after high school. *Id*. All of this is important for many reasons, including that

these incidents lower a person's self-esteem and people with low self-esteem often turn to substance abuse. *Id*. at 1081-82. Hanlon summed up the theme of Chuck's life: "rejection, abuse." *Id*. at 1087. "There [was] no solid foundation for him in any way that he turned. "*Id*.

Brain Damage

At the hearing, Dr. Wu explained the significance of the PET scan images. RV 12, p. 2286-97. The scan was abnormal and there were abnormalities in several different regions: the frontal lobe, the anterior cingulated and the occipital lobe. RV 14, p. 1023. The anterior cingulate region of the brain is "part of the circuitry in the brain that helps to regulate violent, aggressive impulses." *Id*. at 1025-26. The frontal lobe also regulates the violence response, so damage to the cingulate is a "second source of damage" to that system. *Id*. at 1026-28. The anterior cingulate is also a key part of the brain that regulates the cognitive and emotional area. *Id*. It is an area of the brain which can be damaged by exposure to toxins, such as lead and methamphetamines. *Id*.

Wu agreed that eating plaster and lead paint as a child, head banging as a child, methamphetamine use and a head injury as an adult are all events that could have caused brain metabolic abnormalities. *Id*. at 1032-33. In addition, sleep deprivation is also known to depress frontal lobe activity. *Id*. at 1033-34. In an individual such as Brant who has abnormal brain function, "when you add sleep deprivation on

top of the matters that were present, it would have a negative kinesic effect in terms of *significantly compounding impairment of the frontal lobe*." *Id*. at 1045. Given Brant's PET scan abnormality, meth use and sleep deprivation, Wu opined that Brant's capacity to have a normally functioning frontal lobe would have been substantially impaired and would have significantly impaired his ability to conform his behavior to the requirements of the law. *Id*. at 1045-46.

Dr. Wood also explained the significance of the PET scan images. The left hemisphere of Brant's brain is extremely underactive and there are "*very striking abnormalities*." RV 53, p. 1666. Wood specifically identified abnormalities in the orbital frontal cortex, the left side of which was "*extremely underactive and suggestive of true problems, true disability in behavioral impulse control*." *Id*. at 1675 -77. Slides of the base of Brant's frontal lobe show that "*impulse control and decision-making would be seriously limited and impaired*." *Id*. at 1678.

The additional information Wood received in post-conviction about Brant's lead exposure, head banging and head injury was significant. "[W]hen you combine all of that you begin to get strong certainty that there is brain damage . . . each of them adds its own degree of probability . . . [which is a] *multiplicative, not an additive increase in probability* ... of brain damage." *Id*. at 1683-84.

Dr. Ruben Gur, a professor of neuropsychology at the University of Pennsylvania School of Medicine with a primary appointment in the Department of Psychiatry and a secondary appointment in the Departments of Radiology and Neurology, reviewed the PET scan in this case, reviewed and conducted additional neuropsychological testing, and assessed the results of the MRI of Brant's brain conducted in post-conviction. Gur also reviewed records and met with Brant. Gur explained how behavior relates to regional brain function as demonstrated through behavioral imaging, neuropsychological testing, PET scans and how that information is used to assess brain functioning and the regions of the brain that are implicated by the deficits demonstrated in the testing.

Dr. Gur described the anatomy of the brain and that the entire brain is "amazingly connected."

Brant's MRI demonstrated a decreased volume in the left side of the limbic system and basal ganglia, the temporal lobe, and the anterior and postular insula. *Id*. at 2097-2100. In addition, Brant had reduced volume in the back of the frontal lobe, a "quite dramatic difference between the left and the right entorhinal area part of the temporal lobe." *Id*. at 2099. Dr. Gur explained that it is "*very rare to see such a difference* between the left and the right." *Id*.

Gur's review of Brant's PET showed *a striking abnormality in his hippocampus of almost 15 standard deviations below normal*. *Id*. at 2102-04. The amygdala

and left insula are also low, six and four deviations below normal respectively. *Id*. The frontal lobe shows three to four standard deviations below normal, mostly on the left side of the dorsolateral prefrontal regions as well as the dorsomedial prefrontal regions. *Id*. at 1204.

The significance of the findings is that if Brant is stressed or facing a difficult situation, his amygdala and hippocampus will become hyperactive (overactive) and his thinking brain, or executive function, will become hypoactive (underactive). *Id*. at 1206. Brant's frontal lobe is less able to inhibit aggressive responses that are being overly generated in his amygdale. *Id*.

Dr. Gur identified multiple risk factors. *Id*. at 1212-16. The risk factors included Crystal's heavy smoking during her pregnancy, the snakebite she suffered during her pregnancy, poor prenatal care, a breech delivery, lack of maternal bonding which is "crucial for healthy brain development," head banging as an infant and toddler which risks the brain hitting the sharp bines in the front of the head, ingestion of plaster and lead paint because the damage to brain tissue as an infant will affect the individual for the rest of their life, being beaten by his stepfather, exposure to trauma, Brant's elevator accident as an adult and, lastly, his history of chronic substance abuse, including methamphetamines, which are very toxic. *Id*. at 1212-14. Gur identified the snakebite as the most crucial risk factor and believed that as a result of the snake bite, Brant "was born with a bad brain." *Id*.

Gur concluded that Brant has *moderate to severe brain damage and pockets of dead gray matter tissue in his brain. Id*. at 2120-24. The damage is in regions that are important in regulating behavior so that the damage in the emotional brain that is designed to motivate pleasure seeking and the damage to the frontal lobe that is designed to control pleasure seeking behavior, suffer from a "combination of lesions and deficits and abnormalities" that made it difficult for Brant to conform his conduct to the requirements of the law. *Id*. at 2124. The addition of the methamphetamine use, "spun his brain out of control." *Id*. at 2124-25.

Testimony on Methamphetamine (history, social epidemic, addictive qualities, heightened sexuality, risk for violence)

Dr. William Alexander Morton is a psychopharmacologist whose focus is the study of the effects of prescribed drugs and drugs of abuse. RV 56, p. 1956-2020. He is one of only 750 people who are board certified in psychiatric pharmacy practice. He has evaluated over 15,300 patients with substance abuse problems. 500 to 1,000 of those patients were using methamphetamine. Dr. Morton was accepted as an expert in psychopharmacology and addiction. *Id*. at 1964.

Dr. Morton explained that there are a number of important considerations in the medical-legal arena when assessing an individual who has been using methamphetamine prior to and/or during a crime, the first of which is that meth is known to lead to violence. *Id*. at 1968-69. Meth is a very old drug that has been around for one hundred years. The information about its violent effect has been widely documented

and known even in the 1930s. *Id*. at 1969-70. "We knew that methamphetamine and violence go hand in hand." *Id*. Scientists now have a better idea of why and what part of the brain methamphetamine affects, but its link to violence and murder has been known. *Id*. at 1969.

The second factor about meth is that and it damages people's brains. *Id*. at 1970-72. At first medical experts did not know where the brain was affected, but with the advent of scanning and neuroimaging, experts can see "more or less where the changes are occurring." *Id*. at 1971. Meth reduces the volume of the brain. *Id*. Methamphetamine is one of the most powerful stimulants and it acts on the brain in a very powerful way. *Id*. at 1976.

In reviewing the testimony in Brant's case, he was struck by how the experts talked about meth "the same way they might talk about Motrin, [that] everybody knows what methamphetamine is." *Id*. They failed to explain the power of the drug. *Id*. They also failed to explain how the drug increases sex drive. *Id*. at 1978. People who take meth frequently have a three to four times higher amount of sexual activity than what is normal. *Id*. People addicted to meth "may have sex 30, 40, 50 times a month." *Id*.

Meth is an extremely potent central nervous system stimulant "of almost every nerve cell in the brain." *Id*. at 1979. It stimulates dopamine, epinephrine, norepi-nephrine and serotonin, and "causes all of these nerve cells to release all of their

stored chemical at once." *Id*. Having all of these chemicals released simultaneously in a manner the brain is not prepared for is what causes the damage and side effects. *Id*. at 1980. Methamphetamine stays in the body longer than cocaine and may stay in the body for three to five days. *Id*. People can take meth by swallowing it, injecting it, inhaling it, smoking the vapor, even putting it in their food. *Id*. at 1987.

There have been numerous meth epidemics over the years documented by the Department of Justice. *Id*. at 1986. The DOJ study recognized that meth addicts are "the sickest of all drug addicts." *Id*. at 1990.

MDMA, another drug that Brant used, was discovered in 1913. Its potential for abuse is also high. *Id*. at 1996-99. It makes people feel extremely good and for those who have never felt loved, it's a wonderful feeling. *Id*. MDMA affects memory, thinking, and mood stability and causes brain damage. *Id*.

Morton explained that there are factors which tend to cause addiction, and that 40 to 60 percent of addiction is related to a person's genetic profile. *Id*. at 2003-04. What happens to a person in utero up to six years old is also critically important in tending to cause or inhibit addiction, as is who a person lives with. *Id*. Brant has a strong genetic history of addiction and mental illness, in utero factors, including being bitten by a snake and his mother's chain-smoking during pregnancy, and environmental factors of abuse and humiliation at the hands of Marvin that all put Brant at risk for addiction. *Id*. at 2005- 07.

Dr. Morton concluded that due to Brant's methamphetamine use, Brant was *under an extreme emotional disturbance* and that his ability to appreciate the criminality of his conduct was substantially impaired. *Id*. at 2010-11. In addition, from a psychopharmacological point of view, Brant's brain damage, the kindled pathways of unusual sexual functioning, and methamphetamine addiction, all contributed to this offense. *Id*. at 2011-12.

Dr. Mark Cunningham is a nationally recognized forensic psychologist with a focus on capital cases. Dr. Cunningham was allowed to render opinions in the field of capital forensic sentencing evaluations, forensic psychology, and risk assessment as it relates to capital defendants and their conduct in prison. Cunningham was asked to identify whether there were any adverse developmental factors in Mr. Brant's background that were relevant to an analysis of moral culpability and deathworthiness and Brant's likelihood of making a positive adjustment to life in prison without parole. RV 53, p. 1708.

Based on scientific research, Cunningham explained that it is critically important that the sentencing judge or jury has an understanding of the relationship of damaging or impairing factors to choice and moral culpability. *Id*. at 1715-18. It is vitally important that the jury be educated on why they should care, or even consider, whether a capital defendant had a difficult childhood. *Id*. In the face of the notion in popular culture referred to as "the abuse excuse," it is important to explain to a fact

finder how a capital defendant's background has a nexus to criminal violence. *Id*. at 1716. It is to remind jurors of what they know about their own children – that childhood is "profoundly important." *Id*. at 1717. Children are "delicate" and childhood trauma can leave an "indelible imprint on them." *Id*. "So the task for defense counsel is to illuminate" the defendant's background and childhood with "the best available science that is essentially consistent with what jurors are thinking about their own kids but are unlikely to apply to a [capital] defendant." *Id*. at 1717-18.

When assessing moral culpability to determine if a person is deserving of the death penalty, Cunningham looks at the developmental factors of the person to determine what was the quality of the raw material that this person brought to bear in the their decision-making around the offense conduct. Cunningham identified four basic arenas of adverse developmental factors – neurodevelopmental, family and parenting, community influence, and disturbed trajectory. RV 54, p. 1726.

First, under neurodevelopmental factors which were discussed briefly at trial, Cunningham identified that Crystal smoking during her pregnancy, experienced a snakebite during her pregnancy, that Chuck was engaged in severe head banging, suffered lead exposure, and breech birth accompanied by emergency procedures. In addition to those factors, Cunningham identified that Charles Brant suffered from a socialization spectrum disorder as demonstrated by his inability to be soothed as a baby, and his difficulty in making friendships. *Id*. at 1729. Brant also exhibited

symptoms of attention deficit/hyperactivity disorder. *Id*. at 1728. Other neurodevelopmental factors include the abnormal PET scan, MRI and neuropsychological testing. This was discussed but not well linked to Brant's behavior during the offense. *Id*. at 1729. Additional factors were Brant's genetic predisposition to drug and alcohol use and his methamphetamine dependence. *Id*. at 1731-37.

The next arena that Dr. Cunningham addressed was family and parenting. *Id*. at 1735. He identified: product of a rape of his mother, Crystal; Crystal failed to bond to Chuck as a result of the rape, her own postpartum depression and psychosis, her own psychological problems and deficiencies based on her traumatic childhood and life, and Chuck's own failure to form a bond to Crystal as a baby. *Id*. at 1735-37. In addition, Brant's purported father, Eddie Brant, abandoned him and Brant was cared for as a baby by sequential caretakers. *Id*. at 1738.

In addition, Brant was exposed to Marvin's verbal abuse of Crystal, which was sexually accusing and demeaning in its content, Marvin's physical abuse and rape of Crystal, and Marvin's sexual abuse of Sherry. While some of that was touched on at trial, the implications of that on a child with sexually aggressive fantasies was not explained. *Id*. at 1737-40. "As we are trying to understand where does Chuck's sexuality --- how did he fall off the rails here in terms of the development of his own sexuality, this kind of family history is critically important in illuminating … [Chuck's] moral culpability about that sexual orientation." *Id*. The same

was true of the next factor, domestic violence; while it was discussed it was not linked to criminal violence. *Id*. at 1740. There was also generational family dysfunction in Brant's family including substance abuse and domestic violence. *Id*. at 1743.

The final arena Dr. Cunningham addressed was disturbed trajectory. *Id*. Dr. Cunningham identified two factors under this arena – aggressive sexual fantasies from early childhood and multiple risk factors for drug dependence. *Id*. at 1743-45.

Dr. Cunningham concluded that the developmental damage and impairing factors that Charles Brant experienced as a child are "extraordinary in nature," and "very significant." *Id*. at 1746.

Cunningham also explained that Brant's social difficulties as a child were consistent with research that shows sexual offenders are likely to have serious social difficulties and exhibit deficits in basic social skills. *Id*. at 1748-50. Cunningham also explained that heredity is the most powerful risk factor in identifying who might become alcohol or drug dependent. Both of Brant's maternal grandparents and Crystal had addictive issues around spending and gambling. In addition, Marvin Coleman, while not genetically linked, had addiction problems. If you have a first-degree relative who is an alcoholic or drug-abuser, you are three to five times more likely yourself to be an alcohol or drug abuser.

Cunningham explained that psychological disorders or mood disturbances also have a genetic link. RV. 55, p. 1805-07. In Brant's family, both maternal grandparents, and his mother suffered from these disorders. All of this affected Chuck's neurological development. *Id*.

Cunningham then discussed the effects of methamphetamine abuse which have a "well-known nexus with heightened sexuality, aggressive reactivity, violence and homicide." *Id*. at 1808-14. The fact that Brant said his meth use was solely to help him with his work does not negate its mitigating value. *Id*. The issue is that this abuse, regardless of why it was used initially, "has the same destabilizing effects and the same potential for engendering violence if it's used for recreational purposes. At the end of the day, it only matters what is the intensity and chronicity of the use, not the purpose for which it was started." *Id*. at 1809.

Cunningham also described what Crystal had told him about the rape. He explained that, "there are so many disturbing implications from this. First, that [Chuck's] genetic heritage from his father is from a rapist with all the personality issues that involves." *Id*. at 1816. It also implicates research that suggests there is a genetic link to sex offending and it also "speaks volumes" about Crystal's mental health problems during pregnancy and after giving birth and her inability to bond with Chuck at a critical stage of his development. *Id*. at 1817. This information provides a critically important understanding of the trial testimony about Crystal's

breakdown and shock therapy and why Eddie Brant abandoned Chuck and disappeared from Chuck's life. *Id*.

Another important factor is Crystal's failure to bond to Chuck and the sequential care Chuck received in infancy. An infant's lack of a chance to bond to a single caregiver who is nurturing is a psychological injury to a child that is profound in nature, even though the child will have no memory of it. *Id*. at 1817-19. Primary attachment disorder has significant and lasting effects and impairs a child's ability to empathize in adulthood. *Id*. There is also a nexus between disrupted attachment and sexual offending. *Id*. at 1837-39.

In addition, the sequential damage Crystal suffered as a result of her own traumatic childhood, left Crystal injured so that she comes into parenting as an injured person, and then goes about parenting with diminished capability to be a good, nurturing parent. *Id*. at 1823-27. This is why it is important in a capital sentencing investigation to obtain a multi-generational history. Id. So, for example, Crystal grew up in a house where Delphia was horribly abused, and then Crystal marries and remains with Marvin, who also horribly abuses her. *Id*. It was as if it was part of Crystal's life script. *Id*. A juror would not know that absent trial counsel investigating and presenting a generational understanding of a family system. *Id*. Crystal also neglected Chuck in two ways. *Id*. at 1831-35. First, she isn't emotionally available to love him. A child senses the quality of feeling that the adult has for them and

when a child senses a void, that is a "deeply disturbing and anxiety provoking experience" for the child. *Id*. at 1832. The other aspect of neglect is that Crystal stays in the relationship with Marvin, serving her own disturbed needs, "at the expense of protecting and providing stability" for her children. *Id*. The household was a "profoundly chaotic context" in which the children grew up. *Id*. This kind of neglect creates a "sense of terror that the child has that their world is out of control." *Id*. at 1832-33. This damage is observable in Chuck as he enters middle childhood. *Id*. And, children who have been emotionally neglected are at increased risk for psychological disorders and for criminal behavior in adulthood. *Id*. at 1833-34.

Dr. Cunningham also explained that Marvin's behavior, of raping Crystal and attacking Sherry sexually "by surprise," affected Chuck's sexual development and was so "injurious," that we would wonder how could anyone "develop a healthy sexuality in this climate." *Id*. at 1841-50. In Chuck's case, not only is there a lack of healthy emotional and psychological development due to abuse and neglect, but the "additional pieces that get added to aggression and eroticism include the brain abnormality … and methamphetamine dependence." *Id*. at 1850-54.

Cunningham explained that cumulative and synergistic action of the neglect, abuse, neurological and psychological deficits that Brant experienced affected his conduct at the time of the crime and resulted in a psychological state so that Brant's capacity to appreciate the criminality of his conduct and conform his conduct to the

requirements of the law was substantially impaired and that the capital felony was committed while Brant was under *the influence of an extreme emotional disturbance*. RV 56, p. 1897-1900.

Positive Prison Adjustment Testimony

Prison Adjustment Testimony

Brian Richie was in jail with Brant from 2004-2005. RV. 44, p. 744-54. Both he and Brant were trustees. They were allowed out of their cells at night and cleaned the floors with a heavy buffer machine, and made breakfast and served it to the other inmates. There were approximately 50 to 60 inmates housed in the pod at a given time.

Brian Coggins (who witnessed Brant's drug use as noted above) was arrested about a year after Brant was arrested and ironically placed in the same Pod at the jail. RV 48, p. 1227-42. Brant looked a lot different, he had gained weight and he was very emotional and remorseful. Coggins was only in the same Pod for a few days but saw Brant on the phone talking to his family, crying and breaking down. Coggins never talked to him again.

Records Custodian Jan Bates reviewed Brant's HCSO jail records. RV 45, p. 871-80. Brant was initially placed in confinement due to the high profile nature of his case but was later moved to general population even though he was considered a maximum security inmate due to the severity of his charges. The jail classifications

staff later allowed Brant to be a "close supervision trustee." Trustees were allowed to clean the Pod, heat meals in an oven and serve them, and do laundry using a washer and dryer kept in the Pod.

James Aiken is a nationally respected expert on prisons and prison adjustment, with decades of experience as a warden and secretary of departments of corrections. RV 47, p. 1102-50. While he was a warden, Mr. Aiken personally put two people to death. He was able to come to Florida to observe an execution prior to performing the two executions in South Carolina. *Id*. at 1111. He was appointed by President George W. Bush to serve on the Prison Rape Elimination Commission. *Id*. at 1115. He has classified "literally thousands and thousands of inmates, developed classification systems and revalidated classification systems in a number of jurisdictions." *Id*. at 1116. He was accepted as an expert in the areas of prison operations and classifications of inmate's adaptability to the prison setting. *Id*. at 1116-17.

Aiken reviewed Brant's Jail Records, the Sentencing Order, the Opinion on direct appeal, and also interviewed Brant. He was also able to speak with several correctional staff from the Jail in developing his opinions in this case.

In assessing Brant's ability to adapt to prison, Aiken made a number of determinations. First, because Brant's crimes include a rape, Brant is actually coming into the prison system with a high degree of vulnerability. He has seen inmates attacked because they are sex offenders. "They are at the lowest ebb of the prison hierarchy."

Id. at 1121. His concern about Brant is that he is someone who, "doesn't know how to pull time. In other words, he has to learn how to survive in this abnormal environment. " *Id*. at 1121-22. Aiken, however, was intrigued by how well Brant did. He obtained trustee status in a Pod setting and had, "only two altercations when he was standing charges as a sex offender. That tells me something. . . .[H]e is evidently doing something correct in order to avoid trouble," *Id*.

In addition, people with mental illness do well in a structured prison environment. They adjust well to the mundane routine. *Id*. at 1122-23. Age is also a very important factor, the older an inmate, the more compliant. *Id*. Aiken saw Brant as a compliant inmate who accepts his circumstances. *Id*. at 1125.

The significance of Brant being a trustee is that trustees have access to contraband or the dissemination of contraband within a facility. So Aiken saw that Brant was an inmate who gained a level of professional trust from the staff. *Id*. at 1129-31. When you put that on top of a sex offender charge, this tells Aiken "volumes." *Id*. This is "an inmate that is above the regular inmates. "*Id*. Aiken opined that Brant can be housed and managed and secured in the Florida Department of Corrections for the remainder of his life without causing an undue risk of harm to staff, inmates, or the community. *Id*. at 1131.

Dr. Cunningham was also asked to address positive prisoner adjustment. Even if future dangerousness is not a specific aggravating factor that jurors are required

to find before rendering a death verdict, research suggests *that it is always an issue of consideration for the jury*. RV 14, p. 1464-1468. "It's the elephant in the room." *Id*. at 1464. Jurors overestimate the likelihood of a defendant committing another homicide in prison by up to 250-fold. *Id*. at 1466. The actual rate of homicide is 1%-5%, but studies show that jurors believe it is 50%. *Id*.

Cunningham concluded that "there is very little likelihood that [Brant] would commit serious violence [if] confined for life in the Florida Department of Corrections." *Id*. at 1468.

Testimony Regarding Brady Issue

The State never told defense counsel at any time during or prior to trial that Garrett Coleman was a Confidential Informant and for two years objected in post - conviction to turning over complete records about Garret's status and the names of the OCSO officers on duty in Pine Hills the night Brant was arrested. RV 5, p. 895-905. After repeated objections to public records requests and questioning of Garret in the back of a car, the State turned over minimal records – which appear to be incomplete - that showed Garret was a CI during Brant's trial in 2007. RV. 4, p. 610-645, RV 4, p. 672-681, RV 13, p. 2430-2465; see also Post-Conviction testimony of Garret Coleman. Neil Clarke, a narcotics agent with OCSO confirmed Garret's status as a CI at the time of trial but claimed Garret only started as a CI in 2006.

Hillsboro County Detectives in the case, testified in post-conviction based on hearsay and conjecture and a "review" of the police reports, that they did not think they obtained Brant's location through Garret Coleman. *Id*. at 401 to 430.

SUMMARY OF ARGUMENT

Claim 1: Brant's counsel rendered ineffective assistance in advising him to enter a guilty plea because the jury would be less likely to be angry with him. Counsel gave this advice without consulting a jury expert or doing any investigation on jury decision making. Counsel was wrong and the jurors were irate that Brant had pled guilty and still wanted a penalty phase trial. As a result, Brant then waived a penalty phase jury. But for counsel's deficient performance, Brant would not have pled guilty but would have exercised his right to a trial.

Claim 2: Brant's counsel rendered ineffective assistance in the penalty phase by failing to conduct a reasonable investigation, most significantly by failing to make any effort to find out anything about Brant's father and thereby failing to discover that Brant himself was conceived in a rape. Counsel further failed to consult with a specialist expert on methamphetamine even though counsel was advised by a judge and his psychiatrist expert that such an expert should be consulted. Counsel likewise failed to investigate and present prison adjustment testimony and link Brant's abusive childhood to his psychological and emotional development. Counsel's failure prejudiced Brant so that there is a reasonable probability he would have

received a life sentence. The post- conviction court erred, misstated the *Strickland* prejudice prong and misapprehended the analysis required under the prejudice and performance prongs of *Strickland*.

Claim 3: Brant's counsel rendered ineffective assistance in the penalty phase by advising him to, or failing to advise him not to, waive a penalty phase jury. But for counsel's ineffective advise to plead guilty, and in failing to investigate and advise him of the wealth of mitigation in his case, Brant would not have waived a sentencing phase jury. The post –conviction court erred when the court found that trial counsel simply didn't advise Brant so there was no Sixth Amendment violation.

Claim 4: The State's repeated refusal to turn over *Brady* material as to Garret Coleman's status as a CI not only violated Brant's rights at trial but also in post-conviction as Brant has been precluded from a full and fair hearing to establish his claim that Garret was a CI at the time Brant was arrested.

STANDARD OF REVIEW

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

ARGUMENT

CLAIM I – Counsel was ineffective in failing to research jury decision-making and thus misadvising Brant to enter a guilty plea based on an uninformed belief that by

pleading guilty, Brant was less likely to incur the jury's anger. Counsel was further deficient in failing to investigate mitigation prior to advising Brant to enter a plea. But for counsel's deficient performance, Brant would not have pled guilty.

Counsel's failure to investigate and consult with a jury expert or research jury-decision making and thus misadvise Brant to plead guilty to crimes of sexual violence, kidnapping and murder was deficient performance which fell below prevailing norms. Counsel's failure prejudiced Mr. Brant. There exists a reasonable probability that Mr. Brant would have exercised his right to a jury trial and not have been sentenced to death.

When a defendant challenges a guilty plea under an ineffective assistance of counsel claim, the two-part *Strickland* standard applies. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985). To show deficient performance in the context of a guilty plea, a defendant "must demonstrate that the advice was not within the range of competence demanded of attorneys in criminal cases." *Id*. at 58, 370. When as here, an attorney induces his client into entering a blind guilty plea, automatically qualifying him for the death penalty, and obtaining no benefit for his client's plea, the attorney fails to perform as required by the Sixth Amendment. Brant need not prove his defenses would prevail – and in this case that includes whether he would be sentenced to death - but only that, had he been correctly advised, there exists a reasonable probability he would have proceeded to trial.

"In determining whether a reasonable probability exists that the defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial." *Grovesnor v. State*, 874 So. 2d 1176, 1181-82 (Fla. 2004) (collecting state and federal cases). As emphasized in *Hill*, the analysis should be "objectively" made without regard for the idiosyncrasies of the decision maker. *Hill*, 474 U.S. at 59-60.

The post- conviction court denied this claim determining that the ABA Guidelines "are neither rules nor requirements," and that trial counsel's agreement to have Brant plead guilty was a reasonable strategy because counsel considered an alternative strategy of trying to suppress Brant's confession. RV. 18, p. 3397. The court further found Terrana's testimony that Brant wanted to plead "'from day one'" to be credible. *Id*. The court also found Brant benefited from his guilty plea as the trial court included it as a factor in mitigation. The court also found that counsels' mitigation investigation was not unreasonable, referencing her findings as to Claim 2. The court also found that Brant's testimony that he would not have pled guilty absent counsel's advice to be not credible. Id. at 3399. However, the court doesn't set out any facts or reasons for the credibility determination.

The post-conviction court's ruling is an unreasonable application of the law to the facts. Trial counsel's mitigation investigation fell below prevailing norms. It is uncontested that trial counsel failed to conduct any analysis or research into whether their advice to Brant to plead guilty *because they believed the jury would be less angry* was grounded in science and jury research. The potential jurors' comments and conduct illustrate the extent to which counsel's advice was uninformed. Strategic decisions are only reasonable to the extent they are based on a reasonable investigation. "*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." *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Here, counsel attempted "to justify their limited investigation as reflecting a tactical judgment." Id. at 522. Where, as here, counsel conducted no investigation into jury decision-making, it cannot be said that counsels' decision was based on an informed judgment. *Strickland v. Washington*, 466 U.S. 668, 690-91(1984). The post- conviction court failed to make the necessary consideration in assessing counsel's performance.

Further, the post- conviction court's dismissal of the legitimacy of the ABA Guidelines conflicts with clearly established federal law. "[W]e have long referred to [these ABA standards] as 'guides to determining what is reasonable' and the [State] has come up with no reason to think the quoted standard impertinent here."

Rompilla v Beard, 545 U.S. 374, 387 (2005) citing *Wiggins v. Smith*, 539 U.S. at 524 (quoting *Strickland v. Washington*, 466 U.S. at 688). *See also Porter v. McCollum*, 130 S.Ct. 447, 453 (2009) (finding counsel's performance "fell short of . . . professional standards.") (quoting *Wiggins v. Smith*, 539 U.S.510, 524 (2003)). Brant did not ask the court to treat the Guidelines as "inexorable commands," but as "guides to determining what is reasonable in the defense" of capital cases.

Trial counsel testified that they discussed entering a guilty plea with Mr. Brant. Neither attorney could recall the specifics of the discussion but Fraser agreed that the letter he sent to Brant detailing the conversation was the most accurate rendition of the conversation. RV 10, p. 1880-83. Fraser and Terrana advised Brant that by entering a guilty plea, he was "less likely to incur the jury's wrath." *Id*. Terrana and Fraser gave this advice even though they had not consulted with a jury selection expert and had conducted no review of the available literature to see if their guess was supported by research or other objective facts. This was deficient performance.

Unrebutted testimony established that allowing a client or advising a client to enter a guilty plea as charged without an agreement for a life sentence is something capital lawyers are strongly urged not to do. While it is the client who ultimately makes the decision, the client doesn't do so in a vacuum. The client relies on the advice of his attorneys. The advice the attorney gives, based on prevailing norms, must be based on a reasonable investigation.

In addition, the trial lawyers were also unaware of extensive mitigation in this case –including the fact Brant was conceived during a rape. Counsel lacked an understanding of the extent of Brant's brain damage and childhood experiences, and failed to comprehend the mitigating value of Brant's meth use. Because their investigation was deficient, the advice they gave Brant about entering a plea, was likewise deficient.

In this case, the unique facts of pleading guilty are inextricably intertwined with the lawyers' advice and decision-making on avoiding a death sentence. Counsel's mitigation investigation was so deficient and so flawed in this case, that their advice to plead guilty was based on an unreasonable judgment that there was not much mitigation in this case. That there exists a reasonable probability that Brant would not have entered a guilty plea, absent counsel's misadvice about the strength of the mitigating evidence available in Brant's case, and their uninformed guess work that the jury would be less angry if Brant pled guilty.

Based on an objective assessment of the case as required by *Grovesnor*, particularly the fact that Brant received no benefit for his guilty plea and was exposed to the maximum penalty under law, and that his lawyers' advice about the jury not being angry with him was not supported by any scientific or objective data about jury decision-making, there exists a reasonable probability that but for counsel's misadvice Brant would not have pled guilty but would have insisted on exercising

his right to trial. The court's determination that Brant received a benefit because the judge gave him some credit in mitigation for pleading guilty is illusory. It does not qualify as a negotiated meaningful benefit as contemplated by the Court in *Hill.*

This Court should set aside Brant's guilty plea and allow him to have a trial in front of a jury that can hear the evidence in his case and then proceed to an informed sentencing trial.

CLAIM II – *Counsel rendered ineffective assistance in the penalty phase by failing to investigate and present mitigation which prejudiced Mr. Brant.*

Trial counsel rendered deficient performance in the penalty phase by: 1) failing to investigate Brant's father and thereby failing to learn Brant was conceived in a rape, 2) by identifying the need for a methamphetamine specialist expert at the advice of a circuit court judge but failing to consult with one through inattention and neglect, 3) by identifying the need for a prison expert but failing to consult with one through inattention and neglect, 4) by making a decision to not present the PET scan images without ever viewing those images, and 5) by failing to conduct an adequate background and mental health investigation as will be more fully argued below.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. *Id*. at 688. Specifically, counsel has a duty to investigate in order to make the adversarial testing process work in the particular case. *Id.* at 690. "An ineffective assistance of counsel claim has two components: A petitioner

must show that counsel's performance was deficient and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984) (internal citations omitted). The proper measure of an attorney's performance remains "simply reasonableness under prevailing norms." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). *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. "'[S]trategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.' *** A decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances.'" *Wiggins*, 539 U.S. at 533.

Prejudice is defined as "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. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694.

Because the right to effective assistance of counsel is so fundamental, the standard for proving prejudice is low. *Strickland v. Washington*, at 694-696.

When a court fails to consider the totality of the evidence presented at trial and at post- conviction, its decision is unreasonable within the meaning of *Strickland. (Terry) Williams v. Taylor,* 529 U.S. 362 (2000). See also *Cooper v. Secretary, DOC,* 646 F.3d 1328 (11th Cir. 2011) (finding prejudice despite overwhelming evidence of guilt in a triple murder case). Moreover, the Court has held, "[w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was 'little to no mitigation evidence presented.'" *Sears v. Upton,* 130 S.Ct. 3259, 3265-66 (2010).

In its order denying relief on this claim, the post- conviction court made four legal errors which render its prejudice analysis fundamentally flawed. First, the post-conviction court assessed the additional mitigation evidence piece-meal. R. V 18, p. 3476 -82. In so doing, it performed a flawed analysis and failed to consider all the evidence presented in post-conviction. Second, the post-conviction court misapprehended the prejudice standard when it stated that "there is no reasonable probability that the trial court would have imposed a life sentence" if an individual piece of evidence had been produced. *Id*. at 3477, 3480. The court must consider the totality of the evidence presented at trial and in post- conviction and the effect it would have

on a reasonable juror. Third, in rejecting this claim, the post-conviction court addressed some of the sub-claims under prejudice, avoiding having to determine deficient performance, and then addressed other sub-claims under performance only. Id. at 3475 to 3483. In so doing, the post-conviction court misapprehended the Strickland analysis. While it is true a court need only address one prong of *Strickland* if it determines the defendant has failed to meet that prong as to a claim, it cannot subdivide individual allegations in a claim and treat them as separate claims as a means to avoid a full analysis of one of the prongs. Fourth, the post-conviction court misapprehended the nature and meaning of what constitutes cumulative evidence under *Strickland*.

Counsel's deficiencies as to this claim are identified and set out below. Brant will then address the prejudice as a result of counsel's failures in the last section of this claim.

A. Failure to investigate Brant's father and determine he was conceived in a rape

Counsel failed to conduct a reasonable investigation into Brant's background, including his conception and his purported father's family history. Despite prevailing norms and unrebutted testimony that a capital mitigation investigation should include a multi-generational assessment of both sides of a capital defendant's family, including an investigation of the defendant's life from "conception" to the present, counsel wholly failed to even try to speak to Eddie Brant or, later, Eddie Brant's

widow. Trial counsel obtained a mitigation specialist and a fact investigator yet inexplicably and unreasonably limited their investigation to witnesses in Florida. Had counsel, or his investigator, simply picked up the phone and had a ten-minute phone call with Eddie Brant or, after mid-2005, his widow, Mary Kay Brant, counsel would have been put on notice that Eddie Brant was not Chuck's father. Had counsel spoken to other witnesses in Ohio and West Virginia, including Brant's maternal uncle, Jerry Crane, or paternal aunt, Annice Crookshanks, he would have been aware that this was common knowledge within both families. Armed with this information, trial counsel could have confronted Crystal, who admitted she would have come forward with the fact that Chuck was conceived in a rape if approached with the fact that both families knew Eddie wasn't Chuck's father.

The significance of this mitigation cannot be overstated in a rape-murder. As Dr. Cunningham explained, the rape illuminates the tragic trajectory of Brant's life, starting with his conception, his mother's difficult chain-smoking pregnancy, and her rejection of him from infancy forward. The fact that Chuck was conceived in a rape, and the expert testimony explaining the significance of that on Chuck's physical, emotional and neurological development, would have had a profound effect on a reasonable juror.

In rejecting this sub-claim, the post-conviction court found that Brant has "failed to show that counsel performed deficiently in failing to discover this information," because "counsel cannot be expected to verify paternity through other family members nor seek DNA testing to confirm parentage." R. V. p. 3476-77. The court's analysis is inconsistent with *Strickland* and directly contradicts the unrebutted testimony regarding prevailing norms and the ABA Guidelines. It is rudimentary that counsel is expected to make efforts to speak to a capital defendant's father. Counsel's failure to do so falls well below the wide range of prevailing norms.

The post-conviction court is also mistaken in stating that trial counsel would have had to obtain DNA testing to discover Brant's paternity. [6] The court's finding is refuted by Mary Kay Brant's testimony that she voluntarily "opened a can of worms," in a ten-minute phone call and Crystal's testimony that she would have come forward. The testimony squarely established that the information was there for the taking in a brief phone call – and Crystal expressly testified that she would have told the truth about being raped if she had been confronted with the fact that almost everybody in West Virginia and Ohio knew Eddie wasn't Chuck's father. Also, it is standard practice in a capital investigation to develop rapport with family members in order to obtain information about the intimate details of a family's history. This is especially true when dealing with a sexual assault victim – such as Crystal. The

[6] Indeed, Brant never once argued or suggested that counsel needed to obtain DNA.

lower court's analysis is an unreasonable application of *Strickland* and is unsupported by the facts.

Lastly, the post-conviction court, having determined counsel did not perform deficiently, did not assess the fact that Brant was conceived in a rape as part of its prejudice analysis. *Id*. at 3477. This is clearly error and will be addressed more fully below.

B. Failure to consult with a methamphetamine expert

Trial counsel knew evidence of Brant's methamphetamine use was going to be admitted at his trial and Terrana, at least, recognized it as an important part of the mitigation theory. On November 6, 2006, Fraser sent a letter to Maloney, asking her to contact two methamphetamine experts that Judge Behnke had recommended. R V 10, p. 1875-79. Fraser's own psychiatric expert, Dr. Maher, recommended Fraser seek a specialist expert on this subject due to the significance of Brant's meth use in this case. Neither Fraser nor Maloney could clearly explain what happened or why neither of these experts were retained. Trial counsel's failure to present a specialist expert on methamphetamine and its effect on the brain was not a strategic decision but the result of inattention and neglect.

The post-conviction court rejected this sub-claim, finding that "Fraser attempted to find a methamphetamine expert but ultimately made a strategic decision to introduce testimony regarding the effects of methamphetamine use through Dr.

Maher." R. V. 18, p. 3479. The post- conviction court's finding must fail under the facts and the law. Fraser's decision not to present a specialist expert on meth use cannot fairly be considered a reasonable strategic decision because Fraser never spoke to such an expert and therefore would not have been able to make a reasonably informed strategic decision whether to present such testimony. Further, Fraser lacked an understanding of the effects of meth on his client when he stated he didn't think it was mitigating because Brant used it to work. Counsel performed deficiently in failing to have his mitigation expert follow up with the experts, or, upon her failing, failing to do so himself.

The post-conviction court also found the testimony to be cumulative as "the crux of Dr. Morton's testimony . . . was conveyed through Dr. Maher." RV 18, p. 3479. The lower court is mistaken on the facts and law in making this determination as well. This will be addressed below.

C. Trial counsel performed deficiently in identifying the need for a prison adjustment expert but failed through inadvertence and neglect to consult with such an expert.

Fraser identified the need for a prison expert. Fraser wrote a letter to Toni Maloney asking her to find the name and contact information for the prison adjustment expert they had discussed. RV 10, p. 1886. As far as Fraser knew, Maloney never did so. Fraser had thought Maloney had too many cases at the time she worked on Brant's case. Maloney claimed she spoke to James Aiken but did not know why he

was not retained. Aiken said he had no memory of ever being contacted on Brant's case prior to post conviction counsel contacting him. Fraser said he never spoke to any jail guards or other inmates. He had no explanation for this failure. Terrana stated he always presented prison adjustment evidence, usually through his psychologist, and did not know why Fraser failed to do so in this case. There was no testimony at trial about Brant's status as a trustee or his potential adjustment to prison.

Dr. Cunningham also testified that scientific studies show that a capital defendant's likelihood to hurt someone while in prison is *almost always* on a juror's mind and that juror's over-estimate by 250 fold a capital defendant's likelihood of harming another inmate or staff if sentenced to life. That is why prevailing norms guide a lawyer to investigate and present favorable prison adjustment testimony.

Trial counsel was aware of and recognized the need to present Brant's potential to adjust favorably to prison, but trial counsel simply failed to investigate this mitigation. Counsel's failure was due to inadvertence and neglect and not based on a reasonable investigation said to support a strategy. Counsel's performance fell below the wide-range of prevailing norms.

The post- conviction court determined the record was "unclear why counsel did not present *Skipper* evidence," but that counsel's "failure" to do so "did not affect the outcome of the proceedings." RV 18, p. 3477. The lower court, therefore, found

counsel deficient in this regard but denied this sub claim by determining the evidence would not have persuaded the trial court to "impose a life sentence." Id. This was error because, 1) the court applied the wrong standard, 2) failed to consider the mitigation in its totality and, 2) the court failed to credit the weight and significance of this testimony.

D. Trial counsel performed deficiently in failing to conduct a reasonable investigation into Brant's childhood, family and multi-generational background of addiction, abuse, neglect and sexual exposure.

Trial counsel performed deficiently by failing to fully investigate Brant's childhood, his family background, multi-generational history, mental health and risk factors for brain damage and sexually aggressive behavior. Counsel further performed deficiently by failing to provide background information to his experts so that they could assess the information and provide insight as to how Brant's background affected his emotional and psychological development.

The post-conviction record establishes that trial counsel unreasonably limited their mitigation investigation to witnesses in Florida, failed to identify or find classmates and peers, and failed to communicate with the family in a consistent and meaningful manner as is required to develop rapport. Counsel gave his two mental health experts limited background information and only had them speak to one or two family members. Fraser only spoke to Brant's mother twice. In so doing, trial counsel failed to investigate or discover significant mitigation.

The post-conviction court denied this sub-claim finding that the testimony was cumulative and "[c]onsequently, the Court further finds Defendant has failed to establish that counsel performed deficiently." RV 18, p. 3475-76. In so doing, the court mixed the prejudice and performance prongs and applied a circular analysis not supported by law, e.g. if the evidence is cumulative, counsel is not deficient. Rather, when analyzing counsel's performance, the question must be, did counsel conduct a reasonable investigation based on the information he or she reasonably should have obtained or known? The court wholly fails to engage in an analysis of counsel's efforts and/or compare counsel's efforts to prevailing norms. The post-conviction court's analysis fails to comply with *Strickland*.

Had the court applied the analysis compelled by *Strickland,* the court would have concluded that counsel unreasonably curtailed their mitigation investigation after relying on rudimentary information obtained from a narrow set of sources. Counsel simply failed to 1) investigate any multi-generational history of either the Brants or the Cranes; 2) failed to obtain medical records documenting a head injury, even though the mitigation specialist said she was aware of it; 3) failed to convey to their experts risk factors for brain damage, such as Brant's childhood head-banging, ingestion of plaster, and Crystal's pregnancy history, where she was bitten by a venomous snake and chain-smoked cigarettes; 4) failed to speak to teachers or school age peers; 5) failed to speak to friends who used drugs with or observed Brant use

drugs just prior to the crime; 6) failed to fully investigate the efforts of the family to turn Brant in to the authorities and the mitigating value of that, 7) failed to speak to Marvin's ex-wife and daughter who described the nature of Marvin's sadistic and sexually driven cruelty in detail beyond the passing references offered at trial and, who corroborated Crystal's description of Marvin's rapes and abuse, and 8) failed to discover and elicit Marvin's "pretend rape" of Sherry and the fact his sexual assaults were initiated by "surprise." Counsel cannot be said to have performed within prevailing norms based on the evidence of their truncated, scattered and unfocused investigation described in post-conviction.

E. Failure to Adequately Investigate and Present Brain Damage By Failing to View PET Scan Images, Identify Risk Factors and Understand the Existence of and Extent of Brant's Brain Damage

Prevailing norms establish that attorneys should investigate brain damage and that it should be presented in a cohesive manner that sets out the likely causes, the effects, and the nexus to the crime. When possible, counsel should also present neuro-imaging to provide visual evidence that studies have shown is particularly persuasive to jurors. Trial counsel recognized the need to investigate brain damage and retained neuropsychologist McClain. McClain recommended Fraser have Brant undergo a PET scan and swore in an affidavit that the PET scan was necessary. The scan demonstrated brain damage. Fraser, however, never presented the PET scan.

Fraser also failed to present testimony about the numerous risk factors for brain damage that Brant had been exposed to, failed to clearly link the brain damage to Brant's severe and chronic methamphetamine abuse, and failed to present testimony of how Brant's brain damage was inexorably linked to the crime. This was deficient performance.

The post – conviction court denied this claim. RV p. 3478. The court found Fraser's testimony that he made a strategic decision to present the PET through Maher to be credible. Fraser's was concerned that the State's expert, Helen Mayberg, would be more credible. *Id*. The court further found that all the experts acknowledged that the use of PET scans was "an issue of some debate in the scientific community." *Id*.

The court's findings in this regard are both an unreasonable application of the law and unsupported by substantial and competent evidence. A comparison of Fraser's Memo, RV. 10, p. 1903, the trial record and the post-conviction record demonstrate that Fraser gave conflicting testimony, that he failed to view the PET scan images, that simple research would have demonstrated that his concern about Dr. Mayberg was unfounded and that he failed to recognize the risk factors Brant experienced.

In his Memo, Fraser claimed that, although a lightning storm disrupted his conference call with McClain, Wood and Wu, he was still able to talk to them. However, Wood and Wu both said the call never happened and they never discussed the PET images with Fraser in any meaningful way. Fraser also wrote that Wood and Wu agreed with his decision. But Wood and Wu couldn't have done so since the call never happened. All they knew was that they were suddenly told not to come and testify and they had no idea why.

Fraser also wrote in the memo that he had a discussion with Maher about not presenting the PET scan. But both Drs. McClain and Maher didn't know he didn't present the PET until post – conviction. Maher said he was asked to testify about the PET but he is not able to read a PET and is not a PET scan expert. Terrana, likewise, had no idea Fraser didn't present the PET scan images until post-conviction and had no idea why he didn't present them. Fraser's concerns about Mayberg were likewise unfounded. See *State v. Hoskins*, 965 So. 2d 1, 6-7 (Fla. 2007); *State v. Hoskins*, 735 So. 2d 1281 (Fla. 1999) and *State v. Hoskins*, Trial Court Order on admissibility of PET scans pursuant to *Frye* hearing, Brevard County Circuit Court Case No. 92-CF-1795 (crediting Wu and Wood's opinion over Mayberg and determining that a PET scan meets the *Frye* standard). See also RV 46, p. 1043-44.

In addition, Fraser failed to provide Drs. Wood, Wu and Maher with background information that supported the diagnosis of brain damage: the snake bite

Crystal suffered during Brant's pregnancy, and that Brant engaged in head-banging, and ingested plaster, lead paint and fertilizer as a child. Fraser himself mistakenly thought Brant had no risk factors for brain damage – a misunderstanding contradicted by a wealth of evidence. Trial counsel further failed to obtain records of a head injury Brant suffered as an adult or convey to Drs. Wood or Wu the extent of Brant's methamphetamine use.

Thus any decision to not present the PET was not based on a reasoned and informed judgment but appears to be the result of neglect. As a result of these failures, the trial judge never saw the PET scan images, was unaware of the risk factors for brain damage that were present in Brant's case, and was not given a complete understanding of the of brain damage suffered by Brant as evidenced by his findings in his Sentencing Order. In post-conviction, Gur administered additional neuropsychological testing, reviewed the PET and evaluated an MRI to determine that Brant has "moderate to severe brain damage," and his brain has "pockets of gray matter tissue that is dead, that is just gone." RV 15, p. 1687.

In this case, Fraser failed to fully investigate and/or present brain damage and the effects of environmental toxins and childhood abuse and neglect on the developing brain. Fraser failed to inform his experts about the risk factors for brain damage noted supra. Counsel's deficient performance prejudiced Brant.

Prejudice Analysis – Had a Jury Been Presented with the Totality of the Mitigation Presented at Trial and Post- Conviction, there Exists a Reasonable Probability Brant would have Received a Life Sentence.

Brant has established prejudice. He has presented a wealth of mitigating evidence not presented at trial – and presented additional evidence which paints a graphic picture of the neglect, cruelty and dysfunction Brant experienced that was only touched on at trial and which marked Brant's life from the moment Crystal discovered he was growing in her womb.

The Supreme Court has "found deficiency *and* prejudice in cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase." *Sears v. Upton*, 130 S. Ct. 3259, 3266 (2010) (emphasis in original) (citing *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (remorse and cooperation with police); *Rompilla v. Beard,* 545 U.S. 374, 378 (2005) (residual doubt); *Porter v. McCollum,* 130 S.Ct. 447, 453-54 (2009) (per curiam) (diminished capacity based on drunkenness). The Court explained in *Sears* that "[w]e certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears,* 130 S. Ct. at 3266 (emphasis in original).

Moreover, even where, as here, some of the subject matter of the trial and post-conviction evidence overlaps to some degree, prejudice may be established under *Strickland* where trial counsel fails to adequately describe the nature and extent

of abuse the petitioner suffered. *See Wiggins v. Smith*, 539 U.S. 510, 535-36 (2003) (finding deficiency and prejudice "[g]iven both the *nature and extent* of the abuse petitioner suffered") (emphasis added); *Williams*, 529 U.S. at 370, 398 (finding prejudice based on counsel's omission of "*graphic description* of [the petitioner's] childhood" including "documents . . . that *dramatically described* mistreatment, abuse, and neglect") (emphasis added).

Thus, the federal circuit courts have consistently granted *Strickland* relief where some evidence of childhood trauma was presented at trial, but the post-conviction evidence made clear that the jury never learned the full scope of that trauma. *See Williams v. Allen*, 542 F.3d 1326, 1329, 1342 (11th Cir. 2008) (even though petitioner's mother testified at trial that the petitioner was subject to physical abuse as a child, the post-conviction investigation revealed "a vastly different picture of [the petitioner's] background than that created by [the] abbreviated [trial] testimony . . . . [and] the violence experienced by Williams as a child far exceeded—in both frequency and severity—the punishments described at sentencing."); *Johnson v. Secretary of DOC*, 643 F.3d 907, 936 (11th Cir. 2011) ("The description, details, and depth of abuse in Johnson's background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told."); *Foust v. Houk*, 655 F.3d 524, 539-40 (6th Cir. 2011) (trial testimony was that petitioner's home was not "well kept," that his mother did not clean the home,

and that the children had head lice; post-conviction evidence depicted the squalor and chaos of the home in more vivid detail, and as a result, "[p]assing references at the mitigation hearing . . . in no way conveyed the abysmal condition" of the home); *Johnson v. Bagley*, 544 F.3d 592, 602 (6th Cir. 2008) (finding deficient performance where "the [trial] testimony only scratched the surface of Johnson's horrific childhood."); *Jermyn v. Horn*, 266 F.3d 257, 271, 310 (3d Cir. 2001) (where the defense presented evidence of petitioner's mental illness and dysfunctional relationship with his parents, relief was granted because of unpresented "strong and specific testimony about a horrific home life" and additional testimony that "would have strengthened the evidence pertaining to Jermyn's mental illness . . . ."); *Stankewitz v. Woodford*, 365 F.3d 706, 724 (9th Cir. 2004) (explaining that a defendant is prejudiced when counsel introduces "some of the defendant's social history" but does so "in a cursory manner that was not particularly useful or compelling.") (citations omitted).

In spite of this well-established case law, the post-conviction court misapprehended the Strickland prejudice standard and evaluated the claims in a piece –meal fashion. As noted supra, the court found that "although trial counsel did not" explain how Brant's childhood and background of abuse and neglect affected his emotional, psychological and brain development, no prejudice was established. RV 18, p. 3477. In denying this sub-claim, the court not only improperly considered this piece-meal but limited the prejudice analysis to the following: "The Court first notes the trial

court found in aggravation that the homicide was committed in the course of a sexual battery and HAC, an especially weighty aggravator. *See Butler v. State*, 100 So. 3d 638, 667 (Fla. 2012) ('HAC is considered one of the weightiest aggravators in the statutory scheme.') The Court finds there is no reasonable probability the trial court would have imposed a life sentence." *Id*.

The post- conviction court clearly misstates the prejudice standard and further misapprehends the standard by engaging in a perfunctory, piece -meal analysis that fails to weigh the totality of the mitigation presented at trial and in post- conviction. The post- conviction court repeats this error throughout its Order, stating, by way of example as to counsel's failure to present positive prison adaption evidence, "in light of the trial court's finding of HAC and that the murder was committed during a sexual battery, the Court finds there is no reasonable probability that the trial court would have imposed a life sentence if such *Skipper* evidence had been presented." *Id*. This is the sum of the court's analysis as to this sub – claim. See also Id. at 3477-3483 (improper standard as to sub –claims, evaluation of prejudice limited to sub – claims). The court also improperly failed to assess or weigh evidence where the court found counsel to have made a strategic decision. Id. at 3476-77 (failure to investigate Brant's father and discover he was conceived in a rape). While a court may deny a claim on a single prong, it cannot use that technique to avoid weighing mitigating evidence where it has found counsel performed deficiently in some other regard.

This Court should clarify the proper standard and engage in the necessary totality analysis required by the Supreme Court in *Strickland*, *Williams* and their progeny as cited above.

Further, the post-conviction court's reliance on *Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007) for the proposition that "even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence," RV 10, p. 3476, is not supported by the evidence in this case. While there are certainly instances where testimony may be cumulative and preclude a finding of prejudice, the post –conviction court in this case has misapplied *Strickland*. Further, to read *Darling* in a manner that precludes a finding of prejudice just because a witness mentioned abuse at trial flies in the face of the detailed, fact-specific analysis required in a capital post-conviction proceeding that must give weight to additional, compelling mitigation that is presented in a more graphic and persuasive manner as recognized by the federal circuit courts and the Supreme Court as set out above. Merely because there was mitigating evidence presented at trial does not preclude a finding of prejudice. Nor does it authorize a court to subtract that evidence from the prejudice analysis as the post – conviction court has done here. The mitigation presented at trial must be *added* to the mitigation presented in post- conviction.

Prejudice is also demonstrated in this case because the trial court only found two statutory aggravators. This is not the most aggravated capital case. And, there was no testimony at trial about the statutory mental mitigator of extreme mental or emotional disturbance. *Brant*, 21 So. 3d at 1286. In post-conviction, however, Drs. Morton and Cunningham explained that Brant would have been under an extreme mental or emotional disturbance. Dr. Morton explained that Brant's methamphetamine use was so severe that, combined with his already damaged brain he would have been under an extreme mental and emotional disturbance. Dr. Cunningham likewise explained that based on the developmental and psychological factors Brant experienced as a child, the disturbed sexual development, the meth addiction and the defects in his brain, Brant would have met this mitigating factor.

As alleged above, Brant presented a wealth of mitigation in post –conviction which was not presented at trial -most dramatically, that he was conceived when his biological father raped his mother, Crystal. Crystal wept when she told the post-conviction court that she never loved her own child. Crystal herself suffered a horrendous childhood of extreme poverty and abuse in the mountains of West Virginia. She was made to watch her father bury her cat "live." She also witnessed her father push her crippled mother into a radiator, burning a perfect pitchfork mark into her mother's face that her father later said was the sign of the devil. The prejudice as to

this evidence can be found by the trial court's giving Brant's family history of mental illness only "little weight." RV 18, p. 3474.

While it was described at trial that Marvin was a "bully" who beat Brant twice with his fists, openly criticized Brant, and was not "affectionate, RV 18, p. 3471, the trial court was not told that Marvin was a rapist himself, raping Crystal in a drunken rage almost nightly, "pretend raping" Brant's sister and sexually assaulting her by surprise, and demeaning his first wife physically and sexually by grabbing her crotch or "smelling her privates," then beating her so that her face was mangled and bruised. In addition, a vivid picture of Marvin's emotional cruelty to Brant was presented in post-conviction that was not presented at trial where Heidi Hanlon described how Marvin made a six-year-old Brant wear diapers after he wet the bed, and punished him as an adolescent by cutting his hair in an embarrassing style and forcing him to wear plaid pants to school where he was inevitably teased by his classmates.

In addition, in contrast with the description of the brain damage at trial where Dr. Maher said Brant had areas of "under- utilization of glucose" in his brain, Drs. Gur, Wu and Wood explained that Brant has, inter alia, actual "pockets of dead gray matter" in the parts of his brain associated with the ability to control anger and violence and linked this dysfunction to Brant's behavior at the time of the offense.

Also, Brant's exposure to Marvin's deviant and violent sexuality at an early age adversely affected his sexual development. As Cunningham stated, it is a wonder any child growing up in this household could develop a healthy sexuality. And, as Dr. Morton explained, Brant's meth use would have exacerbated Brant's previously kindled brain pathways of sexual aggression. Had counsel consulted with an expert like Dr. Cunningham, who was prepared and able to address Brant's significant risk factors for sexual homicide, all of which were out of Brant's control, and had an expert such as Dr. Morton spoken about the effects of meth on sexual behavior, counsel would have been able to give the jury an effective vehicle with which to assess Brant's moral culpability in relation to the sexually violent nature of this homicide.

Counsel's failures prejudiced Brant so that the Sentencing Court was not informed about how Brant developed his deviant sexuality and how little he could control the risk factors that predisposed him to develop his aggressive sexual desires. The trial court was given a frightening diagnosis of sexual sadism but not an individualized explanation of how a devoutly religious, married father of two came to commit a sexual homicide. Nor was the court informed about the remorse that is common in sex offenders who have acted on impulse and harmed others.

And, despite this tragic, horrific background, Brant is a passive, compliant inmate who poses no future risk.

Brant has established prejudice. The post-conviction court misapprehended the Strickland prejudice standard, misapplied the facts to the law, engaged in an improper piece –meal analysis and erroneously concluded the evidence in post-conviction was cumulative. This Court should reverse.

CLAIM 3
*Counsel's performance in failing to investigate and prepare for jury selection and develop and inform Mr. Brant of mitigation in the penalty phase fell below prevailing professional norms. But for counsel's deficient performance, Mr. Brant would have exercised his right to a sentencing phase jury. Confidence in the outcome is undermined***.**

Brant pled guilty to first degree murder. After one attempt to secure a jury for the sentencing phase of his trial, upon advice of counsel, counsel either advised Brant to waive his right to a jury, or failed to advise him against doing so. In so doing, counsel's performance fell below prevailing norms in three significant areas: 1) Counsel was deficient in failing to develop rapport and trust with a client they knew suffered from depression, 2) Counsel was deficient in failing to investigate and advise Brant of mitigation as set out above, and, 3) Counsel was deficient in failing to consult an expert on jury selection, having previously advised Brant to plead guilty. But for counsel's deficient performance, Brant would not have waived a sentencing phase jury. As a result, Brant's waiver of his right to a jury trial was not knowing, intelligent and voluntary within the meaning of the Fifth, Sixth and Eighth Amendments. The post –conviction court erred as a matter of law in denying this claim.

The Sixth Amendment provides that a defendant has a fundamental right to a jury trial during the penalty phase of a capital proceeding. *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Duncan v. Louisiana*, 391 U.S. 145 (1968). Fundamental constitutional rights can be waived, *Boykin v. Alabama*, 395 U.S. 238 (1969), but an effective waiver of a constitutional right must be knowing and intelligent. *Brady v. United States*, 397 U.S. 742 (1970). A citizen accused of a crime can waive his right to a jury but the waiver will be set aside upon a showing that the relinquishment of the right was not knowing and voluntary. *Patton v. United States*, 281 U.S. 276 (1930) (*abrogated on other grounds* by *Williams v. Florida*, 399 U.S. 78 (1970)). There can be no effective waiver of a fundamental constitutional right unless there is an "intentional relinquishment or abandonment of a *known* right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) (emphasis added).

Because the right to jury trial is critical in protecting a defendant's life and liberty, trial courts must apprise the defendant of the "relevant circumstances and likely consequences," *Brady, supra*, 397 U.S. at 748, to determine whether the defendant's waiver is made freely and intelligently. The decision to waive the right to jury sentencing may deprive a capital defendant of life saving advantages. As courts have recognized, the jury operates as an essential bulwark to "prevent oppression by the government." *Duncan v. Louisiana*, 391 U.S. 145, 155, 88 S.Ct. 1444, 1450, 20

L.Ed. 2d 491 (1968) "'[O]ne of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system,'" *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.), quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519, n. 15 (1968). Juries are less inclined to sentence a defendant to death than are judges. *See Spaziano v. Florida*, 468 U.S. 447, 488 n. 34 (1984)(Stevens, J., concurring in part and dissenting in part), citing H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment 37-50 (1968). *Jells v. Ohio*, 498 U.S. 1111 (1991) (Marshall, J., *dissenting on the denial of certiorari*).

The two pronged *Strickland v. Washington* test applies to the challenges to guilty pleas based on ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). In order to prevail, a defendant "must show that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial [by jury]." *Hill*, 474 U.S. at 59. In analyzing similar claims of jury waiver, lower federal courts have applied the *Hill* prejudice standard, or have determined that the waiver of a right to a jury trial is a structural error where prejudice is presumed. *See Torres v. Small*, 2008 WL 1817243*22-25 (C.D. Cal. 2008) (Slip Op.) (waiver of jury in non-capital case where prejudice presumed but alternatively, prejudice established under *Hill).* As explained by the *Torres* court:

> There are certain fundamental decisions that a criminal defendant has the ultimate authority to make, including whether to plead guilty, waive a jury or take an appeal. Of course, a criminal defendant is entitled to effective assistance of counsel during all critical stages of the criminal process, including pre-trial decisions such as the decision to plead guilty or waive a jury trial. *Hill*, 474 U.S. at 56-57 . . . In the context of pre-trial ineffective assistance of counsel claims, such as alleged ineffective assistance during plea negotiations, the fact that the defendant later receives a fair trial does not remedy a violation of the right to effective assistance of counsel..

Torres at *24 (most internal citations omitted). The Supreme Court has also extended *Hill* in the habeas context. When counsel's deficient performance results in counsel's failure to file an appeal, the prejudice analysis is whether, absent counsel's deficient performance, the defendant would have exercised his right to an appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 484-85, 120 S.Ct. 1029 (2000). *See also Lafler v. Cooper*, -- U.S. --, 132 S.Ct. 1376 (2012) (counsel deficient and prejudice established in the plea negotiation context).

Prevailing standards establish that entering a guilty plea and waiving a jury should only be done in the rarest of circumstances. *Defending a Capital Case in Florida 1992-2003, (5th Ed. 1999)* Chapter 6, p. 4, Guilt Phase Strategy, recommends an aggressive, attacking defense in spite of the fact that most capital cases present with overwhelming evidence of guilt. When counsel may be considering having their client enter a plea to the charges and proceed to bench trial on the penalty phase, prevailing norms "*strongly recommended that this rarely if ever should be done*.

This type of 'trial plea' can be as bad, if not worse, than adopting a strategy of a passive defense." Ch. 6, p. 10.

Counsel's advice, or failure to advise, Brant about waiving a jury was deficient performance. Counsel's deficient mitigation investigation (as set out in Claim 2) led counsel to unreasonably conclude – and tell his client – that there was little weighty mitigation in his case. Counsel's statement in open court that jury selection was a debacle, without following up at the jail with a client counsel knew or should have known was depressed – cannot reasonably be said to meet the minimal standards required of counsel in a capital proceeding. Counsel failed to develop a written questionnaire to address the fact that Brant had already pled guilty and failed to consult a jury expert, who surely would have advised him to draft a questionnaire, in light of Brant's guilty plea.

Brant swore in his Motion, and testified in post –conviction, that but for counsel's deficient performance, Brant would have exercised his right to a jury. Brant explained that had he known about the mitigation that was presented in post-conviction, he would not have pled guilty and waived a sentencing jury.

The post-conviction court denied this claim, finding that neither attorney advised Brant to waive a jury, R. V.18, p. 3493. The court further found that based on the trial court's colloquy, Brant was aware of the rights he was giving up as well as the penalty he faced so his decision was "knowing, intelligent and voluntary." Id.

The court further denied the claim because Brant failed to "demonstrate that the outcome of the proceedings would have been different had he proceeded to a penalty phase before a jury." Id. at 3493.

The post-conviction court erred by; 1) misapprehending the *Strickland* deficient performance analysis and failing to assess counsel's performance against prevailing norms, 2) failing to consider the knowingness of Brant's decision against the backdrop of the deficient mitigation investigation and deficient advice to plead guilty, and 3) applying an incorrect prejudice analysis.

The post – conviction court further critically erred by failing to give weight to the principle that Brant was entitled to have his lawyers provide constitutionally effective advice about whether or not to waive a jury. The right to effective assistance of counsel exists through all critical stages of a proceeding, including a pretrial jury waiver. The post-conviction court's conclusion that counsel wasn't deficient because they didn't offer Brant advice, but merely stood by while he made his own poor decision, cannot be reconciled with counsel's obligations under the Sixth Amendment to provide effective assistance through all critical stages of a proceeding. Counsel is constitutionally mandated to guide their client through the legal process. The post –conviction court's finding amounts to a deprivation of the right to counsel, a more serious constitutional violation. Further, because the court premised its denial of this claim on its determination that counsel wasn't deficient in failing to

investigate mitigation – as set out in Claim 2, the court's analysis of this claim is likewise premised on a flawed analysis. This Court should set aside Brant's sentence and allow him to have a jury trial.

CLAIM IV, The State violated Brady v. Maryland in failing to disclose Garret's status as a CI at trial. Further, Brant was denied a full and fair hearing on this claim when the state continued to refuse to disclose evidence which would have substantiated Garret's status as a CI.

The State's failure to disclose Garret's CI status violated Brant's rights under *Brady v. Maryland,* 373 U.S. 87 (1963) and its progeny. Garret's status was a mitigating and material fact in sentencing and affected his failure to appear at trial. The State's continuing refusal to turn over complete records of Garret's career as a CI violates Brant's rights under the Fifth, Eighth, and Fourteenth Amendments and has deprived him of a full and fair hearing in post- conviction.

The Eighth and Fourteenth Amendments require that the sentencer be allowed to consider as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2965-2964, 57 L.Ed.2d 973 (1978). A defendant has a virtually unrestricted right to present any circumstance to a jury for consideration as a reason to spare his life. *See Smith v. Texas,* 543 U.S. 37, 44, (2004); *Tennard v. Dretke,* 542 U.S. 274, 284-85 (2004). Any privilege against disclosure claimed by the State was waived under the facts of this case. *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957).

In this case, Garett, was twice served with a subpoena to give a statement to the State and was interviewed by the Assistant State Attorney pursuant to the subpoenas. The State provided Garett's statement to defense counsel in discovery and listed Garett as a witness. Defense counsel deposed Garett but remained unaware of his status as a CI. The State introduced Garett's sworn statement and deposition at trial. The Defense filed a Motion for Production of Favorable Penalty Phase Evidence, TR V 1, p. 130 -132, but the State failed to disclose Garett's status. Garett was instructed by Sheriff's deputies to not reveal his status as a CI to anyone.

The post-conviction court erred in its resolution of this claim and failed to ensure that the State fully disclosed all records about Garret's career as a CI and/or casual informant, despite repeated public records requests and the filing of OCSO's two-page response which Brant argues in good faith demonstrates their response was incomplete. The Court determined that Garret was not a CI at the time of Brant's arrest, and that Garret's status as a CI at the time of trial would not have been mitigating, so no *Brady* violation occurred. RV 10, p. 3495-97.

This Court should find that Garett's status as a CI was not disclosed, that his status was material as a mitigating factor under the Eighth Amendment and that the State's failure to disclose Garett's status as a CI violated Brant's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the Federal Constitution. This Court should further find that the post-conviction court failed to ensure that the State complied

with Rule 3.852 and that such failure rose to the level of a Due Process violation. This Court should remand this case to the post-conviction court so that OCSO and HCSO can be made to provide complete records as to when Garret Coleman first became a CI and the names of the officers on duty in Pine Hills the night Garret turned Brant in. The State's continuing refusal to turn over exculpatory evidence substantiating Garret's status as a CI has violated Brant's right to a full and fair evidentiary hearing in state court.

CLAIM V, Cumulative Error

Mr. Brant did not receive the fundamentally fair trial to which he was entitled under the Fifth, Sixth, Eighth and Fourteenth Amendments. See *Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991); *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991); *Rose v. Lundy*, 455 U.S. 509, 531, 102 S.Ct. 1198, 1210 (1982). The sheer number and types of errors in Brant's guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel significantly tainted Brant's guilty plea, waiver of penalty phase jury and penalty phase. Trial counsel failed to properly investigate and present mitigation, including the extent of Brant's brain damage and the full effect of his meth addiction on his damaged brain,

that Brant was conceived in a rape, that he is a model prisoner, and that his background of abuse, neglect and rejection so adversely affected his emotional and psychological development that he met both statutory mitigators. Further. The State's *Brady* violation undermined the proceedings.

These errors cannot be harmless. Under Florida and federal law, the cumulative effect of these errors denied Brant his fundamental rights under the Constitution of the United States and the Florida Constitution. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986); *Ray v. State*, 403 So.2d 956 (Fla. 1981).

Claim VI: Brant's Eighth Amendment right against cruel and unusual Punishment will be violated as Brant may be incompetent at the time of execution.

This claim was raised below and stipulated as not ripe. However, Brant raises it here to preserve it for federal review. *In Re: Provenzano*, 215 F.3d 1233 (11th Cir. June 21, 2000). Brant suffers from brain damage and depression. His already fragile mental condition could only deteriorate under the circumstances of death row causing his mental condition to decline to the point that he is incompetent to be executed.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Brant relief on his 3.851 motion. This Court should order that his sentences be vacated and remand the case for a new trial, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Sara Macks, Assistant Attorney General at sara.macks@myfloridalegal.com and CapApp@myfloridalegal.com, on this 20th day of November, 2014.

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CERTIFICATE OF COMPLIANCE

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

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