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IN THE SUPREME COURT OF FLORIDA

MICHAEL HERNANDEZ, JR.,

Appellant,

v.

Case No. SC13-718

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT, IN AND
FOR SANTA ROSA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Michael Hernandez, Jr., appeals from the order of the Honorable David Rimmer, Judge of the First Judicial Circuit, denying Appellant's Motion to Vacate Conviction and Sentence. The record on appeal consists of 47 volumes: seventeen volumes of pleadings, orders and exhibits, and 30 volumes of transcript. The original file numbering was changed by the lower court clerk so that the 47 volumes are now numbered consecutively, 1 through 47, and Appellant will follow the new numbering when citing the record on appeal. The most relevant transcript volumes will be the ones recording the eight-days of evidentiary hearing proceedings: **Volumes 32 through 40** (January 9 through January 13, 2012), **Volume 30** (May 25, 2012), **Volumes 25 and 26** (July 16, 2012), and **Volume 31** (July 25, 2012). Appellant will cite to the record on this appeal as "R," with reference to the appropriate volume and page number - e.g., "39R 893."

By virtue of Rule 9.142 (C), Fla.R.App.P, this Court judicially notices the record in all prior appeals of the case - here, the appeal from Appellant's conviction and death sentence, reported at Hernandez v. State, 4 So.3d 642 (Fla. 2009). The record on the prior appeal includes seven numbered volumes of pleadings/orders plus fifteen separately numbered volumes of transcript. Appellant will cite to the former as "TR" and to the latter as "TT," with references to the appropriate volume and page numbers.

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STATEMENT OF THE CASE AND THE FACTS

1. Procedural history: On December 13, 2004, Hernandez was indicted for first degree murder and robbery (1TR 10-11). On February 6, 2007, a jury convicted him on both counts and also on a charge of burglary (2TR 323-25). By an 11-1 vote, the jury recommended a death sentence, and Judge Larry Swanson imposed a death sentence, finding four aggravators (prior violent felony, murder committed during a robbery, avoid arrest, and HAC), one statutory mitigator (no significant criminal history) and several nonstatutory mitigators (3TR 419, 459-79). This Court affirmed. Hernandez v. State, 4 So.3d 642 (Fla. 2009). A motion for reconsideration was denied, and the United States Supreme Court denied certiorari on October 5, 2009. Hernandez v. Florida, 130 S.Ct. 160 (2009). On September 28, 2010, Hernandez filed a 65-page Motion to Vacate Conviction and Sentence (2R 201-65). The State filed its answer on November 29, 2010 (2R 275-323). Following evidentiary hearing and the submission of written argument, Judge David Rimmer issued an order denying relief on March 28, 2013 (7R 1290-1344).

2. Trial counsel: Richard Hill was appointed to represent Hernandez on February 7, 2005 (1TR 32). On April 12, 2005, Michael Rollo was appointed as co-counsel (1TR 36-38). On September 24, 2006, Hill was allowed to withdraw (2TR 211), and on October 11, 2006, Ted Stokes was appointed as lead counsel (2TR 225). He and Rollo represented Hernandez throughout the remainder of the proceedings.

3. Evidence presented at trial: This Court summarized the evidence in its opinion on direct appeal. Hernandez v. State, *supra* at 647-54. Stated briefly, Michael Hernandez, Jr., lived near his mother's first husband, Richard Hartman, Jr. and Richard's current wife Daveine Tammy Hartman, and worked with Shawn Arnold - the father of Tammy's granddaughter. One morning, Michael and Shawn smoked crack cocaine and Shawn drove them to the home of Ruth Everett, whose son was a drug dealer. Finding the son absent, Shawn directed Michael to push Mrs. Everett into the living room and into a recliner. Shawn retrieved a pillow and began smothering her. At some point her neck was broken, and then Michael cut her throat. Mr. Everett died from her broken neck, her cut throat, or both. Shawn grabbed the purse, and they left, using her ATM card to obtain money they spent on more cocaine. They turned themselves in the next day.

In upholding the avoid-arrest aggravator, this Court relied on Tammy Hartman's testimony that Michael had told her he had cut Mrs. Everett's throat because she had "seen their faces." 4 So.3d at 668. In upholding the HAC aggravator, this Court relied on Tammy's testimony that Michael had admitted "intentionally twist[ing] the victim's neck with a two-handed grip." 4 So.2d at 669. Finally, in finding Michael more culpable than Shawn Arnold (who was sentenced to life), this Court relied on Tammy's testimony that Michael had told her he had pushed Shawn aside and killed Mrs. Everett himself because Shawn had got cold

feet, had quit smothering her, and had given her "a bag to breathe in and to calm her down." 4 So.3d at 671.

4. Evidence presented at the postconviction evidentiary hearings:

Ted Stokes testified he "had very little to do with" sentencing, as that was Rollo's responsibility; Stokes handled the guilt phase (37R 601-03). His "primary strategy" was to portray Michael as the less culpable defendant (37R 608).

Stokes testified he had a "standing objection" to hearsay, because the trial court had sustained one hearsay objection to Tammy's testimony (37R 610-13). Stokes made one other hearsay objection, to Tammy's testimony that *Michael* had told her that Shawn had said, "I told you we are not going to do this" (37R 613-15). After that objection was overruled, Tammy testified that, on second thought, *Shawn* may have been the one who had stated this to her (8TT 1233). Stokes did not object to this testimony, and did not know what objection he might have made to any statements made to Tammy by *Shawn* (37R 631-32), but he felt her "uncertainty" was more "beneficial to us" than excluding her testimony as hearsay (37R 628-30). There were enough contradictions in her trial testimony that he did not need to impeach her with any prior inconsistent statements or rebuttal testimony (37R 631-32, 635). When the State refreshed Tammy's recollection with her prior deposition testimony at page 35, he did not have to show that she had contradicted that deposition testimony at page 42 (37R 636-37). Her "memory"

was already in the record, and Stokes saw no reason to "reiterate," as he was not "so concerned with her inconsistencies as [with] her motivation" (37R 637-38).

Stokes had forgotten who Tammy was when he talked to postconviction counsel several months before the evidentiary hearing, but he had since "refreshed" his memory (37R 624). Before trial, he had read Tammy's statements of November 19 and 24, 2004, but had not read her deposition because "apparently" Hill had delivered it to Rollo - a fact Stokes only became aware of mid-trial (37R 616-24, 684-85). He had not noticed its absence because he was not "part of the discovery process," and would not typically look for depositions that were not in his file (37R 682-83). Asked if he had ever thought, "Maybe I should depose Tammy," Stokes answered, "No, I never thought of that" (37R 686).

Stokes did not ask for a verdict of second degree murder because "case law" forbade telling the jury "to convict your client of any offense" (37R 657). He could not think of any issue that could have been addressed by an independent medical examiner (37R 672); he did not think the testimony of Michael's wife Stephanie was privileged (37R 675-76); he never talked to Shawn Arnold (37R 679); and, although he was the one who had cross-examined deputy Jarvis, he was unaware of the jury's verdict in the battery-of-a-law-officer case, and had not read a transcript of that trial (37R 676, 678-79).

Michael Rollo's primary responsibility was the penalty phase (38R 772-74). Co-counsel had prepared the entire guilt-phase preparation including depositions, so Rollo "did nothing in relation to that," and did not help co-counsel "in preparing his defense" (38R 774-75).

Rollo first met with Michael on November 14, 2005, to "build a rapport with him" and to learn about his life (38R 777, 822). His billing records (12R 808-41) show that, between that first meeting and the February 2007 trial, he talked to Michael for less than two and one half hours total. Despite the importance of assuring Michael that his attorney was on his side (40R 1030-31), Rollo was not present when Michael was taken to Dr. Larson's office for evaluation, had not spoken to him since his first visit two weeks earlier, did not talk to him again for another week, and not again for another month after that (40R 1031-33).¹

Six months after he was appointed to represent Michael, Rollo mailed him a "Confidential Forensic Assessment" which Michael filled out by himself (11R 781-88)(38R 777-80, 811-13). Michael identified Wayne Merritt, Deanna Merritt, and Joe Rudis as significant family members (38R 782). Rollo talked to none of them. Despite admitting prior to trial that he had a case with "tons of mitigation to be developed," and not knowing "if he could do it all" (11R 792), and despite

¹ Rollo's billing records show that he talked to Michael by telephone for 18 minutes five days before Dr. Turner first interviewed him (12R 814), but had not talked to Michael for a month and a half when Dr. Bingham first met him (12R 811).

obtaining a court order approving a defense investigator (11R 791), Rollo never retained an investigator or a mitigation specialist (38R 783-86). He did talk to Michael's mother Cheryl Walker, his half-brother Richard T. Hartman (38R 787), his step-grandmother Barbara Hernandez (now Walker) (38R 788), Cheryl's father (38R 790), and Michael's wife Stephanie (38R 800).² He talked to no other friends or family: he never talked to Shawn Arnold, Leola Estabrook, Sean Estabrook, Eric Estabrook, Brandy Higashi, Jennifer Hartman, Brandy Kahl-Hayman, Shawn Hartman, Richard Hartman, Jr., Tammy Hartman, Joe Rudis, Deana Merritt, or Wayne Merritt (38R 788-90, 836, 853). While testimony from friends and family "could have had an impact," he decided to rely solely on a California social services report, on the testimony of Michael's mother Cheryl and his half brother Richard, and on the "experts" (38R 793-97).

Rollo knew the State was going to prosecute Michael for the batteries of Shawn Arnold and deputy Jarvis, and knew that any convictions would be used by the State in aggravation, but he did not attend either trial, read the transcript of either trial, or talk to anyone who testified at either trial (38R 847-48, 850; 40R 1021). Asked why he had not objected to the jury being informed of an attempted murder charge for which Michael had not been convicted, Rollo admitted he

² Rollo talked to Cheryl once by telephone for 20-30 minutes, then met her for the first time six months later, on the day she testified by deposition (12R 815, 827, 38R 815, 820, 822). He talked to Stephanie only once, by telephone (38R 829).

"might have missed that" (38R 854-55). Asked why he had not objected to deputy Bartley's testimony that Michael had strangled Shawn Arnold, Rollo answered, "Because that is what Michael did" (38R 855). If his billing records do not show that he had talked to deputy Bartley (and they do not), he never talked to him (38R 852-53). Despite the jury's rejection of the attempted murder charge, Rollo saw no issue of collateral estoppel or double jeopardy, or other basis of objection (38R 861). He did not consider putting Arnold on the stand to deny that he had been strangled (38R 861). Asked if it would not be more aggravating to both punch and strangle someone than simply to punch him, Rollo answered that "the jury is not going to appreciate that no matter what is done" (38R 861). Asked if he were saying that the jury would find one scenario just as bad as the other, Rollo answered that he could not give a better answer than he already had (38R 862). Asked if he was aware that the medical records failed to corroborate strangulation, Rollo said he was not aware of any medical records (38R 862). Reminded that the same medical records had been admitted in the inmate battery case and the penalty phase of this case, Rollo responded, "Just because there's no marks doesn't mean there was not a strangulation" (38R 863). Asked if it might have been worthwhile to point out to the jury that the medical records showed that Shawn had no neck pain or bruising, Rollo answered that it would not have been a "big hang-up point with the jury" and was not worth objecting to or refuting (38R 863-64). Rollo also

did not consider objecting to the judgment showing a conviction for the battery of deputy Jarvis "with great bodily harm." He was unaware that the jury not only had rejected a finding of great bodily harm, but had expressly noted in its verdict that Jarvis had only suffered "slight injury" (38R 864-65).

Rollo agreed that much of the victim impact testimony did not show the victim's uniqueness to the community, but did not object because an objection would have been "trifling" (38R 866-68, 40R 1027). He elicited testimony from the victim impact witnesses about how Mrs. Everett had felt about her son's drug dealing to "bring out that fact" (38R 868). Asked how that was helpful to the defense, he answered that the case involved drugs (38R 868). Asked again how this testimony mitigated Michael's case, Rollo said it was something to consider because the murder was about two people seeking drugs (38R 868-69). Asked a final time how it was mitigating that the victim's son was a drug dealer/user, Rollo said it was just "a part of the fabric of the story" (38R 869).

Rollo did not object to Stephanie's testimony about Michael's statement to her because he did not think it was privileged (38R 878-79). Rollo did not ask her if Michael had also told her he thought Mrs. Everett was deceased when he cut her throat because he did not "want to fight with the medical evidence" (38R 870).

Rollo testified that "isolated and random" good acts by Michael would not have shown the "entire body of his life's work" (39R 893). Any attempt to portray

him as "some sort of hero" would have been "laughable, frankly" and "insulting" (39R 893). It would also have been inconsistent with his theory of mitigation - that Michael's life experience consisted of "drug involvement, dysfunctional family from the get-go" (39R 893-94). He did not need Jennifer Hartman to establish Michael's history of drug use and abuse, and that she was a meth addict herself would have "factored into my decision to reject her as a witness" (39R 894-95). Shawn Hartman would have been "redundant" to Cheryl's testimony of family dysfunction (39R 896-97). Presenting testimony that Michael was not violent would have been "borderline absurd" (39R 899). Testimony presenting "isolated instances of Michael being a wonderful person" when he was not using and abusing drugs would have had a "limited efficacy" because his life story was about his proclivity to use and abuse drugs (39R 899-900).

Rollo did not need to talk to Leola Estabrook about whether she had been abusive to Michael because, although he was a "good questioner," he doubted that he "could have gotten her to admit that" (39R 910). Rollo made a "tactical decision" not to call Stephanie subject to cross-examination; it was better for Dr. Bingham to report that she had told him that Michael was a great husband and father (39R 912-13). Although Rollo had never talked to Wayne Merritt, he knows he would not have used him as a witness, because "to preserve credibility in your overall presentation to the jury, you need to stick with one theme, and I didn't think

presenting isolated instances [of 'good behavior or commendable actions'] would have enhanced the credibility of our overall theme and presentation to the jury" (40R 926-27). Nor would he have called Deana Merritt - another witness he had never talked to - because if she did not know about Michael's drug use, "she really didn't know anything" about him (40R 929). Although Rollo had never talked to Shawn Arnold, it was "obvious" that he "was not going to offer anything positive whatsoever" (40R 932). If he had "for the briefest of moments" considered calling him as a witness, he "very quickly dismissed [the idea] as totally untenable" (40R 935). Rollo would not have called Tammy's husband Richard, either, because although he had never talked to him, Rollo knew the "entire Hartman situation" was a "tribal morass" of bad news and drug abuse (40R 935).

Rollo did not consider portraying Michael as a "devoted Christian" because that would have been incongruous with his having committed murder (40R 930). His church attendance would "not have been something that I would remotely have considered as having any effect whatsoever on a typically composed" capital jury in Santa Rosa County (40R 931). Asked whether presenting church-going witnesses like Stephanie and her family might make a difference, Rollo answered, "I have no way of knowing that" (40R 1042-43). Nor could he say whether having a marital family that was willing to travel many miles to testify on his behalf would mean anything to a jury (40R 1048). Testimony that, despite a long history of drug

use and abuse, Michael was sometimes able to "clean up" for a while, but then relapse, would not have been helpful because it would have presented "a picture of an inconsistent person" (40R 1038).

Rollo believed that, in presenting any mitigation, what a defense attorney is really doing is "trying to present the jury reasons [to] . . . excuse" a defendant's conduct and "not impose the sentence as permitted by law" (40R 1046). Good character evidence cannot "overcome the facts of guilt that the jury has already accepted as being proven beyond all reasonable doubt" (40R 1045), and drug abuse does not "really resonate" with a jury (40R 1040-41). Rollo presented drug abuse in mitigation because it was the only mitigation available that could be "shaped into" one or more of the statutory mitigators (40R 1040). Asked if capital sentencing involves making a "moral judgment" about the defendant, Rollo answered that he had "never quite thought of it in those terms" (40R 1047). Asked if it had occurred to him that he might have found additional information or helpful material if he had actually talked to some or all of the Estabrooks, Rollo answered: "Additional information is a broad question . . . [and] I don't know what helpful material means" (40R 1051). He saw no reason to talk to the Estabrooks; they were "unsavory folks" that "certainly weren't going to admit to any abusive offenses committed against Michael Hernandez" (41R 1064).

Rollo made no further effort to establish brain damage after initial evaluations proved inconclusive (40R 1034). He had not heard of QEEG, but the prospect of a Frye hearing was reason enough to avoid it; QEEG would "just [be] interjecting another level of uncertain nebulous evidence" (41R 1066).

Leola Estabrook has known Michael since he was two years old, when he was living with his father (Michael Hernandez, Sr., AKA "Big Mike") and mother (Cheryl) in an apartment over a bar (34R 235-36, 238). Big Mike returned from work one day to find that Cheryl had left the bar with a half dozen men and had left Michael by himself, without food, needing a change of diapers, and surrounded by drug paraphernalia (34R 236-37). Big Mike left her, and for the next few years, Michael lived with or near the Estabrooks, interrupted by short stays with his mother (34R 237-42). Once Big Mike picked Michael up after Cheryl fled one of her boyfriends in the middle of the night (34R 242). Twice, Cheryl demanded that someone come get Michael before she or her boyfriend killed him (34R 240-45).

Big Mike was no paragon, either, and could be violent. He mostly just "yelled" at Michael, but once knocked him out of his chair (34R 246). He died after receiving a large settlement which he spent on drugs (34R 247). Cheryl took custody of Michael, but soon returned him to the Estabrooks, and he stayed with them until removed by the State of California 4-5 years later (34R 248-49).

Leola' husband Dan was violent; he had physically attacked her while she was recovering from knee surgery, and had grabbed their son Eric by his testicles and slammed him into the refrigerator (34R 249-50, 252, 254-55). But Leola was abusive, too (34R 252, 258-59, 261, 267-68). She acknowledged that Michael had been removed from her home because of the abuse (263). Addressing the report of California social services (the Calveras Report), Leola admitted:

(1) She and Dan had "hit, slapped and spanked" Michael on "an ongoing and unpredictable basis for approximately four years" (34R 271).

(2) Dan has warned that if anyone messed with him or his family, he would kill them and put them in a hole (34R 271, 276-77).

(3) She slapped and yelled at Michael for using her computer without permission (34R 267-68). If Dan did not drag him down the hall by his hair that time, he has done so other times (34R 272).

(4) Dan has called Michael "a little fucker, little shit, little bastard, and other degrading names . . . on a daily basis" for years. Leola has also called him all of these things, but not as often. One falls "into the same trap as the person you're living with, and you do what you have to do to survive and not get beaten your own self" (34R 272-73).

(5) After finding a suicide note Michael had written, Leola warned him that he would not go to heaven if he killed himself (34R 274-75).

After Big Mike died, Leola discovered that Michael had been eating his father's ashes from the urn they kept in their living room (34R 277). Michael explained to her that he had done so to keep his father with him always (34R 278). Leola would have testified on Michael's behalf at sentencing, but was never contacted by trial counsel (34R 269-70).

Sean (Estabrook) Skenan is Leola's son, not quite a year and a half older than Michael (32R 129-30, 138). He met Michael when he lived with his father at a Rescue Mission in Hayward, California where Dan and Leola worked (32R 130). After Big Mike died, Michael lived with the Estabrooks continuously - except for a few months that he lived with his mother - until he and Michael were placed into foster care (32R 140-43).

Cheryl seldom, if ever, visited Michael (32R 135). Michael occasionally visited her, but "every time" he did so, he would return with injuries ranging from bruises and lesions on his bottom to, once, having his front teeth "busted out" (32R 135, 138, 154). Michael told Sean that Cheryl's boyfriends were responsible, and described how they had touched him sexually, poked him with needles and drugs, beat him, and hit him in the face with a rock (32R 135, 154). He also described witnessing drug-fueled orgies taking place right in front of him (32R 139).

Leola took Michael's Social Security benefits and spent them on herself, all the while continually insulting him and telling him he was worthless and stupid

(32R 145-46). She gave her own children lunch money, but not Michael; she gave her own children new clothes, but gave Michael hand-me-downs; and her own children got first choice at the dinner table, leaving whatever was left over for Michael (32R 146). Dan resented having to take care of Michael; he physically and verbally abused him, repeatedly slapping and punching him, throwing him across the room and calling him names (32R 147, 149). Sometimes, he would punch Michael just for walking by, and if he cried, Dan called him names and told him to get up so he could hit him again (32R 148). Michael was in special education classes; other students verbally and physically abused him (32R 149-50). He never fought back, even though he was larger than most (32R 150). Sean admitted that he and his brother Eric were also verbally and physically abusive to Michael (32R 151). Michael cried because he could not understand why no one liked him (32R 150). Sean, who had suffered his own mistreatment, finally reported the abuse; he and Michael were placed in foster care (32R 152, 161-62). Michael never returned to the Estabrooks (32R 152). When he learned the state planned to return him to his mother, he fled because he wanted to live with her even less than he wanted to return to the Estabrooks (32R 153-54).

Michael was a socially immature follower, who had no self esteem (32R 155-56). Sean would have testified at sentencing, but was never contacted by trial counsel (32R 157). He has no felony convictions (32R 164).

Eric Estabrook is Sean's older half brother, not quite five years older than Michael (33R 170-71). He met Michael at the same time Sean did, living with or near Michael from the time he was a toddler until he was sent to foster care when he was in his mid-teens (33R 170-73). Eric confirmed the abusive conditions of the Estabrook household (33R 174-75, 182-83). Eric's own childhood was an unhappy one, and he took it out on Michael by verbally and physically abusing him - acts that Eric now deeply regrets (33R 176-77). Eric only learned of Michael's involvement in murder when contacted by an investigator for postconviction counsel (33R 180-81). Eric would have been able and willing to testify at Michael's sentencing (33R 184).

Brandi Lori Higashi (nee Teixeira) testified by video deposition accepted in evidence in lieu of her live testimony (33R 187, 5R 845-90). She has known Michael since he was five years old (5R 851). Her parents were friends with Big Mike, and she spent much of her time baby-sitting Michael while their parents got high (5R 851-52). Michael had blackouts that Big Mike attributed to a "really bad" bicycle accident (5R 864). During the entire time Brandi knew Michael, she never saw Cheryl and was told not to ask about her (5R 857). For Michael's ninth or tenth birthday, Big Mike gave him an eight ball (3.5 grams of cocaine mixed with baking soda) (5R 859-60). Brandi helped Michael make "cabbies" by smashing the eight ball and rolling the pieces into marijuana cigarettes (5R 860-61). They

got high off the cabbies and pill-laced wine (5R 862-63). From that day until Big Mike died, Michael got high on crack cocaine every day (5R 864). When Big Mike died, the Estabrooks took Michael away and Brandi never saw him again (5R 856). Brandi would have been willing and able to travel to Milton and testify at sentencing for Michael, but was never contacted by trial counsel (5R 864-65).

Cheryl Walker also testified by video deposition in lieu of her live testimony (33R 187, 4R 733-792). She testified that Rollo contacted her once by telephone and then, just before she was deposed, talked to her in person at the Las Vegas prison where she is serving a life sentence for murder (4R 738, 746-49). They did not discuss Michael's history or background (4R 748).

While pregnant with Michael, Cheryl drank hard liquor and used meth daily, despite having been warned by her doctor that a possible consequence might be that her child would be "a little slow" (4R 756-59). Shortly after birth, Michael underwent surgery for pyloric stenosis (4R 759-61). When he was a year old, Cheryl found him covered with speed from a bag she had left out (4R 761-62). Michael later was hit by a car while he was riding his bicycle; when Cheryl arrived at the scene, he was unresponsive (4R 780-81). He was life-flighted by helicopter to the hospital, where he spent at least two nights (4R 781-83).

After Cheryl separated from Big Mike, Michael mostly stayed with his father (4R 769). Michael did stay with her while she was living with Michael

Murphy and later with Anthony Walker, but not for long; Michael was not safe with her (4R 767-68, 770-71). She knew nothing about his treatment by the Estabrooks (4R 773, 783). She was unaware of drug usage by any of her sons; they "weren't around that much" (4R 783, 788).

Barbara (Hernandez) Walker, Michael's step-grandmother (married 48 years to Albert Hernandez, now deceased) took Michael in after he was removed from the Estabrooks, but when he began roaming the streets instead of going to school, he was sent to his uncle Frank (36R 499, 513-16). After Michael got drunk and wrecked a truck belonging to the neighborhood association, his half-brother Richard took him to Adelanto, California, and dropped him off with another half-brother, Shawn Hartman (36R 518-19). Albert was an alcoholic, as was Big Mike and his brother Frank (36R 522-23). Big Mike got hooked on drugs in Viet Nam, and was on drugs from then on (36R 507-09). Michael had rejected the home she and Albert had offered him because he "didn't think he deserved it" (37R 535). He was a follower, with very poor self esteem (36R 523).

Barbara talked to Rollo several times by telephone and in person once, but he never asked her about Michael's life (36R 500-03). Rollo told her there was little hope, and that Michael "would probably get the death sentence" (36R 503). He told her he had enough witnesses and did not need her (36R 504, 37R 541-42). She and Albert would have been willing and able to testify if asked (36R 504).

Brandy Kahl-Hayman, Jennifer Hartman, and Shawn Hartman all lived in drug-and-violence-infested low income apartments in Adelanto, California, called the "low-lows" by its residents, when 16-year-old Michael moved in with his half brother Shawn and his then wife Jennifer (32R 29-32, 39, 72-73, 108-09). He stayed with them for six months before moving in with Brandy and her husband for another 8-9 months (32R 42). Shawn had a job with an oil refinery, but sold meth on the side and also used it himself (32R 74-75, 110-11). He and Michael "partied" together, and Michael began using meth and drinking heavily, staying awake for days and crashing for days (32R 76-77). He lost weight and stopped bathing (32R 34-6, 76-77, 81). His clothes got so dirty that Jennifer had to throw them away instead of washing them, and he was so dirty that Brandi's children began calling him "Uncle Crusty" (32R 40, 82). He also began stealing tools and drugs from Shawn (32R 77-78, 109, 112).

Shawn testified that Big Mike and Cheryl had supplied alcohol and marijuana to their children when they were "toddlers" (32R 103). Michael had smoked pot and drunk beer when he was four years old (32R 125). Shawn had never seen Cheryl sober, or without a drink in her hand (32R 116). She left her children unsupervised; if they needed her, they would call the local biker bar (32R 103). When Michael Murphy spent 90 days in jail in San Francisco, Cheryl left her children to be close to him, leaving 15 year old Shawn in charge (32R 98-99).

Brandi, Shawn and Jennifer all described Michael as a follower who had never been violent (32R 69, 78, 112), and "did not have a violent bone in his body" (32R 116). Shawn, who was in and out of prison for a few years, was shocked to learn upon his release in 2006 that Michael had been arrested for murder (32R 115). Jennifer, who had her own meth problem, has been clean and sober for four years and was living with her mother in 2007 (32R 80, 84-5, 88, 91). Brandi re-established contact with Michael after she moved to Tennessee and began visiting him monthly (32R 43-45). At first, he look "great," and was "clean" and happy (32R 44). Later, he lost weight and acted as though he was on drugs (32R 45). Brandi is a dental hygienist with no criminal record (32R 39-40). Brandi, Shawn and Jennifer were all available and willing to testify at sentencing, but were never contacted by trial counsel (32R 47, 62, 86, 92, 115-16, 122).

Richard Travis Hartman, Michael's half brother, gave Rollo the names of "everybody I could think of that ever knew" Michael (33R 197). Rollo told him he would not use Shawn Hartman because of his prison record and his tattoos (33R 198). He also told Richard the jury would not believe what he, Shawn, or "anyone else" would have to say (33R 227).

Richard W. Hartman, Jr. (Richard Travis Hartman's father), met Cheryl when she was 17 (36R 463-65). Except for a brief period when they lived in Arkansas, Cheryl never stopped using drugs while Richard was with her (36R

466). When Michael was 17, he moved to the Pensacola area and lived with Richard and his present wife, Tammy (36R 469). Richard sold drugs and they all used drugs - mostly cocaine and marijuana (36R 470-71). Richard eventually decided their drug use was "way out of control" and they moved to Milton and quit everything except marijuana (36R 471-72). He and Michael got jobs at Sterling Fiber and they all began attending church (36R 472). Michael was a "great worker"(36R 474). Michael met and married Stephanie and moved to Tennessee (36R 473). When they returned to Milton after Hurricane Ivan, Michael began working - and smoking crack - with Shawn Arnold (36R 473-75). Richard did not hear Michael tell Stephanie anything about having cut Mrs. Everett's throat with a knife; Tammy was "the one who kept pushing it all" (36R 477).

Floyd Merritt and his ex-wife **Deanna Merritt** are the parents of Michael's wife **Stephanie Hernandez**; Deanna's current husband is **Joe Rudis** - an electrician and a pastor (31R 6-7; 34R 280, 347; 35R 363-64). Joe met Michael when they both worked at Sterling Fibers in Milton, and was impressed that Michael brought his Bible to work every day, came to work on time, and worked hard (31R 7-8; 35R 365-66). Deanna invited Michael to join their church, and he accepted (35R 367). After she got to know him, she asked him if he liked "thick" women; he told her the only thing that mattered to him was whether she would just love him (35R 367, 369). Joe and Deana decided to introduce this "really nice

young man" to Stephanie (31R 8-9; 35R 366-67). Michael was "one of the hardest working young men" Deanna had ever met (35R 369); the whole family loved him (35R 370), but she could tell he had never been loved before. He was "like a dog that had been kicked so long he couldn't take it anymore" (35R 372) He was a follower; he would not initiate anything, but he would follow whatever anyone else did (35R 372). If anyone paid him any attention, he would "eat it up" (35R 372).

When Deanna first met Tammy and Richard Hartman, they were living with Tammy's daughter in a fully equipped trailer, while Michael lived in a run-down trailer on their lot that had no lights, no water, no electricity and was torn "all to pieces" (I35R 375-76). Deanna was aware of Tammy's reputation in the community for honesty, and her reputation is that she is a liar (35R 377-78). She has lied to Deanna more than once (35R 378-79).

When Michael was laid off from Sterling Fiber, he tried but was unable to find a job or - due to his lack of education - join the military (34R 284-85). When Stephanie became pregnant, they moved to Tennessee, where they lived with her father Floyd Merritt and Michael found work detailing cars (34R 284, 286-87, 348). Floyd described Michael as a "good fellow" - not a leader, but the kind of guy who would "give the shirt off his back . . . anytime you'd need him, he was there" (34R 348-49). He was a hard worker but considered himself a failure and a "screw-up" (34R 349-51) His downfall was drugs (34R 351).

Michael told Stephanie his mother had introduced him to marijuana when he was two, and his father had introduced him to crack when he was ten (34R 289-90, 310). He had been raped and molested, had lived on the streets since he was in his mid-teens, and had tried every drug except heroin (34R 310, 321). His mother had not cared where he was or what he did, choosing her boyfriends over him (34R 312-130. He had been deprived of love and attention his whole life (34R 311). Stephanie described him as a follower, who would "do what anybody wanted him to do" just to be accepted and fit in (34R 283). He had no self esteem, having been repeatedly called a "fuck up," and a "bitch and an asshole" by those on whom he should have been able to rely on for love, attention and guidance (34R 312). He believed he would never amount to anything (34R 312).

After two years, Michael was fired from his detailing job (34R 287). He got drunk and burglarized his former employer; for that he was given a probated sentence (34R 288-89). He admitted to Stephanie that he had begun using hard drugs again, and had overdrawn their bank account by \$4,000 (34R 290). He lost weight and stopped bathing or changing clothes (34R 293). He was soon arrested for public intoxication and bad check charges (34R 291). They moved back to Milton, where he and Stephanie found jobs and made good money (34R 292, 296).

Stephanie thought Michael would not be able to use drugs when they returned to Milton because he would not know where to get them (34R 294). But

he began working with Shawn Arnold, who was a heavy crack cocaine user (34R 295). Michael was still high on crack when he turned himself in after the murder, because his clothes stunk with a "cleaner bleachy smell," his eyes were glazed over, and he acted strangely (34R 299). He and Shawn smoked a joint before turning themselves in, to get high one last time (34R 300).

Floyd was shocked by Michael's arrest for murder (34R 352). Deana fainted when she heard (35R 379). Neither of them could believe that Michael could have done such a thing (34R 352; 35R 379-80). Deana described Michael as the "sweetest, kindest, most respectful" person she had ever met; she had never seen him act abusively to his family, and had never seen him violent (35R 380).

Floyd, Joe and Deanna all testified that they would have been willing and able to testify on Michael's behalf at trial, but trial counsel had never even talked to them (31R 19; 35R 357-8, 364-65, 385) . Stephanie moved back to Tennessee after the arrest (34R 306). Rollo spoke to her briefly, but never asked her to testify (34R 307). Nor did he talk to anyone in her family, or to Brandi Kahl-Hayman, with whom Stephanie had remained in contact throughout the pretrial and trial proceedings (34R 309-10, 342). When she voluntarily returned to Milton to attend the trial, the State served her with a subpoena and called her as a witness to testify about a statement made to her by Michael about stabbing the victim's neck (34R 307). She was asked no questions whatever about mitigation (34R 308).

Tammy Hartman testified that she never talked to Stokes and did not think she talked to Rollo, or any other defense attorney except at her deposition (37R 546-48).³ She recalled testifying at trial that Michael had told her that Arnold had told him to "grab" Mrs. Everett when she answered her door (37R 548-49), but when confronted with her prior statements, she admitted that she originally had identified Shawn Arnold as the source of this information (37R 549-51).⁴

Tammy did not recall her trial testimony identifying Michael as the source of her information that, after Shawn had stopped smothering Mrs. Everett with a pillow, he had taken a bag and tried to revive her, but her present recollection is that Shawn had been the source (37R 561). Reminded that her initial written statement to law enforcement had identified Shawn as the one who had told her about this, she answered, "that's it, then" (37R 564). Tammy was unable to recall her prior statements and testimony about who had told her that Michael had become frustrated and knocked Shawn out of the way, but her present recollection is that Shawn had told her that (37R 564-67). Shawn told her that Michael had cut Mrs. Everett's throat; she did not think Michael ever made such a statement in her

³ She was deposed on August 31, 2005, by Bobby Elmore for the State, Shawn Arnold's defense attorney, and Michael's then attorney Richard Hill (11R 696-773). Rollo did not participate, and Stokes was not yet in the case.

⁴ Tammy gave a written statement to law enforcement on November 19, 2004 (the day after the murder) (11R 774-75). Five days later, she was interviewed under oath by detective Shuler (11R 686-695).

presence (37R 594). She admitted that, at the time of the trial, she had difficulty remembering what had happened and who had told her what (37R 591).

Christopher Shawn Arnold met Michael when he returned to Milton six weeks before the murder, and they began working together doing post-hurricane cleanup (35R 399-401). Arnold has used hard drugs, including crack cocaine, since he was 15 (35R 400-01). He smoked crack with Michael at least four days a week, and for several consecutive days leading up to the murder (35R 401-03). On the day of the murder, Michael was too drunk to work (35R 403). Arnold had a remedy for that: they bought and smoked a \$60 rock of crack cocaine (35R 403-04). Wanting more, Arnold drove them to Mrs. Everett's home to buy crack from her son - a drug dealer known to Arnold as "Snapper" (35R 404-05). Snapper was not home, but Mrs. Everett, who knew Arnold, but not Michael, answered the door (35R 405-06, 424). Michael pushed her from the door to a recliner in her living room (35R 406). She became hysterical, so Arnold gave her a bag to breathe in and she calmed down (35R 407-08, 435). Arnold asked permission to use the bathroom, but went instead into Snapper's room looking for his "stash" (35R 408). Failing to find it, Arnold picked up a pillow, returned to the living room and, standing behind Mrs. Everett, began smothering her by placing the pillow over her face and pulling it toward him (35R 408-10, 436). After a bit, Michael, who had been standing aside, came over to help hold her down (35R 410, 424).

Arnold was not quite sure how Mrs. Everett ended up on the floor; either the recliner rocked when Michael joined the fray and threw him and Mrs. Everett onto the floor, or Michael pulled her onto the floor (35R 410-11, 439). Arnold was clear, however, that Michael never at any point knocked him out of the way (35R 414). They had not planned to rob Mrs. Everett, and no one had told Arnold to smother her (35R 418, 425). Before Arnold began to smother her, Michael had taken no action that could be interpreted as trying to kill her (35R 418). Between them, they had \$900 when they went to Mrs. Everett's home, and had no need to steal any money (35R 425). Nevertheless, Arnold stole her purse (35R 428-29). Arnold denied ever having been called a "pussy" by Michael, and he never saw Michael trying to break her neck (35R 418-19). He did not see Michael cut her throat, but Michael later told him he had done so because he was "scared" (35R 427). Arnold testified that he and Michael were high on crack cocaine during the murder, and had been continuously high for several days (35R 420-21). They smoked "a bunch" more crack after the murder (35R 421).

Arnold talked to Tammy about the murder after his arrest (35R 427). His daughter was present during these conversations, but was only two months old at the time, and no one would have been worried about her overhearing anything (35R 428). Arnold pled guilty as part of a plea deal in which he received a life sentence and would testify against Michael (35R 421). He told the prosecutor

before the inmate battery trial that he had no recollection of being strangled by Michael, or having seen or felt his hands around his neck (35R 422-23).

Daniel Ashton, defense investigator for postconviction counsel (38R 709), had many discussions with Shawn Arnold (38R 710). Arnold consistently denied having seen Michael break Mrs. Everett's neck with a twisting or spinning motion or any other deliberate action (35R 711). Arnold consistently reported that Mrs. Everett had ended on the floor from the movement of the recliner after Michael joined the fray, not from deliberate action by him or Michael (35R 721). Finally, Arnold had been "totally consistent with saying that the victim had stopped moving and stopped struggling when she was in the . . . recliner" (38R 710, 725, 731).⁵

Dr. Leroy Riddick is a forensic pathologist, formerly a medical examiner with the State of Alabama for over 20 years, and currently an Adjunct Professor of Pathology at the University of South Alabama College of Medicine in Mobile, Alabama (38R 738-40). Because pathologists are not infallible, Dr. Riddick recommends seeking a second opinion when the cause of death is important to a criminal case (38R 744). He reviewed the opinion of this Court, Dr. Minyard's deposition and trial testimony, the statements of both defendants, statements and testimony of Tammy Hartman, the autopsy report, and crime scene and autopsy photographs (38R 745). He noted multiple contusions on Mrs. Everett's face, a

⁵ At sentencing, Dr. Harry McClaren testified that Michael had told him that Mrs. Everett had stopped moving while she was in the chair (17TT 2436).

large incised wound on her neck, and a linear fracture of her neck that was only visible after dissection (38R 745-46). The fracture was not displaced (i.e., the broken ends were not widely separated) and the break was not all the way around, but only in the front (38R 746-47). There were no indications of a "massive injury" to the neck such as torn blood vessels and muscle (38R 747). Additionally, because there were no bruises or abrasions to the neck, no petechial hemorrhaging in the eyes, along the skull, or in the mucosa of the trachae, and the hyoid bone and the cartilage of the larynx were intact, Dr. Riddick concluded that Mrs. Everett had *not* been manually strangled (38R 748-49). Dr. Riddick agreed with Dr. Minyard that the manner of bruising on Mrs. Everett's face (only in the recesses), coupled with the lack of injuries to the top or back of her head, was consistent with her having been smothered with a pillow and inconsistent with her face having been hit with a fist or a board or slammed to the floor (38R 749-50). The pillow would have to have been pressed against Mrs. Everett's face with a great deal of force to have caused the extensive bruising that Dr. Riddick observed (38R 750) .

Asked about three possible scenarios for the broken neck - (1) someone tried to break Mrs. Everett's neck with a twisting or spinning motion; (2) she fell to the floor and hit her head hard; or (3) she was smothered with a pillow while sitting in a chair - Dr Riddick testified that the most likely scenario is that her neck broke while Shawn Arnold was forcefully mashing a pillow against her face (38R 750-

53). The nature of the break indicated that it was broken by someone forcing her head backward - which is what Arnold was doing while smothering her (38R 759-60). It is unlikely that her neck broke as the result of striking the floor because there were no bruises or lacerations on her head, front or back, that one would expect from such a fall (38R 753-54). Finally, her neck did not break as the result of someone deliberately breaking her neck with a spinning or twisting motion as described by Tammy (38R 747-48). Had that happened, the fracture would have been displaced, and it was not (38R 767). And there would have been some external signs of a broken neck, and there were none (38R 767-68).

Once Mrs. Everett's neck was broken, she would have lost both motor and sensory activities of her central nervous system, and perhaps have gone into spinal shock (38R 754-55). Spinal shock combined with asphyxia could have caused her death at that point (38R 755). The heart can continue beating for several minutes even though the brain has already suffered irreversible injury from lack of oxygen (38R 756). It was "reasonable" to conclude from all the circumstances that Mrs. Everett died while still in the chair, as the result of her neck having been broken while Shawn Arnold was smothering her with a pillow (38R 758). In Dr. Riddick's opinion, she was not alive when Michael cut her throat (38R 759).

Dr. Peter Kaplan testified for the State about QEEG, over the defense objection that he had never used QEEG, had not been trained in QEEG, and had no

expertise in QEEG (30R 12-15). Dr. Kaplan voiced two objections to QEEG, relying in large part on a 1997 "Nuwer" article (9R 256-76) , introduced in evidence over the defense objection that the article was not peer reviewed and was outdated, given the many developments in QEEG since 1997 (30R 22-27). First, his understanding was that the selection of raw EEG data to feed into the QEEG software is typically "done by a technologist" who does not have sufficient training to select data that is free of artifacts that would "confound" and "dramatically alter[]" the results (30R 19-20, 29, 36). Second, he believed it improper to make a diagnosis from a comparison of a "printout" to a "normative database" (30R 20). Statistical abnormalities were not necessarily clinical abnormalities, and only a neurologist can "put it all together" (30R 35).

Dr. Kaplan acknowledged that (1) a qualified person could identify and select artifact-free data to analyze quantitatively; and (2) the analysis itself is "computational and . . . cannot be faulted (30R 43-44, 51-52). While he believed that an uncooperative subject could intentionally "produce enough artifact in the EEG" to preclude valid interpretation by QEEG, he admitted that such an attempt would be obvious to any reasonably competent tester (30R 57, 59). Dr. Kaplan was unaware that the military uses QEEG to diagnose mild traumatic brain injury (30R 44). He acknowledged that "there are probably a few universities that perform [QEEG] and accept it . . . in a clinical realm," but it was not his "purview"

as an expert in EEG to know which universities would do so (30R 45-46, 54).

Asked the significance of the wide use of QEEG clinically by psychiatrists, neuropsychologists, clinical psychiatrists and clinical neuroscientists, Dr. Kaplan responded that, "these people are by and large not trained in doing the EEG, and this is an EEG test" (30R 62-63).

Dr. Lukas Koberda is an M.D. neurologist with a practice in Tallahassee (25R 126-27). He uses QEEG to diagnose brain problems (25R 127-28) and is an author and speaker on QEEG. There are a limited number of neurologists, and they have busy practices, which makes them reluctant to adopt "new technology, which requires additional training, . . . additional investments, and so on (25R 150). Until recently, QEEG has been "utilized more by psychologists than neurologists," even though neurologists had pioneered QEEG and some had been involved with QEEG for 30 years (25R 163-64). Now, QEEG is being increasingly used by neurologists (25R 151). Dr. Koberda described the 1997 Nuwer paper relied on by Dr. Kaplan as "outdated" (25R 152-53).

Dr. Koberda was retained by postconviction counsel to quantitatively analyze the EEG data - of "very good quality" - collected by Dr. Gerald Gluck, and to review Dr. Gluck's findings (25R 140-41, 147). Dr. Koberda immediately noticed that Michael's raw EEG was abnormal, and showed "multiple misfiring" (erroneously transcribed as "misfiling") in the frontal and temporal lobes, which

would indicate a "very high likelihood that there is brain damage" (25R 142-43). Often, quantitative analysis is necessary to identify brain abnormalities that the raw EEG is not sophisticated enough to reveal, but that was not the case here (25R 143). Dr. Koberda selected his own artifact-free portions of the raw EEG data and ran them through his Neuroguide program (25R 140-41), which revealed additional abnormalities and also quantified the extent to which those abnormalities deviated from the norm (25R 146-48). Although Dr. Koberda did not personally evaluate Michael, based upon the QEEG findings obtained by himself and by Dr. Gluck, and upon his own review of Michael's history (Def. Ex. 27, 12R 913 through 15R 1710) furnished to him by postconviction counsel (25R 141-42), which included multiple head injuries and a long history of drug abuse (25R 147), it is "very likely" that Michael is brain damaged (25R 148, 157)

Dr. Gerald Gluck is a Ph.D. licensed psychotherapist, who has been using QEEG since 1991, and administering QEEG on his own since 2000 (26R 159, 184-85). He is in private practice with an M.D. neurologist who has used QEEG since the late 1980's (26R 182-83). Dr. Gluck uses a Deymed amplifier, and FDA approved Neuroguide software which uses a database that was collected for 15-20 years before first being marketed in 2001 (26R 185-86).

Dr. Gluck explained that the earliest EEG machines in the late 1920's were analog, receiving electrical signals from sensors, and recording them with special

ink on a piece of specially waxed paper by moving pins with a precise amount of spring tension that made squiggly lines on the paper, which would be interpreted by visual examination (26R 186-87). Beginning in the early 1980's, with the advent of computers, EEG machines began to be digitized (26R 188). This eliminated sources of error that arose from the insensitivity of the springs, the ink and the paper, as well as error induced by manually changing "montages" (26R 188). Once digitized, the EEG became quantitative; the raw EEG was now entirely computer generated and could be manipulated so that one could create "brain maps" (26R 189). Analyses that were impossible with visual observation of raw EEG - such as coherence and phase - could now be generated instantly by computer (26R 199-200). Once normative databases like Neuroguide became available, then, using mathematical tools like "Loreta," one could not only "break down the signal and localize the source" of various signals, but also determine what was normal brain activity and what was not (26R 191). Neuroguide has been well accepted by the psychological community; in 2001, the American Psychological Association issued a policy statement approving it (26R 191-92).

Dr. Gluck explained that Defense Ex. 35 (16R 1742-95), a peer-reviewed article by Dr. Robert Thatcher entitled "Validity and Reliability of Quantitative Electroencephalography," published in the Journal of Neuro-therapy, details how the scientific literature demonstrates concurrent validity, predictable validity,

construct validity, content validity and other types of validity of QEEG analyses (26R 193, 198). He identified and explained additional articles, viz:

(1) Defense Ex. 38 (17R 1881-85) - a peer reviewed article by Dr. Rex Cannon, published in Neuroscience Letters, entitled "Reliability of Quantitative EEG Measures on LORETA Course Current Source Density at 30 Days." Dr. Cannon's LORETA testing found that QEEG is reliable (26R 254).

(2) Defense Ex. 39 (17R 1886-1903) - a draft of an article subsequently published in a peer-reviewed journal, entitled "Use of Quantitative EEG in Evidence with Port Wine Birthmark Assets for Surgical Brain Development." The authors determined that QEEG evaluation of newborns was 100% accurate in determining which newborns with a particular birthmark would develop a syndrome that such babies are at risk for (26R 256-58).

(3) Defense Ex. 40 (17R 1904-16) - a peer-reviewed article published in Neuro-Psychopharmacology in 2006, entitled "Topographical Imaging and Quantitative EEG in Reponse to Smoked Cocaine, Self-Administration in Humans." This study established concurrent validity for identifying which of a group of test subjects had ingested cocaine and which had been given placebos. The QEEG identification was 100% accurate (26R 257-58).

(4) Defense Ex. 41(17R 1917-25) - an article published in 1998, entitled "Persistent QEEG Abnormality in Crack Cocaine Users at Six Months of Drug

Abstinence." This article made a "major contribution" to explaining low Delta in crack cocaine abusers (26R 260).

(5) State's Ex. 18 (9R 256-76) (provided to the State by postconviction counsel) - an article entitled "Clinical Electrophysiologic Assessments and Mild Traumatic Brain Injury." Dr. Gluck testified that the article finds that use of QEEG to diagnose traumatic brain injury is solid and accepted science: it also concludes that using QEEG alone is improper - a conclusion with which Dr. Gluck agrees (26R 285-86). In Michael's case, the QEEG findings were used with other multiple measures, which is "exactly" what the article recommends (26R 286).

Many institutions use QEEG diagnostically, including the Army Brain Injury Center in Fort Campbell, Kentucky, which uses QEEG and LORETA to diagnose returning veterans for fitness to return to combat (26R 262); the University of North Texas, which has a program to teach students how to do QEEG and neurofeedback diagnosis and treatment (26R 263); and the naval hospital in Pensacola, which uses QEEG and LORETA to diagnose and treat chronic brain injury and PTSD (26R 265-66). Additionally, Dr. Gluck personally knows many mental health practitioners in Florida using QEEG diagnostically (26R 267-68). Dr. Gluck identified the relevant scientific community as consisting of neuro scientists, psychologists, family therapists, psychiatric social workers, neurologists and psychiatrists, "many thousands" of whom use QEEG and

neurofeedback (26R 269, 271). QEEG (and Neuroguide) is generally accepted in the scientific community (26R 276), and evaluation for traumatic brain injury is "one of the most common uses" of QEEG (26R 277).

Dr. Gluck testified that a QEEG examiner wants as few artifacts as possible - artifacts being electrical signals that did not originate in the brain, caused by such things as muscle movement, eye movement and the like (26R 203-04). It is not possible to eliminate them entirely, but with proper procedures (establishing rapport with the client, making him comfortable, etc.) they can be minimized (26R 204-05). Once the data is collected, the examiner uses the computer to select artifact-free data to analyze (26R 208). Dr. Gluck rejected the possibility suggested by Dr. Kaplan, that a criminal defendant could muck up the results by deliberately creating artifacts; any such artifacts would immediately show up on the EEG, and if artifact-free segments could not be culled for the QEEG, the examiner would simply not run QEEG (26R 209-10). Responding to Dr. Kaplan's concern about untrained personnel, Dr. Gluck noted that he was trained in both EEG and QEEG (26R 210-12). Dr. Gluck agreed that QEEG should be used in coordination with other measures, such as obtaining a clinical history, doing a mental status examination, and the like (26R 212-13). He obtained a history, both from Michael and from postconviction counsel (Defense Ex. 27), and conducted a mental status examination (26R 213-15).

Dr. Gluck's conclusion was that Michael has "frontal, temporal, central deregulation, which is associated with brain injury and damage" (26R 216). The QEEG revealed "classic patterns" seen in brain-injured patients, including short-term hypo-coherence, long-paired hyper-coherence, and "*coup contrecoup*" (26R 216). The brain is roughly the consistency of jello, encased in a hard skull (26R 217). If a blunt force hits the skull, the brain hits the skull where the blow occurred, then bounces off to slam against the opposite side of the skull (26R 217). If the initial force is hard enough, it can cause injury not only in the location of the blunt force, but also a lesser injury on the opposite side of the brain - i.e., *coup contrecoup* (26R 218). Blows can have a cumulative effect; repeated blows to the same area can make permanent brain injury much more likely (26R 218-19).

Dr. Gluck's findings are set out in his 84-page report (Defense Ex. 36, 16R 1796-1800; 17R 1801-1880) (26R 220). Pages 17 and 20 (17R 1812, 1815) show "phase reversals" that were visible on the raw EEG (26R 222-23). These alone are "evidence of some kind of deregulation" of the brain, and indicate brain damage (26R 223-24). Pages 22-23 (17R 1817-18) show a typical *coup contrecoup* pattern; the slightly different patterns in different frequencies were evidence that Michael had suffered multiple blows, and are consistent with Michael having been left in the custody of motorcycle gang members who physically abused him and hit him on the head multiple times (26R 228).

Page 50 (17R 1845) shows "coherence," which is one of the most sensitive measures of traumatic brain injury (26R 230). The presence of short paired hypo-coherence and long paired hyper-coherence in Michael's QEEG indicate traumatic brain injury (26R 234). Behaviors connected to such injury include perseveration - one can hear something, but it won't quite register (26R 234-35) - and the inability to perform at one's IQ level (26R 235). LORETA can pinpoint areas of brain dysfunction mathematically; the phase reversals revealed by the EEG were in precisely the areas one would expect to find brain injury from the coherence findings (26R 237-39). Because we know what functions are performed by the Brodmann areas shown by QEEG to be damaged, we can determine that the damage was to areas of Michael's brain that control language, working memory, self-reflection, solving novel problems, judgment, ability to inhibit one's responses, planning and organization (26R 239).⁶ All of this was consistent with Michael's history and behavior (26R 239). These localized areas of damage were most likely caused by injuries to the head, whether the bicycle accident that resulted in Michael being life-flighted to the hospital, or the physical abuse inflicted by various caretakers (26R 243). Michael's abuse of drugs beginning at an early age

⁶ We all have too many neurons when we are born, so superfluous neurons normally are pruned in our first two years, forming discreet areas, called Brodmann areas (26R 231). If the pruning does not occur like it should the brain cannot function efficiently (26R 233).

would have caused more generalized damage, as shown by the diffuse general loss of amplitude (or strength) of the brain waves, particularly in the Delta range, as shown, for example, on pages 11-12 of the report (17R 1806-07), but also throughout his brain, as shown on pages 44-45 (17R 1839-40) (26R 243-44). Mildly low amplitude EEG's could be a normal variant, but Michael's were as much as *seven standard deviations below normal* (26R 244-46) . The low amplitude was much more pronounced at lower frequencies, which would be consistent with cocaine use (26R 247-48).

Base on his evaluation, testing, interview with Michael, and review of his history, Dr. Gluck concluded that Michael was impaired in his ability to learn social relationships, to see consequences, and to judge. When he "gets into novel situations, things he hasn't seen before, his medulla will light up . . . and he will go into a fight or flight reaction" (26R 252-53). When one does something over and over, the information is stored further back into the cerebellum into what is called "procedural memory" (26R 253). Thus, when not faced with a novel situation, Michael may not exhibit noticeable problems, but give him "a novel situation where the frontal lobe has to work, figure it out, problem solve, he's going to have a problem" and will "do things that make no sense" (26R 253).

Dr. Deborah Mash, a Ph.D. neuropharmacologist and neuroscientist who has been a member of the faculty of the University of Miami Miller School of

Medicine since 1987 (25R 17-18) evaluated Michael by conducting a structured interview and reviewing material supplied to her by postconviction counsel, including Defense Ex. 27, the QEEG reports, transcripts of the January 9-13, 2012 evidentiary hearing proceedings, and the deposition testimony of Brandi Lori Higashi (25R 24, 26). She arrived at several conclusions. First, she found "an extremely severe" case of post-traumatic stress disorder (25R 27). Second, she found that Michael had an "extreme" genetic risk for substance abuse and neuropsychiatric disabilities (25R 27). Third, there was "no doubt" in her mind that Michael suffered from "very significant neuro-developmental disabilities" (25R 127). Finally, she found a "severe" poly substance abuse disorder (25R 28).

Michael's neuro-developmental disabilities began *in utero* as the result of drug and alcohol use by his mother during pregnancy (25R 28-9). Not only was that use confirmed by testimony, but Michael's bout of pyloric stenosis shortly after birth was itself an indicator of "third trimester problems in the mother," including drug abuse, poor nutrition, and neglect of the developing baby (25R 29). Michael's life was "quite horrendous" (25R 29). Most people do not fully appreciate the "extreme nature" of witnessing daily violence by people who are abusing psycho-stimulants like methamphetamine and cocaine, but Michael was surrounded by it his whole childhood (25R 29-30). His mother hung out with

"very sick individuals" who suffered from "the worst forms of psychopathology and substance abuse disorders" (25R 30).

Michael has a "genetic load" for substance abuse on both sides of his family (25R 31-32), magnified and compounded by the neglect and abuse he suffered at the hands of those who should have been taking care of him; the ever-present lack of stability and the ever-present abuse, both verbal and physical, was "off the chart" (25R 33). Michael showed stigmata of heavy drug use leading up to the murder, including loss of weight and crack lung (25R 41). Minimal crack use would not cause crack lung; it would take "sustained use over a period of years" (25R 42). Furthermore, his use of cocaine in combination with alcohol would cause the liver to form coca-ethylene, which stays in the body and in the brain longer than cocaine alone, and has been associated with violence (25R 42-43).

Michael's inability to complete Dr. Turner's neuro psych evaluation is not surprising. Michael's brain damage causes "a lot of perceptual errors," particularly in novel situations and when he is fatigued (25R 64-65). In addition, "MMPI's in substance abusing populations [often] come back with invalid measurements," and Michael's PTSD and stress reactivity further complicate things (25R 65, 71). There are limitations to neuro psychological examinations of people like Michael; it is not that he is not trying, it is that he cannot (25R 72).

A "neuro" examination would have been "less intrusive" than "neuro psych" testing and would have been a preferable way to substantiate brain dysfunction (25R 65). The testing done for trial was deficient not just because of the lack of a determination of brain damage, but also because of the lack of corroboration of Michael's self-reporting (25R 67, 102). When Rollo was unable to secure an affirmative determination of brain damage, he should have pursued other available methods of making that determination (25R 105). We now have an objective determination that Michael was brain damaged - the QEEG confirms that Michael has functional damage to Brodman areas 10, 11, 40 and 7 - all of which are in the frontal lobe area (25R 50). QEEG has been around a long time, and is being used diagnostically by, for example, the Department of Defense to diagnose mild traumatic brain injury, and to decide whether or not to allow a pilot back in a very expensive jet aircraft (25R 49-50). In addition to QEEG, his self-reporting has been exhaustively corroborated by the testimony presented on postconviction (25R 67), and also by his behavior since being sentenced to death. That Michael has had no disciplinary reports in five years on death row (Defense Ex. 42, 17R 1931-32), but became so stressed from being transported to Milton and sitting in the Santa Rosa County Jail that he waived his presence at the final two days of the evidentiary hearing was corroborative of and consistent with his brain dysfunction and his poor ability to handle novel situations and stress (25R 119).

The abuse Michael suffered, by itself, would have adversely affected his mental development (25R 34-35, 46-47). In addition, his consumption of drugs and alcohol at a very young age would have retarded the necessary "pruning" of the neural connections of the brain, resulting in a diminished ability to engage the frontal lobe - the "stop sign" that allows thinking about the consequences of behavior and higher reasoning (25R 37-38). Because of his brain damage, Michael is very impaired in his ability to deal with stress and novel situations (25R 107). He can function well enough in familiar and non-stressful circumstances (25R 39), but his frontal lobe damage is like an iceberg that lies below the surface until he is under the influence of drugs, alcohol or extreme stress, and then his primitive limbic circuit becomes "the driver" (25R 37-39). On the day of the murder, he was in unfamiliar territory, which his brain dysfunction could not deal with rationally, compounded by his heavy use of cocaine and alcohol (25R 44-45, 94-95). His ability to conform his conduct to the requirements of the law was substantially impaired (25R 94-95). He was in "limbic overdrive," in which the part of the brain that is "flight or fight" would have been fully engaged (25R 44). Then, being arrested for murder and facing a death sentence when he had never before been in serious trouble would have been extremely stressful to Michael (25R 107). When he punched his co-defendant shortly after his arrest, he was in a state cocaine withdrawal, which would have made him even more reactive and more anxious

(25R 112). The evaluation by Dr. Larson would have been "very frightening." The very irrationality of his escape attempt (there was another deputy present, and Michael had shackles on his legs) was itself evidence of "psychiatric disability" (25R 85-86). Michael was not "a person who [could] deal with going in front of experts" (25R 83). He did not "have enough cards in his game to deal them and play them" (25R 83).

Dr. Mash would have been willing and able to testify at sentencing (25R 51).

Dr. John Bingham (a licensed mental health counselor) and **Dr. Brett Turner** (a licensed psychologist), who had testified for the defense at sentencing, described the material provided to them by Rollo as inadequate. He did not provide Dr. Bingham with statements or deposition testimony from Tammy or Richard Hartman or Stephanie Hernandez (31R 26-27). The only deposition Dr. Bingham saw was that of Michael's mother (31R 25-6). And what he did not have, Dr. Turner also did not have (17TT 2344-45). Much of what they knew about Michael's history came from Michael himself, either directly, or indirectly from what he had told the California social services agency, as reported in the Calveras report (31R 29). The information provided by postconviction counsel corroborates and greatly expands on the history Dr. Bingham and Dr. Turner had at the time of sentencing (31R 33-35, 61, 68, 74). Not only was that history *not* exaggerated by Michael, he had actually understated how bad it was (31R 70). Dr. Turner and Dr.

Bingham now have a "much better understanding" of the extent of Michael's abuse of drugs and alcohol from an early age, and his severely dysfunctional and abusive family environment (31R 40-43). And Dr. Turner's suspicion that Michael is brain damaged, which was not confirmed at the time of sentencing by any medical evidence (a fact the State emphasized to the jury, 27TT 2342), has now been confirmed by the QEEG testing (31R 58). And if "*coup contrecoup*" damage is still observable after these many years, the injuries were severe (31R 59).

Dr. Turner explained that the invalid scale on the MMPI could well have been caused by fatigue, impulsiveness, or by Michael's frontal lobe impairment itself (31R 54). Mild brain injury does not mean mild impairment. A mildly brain injured person can be substantially impaired, while a moderately brain-injured person would be functionally mentally retarded, and a severely brain-injured person would be confined to a nursing home, perhaps unable to communicate at all (31R 81, 89). The standard recommendation for a mildly brain-injured person is that they have a "consistent environment," i.e., "pretty much the same routine every day" (31R 87). Change the environment, introduce novelty or stress, and people with mild brain damage will perform poorly (31R 87). Regarding behavior emphasized at trial which allegedly showed lack of "substantial" impairment (16TT 2287-88), Dr. Turner agreed that we do not know that they were Michael's actions - Shawn Arnold might have taken the pillow, thrown the purse in a

dumpster, and placed his knife under the seat of his wife's car (31R 64-5). And none of those actions are inconsistent with substantial impairment (31R 63-64). The pillow could not have been tied to them if it had been left behind (31R 64). The purse could have been tossed in the dumpster simply to keep Arnold's wife from finding it in her car (31R 64-66). Finally, the knife could have been placed under the seat of the car because that is where Arnold routinely kept it, not to conceal evidence (31R 66). "Substantial" impairment is just that; it does not mean complete inability to function (31R 63). Even animals have a limited ability to plan; no actions here are inconsistent with substantial impairment (31R 66-67).

Assistant State Attorney **Robert Elmore**, who prosecuted Michael at all three of his trials, knew of "no law" that prohibits me from presenting a witness who has given inconsistent statements" (40R 1106). Tammy was an "essential witness" whose testimony was not "totally inconsistent" (40R 1112-1120). Elmore was "acutely aware of every statement in her deposition," (40R 1117), but "certainly would not have called her attention to [contradictory statements] . . . that would be defense counsel's job" (40R 1117).

SUMMARY OF THE ARGUMENT

This brief primarily addresses the many ways in which trial counsel were grossly ineffective, but also includes a claim that the prosecutor knowingly presented false and misleading evidence. Trial counsel were ineffective not merely

because they failed to investigate and prepare, but also because they lacked basic, fundamental understanding of the nature of capital sentencing. They did not comprehend that evidence and argument presented at the guilt phase could have a major impact on sentencing. They did not understand that preparing for a capital sentencing includes investigating and preparing for the State's evidence in aggravation. And they did not really understand or adequately prepare to present mitigation. Trial counsel's investigation and preparation for this case was utterly inadequate and prejudicially deficient.

ARGUMENT

ISSUE 1 - INEFFECTIVENESS OF COUNSEL

To prevail on a claim of ineffectiveness of counsel, a defendant must show that trial counsel's performance was constitutionally deficient, and that the deficient performance deprived him of a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1984). "Pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation." House v. Balkcom, 725 F.2d 608, 618 (11th Cir. 1984). While counsel need not "pursue every path until it bears fruit or until all hope withers," Williams v. Head, 185 F.3d 1223, 1237 (11th Cir. 1999) (internal citations omitted), it is "axiomatic that 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations

unnecessary.'" Hurst v. State, 18 So. 3d 975, 1008 (Fla. 2009) (quoting Strickland). Although trial counsel's strategic decisions are entitled to deference, "[c]ase law rejects the notion that a 'strategic decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.'" Rose v. State, 675 So.2d 567, 573 (Fla. 1996) (internal citations omitted).

Counsel's obligation to prepare for a capital sentencing is not limited to investigating and presenting mitigation, but includes investigating and preparing to rebut "any aggravating evidence that may be introduced by the prosecutor." Parker v. State, 3 So.2d 974, 984-85 (Fla. 2009) (quoting ABA standards). Additionally, "counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed." Florida v. Nixon, 543 U.S. 175, 193 (2004). Not only are many, if not most, of the aggravating circumstances relied upon by the State presented at the guilt phase of a capital trial, but mounting a guilt phase defense that is non-credible or in logical conflict with the penalty phase defense can have "dire" consequences at the penalty phase. *Id.* at 191-92.

While Stokes was primarily responsible for the guilt phase and Rollo for the sentencing, their inadequate performance affected both phases of trial, for several reasons. First, Stokes was lead counsel, and, as such, bears responsibility for the penalty phase even if he attempted to delegate that responsibility to Rollo. Second, Stokes examined one penalty phase witness - Deputy Jarvis - and was

constitutionally obliged to prepare for that examination and all evidence admitted in connection with that witness. Third, Rollo's sentencing responsibilities included preparing for the impact of guilt-phase witnesses on sentencing. Tammy Hartman's testimony, in particular, was highly relevant to several aggravating circumstances, and Rollo should have been involved in preparing to rebut, impeach, or exclude her testimony, if possible, but left that entirely to Stokes.

A. Trial counsels' failure to investigate and develop any meaningful challenge to the critically important testimony of Tammy Hartman

In her November 19, 2004 statement to law enforcement, Tammy stated that *Shawn* had told her that, after Michael had choked Mrs. Everett, Shawn had told him "we are not going to do this," and "gave the lady a bag to breath[e] in," but Michael stabbed her (11R 775). In her November 24, 2004 sworn statement, Tammy stated that when she had confronted the two at her home, *Shawn* had stated that he had told Michael "to quit" (11R 690). In her August 31, 2005 deposition, she initially testified that Shawn had not talked to her about what had happened, and had never told her who had stabbed Mrs. Everett - *Michael* had (11R 719-20, 724). But then she said, "Wait a minute. Now *Shawn* did tell me he saw Michael snap her neck" (11R 724). Then she changed her mind again, saying: "[S]top. That wasn't Shawn that told me that. That was *Michael* that told me that he did that" (11R 724). She admitted getting "the boys mixed up" because she talked to "both of them all the time" (11R 726), but later said that she had never talked to

Shawn about the murder (11R 749). She testified that *Shawn* had told her that he had seen Michael smother Mrs. Everett with a pillow, but then could not remember who had told her that (11R 736).

Reasonably competent counsel reviewing this would note one obvious fact: Tammy has consistently inconsistent about who had told her what. Stoke should immediately have realized that, while statements made to Tammy by Michael would be admissible against him, statements made to her by Shawn would be inadmissible hearsay at Michael's trial. Stokes also have realized that Tammy's testimony, although delivered at the guilt phase of the trial, was going to be highly relevant to the penalty phase, both to establish aggravating circumstances, and also to support a finding that Michael was more culpable than his life-sentenced co-defendant. See Hazen v. State, 700 So.2d 1207 (Fla. 1997) (Hazen's death sentence vacated as disproportionate to the life sentence imposed on co-defendant Buffkin in a plea deal). Preparing for Tammy's testimony was critical, but trial counsels' preparation was minimal to non-existent.

The evidence presented at the evidentiary hearing establishes that, when Richard Hill withdrew from the case, his copy of Tammy's deposition ended up in Rollo's file, and remained there until mid-trial. It never occurred to Rollo that, because Tammy was going to be a guilt-phase witness, he needed to make sure Stokes had a copy of her deposition. And despite the importance of her testimony,

Stokes never wondered why he had numerous depositions in his file, but none from Tammy, and he never thought to ask Rollo if he had such a deposition and, if not, that maybe Stokes should depose her. Although Stokes testified that, once he learned of the deposition mid-trial, he read it before Tammy testified, it is notable that when the State refreshed her recollection (8TT 1233-35) with testimony from page 35 of her deposition (11R 730), Stokes did not confront her with page 42 of her deposition (11R 737), where she contradicted her earlier testimony.

Tammy's trial testimony was both internally inconsistent and inconsistent with her pre-trial statements and testimony. She testified at trial, initially, that *Michael* had told her that, after Shawn put a pillow over the victim's face, Shawn took a baggy and tried to help her breathe because she was hyperventilating (8TT 1228). However, Tammy immediately recanted, stating, "I shouldn't have said that because I think it was *Shawn* that" said that. Then she admitted that she did not remember "which one told me that" (8TT 1228). Significantly, however, her very earliest statement on the subject, made while her memory should have been the freshest, is that *Shawn* had told her about the bag - a fact which the State chose not to elicit. Stokes neither objected to Tammy testifying about a statement Shawn had made to her, nor alerted the court or the jury about her prior statement.

Stokes did object, unsuccessfully, to Tammy's testimony that *Michael* had told her that Shawn had objected to killing Mrs. Everett (8TT 1232-33), but failed

to object when Tammy almost immediately admitted she was unsure who had told this to her (8TT 1233). Stokes should have objected and moved to strike the out-of-court statement when Tammy admitted she could not say who had made it to her. Stokes had no reasonable strategic explanation for his failure to object. He first tried to claim he had a "standing" objection to hearsay because of a single hearsay objection the court sustained, but he ultimately admitted that lone ruling in his favor did not relieve him of the obligation to object to additional hearsay (37R 609-12, 625-26). He claimed Tammy's "uncertainty" was more "beneficial" than trying to exclude her testimony, but, contrarily, that he did not need to "reiterate" that uncertainty by impeaching her with her many prior inconsistent statements, because her "inconsistencies" were not so much a matter of concern as her "motivation" (37R 631-32, 635-38). These are nothing more than inconsistent, ad hoc, after-the-fact attempts to rationalize his failure. The real explanation is that he failed to prepare himself to deal with her testimony, doubtless thinking that a guilty verdict was inevitable no matter what, but not realizing that her testimony might make the difference between a first and second degree murder verdict and would also seriously impact the penalty phase.

Stokes gave the whole issue so little thought that even now he does not know how or why Tammy's testimony was objectionable. But her testimony was not only inadmissible hearsay under Florida law, but, in addition, violated

Michael's constitutional right to confront the witnesses against him. Crawford v. Washington, 541 U.S. 36 (2004); Brooks v. State, 787 So.2d 765, 774-78) (Fla. 2001). Tammy's testimony at the postconviction evidentiary hearing demonstrates what Stokes could have elicited if he had conducted a proper voir dire of Tammy prior to her trial testimony: she identified **Shawn** as the person who had told her: (a) that after he had tried to smother Mrs. Everett, he had taken a baggie and tried to revive her; (b) that he had told Michael, "We are not going to do this; (c) that Michael had knocked Shawn out of the way; and (d) that Michael had cut Mrs. Everett's throat with a knife. Tammy also testified that she does not remember Michael ever telling her he had cut Mrs. Everett's throat. These are the very statements that both the sentencing court and this Court relied on to find two aggravating circumstances and to find that Michael was more culpable than Shawn, but Stokes did not challenge them in any way whatever.

The court below found that Tammy's evidentiary hearing testimony was not "as reliable as the record documents as to what she said at the time." (7R 1299). But Tammy's memory, by her own admission, has never been good, and was not good at trial. She has never been reliable, and has never been able to consistently identify which of the two defendants made any statement to her, as any fair examination of her various statements and testimony show. A trial court's factual

determinations are entitled to deference only if they are supported by the record. Bradley v. State, 33 So.3d 664, 672 (Fla. 2010). This finding is not.

It also never occurred to Stokes that it might be beneficial to talk to Shawn Arnold - or even read his deposition. Had he done so, he would have discovered that Tammy had mixed up the timing of Shawn's use of a bag to help Mrs. Everett. This was vitally important, because Tammy's hopelessly confused testimony supported the State's theory that Michael had been the one who committed all the really bad acts after Shawn had withdrawn from his attempt to commit a murder. In fact, it is clear from both his deposition testimony (8R 19-21) and his postconviction testimony (35R 407-10, 435-36) that, *after* calming Mrs. Everett with the bag, Shawn had gone into her son's bedroom looking for drugs and, not finding any, had picked up a pillow and returned to the living room to kill her by smothering her with a pillow. His use of the bag *preceded* his murder attempt; it was *not a withdrawal* from it. And by Shawn's own admission, the pillow was entirely his idea; Michael had simply been standing in the living room when Shawn had returned with the pillow.

Had Stokes talked to Shawn, he would also have learned that Shawn would admit that he could have been the one who broke the Mrs. Everett's neck while trying to smother her, that Michael had not knocked him aside and had never called him a "pussy," and that he had not seen Michael intentionally break the victim's

neck by twisting it with a two-handed grip or otherwise.⁷ And if Stokes had talked to Deana Merritt, he would have learned that Tammy had a reputation in the community for lying, and could have impeached her on that ground, also.

Stokes could additionally have rebutted Tammy's testimony with scientific evidence.⁸ Had he retained a forensic pathologist such as Dr. Leroy Riddick, he could have presented expert scientific testimony that: (1) Mrs. Everett's neck absolutely and positively could not have been broken by someone intentionally twisting her neck with a two-handed grip as Tammy had so "tearfully" demonstrated; (2) it is most unlikely that striking her head on the floor would have caused the kind of break shown by the autopsy; (3) her neck was most likely broken while Shawn Arnold was smothering by forcing a pillow against her face; and (4) she was most likely already dead when Michael cut her throat. Fitzpatrick

⁷ The trial court questions whether Arnold would have been willing to testify for the defense at trial, noting that he had told Elmore he would not testify for the State (7R 1301). However, Arnold was certainly willing to testify for Michael at the postconviction hearing and, unlike the witness at issue in Mendoza v. State, 87 So.3. 644, 656 (Fla. 2012), Arnold never testified that he would *not* have been willing to testify for Michael at trial. Moreover, counsel had the power to subpoena Arnold and make him testify, since he had waived his 5th Amendment rights by entering a plea of guilty and giving a pretrial deposition. Again, in contrast to Mendoza, the State had never tried to vacate Arnold's plea agreement. Finally, trial counsel could have used Arnold's deposition if he had had been unable or unwilling to testify.

⁸ Tammy's trial testimony came after that of the State's medical examiner, Dr. Minyard, who was not asked by either party whether Mrs. Everett's neck could have been broken in the manner later described by Tammy in her testimony.

v. State, (Case No. SC11-1509, decided June 27, 2013) (counsel ineffective for failing to consult with an expert, or to challenge the State's expert witness).

In short, had counsel adequately investigated and prepared for Tammy's testimony, they could have eviscerated so much of the State's aggravation as arose out of the circumstances of the offense, and thus greatly diminished the strength of the evidence in aggravation that the jury, and later the trial court, would weigh against mitigation. They also could have established that Shawn Arnold, not Michael, had been the significantly more culpable of the two, and that Michael's death sentence was disproportionate to the life sentence given to his co-defendant. Hazen, *supra*. That trial counsel did not even attempt to strike, rebut or diminish Tammy's testimony was prejudicially deficient performance

B. Trial counsels' failure to investigate and develop any meaningful challenge to the State's evidence in aggravation

Capital defense attorneys must prepare for "any aggravating evidence that may be introduced by the prosecutor." Parker v. State, *supra*. When that aggravation includes prior convictions, they are obliged to learn what they can about those offenses. Rompilla v. Beard, 545 U.S. 374, 383-90 (2005). Trial counsel utterly failed to prepare for aggravation. Despite having notice that Michael would be tried on the batteries of his co-defendant (the inmate battery) and deputy Jarvis (the LEO battery), counsel attended neither trial, read the transcript of neither trial, and talked to no one who had testified at either trial.

They had no idea what the testimony had been in either trial, or what issues had been contested, or how. Rollo obviously had not even read the medical records from the inmate battery trial, even though the exact same records were introduced in evidence at sentencing in this case, because he was unaware that they failed to confirm strangulation. Rollo admitted he "might have missed" noticing that the judgment of conviction in the inmate battery case showed that Michael had originally been charged with attempted murder (a fact that Rollo acknowledged was irrelevant given the lack of conviction on that charge), and neither he nor Stokes were aware that the judgment in the LEO battery case did not accurately reflect the jury's verdict. Finally, because Rollo had no substantive discussion with Stephanie, he failed to object to testimony that should have been protected by the marital privilege. All this was prejudicially deficient performance.

(1) *The inmate battery conviction.* The trial record shows that the judgment of conviction was admitted in evidence without objection (15TT 2049). Michael had originally been charged with attempted first degree premeditated murder and battery upon a jail visitor or detainee. The jury convicted him only of battery upon a jail visitor or detainee (9R 187). The judgment of conviction, however, prominently shows the original charge of attempted first degree murder (6TR 998). That a defendant has merely been charged with a violent felony does not support a finding of any valid aggravator, and is not admissible for any reason. Dougan v.

State, 470 So.2d 697, 701 (Fla. 1986). Reference to the arrest for attempted premeditated murder was improper and highly prejudicial nonstatutory aggravating evidence. Worse, underneath the recital that Michael had been "tried and *found guilty* . . . of the following crime(s)," the judgment lists two crimes: "BATTERY UPON A JAIL VISITOR OR" and "ATT FIRST DEGREE PREMEDITATED MURDER" (6TR 998). Below these two listed crimes are the words "nolle prossed" without any specific reference to either crime (6TR 998). Thus, a judgment was sent to the jury that reasonable jurors could have interpreted as a conviction of attempted first-degree premeditated murder - a crime for which Michael was *not* convicted. This is especially so in light of deputy Bartley's unrefuted testimony that he had observed Michael strangling Shawn Arnold.

At the inmate battery trial, Mr. Elmore had contended in his opening statement that Michael was guilty of attempted premeditated murder because he had strangled Shawn Arnold - a fact that, he claimed, would be proved by the testimony of both deputy Bartley and Shawn Arnold (9R 314). Michael (representing himself) asserted in his opening that the evidence would fail to show strangulation (9R 317). Deputy Bartley testified that he had seen Michael on top of Arnold, with his hands around his neck, squeezing and shaking, and that Arnold was making a "gurgling" noise (9R 333-36). Arnold, however, testified only that he had awakened to a "slight pressure" on his *face* (9R 346). He had no memory of

being strangled, and he felt no pressure on his neck at any time (9R 351-52). The nurse at the scene saw no bruises on Arnold's neck (9R 90), and his treatment records show that he had a broken nose from being punched in the face, but "no neck pain" (6TR 993); his neck had a "Normal ROM, No jugular venous distention, No meningeal signs" (6TR 994). In his closing argument, Elmore relied on Bartley's testimony, arguing that strangulation "certainly was an act intended to cause death," asking: "For what other reason would [Michael] be strangling . . . Arnold?" (10R 413-15). Michael relied on the medical reports showing that Arnold's neck had nothing wrong with it, and on Arnold's testimony denying that he had been strangled (10R 427). Michael's "main point" was that he had not strangled Arnold; he did not contest having hit Arnold (10R 428).⁹

Clearly, the issue of Michael's guilt of attempted premeditated murder rested directly upon whether the jury believed that he had strangled Arnold. If not, he was only guilty of battery. By finding Michael guilty only of battery, the jury rejected the strangulation testimony. Nevertheless, at the penalty phase of Michael's capital murder trial, the State introduced, without objection, the very testimony from deputy Bartley that had been rejected by the inmate battery jury. This was completely improper and Rollo should have objected, on several grounds.

⁹ As the court reporter's certificate shows (10R 471), the transcript of the inmate battery trial was not created until July 10, 2010, at the request of postconviction counsel. Rollo made no effort to obtain a transcript of this trial.

First, Double Jeopardy precludes giving the State a second shot to prove a crime for which a defendant has been acquitted. Burks v. United States, 437 U.S. 1 (1978); Bullington v. Missouri, 451 U.S. 430 (1981); Arizona v. Rumsey, 467 U.S. 203 (1984); Poland v. Arizona, 476 U.S. 147 (1986). By accepting the verdict of guilty of battery and announcing nolle prosequi to the attempted murder charge, the State acceded to the jury's determination that Michael had only punched Arnold, not strangled him, and was guilty only of battery, not attempted murder. "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443 (1970).

Second, the doctrine of res judicata and the related doctrine of collateral estoppel should have demanded the exclusion of Bartley's testimony about strangulation. Denson v. State, 775 So.2d 288, 290 (fn. 3) (Fla. 2000); Gentile v. Bauder, 718 So.2d 781, 783 (Fla. 1998). However dissatisfied Mr. Elmore may have been with the outcome of the inmate battery trial, he had no right to relitigate the issue of attempted murder at the penalty phase of Michael's murder trial. Donaldson v. State, 722 So.2d 177, 183-85 (Fla. 1998).

Third, while the State is entitled to flesh out the circumstances of a prior violent felony to some extent, it is not at liberty to re-present the evidence from the prior case in its entirety - especially evidence that was presented in support of a

count for which the defendant was not and has never been convicted. "Evidence that may have been properly admitted during the trial of the violent felony may be unduly prejudicial if admitted to prove the prior conviction aggravating factor during a capital trial." Finney v. State, 660 So.2d 674, 684 (Fla. 1995) (internal citations omitted). "Unduly prejudicial" is exactly what deputy Bartley's testimony was; through him, the State was allowed to prove a crime that it had been unable to prove at the original trial - a crime far more serious than the crime for which Michael had actually been convicted.

Rollo's additional failure was not to have contested the strangulation evidence in any way once it came in. Although the medical report failed to corroborate strangulation, it was one of numerous State exhibits, and alone was 12 pages of small, fine print and technical jargon (6TR 986-997). Because Rollo had not studied the medical records himself, and was himself unaware of what they said, he said nothing to the jury about them, allowing significant facts about the prior felony to be buried in minutiae. Rollo also failed to present rebuttal testimony. Had he bothered to attend the inmate battery trial, or had he even obtained and read a transcript of it, he would have realized that the victim of the alleged strangulation denied that it had occurred. Ample evidence was available to Rollo to rebut deputy Bartley's testimony, but he was completely unaware of such evidence as the result of his complete and utter failure to investigate or prepare.

Rollo's failure to object to or rebut this damning and highly prejudicial nonstatutory aggravating evidence was inexcusable.¹⁰

2. *The LEO battery conviction.* As with the inmate battery conviction, because of trial counsel's lack of preparation, the State was able to portray the LEO battery as more severe than it actually was. Because trial counsel had not read the transcript of the LEO battery trial, and had not otherwise prepared, they were unaware that the jury in the LEO battery trial had returned a verdict stating: "We, the jury, find as follows as to the offense charged in the information, guilty of aggravated battery upon a law enforcement officer with a deadly weapon, as charged in the information. We, the jury, find that John Wade Jarvis *suffered slight injury*" (11R 665)(emphasis supplied). Not only did trial counsel fail to inform the capital sentencing jury that the LEO battery jury was sympathetic enough to make this express finding part of its verdict, but trial counsel allowed the judgment of conviction to be introduced in evidence, which recited that Michael had been convicted of "AGGRAVATED BATTERY ON A LAW ENFORCEMENT OFFICER *WITH GREAT BODILY HARM*" (6TR 1004) (emphasis supplied). Counsel should have objected to this judgment as not

¹⁰ While the prior violent felony aggravator would have been established anyway, its weight would have been greatly diminished by the exclusion of any consideration of attempted premeditated murder. Cf. Seibert v. State, 64 So.3d 67, 79 (Fla. 2011)(testimony about details of prior violent felony relevant to determine "what weight to give to the prior violent felony aggravator").

representative of the actual determination of the jury and demanded that the State present the jury's verdict in lieu of the judgment. At the very least, counsel should have introduced the jury's verdict to counter an erroneous judgment that Michael had inflicted "great bodily harm." Due to trial counsel's inaction, the only evidence before the capital sentencing jury was that Jarvis had suffered "great bodily harm." The capital sentencing jury never learned that the jury in the LEO battery case had expressly found Jarvis' injuries to be "slight."

3. *Stephanie's testimony and the marital privilege.* When Stephanie voluntarily attended Michael's trial, the State served a subpoena on her, and called her as a witness at the sentencing phase to testify that Michal told her he cut Mrs. Everett's throat to "make sure she was dead" (15TT 2063). Despite having been on notice (1TR 15) that Stephanie was a "Category A" witness - meaning she had been present when Michael had made a statement - Rollo had done nothing to prepare for her testimony, and did not object to it.

Generally, communications between husband and wife are privileged, and (with exceptions not applicable here) either spouse may prevent the disclosure of such communications. Section 90.504 (1) Fla. Stat. There is a strong public policy supporting this privilege, and it should not be narrowly construed. Jackson v. State, 603 So.2d 670, 671 (Fla. 1992). Where no third party has overheard the conversation, a communication between husband and wife does not lose its

privilege simply because third parties may have been nearby. Taylor v. State, 855 So.2d 1, 26-7 (Fla. 2003). "The mere fact that a conversation is recorded or overheard does not compromise a couple's privilege *if the only person who can testify regarding the content of the communication is a spouse*." Boyd v. State, 17 So.3d 812, 817-18 (Fla. 4th DCA 2009) (emphasis supplied).¹¹

That is precisely the situation here: although Stephanie testified that Richard and Tammy had been nearby when Michael allegedly made the statement at issue (15TT 2058), neither of the alleged third parties was able to testify at trial (or now) that they heard any such statement.¹² As in Boyd and Taylor, the State could not at trial or now demonstrate that any third party had overheard Michael's statement. Michael's wife is the only person who could testify about the statement. Hence, the statement was privileged, and Stephanie's testimony would have been excluded on proper objection. By failing to assert the marital privilege, Rollo waived it. Kerlin v. State, 352 So.2d 45, 52 (Fla. 1977). The trial court found no prejudice because, although Tammy denied hearing Michael's statement to Stephanie, she

¹¹ Lynch v. State, 2 So.3d 47 (Fla. 2008) cited by the trial court in its order, is inapposite. There, the statement had been made in the immediate presence of one who died before trial. The circumstances were sufficient to show such close proximity as to allow an inference that the witness had overheard the statement, and, unlike here, that witness never expressly denied having heard the statement.

¹² The State asked Tammy at trial if she had heard Michael say anything about the stabbing to Stephanie; she testified that she had not (8TT 1209). On postconviction, Richard was asked about such a statement; he had not heard it, either (36R 476-77). Rollo had never talked to Richard or Tammy.

had testified at trial that Michael had made an essentially identical statement to her (7R 1294). But Tammy's trial testimony is highly problematic. In particular, Tammy testified at the postconviction evidentiary hearing that Michael had never made such a statement to her (37R 594). Stephanie's testimony about a possible reason Michael had cut Mrs. Everett's throat was a primary foundation for the prosecutor's argument that the evidence established the avoid arrest aggravator (18TT 2514). It also was the major factor in the rejection of the substantial impairment mitigator by the State's psychologist, Dr. Harry McClaren (18TT 2476-77) - testimony that the prosecutor emphasized in his closing argument (18TT 2525). Rollo's failure to object to Stephanie's testimony, couple with Stokes' failure to object to Tammy's testimony, gave the State one more aggravating circumstance to weigh against mitigation, and one less mitigator to weigh against aggravation. Their performance was prejudicially deficient.

C. Trial counsels' failure to investigate, develop and present mitigation

Attorneys in capital cases are obliged to conduct a diligent and thorough investigation of their clients' background and mental deficiencies, if any, and to thoroughly prepare themselves and their witnesses. Wiggins v. Smith, 539 U.S. 510, 522-23 (2003). *Accord*, State v. Lewis, 838 So.2d 1102, 1113 (Fla. 2002) ("The obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated - this is an integral part of a capital case."). It is not sufficient

for counsel to do "some" investigation or to present "some" evidence in mitigation. This Court has granted relief on sentence where trial counsel had presented only "bare bones" mitigation at trial and where substantial mitigation was presented at the postconviction evidentiary hearing. Parker v. State, 3 So.2d 974 (Fla. 2009). Here trial counsel presented only two lay witnesses in mitigation, neither of whom had spent much time with Michael - a fact of which trial counsel was unaware. This "bare bones" mitigation sharply contrasts with the huge amount of readily-available mitigation testimony presented at the postconviction evidentiary hearing.

It is clear from the postconviction evidence that, despite being nominally the lead counsel, Stokes did nothing at all to prepare for the penalty phase. Not only did he entirely leave to Rollo the investigation and development of mitigation evidence, but Stokes made no attempt to coordinate his guilt phase strategy with Rollo's penalty phase efforts, and, as argued above, failed to prepare for the potential impact of guilt phase evidence on the penalty phase. Stokes bears responsibility for the penalty phase no matter how he and Rollo divvied up their workloads, but since the investigation and development of mitigation was entirely Rollo's responsibility, Appellant will focus on Rollo's actions and omissions.

Rollo's performance was the antithesis of the diligent and thorough investigation and preparation that his client should have been able to expect. He declined the services of an investigator, and decided not to retain a mitigation

specialist. His own investigation was minimal. His only source for the names of mitigation witnesses were Michael's step-grandmother and grandfather (40R 1057). Not only did he fail to discover and present numerous friends and family members who in their testimony could have presented a complete picture of Michael's life, but he spent a minimal amount of time talking to the few mitigation witnesses he did talk to, as his own time records show. He also spent a minimal amount of time with his client. Instead of sitting down with Michael and helping him to fill out the "Confidential Assessment," Rollo mailed the form to a client he suspected might have brain damage, and let him fill it out unassisted. Then Rollo contacted none of the potential witnesses Michael had identified. And despite recognizing that counsel in a capital case needs to build a rapport with his client and to earn his trust, Rollo talked to Michael one time and then, two weeks later, without any further discussion or explanation, had him sent to Dr. Larson for an evaluation accompanied only by two sheriff's deputies.¹³ The very irrationality of Michael's escape attempt - as well as the damage he did to his own case - should have spurred Rollo to immediately seek out his client to reassure him that there was someone on his side and to counsel him about the importance of his behavior while in custody. Instead, Rollo did not see Michael again for over a week, for only the

¹³ Dr. Turner testified that many attorneys will accompany their clients to his office to reassure them it is OK (31R 90). Rollo, however, did not accompany Michael to any of his evaluations.

briefest of visits, and did not visit him again for another month. In fact, between his first visit with Michael and the trial, Rollo spent less than two and one half hours total with him, as Rollo's own billing records show.

Despite the huge number of readily available witnesses who, cumulatively, could have testified about Michael's entire life from his birth until his arrest for murder, Rollo presented a mere two background witnesses, neither of whom he had adequately prepped, and neither of who had spent a lot of time with Michael - a fact that eluded Rollo, who did not realize there were significant events in Michael's life that neither witness knew anything about. Although Michael had reported his drug use at a very young age to Dr. Bingham, no witness at the sentencing proceedings could confirm his self-report, and the State had been openly skeptical. Rollo's only attempt to fill in the gaps in their knowledge was the introduction of the Calveras report and its hearsay allegations of mistreatment.

Rollo violated his constitutional duty to discover "*all reasonably available mitigating evidence*." Wiggins, 539 U.S. at 524 (quoting ABA guidelines) (emphasis in original). Like the attorney in Wiggins, Rollo "abandoned [his] investigation of [Michael's] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* The trial court accepted Rollo's assertion that his decisions were strategic. But it is well settled that counsel's allegedly strategic decisions cannot be deemed constitutionally

reasonable if they are based on incomplete investigation. Wiggins, supra; Sears v. Upton, 130 S.Ct. 3259, 3265 (2010). Accord, Simmons v. State, 105 So.3d 475, 510 (Fla., 2012) ("The record in this case does not show that counsel knew the full extent of the available alternative course for presentation of mitigation and made a reasonable strategic decision under the circumstances."); Rose v. State, 675 So.2d 567, 573) (Fla. 1996) ("Case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.") (internal citations omitted). Despite having been given the names of many additional witnesses by Michael and his brother Richard, Rollo ceased his investigation after talking briefly with only a minimal number of witnesses who had little knowledge of most of Michael's life or the abuse he had suffered or his early exposure to and continuing difficulty with hard drugs. He simply did not know enough about what kind of evidence was available to make a strategic decision whether or not to use any of it.

Beyond that, the mere incantation of "strategic decision" does not insulate Rollo from the unreasonableness and inconsistency of his purported justifications for failing to offer more witnesses. For example, Rollo repeatedly insisted that "isolated incidents" in Michael's life would not be helpful mitigation. Of course, if the defense had failed to offer testimony about discreet events in Michael's life, the State would (justifiably) have described the evidentiary presentation as too vague

to be helpful. The postconviction testimony of numerous witnesses about many, many discreet "incidents" (and consistent patterns of behavior) in Michael's life, from the time he was in the womb until he was arrested for murder and afterwards, is precisely what shows the "entire body of his life's work" (39R 893); that testimony cannot accurately be described as showing only "isolated incidents."

Rollo's judgment that it was "obvious" that various witnesses would have given him nothing "positive" is belied by the testimony they gave at the evidentiary hearing.¹⁴ Rollo, of course, does not know that, because he heard none of the testimony and, even now, has no idea what any of these witnesses testified about.

Other rationalizations by Rollo simply do not hold up. His assertion that he would not have called Deana Merritt as a mitigation witness because she was unaware of Michael's drug use is hard to square with his decision to call Michael's mother, who likewise was unaware of Michael's drug use. His "tactical decision" to let Dr. Bingham tell the jury that Stephanie had told him that Michael was a good husband and father is inconsistent with Rollo's earlier testimony that he would not have put on evidence showing that Michael was a good person because it was

¹⁴ Rollo's testimony that, although he was a "good questioner," he never would have gotten Leola Estabrook to admit she had been abusive to Michael is laughable in view of her postconviction testimony admitting just that, in great detail. And Rollo's judgment that Richard Hartman, Jr. (Tammy's husband) would have testified about damaging statements Michael had made to Stephanie is belied by Richard's testimony - two days before Rollo testified - that he had not heard Michael say anything to Stephanie.

"contradictory" to his theory of mitigation that Michael's life story was about his use of drugs - a theory which, by the way, Rollo did not think would make any difference because it was an "excuse" that would not resonate with the jury, but had presented because he had nothing else. Additionally, Rollo never explained what is "contradictory" about showing that a person who has had a lifelong problem with drugs is basically a good person when not on drugs. Although he was convinced that Michael's church attendance would not have had "any effect whatsoever" the jury, he had no "way of knowing" whether presenting church-going witnesses like Stephanie and her family would have made a difference.

Underlying all of Rollo's supposed strategic judgments was his failure to understand the purpose of mitigation. He erroneously believed that evidence was mitigating only if it actually excused the crime. But if it did that, it would be a defense at the guilt phase. Mitigation is not an "excuse," as this Court has recognized. E.g., Delhall v. State, 95 So. 3d 134, 167-68 (Fla. 2012) and cases cited therein (improper for a prosecutor to denigrate mitigation by referring to it as an "excuse"). Rather, mitigating evidence is that which diminishes a defendant's moral culpability and so justifies a less than maximum sentence. Because Rollo did not understand that - had by his own admission never thought of it that way -

he quit before he began, believing (incorrectly) that the jury would be predisposed to recommend a death sentence, and there was nothing he could do about it.¹⁵

The State has not offered a remotely adequate justification for Rollo's failure to investigate. His performance was constitutionally deficient. Coleman v. State, 64 So.3d 1210 (Fla. 2011) (counsel's failure to conduct reasonable investigation into mitigation was constitutionally deficient performance); Hurst v. State, 18 So.3d 975 (Fla. 2009) (counsel's failure to conduct a reasonable investigation into mitigation was constitutionally deficient performance despite counsel's assertion that his decision not to present mitigation was strategic).

The trial court found no prejudice, because the "additional lay testimony presented at the evidentiary hearing" was "cumulative," providing "nothing dramatically different than what was established at trial" (7R 1325-26). This legal determination is entitled to no deference, and is wrong. Even if the readily available mitigating evidence discovered and presented by postconviction counsel exactly duplicated whatever "facts" Rollo presented about Michael's life, it would not have been "merely" cumulative for this reason: a large part of the State's cross-examination and argument at the original penalty phase attacked the credibility of

¹⁵ "[T]he sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime." California v. Brown, 479 U.S. 538, 545 (1987). The less "bad" the crime is, and the less morally blameworthy the defendant is, the more likely it will be that the jury will decide that a death sentence is not warranted for a defendant convicted of murder. See, Gillers, *Deciding Who Dies*, 129 U.Pa.L.Rev. 1, 63-65 (1980) .

the defense background information on the ground that it had originated from Michael himself, and (so the State argued) Michael was not credible (e.g., 16TT 2267-71, 2276-78, 2282-83, 17TT 2350-51). Had Rollo conducted a sufficient investigation and located the many readily-available witnesses who could have told the jury about Michael's life, his self-reported history would have been massively corroborated, and his mitigation would have been hugely more credible to the jury.

Moreover, the evidence presented was not cumulative. Even if we just look at the original testimony of Michael's mother, Rollo's examination failed to elicit the very damning admission from Cheryl that she had abused hard drugs and alcohol while pregnant with Michael, or to elicit the important testimony that, after his bicycle accident, Michael had been unresponsive and had been life-flighted to a hospital, where he stayed at least two nights, or to elicit testimony about Michael's bout of pyloric stenosis. This testimony was considered very important to the expert witnesses who testified at the postconviction hearing, and corroborated the existence of brain damage that was only hinted at in the sentencing proceedings. Dr. Mash, for example, testified that Cheryl's postconviction testimony about pyloric stenosis was important because it corroborated her drug abuse, poor nutrition and other neglect of the developing baby while *in utero*.¹⁶ In addition,

¹⁶ Rollo testified at the evidentiary hearing that he did not think pyloric stenosis would be mitigating (40R 977), but he was of course unaware that it is evidence of *in utero* neglect and abuse.

Brandy Higashi, Jennifer Hartman, Shawn Hartman and Richard W. Hartman (Tammy's husband) all confirmed Michael's use of hard drugs, including cocaine and meth, from a very young age. And they did not merely confirm his use of hard drugs, they were able to flesh out the extent of that usage and the ongoing problems caused by it, as well as Michael's repeated, but ultimately unsuccessful attempts to get clean and drug free. And they were not merely able to confirm that Michael had suffered physical and mental abuse, but they were able to flesh out the extent of that abuse. What their testimony conclusively demonstrates is not simply that Michael had a less-than-ideal childhood, but that he had a horribly abusive, deprived and unstable childhood, in which hard drugs and violence were a constant and ever-present reality from even before his birth. What they also establish is that, despite this horribly abusive childhood, until he got involved in the murder of Mrs. Everett, he had never been violent himself. Finally, Stephanie and her family were able to paint a picture of a person who was basically good and who tried very hard to better himself but ultimately could not overcome his mental and emotional impairments and his lifelong addiction to hard drugs.

The trial court called this good character evidence a two-edged sword (7R 1326). But a major point of presenting evidence in mitigation is to portray a capital defendant in the best light possible - to show that, despite his participation in murder, he is not all bad, and therefore should be shown some mercy. To say

that evidence of good character is a two-edged sword simply because the defendant has been convicted of capital murder is misguided. It may or may not be persuasive enough to secure a life sentence, depending on the severity of the crime, but it is not the kind of evidence which can hurt as much or more than it helps.

Drug use and abuse is another matter. This Court has recognized that it can be a two-edged sword, and, depending on all the circumstances of the case, a reasonable defense attorney might choose not to offer drug use or abuse in mitigation. E.g., Pace v. State, 854 So.2d 167 (Fla. 2003); Banks v. State, 842 So.2d 788 (Fla. 2003). But in this case, the murder was all about cocaine; inextricably intertwined with the crime are the facts that Michael and Shawn Arnold had consumed cocaine before going to Mrs. Everett's house, that they had gone there to get more cocaine, and that they had used money they took from Mrs. Everett to buy and consume more cocaine. Rollo could not have kept those facts from the jury, and of course he did not - that Michael was a long-time drug user and addict was the core of Rollo's case in mitigation. Moreover, in contrast to a defendant like Pace or Banks who first uses illegal drugs when he is old enough to make his own decisions, Michael was given drugs when he was just a child incapable of making a free choice, and he was given those drugs by the very people who should have been providing guidance, not hard drugs. Thus, his initial involvement with drugs cannot readily be characterized as a voluntary action on

his part. Nor was Rollo faced with the problem confronting trial counsel in Pace and Banks of having to choose one mitigation theory or another. The testimony from every single witness at the postconviction evidentiary hearing that Michael was fundamentally decent and nonviolent would not have been inconsistent in the slightest with any of the rest of the defense mitigation, and would have been valuable testimony about the kind of person he was - basically a good, nonviolent person with an out-of-control drug problem that began when he was a small child with awful parents and abusive non-parental custodians, with traumatic brain injury that substantially impaired his ability to function rationally when under stress or in novel situations. But the jury never heard this undisputed testimony about Michael's basic non-violent nature. The State will doubtless remind us again, as it did repeatedly throughout the evidentiary hearing, that Michael was not only a party to murder, but also committed two other violent crimes after his arrest, and it is fair enough for the State to do so. What the State cannot do, however, and could not have done at sentencing, is prove that Michael was ever violent or ever committed a violent act of any kind before becoming involved in the murder of Mrs. Everett. And that he nonetheless was involved in these violent acts is readily explained by the mental health testimony presented at the postconviction evidentiary hearing: Michael has traumatic brain injury caused by a combination of *in utero* drug and alcohol abuse by his mother, exposure to hard drugs during his

developmental years, and physical trauma; as a consequence, while Michael can function reasonably well in stable, familiar surroundings and circumstances, he is ill-equipped to deal with novel situations or stress, and is particularly susceptible to being led by someone more capable than he.

All this could have been tied to the circumstances of the offense if Rollo and Stoked had investigated, prepared, and contested the State's portrayal of the crime as one in which Michael was the leader who did all the bad stuff and inflicted all the fatal wounds. They could have established that the ringleader in this murder was Arnold: he was the one who encouraged Michael to treat his hangover with cocaine, who knew Mrs. Everett and her son, who suggested they go to her house to get more cocaine, who provided the vehicle, who told Michael to "grab" Mrs. Everett, who decided on his own to smother Mrs. Everett when he discovered there were no drugs in the house, and who by his vicious attack on Mrs. Everett broke her neck and killed her while smothering her. And trial counsel could have argued that Michael had just followed Arnold's lead - a theory that would have been corroborated by every witness who knew Michael. But trial counsel did none of this. They let Tammy's testimony come in without objection, they barely touched on Michael's abused and deprived upbringing, which they mostly supported with mere hearsay, and while they hinted at brain damage, they never proved it, or explained how that brain damage affected Michael's ability to cope. Trial counsels'

performance was prejudicially deficient. Shellito v. State (Case No SC10-2043, decided July 3, 2013) (slip opinion at 25) ("based on consideration of the plethora of available mitigation and the dearth of mitigation actually presented, when reweighed against the aggravation in the case, our confidence in the outcome of the penalty proceeding is undermined").

D. The admissibility of QEEG

The argument here addresses a preliminary issue regarding ineffective assistance of counsel as to mental health mitigation, including the failure of trial counsel to determine whether Michael is brain damaged. Because the State objected to the admissibility of QEEG, Judge Rimmer ordered a Frye hearing to determine the scientific acceptability of QEEG to aid in diagnosing brain damage. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Initially, a question arises as to the proper standard to review allegedly novel scientific evidence. Section 90.702, Fla. Stat., was amended as of June 4, 2013, essentially adopting the standard articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), regarding admissibility of scientific evidence. Under Section 90.702, as amended, scientific evidence is admissible if: (1) it "is based on sufficient facts or data"; (2) it "is the product of reliable principles and methods"; and (3) the "expert has reliably applied the principles and methods to the facts of the case." Appellant would contend, first, that this standard, and not Frye, should apply to any question

of admissibility of QEEG in this case. Should the Court reject this argument, and apply the Frye standard to this case despite the new statute, that brings up another preliminary question. Generally, this Court evaluates the general acceptance component of the Frye test as of "the time of the appeal." Marsh v. Valyou, 977 So.2d 543, 548 (Fla. 2007). The State contended below, however, that in the context of a claim of ineffective assistance of counsel, general acceptance is determined as of the time of the trial, citing language in Mendoza v. State, 87 So.3d 644, 666 (Fla. 2012). Because resolving the ineffectiveness issue in Mendoza did not require making a precise determination whether the correct time for assessing general acceptance would have been at the time of the trial or at the time of the appeal from the original trial, the language relied on by the State is dicta. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67 (1996) (court is bound only by those portions of an opinion that are necessary to a result). Had trial counsel attempted to introduce QEEG at Michael's sentencing, this Court clearly would have evaluated the issue of general acceptance as of the time of the appeal, i.e. 2009, not at the time of the trial in 2007. Marsh v. Valyou *supra*. It only seems logical that any Frye review of trial counsel's performance regarding QEEG should evaluate the general scientific acceptance of QEEG as of 2009, just as the Court would have done had trial counsel raised the issue. Deciding between 2007

and 2009 is probably unnecessary, however, because - as the evidence shows - QEEG enjoyed general scientific acceptance well before 2007.¹⁷

Frye does not require a court to personally determine scientific reliability, U.S. Sugar Corp. v. Henson, 787 So.2d 3, 15 (Fla. 2002), or to become an expert. Brim v. State, 695 So.2d 268, 272 (Fla. 1997). Rather, the court need only determine "the level of agreement or dissension" within the relevant scientific community, Brim, and "whether there is a quantitative and qualitative acceptance of the science." Henson. In making these determinations, the court may consider scientific and legal literature. Ramirez v. State, 810 So.2d 836, 849-51 (Fla. 2001).

Dr. Gluck, who administered the QEEG testing and generated the raw EEG data, who has been using QEEG since 1991, and who is private practice with an M.D. neurologist who has been using QEEG since the late 1980's, testified that the Neuroguide data base he uses became so well accepted in the psychological community by 2001 that the American Psychological Association gave its express approval of the technology. Dr. Gluck identified and discussed numerous peer-reviewed articles, mostly pre-dating 2007, in which QEEG was found to be clinically useful and reliable in the diagnosis of traumatic brain injury, and also

¹⁷ Alternatively, Appellant would contend here, as he did below, that QEEG is newly discovered evidence of traumatic brain injury, and that, as to such claim, the general scientific acceptance is evaluated as of today (30R 27, 25R 176). Additionally, Appellant would insist that the admissibility of this newly discovered evidence should be evaluated pursuant to the Daubert rule.

identified a number of universities and other institutions, that for years have been using QEEG diagnostically. He testified that the International Society for Neuro Feedback and Research has over 1,000 members who use QEEG, that "many thousands" of mental health professionals use QEEG. and that evaluation for traumatic brain injury was "probably one of the most common uses."

Dr. Gluck and Dr. Mash both testified that the military uses QEEG to diagnose traumatic brain injury, to decide, or example, whether to allow a soldier to return to combat, or a pilot to fly a very expensive jet aircraft.

Dr. Koberda testified that, while neurologists have been slower than other mental health professionals to use QEEG diagnostically, clinical use of QEEG by neurologists is increasing rapidly, that he uses it and encourages other neurologists to do so, and that the 1997 Nuwer paper relied on by the State is "outdated."

Against extensive evidence of the scientific acceptability of QEEG in the diagnosis of brain injury, the State offered *one witness* - Dr. Kaplan - who, although experienced with EEG, has never used QEEG and is unfamiliar with the extent to which QEEG is used clinically and diagnostically by mental health professionals, by universities, and by the military. His lack of QEEG experience is apparent from his very limited objections to QEEG . His main objection stems from his misunderstanding about who culls data from the raw EEG for the quantitative analysis. Noting that an EEG will record electrical activity not

generated by the brain, Dr. Kaplan was concerned that the subject of the evaluation could sabotage the test and no one would be the wiser, because the selection of raw data would be carried out by untrained, unqualified technicians. This concern is nonsense. As Dr. Gluck and Dr. Koberda (who, unlike Dr. Kaplan, are trained and experienced in the clinical use of QEEG) testified, the selection of artifact-free samples for computer analysis is not done by an untrained person. Dr. Gluck personally selected his the raw data for his quantitative analysis, and Dr. Koberda culled his own samples for analysis from the EEG data supplied to him by Dr. Gluck. If Michael had attempted to sabotage the results by moving, blinking, etc., when he was not supposed to, that would have been immediately obvious to them. Both Dr. Gluck and Dr. Koberda testified that it was no problem in this case to select an ample supply of clean, artifact-free data from the raw EEG. Significantly, Dr. Kaplan admitted that if a properly trained and qualified person were to identify and select artifact-free data to analyze quantitatively, the analysis itself is straightforwardly "computational" and therefore "cannot be faulted."

Dr. Kaplan's only other stated objection to QEEG is to the use of databases alone to diagnose brain damage, because statistical abnormalities are not necessarily clinical abnormalities. However, he acknowledged that a qualified clinician could analyze the data and decide whether it was relevant. Dr. Gluck and Dr. Koberda - both of them qualified clinicians - used the QEEG results in

conjunction with other measures, including taking a clinical history, doing a mental status examination, observing Michael, and reviewing background material provided by postconviction counsel.

In short, every objection Dr. Kaplan had to the clinical use of QEEG has been addressed and conclusively rebutted. Moreover, since Dr. Kaplan is unfamiliar with the extent to which QEEG is used clinically and diagnostically to evaluate the existence and extent of traumatic brain injury, he is in no position to dispute the general acceptability of such use in the relevant scientific community. The evidence overwhelmingly shows that QEEG is generally accepted in the relevant scientific community now, was so in 2009 and in 2007, and has been for many years prior to 2007. In addition, the evidence establishes that the QEEG results are based on sufficient facts and data and are the product of reliable principles and methods, and that the defense experts have reliably applied the principles and methods to the facts of the case. Section 90.702, Fla. Stat. 2013. This Court should conclude that QEEG was and is admissible.

E. Rollo's deficient investigation and presentation of mental mitigation

The impact of Rollo's deficiencies in his investigation and presentation of mental mitigation are intertwined with his overall performance at the penalty phase and the many deficiencies identified above as to his investigation, preparation, and presentation of testimony about the sad, tragic life of his client, because that

testimony was highly relevant to any mental evaluation of Michael. But the primary focus here are Rollo's multiple failures in obtaining, preparing for and presenting mental mitigation. Once again, what little investigation Rollo did just scratched the surface. He spent minimal time discussing the case with his mental health experts (31R 67). He never talked to Shawn Arnold, and so never learned how much crack cocaine Shawn and Michael had been consuming in the weeks and days leading up to the crime. As a result, none of the experts could quantify how intoxicated Michael and Shawn both were at the time of the crime, as Dr. McClaren acknowledged when cross-examined by Rollo (18TT 2495). Rollo never discovered or talked to the many friends and family who could have testified in detail about Michael's life, his family, his influences, his drug use, or his general character. As a consequence, his mental health experts were forced to rely largely on Michael himself for the historical and background information that Rollo did not bother to obtain. Their evaluations were further hampered by Rollo's failure to provide them with relevant information about the circumstances of the crime, or to give them copies of any pre-trial depositions or sworn testimony from any of the State's witnesses - an omission that stands in sharp contrast to the police reports and the many depositions and statements furnished by the State to its expert witness, Dr. Harry McClaren (17TT 2409-10). Notably, the defense experts were

unaware of Tammy Hartman's various statements and testimony (16TT 2265-67).¹⁸ These omissions were crucial, because the experts relied on the circumstances of the crime in forming their opinions (e.g., 16TT 2256-58). The State was happy to devote a considerable portion of its cross-examination exposing the defense experts' unfamiliarity with the facts of the State's case, and their reliance on uncorroborated information from Michael in assessing his life history (16TT 2285-92; 17TT 2344-46). Rollo also failed to respond to the State's suggestion that Michael's actions after the murder showed lack of substantial impairment. Dr. Turner's postconviction testimony shows how he could have responded if only he had been asked the right questions (31R 63-67). Finally, neither Rollo nor his experts learned the extent to which Michael had been consuming drugs in the weeks leading up the murder. Such evidence would have been invaluable to any evaluation of Michael's state of mind at the time.

Although Rollo suspected brain damage from the get-go, he not only left the issue unresolved, he compounded his failure by allowing the State to attack Michael's credibility by advancing the claim that he had sabotaged his evaluation by deliberately malingering (e.g., 17TT 2344). And the State used this alleged

¹⁸ Dr. Bingham testified at sentencing that he was unaware that Tammy had reported that Michael had admitted intentionally breaking Mrs. Everett's neck (16TT 2291-92). Dr. Turner, who testified the next day, learned for the first time the day before that a "family member" had reported that Michael had cut the victim's throat because she had seen his face (17TT 2359).

malinger to discredit everything else Michael had told either the California social services agency or Dr. Turner and Dr. Bingham (e.g., 17TT 2350-51). This, too, was critical, because, instead of "solid test results" to confirm brain damage (17TT 2349), Dr. Turner's sole support for his suspicion of brain damage was Michael's history (17TT 2330). But, as Dr. Turner testified at the postconviction evidentiary hearing, Michael's inability to complete the testing could have been the result of fatigue, or the very impulsivity that is a product of his brain damage. And Dr. Mash confirmed that it was not at all unusual for MMPI's in substance abusing populations to come back as invalid. Rollo, of course, never learned this, and never challenged the State's accusation of dishonesty.

Although Rollo had brought Dr. Turner into the case specifically to look for possible brain injury (17TT 2319, 2341), he made no attempt to pursue the issue after Dr. Turner was unable to complete his testing. In particular, he failed to do any research or to learn that QEEG was by that time being used to diagnose traumatic brain injury. Had he done so, he could have had Michael evaluated by Dr. Gluck, who had been using QEEG diagnostically for years and who would have been able and willing to conduct QEEG testing of Michael and to testify about his results. And if Dr. Gluck had evaluated Michael, he would have found "frontal, temporal, central deregulation associated with brain injury and damage." The damage was in areas of the brain that controlled language, working memory,

self-reflection, solving novel problems, judgment, ability to inhibit one's responses, planning and organization. He could function reasonably well in routine, familiar and structured situations, but give "him a novel situation where the frontal lobe has to work," and he will "do things that make no sense or be impulsive."

None of the effects of Michael's brain damage was explained at sentencing. Dr. Turner did testify at sentencing that he thought Michael was substantially impaired and under extreme mental or emotional disturbance at the time of the murder (17TT 2356, 2361), but other than expressing an opinion that Michael was high at the time of the crime, and that he suspected some brain damage that affected his judgment and his ability to spell (17TT 2357-58, 2368-69), he never really explained the nature of his mental impairments or precisely why or how he was impaired. Dr. Turner could have done much better if he only had been asked the right questions, as his postconviction testimony shows. Dr. Gluck's testimony would have been invaluable to any analysis of Michael and his moral culpability. It would have explained how this essentially nonviolent person could have become involved in murder (especially if trial counsel had done enough investigation and preparation to offer compelling evidence that the circumstances of the crime were much more favorable to Michael than the State had contended), and why and how he was substantially impaired at the time. Dr. Mash would have further enhanced Michael's case. Her testimony that (a) Michael's neurological deficiencies had

begun *in utero* as the result of his mother's drug and alcohol use during pregnancy, (b) that he had an "extreme" genetic risk of substance abuse, (c) that he had a "severe" case of PTSD caused by his "horrendous" childhood in which he was surrounded by violence and drug abuse, and subjected to verbal and physical abuse that was so extreme that it was "off the chart," (d) that his own exposure to and consumption of drugs at an early age would by itself have caused brain damage in the sense that parts of his brain would never have developed properly, (e) that he showed "stigmata" of heavy drug use leading up to the murder, including "crack lung," and (f) as the result of the foregoing, he suffered long-lasting, if not permanent brain damage, as confirmed by the QEEG testing - would have been invaluable to a defense mitigation case. In addition, Dr. Mash could have confirmed that Michael was, as the result of his brain damage and drug abuse, incapable of dealing in a coherent way with novel or stressful situations, such as being involved with a friend, who, without forewarning and pursuant to no plan, began smothering an elderly woman with a pillow. Likewise, it would have been extremely stressful for Michael - who had never been in serious trouble in his entire life - to be arrested for murder and facing a death sentence. Being sent to Dr. Larson unaccompanied by anyone except two deputies would have been "very frightening" to a person with Michael's level of brain dysfunction. And when he

attacked Shawn Arnold, he would still have been in a state of cocaine withdrawal, which would have made him even more reactive and anxious.

Finally, the diagnosis of brain damage significantly affecting impulse control would have countered the testimony of the State's psychologist, Dr. Harry McClaren. Dr. McLaren testified that he did not find the statutory mitigator of extreme mental or emotional disturbance in this case (18TT 2471), but when asked what facts might establish the mitigator, he answered , "*the various kinds of brain injuries that very significantly affect impulse control*" (18TT 2474) (emphasis supplied) - precisely what the evidence presented on postconviction establishes.

Judge Rimmer found the postconviction evidence merely cumulative to the evidence presented at sentencing (7R 1330, 1335). However, the sentencer - Judge Swanson - rejected the statutory mental mitigators (3TR 464-67) . There is at least a reasonable likelihood that Judge Swanson (and the jury) would have found these mitigators if the evidence presented on postconviction had been presented by Rollo at sentencing. Moreover, solid evidence of brain damage, coupled with a complete, credible history, with full explanation of Michael's brain damage and its effect on his behavior, with full knowledge of his genetic load for drug and alcohol abuse and the extent and effects of his own drug use, cannot be deemed merely "cumulative" to a suspicion of brain damage based upon an incomplete, non-credible life history, coupled with inadequate knowledge of the extent of Michael's

drug issues. A much stronger mental mitigation case could and should have been presented. Rollo's investigation, preparation and presentation of mental mitigation was woefully inadequate, and his inadequate performance - considered by itself, or couple with the many other demonstrated deficiencies in trial counsel's performance - was prejudicial to Michael's chances of being sentenced to life. In addition, had Rollo presented a proper case of mental mitigation, coupled with Michael's extensive history of abuse and neglect, even if Michael had been sentenced to death, this Court would have found his death sentence disproportionate on appeal. Davis v. State (Case No. SC10-135, decided July 3, 2013) (in view of "substantial mental mitigation" and defendant's "extensive history of abuse and neglect," his death sentence was disproportionate) (slip opinion at 78). Finally, the mental mitigation evidence presented by postconviction counsel also constitutes newly discovered evidence that would probably result in a life sentence.

F. Stokes' failure to develop a coherent defense theory at the guilt phase, and to coordinate his guilt phase case with the penalty phase case

A capital defense attorney has to be aware that the same jurors who decide guilt will be making the sentencing recommendation. Guilt-phase advocacy cannot proceed in isolation from, and without consideration for, penalty phase advocacy and the effects of the former on the latter. Florida v. Nixon, 543 U.S. 175, 192 (2006). Stokes' guilt phase defense was incoherent. In his closing argument, he

first contended that Michael was guilty of nothing - he was merely an innocent bystander who happened to be present when Arnold killed Mrs. Everett without any assistance whatever from Michael other than moving her to the couch. If his action contributed in any way to her death, it was an accident (13TT 1711-15, 1727-29). But if it was not an accident, it was culpable negligence and Michael was guilty only of voluntary manslaughter (13TT 1730-31). Stokes argued that Michael had not cut Michael's throat; Tammy, he argued, had "hijacked" Michael's will and had "planted in his mind the idea" that he had cut Mrs. Everett's throat (13TT 1720-21). But if Michael had cut her throat, it was not premeditated murder because he thought she was already dead (13TT 1723). In any event, it was all Mrs. Everett's own fault, because she was a "classic enabler," who allowed her son to deal drugs out of her home, and to bring people like Arnold there (13TT 1715-16). If she been more responsible, she "might still be alive today" (13TT 1716).

This was not a coherent, credible closing argument, developed after proper investigation and preparation, and with proper regard for the effect of such an argument on the defense credibility at the penalty phase. See Florida v. Nixon, *supra* (non-credible defense argument at guilt phase can damage defense credibility at penalty phase and increase likelihood of death sentence). With more planning and preparation, Stokes could quite credibly have argued that the killing was not a premeditated act, and that the theft was an afterthought, in urging for a

verdict of second degree murder - a strategy that would have precluded a death sentence if successful, but would not have damaged defense credibility at sentencing if not. Stokes, however, erroneously believed that caselaw precluded him from conceding guilt of a lesser offense as his primary defense theory (37R 657). In fact, by the time this case was tried in 2007, this Court had held that a capital defense attorney could affirmatively concede guilt to a lesser included offense, Atwater v. State, 788 So.2d 223 (Fla. 2001), and the U.S. Supreme Court had ruled (in 2004) that capital attorneys were not barred from conceding guilt even to the highest offense charged. Florida v. Nixon, *supra*.

Stokes could also quite properly have laid groundwork for a penalty-phase argument that Arnold was at least as culpable, if not more culpable, than Michael. Such an argument would not have damaged the credibility of a penalty phase case focusing on Michael's deprived and abusive childhood, brain damage, and lifelong drug problems. In contrast, Stokes' argument implying the Mrs. Everett had caused her own death because she tolerated her only surviving son's bad behavior and presenting inconsistent theories of guilt (i.e., my client did nothing, but if he did it was not intentional, but if it was intentional, then it was not premeditated, etc.) was an ill-conceived, incoherent mish-mash of a closing argument that not only failed to help Michael at the guilt phase, but hurt him at the penalty phase. His deficient performance was prejudicial at both phases.

G. The lower court's refusal to consider Stokes' bar disciplinary history

Rollo testified that he was aware of Stokes' performance in other cases and considered him competent despite knowing he had been reprimanded by the Bar (40R 941, 1059). Appellant moved to admit Defense Exhibits 22 through 25 - copies of bar disciplinary proceedings against Stokes (25R 9-15; 12R 856-874), on the ground that Rollo's testimony that he had confidence in Stokes and trusted his judgment had opened the door to Stokes' history of failing to investigate and prepare, or to properly represent his clients. Judge Rimmer sustained the State's objection to these documents. His ruling was erroneous. These exhibits were relevant to, and probative of, the issue of Rollo's reliance on Stokes' investigation and preparation and also corroborate and reinforce all that has been said above about Stokes' deficient performance in this case. In addition to these disciplinary proceedings, Stoke recently was suspended from practice of law for failing to diligently represent clients, Case Nos. SC11-1086 and SC11-2141, and was found ineffective in a capital case. Coleman v. State , *supra*.

H. Rollo's failure to object to improper victim-impact evidence

The State presented "victim impact" testimony that Ruth Everett had a "difficult life," that one of her sons had died when he was 16, that her surviving son (Snapper) was her only family in the area, that she had been good to a friend's parents who had passed away years before, and that she had worked hard, paid her

taxes and voted (15TT 2006-15). On cross-examination, Rollo elicited testimony that Mrs. Everett had been concerned and anxious about the "double life" her drug-dealing son had been living in her home (15TT 2016-17, 2033-34), and that Snapper had forced her to do "whatever he wanted her to do whenever he wanted it done," like "pick him up from work, take him where he wanted to go," watch whatever television program he wanted to watch and cook whatever he wanted for dinner (15TT 2018). Rollo also elicited testimony from one of the victim impact witnesses that she felt "uneasy" visiting Mrs. Everett because of Snapper's activities and "because the neighborhood had become so run down from the time that my folks had lived there" (15TT 2019).

Initially, testimony about Mrs. Everett's hard life, difficulty working, loss of her youngest son, kindness to people long deceased, and having paid her taxes and voted was neither evidence of her uniqueness nor evidence of the loss to the community resulting from her death. See Windom v. State, 656 So.2d 432, 438 (Fla. 1995)("Victim impact evidence must be limited to that which is relevant as specified in Section 921.141(7)."). While this Court has found admissible victim impact statements which speak to the fact that the victim is no longer around to care for his or her family (e.g., Franklin v. State, 965 So.2d 79, 97-98 (Fla. 2007)), or that surviving family members suffered due to the loss of the victim (e.g., Huggins v. State, 889 So.2d 743, 765 (Fla. 2004)), it has not approved of victim

impact statements addressing the victim's own losses of family members, poor living conditions, or personal shortcomings.

Rollo filed a pre-trial motion to exclude victim impact evidence from the jury (1TR 93-98, 111-116), but he did not object to any specific victim impact testimony. Wheeler v. State, 4 So.3d 599, 606 (Fla. 2009) (general pretrial objection to all victim impact evidence is insufficient to preserve for appeal objections to specific portions of such testimony). Asked by postconviction counsel why he had not raised any specific objections to victim impact testimony, Rollo answered that, while he thought some of the testimony was improper, it was "trifling." But this improper victim impact evidence had the effect of generating additional sympathy for the victim based on events that Michael was not responsible for. It is one thing to focus the jury's attention on the consequences - even unintended consequences - of a defendant's own actions and the result of a murder he participated in, including the impact on survivors. Kalisz v. State (SC12-580, decided October 17, 2013) (slip opinion at 50-1). It is quite another - and quite improper - to punish a defendant for impacts on a victim's life resulting from events that preceded, perhaps by decades, any action by the defendant. By failing to object, Rollo allowed the consideration of non-relevant, improper matters. Worse, Rollo compounded the error by eliciting additional testimony that was even more irrelevant, and made Mrs. Everett an even more sympathetic

victim. Asked repeatedly by postconviction counsel how any of this testimony was mitigating, Rollo could not say. In short, he did not offer any justification for eliciting this testimony, much less a reasonable strategic decision for doing so. Rollo's deficient performance here, considered alone or in cumulation with his many other errors and deficiencies, warrants the grant of a new sentencing.

ISSUE II - THE GIGLIO CLAIM

To establish a Giglio violation, a defendant must show that (1) the testimony was false, (2) the prosecutor knew the testimony was false; and (3) the testimony was material. Craig v. State, 685 So.2d 1224, 1226 (Fla.1996). Such a claim presents a mixed question of law and fact; this Court defers to the factual determinations of the lower court if they are supported by competent, substantial evidence, but reviews the lower court's application of the law to the facts de novo. Hurst v. State, *supra*, 18 So.3d at 988.

Mr. Elmore presented testimony of Tammy Hartman about numerous statements supposedly made to her by Michael, and, being "acutely aware" of her prior statements (41R 1117), knew full well that Tammy had been inconsistent about who had made those statements to her, and knowing that, as to many of these statements, she initially had identified Shawn Arnold as the source, not Michael. In particular, in his direct examination of Tammy at trial, Elmore had refreshed her recollection with a statement she had made on page 35 of her deposition (11R

730), knowing full well that she had said the opposite on page 42 of her deposition (11R 737). He thought it was defense counsel's job to expose Tammy for the liar that she is. And it was. But it was also Mr. Elmore's responsibility not to rely on testimony that he knew or should have known was a lie.

Tammy's testimony was clearly material. Guzman v. State, 868 So.2d 498, 506 (Fla. 2003). The jury, the trial court, and this Court all believed her testimony; the trial court and this Court expressly relied on her testimony in imposing and upholding Michael's death sentence. All the while, Mr. Elmore sat quietly and allowed the finders of fact to rely on the testimony of a witness who he knew or certainly should have known was simply not a credible witness. Relief should be granted on this issue, and Appellant given a new trial.

CONCLUSION

Believing it inevitable that their client would be convicted of murder, trial counsel did not challenge the State's guilt-phase evidence in any meaningful way or develop a coherent guilt-phase defense, not realizing that the contradictory and implausible arguments they made at the guilt phase damaged their credibility at the penalty phase, or that their failure to challenge the State's guilt-phase evidence would allow the State to enter the penalty phase with several aggravators plus relative culpability already established. They compounded that error by failing to challenge any of the aggravating evidence presented at the penalty phase, when it

could have been challenged quite significantly if only they had performed adequately. They also did an inadequate job of investigating and preparing for the one obligation they recognized having: presenting mitigation. They quit investigating after obtaining only "rudimentary knowledge" of their client's history "from a narrow set of sources." Wiggins, 539 U.S. at 524, and spent minimal time with the witnesses they did talk to, including the mental health experts they retained, and failed sufficiently to prepare their witnesses for their testimony. Finally, they left the issue of possible brain damage unresolved.

Compounding their investigatory failures were their strategic failures. It is not enough for counsel to mechanically check boxes in their preparation for a capital case (i.e., call mother as witness - "check"; psychological evaluation - "check"); counsel must think strategically about their evidence in mitigation - about how and why it is mitigating. It is not enough to say, for example, that the defendant may have brain damage, or even that he for sure has brain damage; counsel must explain to the jury how that brain damage impairs him and why that impairment mitigates or diminishes his moral culpability for the murder that the sentencing jury has determined that he committed. And counsel must be prepared - and prepare his witnesses - for the State's cross-examination. Counsel in this case did none of these things. As a consequence, the defense at both phases of the trial was not merely muddled and weak, but affirmatively harmful. The performance of

counsel was constitutionally deficient, and that deficient performance was prejudicial. Appellant is entitled to a new trial and a new sentencing, and the lower court's denial of relief should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, the Capitol, Tallahassee, FL 32399-1050, by electronic mail sent to capapp@myfloridalegal.com, this 3rd day of December, 2013.

/s/_____
CURTIS M. FRENCH

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief is filed in Times New Roman 14-point font in compliance with Rule 9.210 (a) (2), Fla.R.App.P.

/s/_____
CURTIS M. FRENCH