

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

CHARLES GROVER BRANT
Petitioner,

vs.

SECRETARY DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL,
STATE OF FLORIDA.

Respondents.

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In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-13124

CHARLES GROVER BRANT,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:16-cv-02601-KKM-JSS

ORDER:

Charles Grover Brant is a Florida inmate sentenced to death. He seeks a certificate of appealability to appeal the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Brant claims that his trial counsel was ineffective. But the record reflects beyond any reasoned debate that Brant’s experienced trial counsel made reasonable strategic judgments and provided a fulsome presentation of mitigating evidence. Because Brant has failed to make “a substantial showing of the denial of a constitutional right” as required by 28 U.S.C. § 2253(c)(2), I **DENY** Brant’s application for a certificate of appealability.

I.

In 2004, Charles Grover Brant sexually assaulted and brutally strangled his neighbor Sara Radfar to death. He confessed to the crime and described the sexual assault and murder in detail. After he had sexually assaulted Radfar in her house, he choked and suffocated Radfar to the point that he thought she was dead. But Radfar was just unconscious. She regained consciousness and ran to the front door of her house, but Brant dragged her back and choked and suffocated her again until she was dead. Physical evidence, including his DNA matching the semen on the victim and Radfar’s debit card in Brant’s garbage, also supported his conviction.

According to the postconviction testimony of Brant’s guilt-phase counsel Rick Terrana, Brant wanted to plead guilty from day one. After an unsuccessful attempt to suppress the confession, Terrana—who had tried between fifteen and twenty-five death penalty

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cases and had only one client receive the death penalty when he had been penalty-phase counsel—advised Brant to plead guilty.

Terrana and penalty-phase counsel Bob Fraser thought that Brant’s confession was extremely hurtful to his case and that it would upset the jury more to hear him describe the sexual assault and murder twice—at both the guilt and penalty phases. Like Terrana, Fraser was an experienced criminal defense lawyer; he had been litigating court-appointed cases for almost twenty years and had tried about twenty-five first-degree murder cases. Terrana and Fraser also thought that if Brant pleaded guilty the jury might be more generous in considering mitigating circumstances at the penalty phase. In postconviction proceedings, however, jury consultant Toni Blake testified that it would not have been bad to expose the jury to Brant’s confession twice because the jury would have become desensitized to the crime by repeatedly being exposed to the disturbing facts of the crime, potentially leading to a lighter sentence.

In any event, in a contemporaneous letter, “Fraser explained to Brant the negative aspects of pleading guilty, the right to testify, and the unavailability of a voluntary intoxication defense.” *Brant v. State (Brant II)*, 197 So. 3d 1051, 1064 (Fla. 2016). Terrana and Fraser both testified during postconviction proceedings that the letter accurately summarized discussions they had with Brant regarding pleading guilty.

On May 25, 2007, Brant pleaded guilty to first-degree murder, sexual battery, grand theft of a motor vehicle, and burglary

with assault or battery; and he pleaded *nolo contendere* to a kidnapping charge. Brant later claimed during postconviction proceedings that he was just doing what his attorneys told him to do, but the postconviction court found that Brant was not credible—in part because his plea colloquy contradicted his postconviction testimony. The Supreme Court of Florida likewise reasoned that Brant’s plea colloquy “demonstrates that the decision to plead guilty was Brant’s alone, that he was fully aware of the consequences of his plea, and that he was satisfied with the representation provided by his attorneys.” *Id.* at 1066.

Terrana attempted to negotiate a life sentence for Brant’s guilty plea, but the state refused. Consequently, Brant proceeded to the sentencing phase without a deal in place. “After a failed attempt to seat a penalty-phase jury in August 2007” in which potential jury members suggested that they would likely give Brant the death penalty, Brant decided to waive a sentencing phase jury and be sentenced through a bench trial. *Id.* at 1057.

At the bench trial, Brant introduced significant mitigating evidence. This presentation included the testimony of Brant’s family members, such as his mother and older sister. Brant’s counsel also presented other family-history-related testimony regarding Brant’s grandparents’ and great-grandmother’s problems with mental health, substance abuse, domestic violence, and low intelligence. Additionally, Brant’s counsel presented evidence of Brant’s life in utero and as a child—including the abuse and neglect he suffered and the sexual abuse he witnessed—through testimony from

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family members, friends, peers, a professional associate, and spiritual advisors and through school records and other information. Brant's counsel also presented expert testimony about his mental health and drug use through Dr. Maher and Dr. McClain. For example, Dr. Maher testified that Brant was hallucinating at the time of the murder but was not suffering from an extreme emotional disturbance. Brant's counsel also introduced the results of Brant's expert-conducted PET scan through Dr. Maher. Lastly, Brant's counsel introduced evidence that Brant was a well-behaved prisoner—by virtue of his trustee status at the jail—got along well with others, and had a reputation for being nonviolent.

The state, of course, presented its evidence of the gruesome nature of the rape and murder, including Brant's confession, and evidence of his behavior surrounding the time of the crime through his former wife.

Based on this evidence, the judge found two aggravating circumstances and a significant number of mitigating circumstances. "The trial court concluded that two aggravating circumstances were proven beyond a reasonable doubt: (1) the murder was heinous, atrocious, or cruel (HAC) (great weight); and (2) the capital felony was committed while engaged in the commission of a sexual battery (great weight)." *Id.* at 1062. The trial court also found that there were three statutory mitigating circumstances: (1) Brant did not have a significant history of prior criminal activity (little weight), (2) Brant had substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the

requirements of law (moderate weight), and (3) Brant was thirty-nine at time of the offense (little weight). *See id.* at 1062 n.1. The trial court found ten non-statutory mitigating circumstances: (1) “Brant is remorseful (little weight)”; (2) “he cooperated with law enforcement officers, admitted the crimes, pleaded guilty, and waived a penalty-phase jury (moderate weight)”; (3) “he has borderline verbal intelligence (little weight)”; (4) “he has a family history of mental illness (little weight)”; (5) “he is not a sociopath or psychopath and does not have antisocial personality disorder (little weight)”; (6) “he has diminished impulse control and exhibits periods of psychosis due to methamphetamine abuse, recognized his drug dependence problem, sought help for his drug problem, and used methamphetamine before, during, and after the murder (moderate weight)”; (7) “he has been diagnosed with chemical dependence and sexual obsessive disorder, and he has symptoms of attention deficit disorder (moderate weight)”; (8) “he is a good father (little weight)”; (9) “he is a good worker and craftsman (little weight)”; and (10) “he has a reputation of being a nonviolent person (little weight).” *Id.* at 1062 & n.2.

Because the sentencing judge heavily weighted the heinous nature of the crime and Brant’s commission of the sexual battery, he found that the aggravating circumstances outweighed the mitigating circumstances and imposed a sentence of death. More specifically, “the trial court sentenced Brant to death for the murder, concurrent terms of life imprisonment for the sexual battery, kidnapping, and burglary, and five years’ imprisonment for the grand theft.” *Id.* at 1062. The Supreme Court of Florida upheld Brant’s

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first-degree murder conviction and sentence of death on direct review. *See Brant v. State (Brant I)*, 21 So. 3d 1276, 1289 (Fla. 2009).

As relevant here, Brant then brought ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984), in state court on postconviction review. Broadly speaking, Brant challenged his counsel's effectiveness in both the guilt phase and the sentencing phase. The state courts, culminating in the Supreme Court of Florida, denied Brant relief on these claims.

The Supreme Court of Florida concluded that Brant failed to establish both deficient performance and prejudice on the issues that became part of Brant's federal Ground One and on the issues that became Brant's federal Ground Two. *See Brant II*, 197 So. 3d at 1065, 1067–75. The Supreme Court of Florida also concluded that Brant had failed to establish deficient performance on the issues that became Brant's federal Ground Three. *See id.* at 1076. Notably, the Supreme Court of Florida did not address one aspect of what became Brant's federal Ground One.

In 2017, Brant filed a successive postconviction motion in state court, arguing that his death sentence was unconstitutional under *Hurst v. Florida*, 577 U.S. 92 (2016). *See Brant v. State (Brant III)*, 284 So. 3d 398, 399 (Fla. 2019). The state court denied Brant relief on this claim, and the Supreme Court of Florida affirmed that denial. *See id.* at 400.

Later, Brant filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in federal court. Among other claims not relevant here, Brant brought the ineffective assistance of counsel claims

related to his counsel's guilt-phase effectiveness (Ground One) and penalty-phase effectiveness (Grounds Two and Three) that had been decided by the Supreme Court of Florida. Brant also brought an additional subclaim relevant here that had not been decided by the Supreme Court of Florida: that his counsel's guilt-phase performance prejudiced him in the sentencing phase (part of Ground One).

The district court denied the petition. It held that the new issue was procedurally defaulted because it was not exhausted in state court and could not be exhausted now. The district court then denied the remainder of Ground One and all of Grounds Two and Three on the merits. It also denied a certificate of appealability.

Brant then moved under Federal Rule of Civil Procedure 59(e) to alter or amend the judgment. The district court denied Brant's Rule 59(e) motion and denied a certificate of appealability on that issue too.

Brant now seeks a certificate of appealability from this Court.

II.

A prisoner must receive a certificate of appealability to appeal the denial of a petition for a writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(1). We “will issue a certificate of appealability ‘only if the applicant has made a substantial showing of the denial of a constitutional right.’” *Jones v. Sec’y, Dep’t of Corr.*, 607 F.3d 1346, 1349 (11th Cir. 2010) (quoting 28 U.S.C. § 2253(c)(2)). “A petitioner

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satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003)). This standard applies to claims resolved on the merits under the analysis required by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and to claims resolved on procedural grounds. *See id.* (quoting *Lott v. Att'y Gen., Fla.*, 594 F.3d 1296, 1301 (11th Cir. 2010)); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

To be issued a certificate of appealability on a claim resolved on procedural grounds, the applicant must establish that reasonable jurists would find it debatable (A) "whether the district court was correct in its procedural ruling" and (B) "whether the petition states a valid claim of the denial of a constitutional right." *See Slack*, 529 U.S. at 484. That is, when we are asked to review a procedural disposition, we are not limited to the review of the procedural question; we must also consider the potential validity of the petitioner's claim on the merits. *See id.* When evaluating the merits of a petitioner's claims, "we review 'the last state-court adjudication on the merits.'" *Sears v. Warden GDCP*, 73 F.4th 1269, 1280 (11th Cir. 2023) (quoting *Greene v. Fisher*, 565 U.S. 34, 40 (2011)).

III.

Brant seeks a certificate to appeal the district court's denials of Grounds One, Two, and Three from his habeas petition and the district court's subsequent denial of his Rule 59(e) motion to alter

or amend the order denying his claims. I will address Brant's claims in numerical order. Then, I will address Brant's request to appeal the denial of his Rule 59(e) motion. On all fronts, Brant's arguments fail.

A.

Brant's first claim is an ineffective assistance of counsel claim about the way his counsel's performance at the guilt phase of trial affected the penalty phase of trial. Specifically, he argues that his counsel's ineffective assistance at the guilt phase of trial caused him to plead guilty and then waive a penalty-phase jury too. The district court concluded that the part of Ground One related to waiving the penalty-phase jury is procedurally barred and that the rest of Ground One fails on the merits. I analyze each of these portions of Ground One in turn.

1.

I'll begin with the part of Brant's claim that the district court held to be procedurally barred. Brant claims that his counsel's deficient performance in advising him to plead guilty prejudiced him in the penalty phase by causing him to waive a penalty-phase jury. The idea is that his decision to plead guilty angered the prospective penalty-phase jury so that he was forced to waive the penalty-phase jury to avoid the jury's wrath. The district court concluded that Brant procedurally defaulted on this part of Ground One because he never presented this claim to the state postconviction court.

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Brant cannot meet his burden to receive a certificate of appealability on this part of Ground One. A state prisoner must raise his federal habeas claims in state court before raising them in a federal habeas petition. *See* 28 U.S.C. § 2254(b); *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) (“[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition.”). The petitioner must have presented the same claim to the state court that he raises in federal court. *See Duncan v. Henry*, 513 U.S. 364, 366 (1995) (“[M]ere similarity of claims is insufficient to exhaust.”); *Picard v. Connor*, 404 U.S. 270, 276 (1971) (“[W]e have required a state prisoner to present the state courts with the same claim he urges upon the federal courts.”). To satisfy this requirement, the petitioner must have fairly presented the claim to the state’s highest court with proper jurisdiction and have alerted that court of the federal nature of the claim. *See Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010).

Brant erroneously contends that he presented a claim in state court about the prejudicial effect on the penalty phase of trial counsel’s deficient performance in advising him to plead guilty. Specifically, in the “Summary of Argument” section of his initial brief to the Supreme Court of Florida during the postconviction relief process, Brant said that his “counsel rendered ineffective assistance in advising him to enter a guilty plea because the jury would be less likely to be angry with him.” Dist. Ct. Doc. 55-12 at 75. He continued that his counsel’s advice was ineffective:

Counsel gave this advice without consulting a jury expert or doing any investigation on jury decision

making. Counsel was wrong and the jurors were irate that Brant had pled guilty and still wanted a penalty phase trial. As a result, Brant then waived a penalty phase jury. But for counsel's deficient performance, Brant would not have pled guilty but would have exercised his right to a trial.

Dist. Ct. Doc. 55-12 at 75. This is the only part of the brief where Brant mentioned the effect of his decision to plead guilty on the penalty phase of trial. The other parts of his brief that discuss deficient performance at the guilt phase—including Page 77, which Brant specifically pointed to below—do not mention prejudice at the penalty phase. And the portions of his brief about prejudice at the penalty phase were related to alleged deficient performance at the penalty phase.

I agree with the district court that Brant did not sufficiently present this issue to the state courts. Brant simply never made this claim to the Supreme Court of Florida. That is, Brant never discussed the prejudicial effect of counsel's guilt-phase performance on the penalty phase. The two relevant sentences in the Summary of Argument portion of his brief are insufficient to say that Brant fairly raised the penalty-phase prejudice argument. *See Sweet v. State*, 810 So. 2d 854, 870 (Fla. 2002) (“[B]ecause on appeal Sweet simply recites these claims from his postconviction motion in a sentence or two, without elaboration or explanation, we conclude that these instances of alleged ineffectiveness are not preserved for appellate review.”); *Shere v. State*, 742 So. 2d 215, 217 n.6 (Fla. 1999) (declining to address issues presented in a brief's headings). It is

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unsurprising, therefore, that the Supreme Court of Florida did not address this issue in its decision on Brant's state postconviction petition. And the district court's order simply acknowledges this and the fact that the Supreme Court of Florida would not entertain this argument now because it would be an untimely successive state petition without any change in facts or information. *See* Fla. R. Crim. P. 3.851(d); *Mungin v. State*, 320 So. 3d 624, 626 (Fla. 2020) ("Because all claims raised in Mungin's [] successive postconviction motion became discoverable through due diligence more than a year before the motion was filed, Mungin's claims are procedurally barred as untimely.").

No reasonable jurist would find this disposition debatable. A claim is procedurally barred if the prisoner failed to exhaust his remedies in state court and those remedies are now unavailable. *See McNair v. Campbell*, 416 F.3d 1291, 1305 (11th Cir. 2005); 28 U.S.C. § 2254(b)–(c). That is the case here. And Brant has not attempted to overcome the procedural default by arguing in the district court or here that an exception to procedural default applies. *See Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001) ("If the petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief, unless either the cause and prejudice or the fundamental miscarriage of justice exception is established." (citing *Boerckel*, 526 U.S. at 848–49; *Coleman v. Thompson*, 501 U.S. 722, 750–51 (1991))). Accordingly, Brant does not deserve a certificate of appealability on this claim.

But even if the district court’s procedural default ruling were debatable, I would still deny Brant a certificate of appealability because Brant has not established that it is also debatable that he states a valid claim of the denial of a constitutional right. *See Slack*, 529 U.S. at 484. He does not argue this point in his application for a certificate of appealability and for good reason. Jurists of reason would not debate whether Brant’s counsel was ineffective for advising him to plead guilty. Even if we assume that advising Brant to plead guilty somehow made it so that he needed to also waive a penalty-phase jury, Brant in fact benefitted in the penalty phase by pleading guilty. Although the Supreme Court of Florida was deciding the issue of ineffective assistance of counsel during the guilt phase, it explained that “counsel’s advice and Brant’s decision to follow that advice provided a benefit to Brant because the trial court considered his guilty plea to be a mitigating circumstance of moderate weight.” *Brant II*, 197 So. 3d at 1065.

Moreover, as I detail in Part III.A.2 below, Brant’s counsel was obviously not deficient for advising him to plead guilty in the face of the overwhelming evidence against him and his own wish to plead guilty. Brant cannot establish that he has a debatably valid constitutional claim, and this issue deserves no further encouragement.

2.

I will turn to the part of the claim that Brant raised in state court—that Brant’s counsel was ineffective during the guilt phase by advising him to plead guilty “without conducting a reasonable

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investigation [and] without consulting a jury expert or doing any investigation, research or reading on the basics of jury decision making.” Dist. Ct. Doc. 1 at 11. The state courts adjudicated this claim on the merits, and the district court denied this portion of Ground One on the merits.

The district court’s resolution of this habeas claim is not debatable, and it deserves no further encouragement. *See Jones*, 607 F.3d at 1349 (quoting *Miller-El*, 537 U.S. at 326). Under AEDPA, “[t]he power of the federal courts to grant a writ of habeas corpus setting aside a state prisoner’s conviction on a claim that his conviction was obtained in violation of the United States Constitution is strictly circumscribed.” *Green v. Sec’y, Dep’t of Corr.*, 28 F.4th 1089, 1093 (11th Cir. 2022). If a claim was adjudicated in state court—like this one was—a federal court may not grant a writ of habeas corpus under 28 U.S.C. § 2254 unless the state court’s merits-based “adjudication of the claim . . . resulted in a decision that was” (1) “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) . . . based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). “An unreasonable application occurs when a state court identifies the correct governing legal principle from th[e] [Supreme] Court’s decisions but unreasonably applies that principle to the facts of [the] petitioner’s case.” *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotation marks omitted) (quoting *Wiggins v. Smith*, 539 U.S. 510, 520 (2003)). “That is, ‘the state court’s decision must have been [not only] incorrect or

erroneous [but] objectively unreasonable.” *Id.* (alterations in original) (quoting *Wiggins*, 539 U.S. at 520–21). “To meet that standard, a prisoner must show far more than that the state court’s decision was ‘merely wrong’ or ‘even clear error.’” *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (quoting *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017)). “The prisoner must show that the state court’s decision is so obviously wrong that its error lies ‘beyond any possibility for fair-minded disagreement.’” *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

The constitutional standard for ineffective assistance of counsel layers an additional degree of deference on the state court’s decision. “Ineffective assistance under *Strickland* is deficient performance by counsel resulting in prejudice, with performance being measured against an ‘objective standard of reasonableness’ ‘under prevailing professional norms.’” *Rompilla*, 545 U.S. at 380 (citations omitted) (quoting *Strickland*, 466 U.S. at 688). The Supreme Court has “recognized the special importance of the AEDPA framework in cases involving *Strickland* claims.” *Shinn*, 592 U.S. at 118. “[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.” *Id.* (alteration in original) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). “Applying AEDPA to *Strickland*’s prejudice standard, we must decide whether the state court’s conclusion that [counsel’s] performance . . . didn’t prejudice [petitioner]—that there was no ‘substantial likelihood’ of a different result—was ‘so obviously wrong that its error lies beyond any possibility for fairminded disagreement.’” *Pye v. Warden*,

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Ga. Diagnostic Prison, 50 F.4th 1025, 1041–42 (11th Cir. 2022) (en banc) (quoting *Shinn*, 592 U.S. at 118–21). “Establishing deficient performance under *Strickland* has this same high bar under AEDPA deference.” *Mungin v. Sec’y, Fla. Dep’t of Corr.*, 89 F.4th 1308, 1317 (11th Cir. 2024).

The Supreme Court of Florida concluded that Brant had failed to establish both deficient performance and prejudice for his guilt-phase ineffective assistance of counsel claim that became the federally cognizable part of Ground One. *See Brant II*, 197 So. 3d at 1065. The district court concluded that the Supreme Court of Florida’s decision on both grounds was reasonable. No fair-minded jurist would debate the district court’s conclusion.

As to the performance element of *Strickland*, the Supreme Court of Florida reasoned that “[c]ounsel’s decision to advise Brant to plead guilty was reasonable given that the original defense strategy to attack the confession was unsuccessful, the advice was given after alternatives were considered and rejected, and the State was proceeding on theories of both premeditated and felony murder with very strong evidence.” *Id.* The district court held that this analysis was reasonable.

No reasonable jurist could debate this conclusion. Brant had confessed to a gruesome sexual assault and murder. After the strategy to suppress that confession failed, it was entirely reasonable for trial counsel to advise Brant to plead guilty—especially because the state had significant physical evidence too.

Brant argues that, contrary to his counsel's testimony, his lawyers advised him to plead guilty *before* the disposition of the motion to suppress. But the postconviction court credited Brant's counsel's testimony, and the Supreme Court of Florida agreed with Brant's counsel. No reasonable jurist could conclude that the Supreme Court of Florida was so wrong about this fact that it committed clear error. *See Shinn*, 592 U.S. at 118. Because that is not debatable, I cannot engage in Brant's counterfactual.

Moreover, Brant had the benefit of an experienced attorney. Rick Terrana, the attorney advising Brant to plead guilty, had tried between fifteen and twenty-five death penalty cases and only had one client receive the death penalty when he was penalty-phase counsel. Brant's penalty-phase counsel Bob Fraser was also very experienced. Additionally, Brant's intent to plead guilty from day one influenced counsel's actions. *See Strickland*, 466 U.S. at 691. Because it was objectively reasonable to advise Brant to plead guilty and Brant wanted to plead guilty, it is impossible to say that the Supreme Court of Florida's decision on this point is unreasonable.

As to the prejudice element of *Strickland*, the Supreme Court of Florida concluded that Brant's counsel's advice to plead guilty did not prejudice him. Most importantly, the large amount of evidence against Brant, including his confession and the physical evidence, makes it unimaginable that he would not have been convicted had he gone to trial. The district court rightly concluded that the Supreme Court of Florida was reasonable to think that Brant could not show that the result of the guilt phase would have likely

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been different had he gone to trial. No reasonable jurist would debate this point, and it deserves no further encouragement.

In his motion for a certificate of appealability, Brant nitpicks the district court's opinion but does not meaningfully grapple with its bottom-line conclusion. For example, Brant argues that the district court cited outdated case law about an attorney's strategic choices. But the district court cited these precedents merely to illustrate how difficult it is to prove ineffective assistance of counsel when challenging a lawyer's strategic judgment; the district court did not foreclose relief based on an incorrect view of the law. In any event, the question at this juncture is not whether the district court's opinion is well written; it is whether Brant has made a substantial showing of the denial of a constitutional right. And, on that issue, I am convinced that there is no ground for debate.

Brant cannot receive a certificate of appealability on Ground One of his habeas petition.

B.

Brant's second claim is an ineffective assistance of counsel claim related to the evidence presented at the penalty phase of trial. Brant argues that his counsel was ineffective during the penalty phase by failing to thoroughly investigate the case and present various pieces of mitigation evidence. The Supreme Court of Florida analyzed five forms of alleged deficient performance that Brant argued supported this claim and denied each subclaim on both *Strickland*'s performance and prejudice elements. *See Brant II*, 197 So. 3d at 1067–75. The district court also denied this claim on the merits,

concluding that the Supreme Court of Florida's decision was reasonable.

Based on the case law laid out above in Part III.A.2, Brant has not established a substantial showing of the denial of a constitutional right or that his claim deserves further encouragement. *See Jones*, 607 F.3d at 1349. Brant faults his counsel for failing to introduce five types of evidence: (1) evidence from his mother that he was conceived by rape, (2) the testimony of a methamphetamine expert about that drug's effects, (3) testimony from a prison expert about how well Brant would likely perform serving a life sentence, (4) additional evidence of brain damage, and (5) miscellaneous evidence of his upbringing and background. I'll walk through each type of evidence.

First, Brant claims that his counsel should have investigated and presented mitigation evidence about his conception via rape. Brant's mother testified in postconviction proceedings that she had kept his conception from a rape a secret until long after Brant was convicted and sentenced to death. In fact, she testified at trial that Brant's father was her ex-husband, Eddie Brant. That is, although Brant's mother was the only source of this information besides distant relatives and DNA testing, she kept it a secret and even testified contrary to it.

The Supreme Court of Florida concluded that Brant's counsel was not ineffective for failing to discover and introduce this information. As to deficient performance, the Supreme Court of Florida reasoned that "[c]ounsel had no reason to believe Eddie was not

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Brant’s father, and [Brant’s mother] testified several times under oath that Eddie was Brant’s father” and reasoned that Brant’s counsel could not be expected to perform DNA testing or verify paternity through other family members on the off chance of discovering a different paternity. *Brant II*, 197 So. 3d at 1067. As to prejudice, the Supreme Court of Florida reasoned that the information was insignificant because (1) Brant did not know about his conception by rape at the time he committed the murder, so it could not have had a meaningful effect on his mental state; and (2) “even without knowing about the rape, the trial court found as mitigating that Brant had an abusive childhood.” *Id.*

Based on the record and state supreme court’s decision, the district court rejected Brant’s claim on the merits. That conclusion is not subject to fair-minded disagreement. The record supports the Supreme Court of Florida’s description of the evidence, and no reasonable jurist would debate that the Supreme Court of Florida’s view of that evidence is reasonable under AEDPA.

Second, Brant claims that his counsel should have presented testimony from a methamphetamine expert about methamphetamine’s effect on his brain—in addition to the testimony his counsel presented from two other mental health experts. The Supreme Court of Florida rejected this claim on both elements of *Strickland*. As to deficient performance, it reasoned that “[t]estimony from a ‘specialist expert’ on methamphetamine would have been mostly cumulative” and that “trial counsel is not ineffective for failing to present cumulative evidence.” *Id.* at 1069. “Trial counsel presented

expert testimony regarding the extent of Brant's methamphetamine use, the effects of it, and the behavior of persons who abuse methamphetamine through Dr. Maher—who was deemed by the trial court to be an expert in that field—and Dr. McClain.” *Id.* “As a result, the trial court found that multiple mitigating circumstances relating to Brant's methamphetamine use were established and gave those circumstances moderate weight.” *Id.* As to prejudice, the Supreme Court of Florida rejected the idea that Brant's postconviction methamphetamine expert, Dr. Morton, “could have established the existence of the extreme emotional disturbance mitigating circumstance based on Brant's report of ‘being suspicious and paranoid and agitated.’” *Id.* Dr. Maher testified at the penalty phase that Brant was hallucinating at the time of the murder but was not suffering from an extreme emotional disturbance; and Brant's former wife testified “that he was able to interact pleasantly with her, wash dishes, clean up the kitchen, watch the evening news, and sleep in bed next to her the night he committed the murder.” *Id.*

The district court rejected this claim on the merits. And I see no basis for fair-minded disagreement. “*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.” *Wiggins*, 539 U.S. at 533. The fact that post-conviction counsel has found additional evidence that could have been introduced does not make trial counsel deficient. *See Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc) (“The mere fact that other witnesses might have been available or that other

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testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.” (quoting *Foster v. Dugger*, 823 F.2d 402, 406 (11th Cir. 1987))). Reasonable jurists would not debate this conclusion.

Third, Brant claims that his counsel should have presented testimony from a prison adjustment expert about his ability to adjust positively to a prison environment. The Supreme Court of Florida reasoned that this evidence would be cumulative. Brant’s trial counsel had already introduced “that Brant was a well-behaved prisoner—by virtue of his trustee status at the jail—got along well with others, and had a reputation for being nonviolent was evidence of a positive ability to adjust to a prison environment.” *Brant II*, 197 So.3d at 1070 (citing *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986)). Thus, there was no deficient performance. *See id.* Moreover, the Supreme Court of Florida concluded that Brant was not prejudiced because Brant had not established that there was a reasonable probability of a life sentence instead of a death sentence from specific testimony that he was generally nonviolent. *See id.* at 1070–71.

Again, the district court concluded that Brant’s federal habeas claim based on this issue fails on the merits. And, again, I cannot see how any fair-minded jurist could debate this result.

Fourth, Brant claims that his counsel failed to reasonably investigate and present mitigation evidence that he has brain damage. “Specifically, Brant asserts that counsel was deficient in failing to present images from his PET scan at the penalty phase and in

failing to identify and inform defense experts of his risk factors for brain damage”—that is, “head banging, ingestion of plaster and lead paint as a toddler, and a head injury in 2001.” *Id.* at 1071. “Trial counsel retained Dr. Frank Wood, a clinical neuropsychologist and forensic psychologist, to conduct the PET scan and also consulted with Dr. Joseph Chong Sang Wu, an expert in brain imaging technology, regarding the results of the PET scan.” *Id.* “Trial counsel ultimately decided not to have Drs. Wood or Wu testify at the penalty phase and [] introduce[d] the results of the PET scan through Dr. Maher instead.” *Id.*

The Supreme Court of Florida rejected this claim on the merits. It reasoned that “[b]ecause counsel was able to establish the existence of the intended mitigating circumstances without presenting Drs. Wood and Wu or the actual images from the PET scan, there was no deficient performance even if Drs. Wood and Wu would have testified in more detail or presented the images.” *Id.* at 1073. The Supreme Court of Florida also concluded that Brant failed to establish prejudice because the PET scan evidence was introduced through Dr. Maher, and “there is no reasonable probability that Brant would have received a life sentence had counsel presented the testimony of Drs. Wood and Wu or introduced the PET scan images themselves.” *Id.* at 1073–74.

As with Brant’s other penalty phase claims, the district court denied this claim on the merits; and no fair-minded jurist could debate that disposition. Counsel hired multiple mental health experts, followed those experts’ advice to secure a PET scan, and then

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introduced the PET scan evidence. This claim is wholly insubstantial, so Brant fails to meet his burden.

Finally, Brant claims that his counsel failed, as a general matter, to conduct a reasonable background and mental health investigation. That is, Brant argues that his counsel did not reasonably investigate “his childhood, family, and multi-generational background of addiction, abuse, neglect, and sexual exposure.” *Id.* at 1074. The Supreme Court of Florida rejected this claim, holding that “[t]he record reflects that counsel did conduct a reasonable investigation into Brant’s childhood, family, and multi-generational background of addiction, abuse, neglect, and sexual exposure.” *Id.* at 1075. The state supreme court explained, for example, that “[c]ounsel presented testimony at the penalty phase regarding Brant’s grandparents and great-grandmother and their problems with regard to mental health, substance abuse, domestic violence, and low intelligence.” *Id.* And the state supreme court pointed out that “[t]he trial court took notice of this testimony and as one of the mitigating circumstances found that Brant had a family history of mental illness.” *Id.* Moreover, the Supreme Court of Florida stated that the record reflects that trial counsel investigated and presented evidence at the penalty phase of “the circumstances of Brant’s life in utero and during his childhood, including the abuse and neglect he suffered and the sexual abuse he witnessed.” *Id.* This evidence came in the form of “testimony from family members, friends, peers, a professional associate, and spiritual advisors” and in the form of “academic records and a plethora of information regarding Brant’s struggles with substance abuse.” *Id.* In short, the

Supreme Court of Florida determined “that trial counsel conducted a reasonable mitigation investigation” and that Brant failed to establish deficient performance. *Id.*

As to prejudice, the Supreme Court of Florida concluded that its “confidence in the outcome is not undermined by the few pieces of noncumulative evidence presented at the evidentiary hearing.” *Id.* That is, the state supreme court effectively determined that Brant did not present sufficient extra background and mental health evidence in postconviction proceedings to make it likely that the result would have been a life sentence instead of a death sentence had all of the background and mental health evidence been presented during his penalty phase.

The district court rejected this claim on the merits, and its conclusion is not open to fair-minded debate. It is always possible for postconviction counsel to uncover additional evidence into a defendant’s background or family life. But the mere existence of that additional evidence does not establish that trial counsel was ineffective. “To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable.” *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc). And nothing about this new evidence changes the overall picture of Brant’s upbringing or mental health from the picture that his trial counsel presented to the sentencing judge.

One final point. Brant spends much of his application for a certificate of appealability arguing that the Supreme Court of

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Florida should not have separately analyzed each of Brant's separate allegations about mitigating evidence. This argument misunderstands *Strickland*. *Strickland* directs reviewing courts to evaluate the totality of counsel's errors in evaluating deficient performance and the totality of those errors in assessing prejudice. But nothing in *Strickland* requires that a state supreme court declare that deficient performance or prejudice exists either overall or not at all. See *Mungin*, 89 F.4th at 1317–18 (affirming where the Supreme Court of Florida had split apart subclaims and then split its analysis along performance and prejudice lines). And, perhaps more to the point, nothing in the Supreme Court's case law tells lower courts how to write their opinions in the light of a habeas petitioner's arguments. Here, Brant's penalty-phase arguments do not lend themselves to a combined deficient performance analysis because they allege separate failings on the part of trial counsel—for example, there is no connection between trial counsel's failure to hire a prison-adjustment expert and their failure to find out that Brant was allegedly conceived by rape. In any event, no fair-minded jurist would debate whether the state courts were reasonable in concluding that Brant's counsel were not ineffective, even if some jurists would have written the state court opinion differently.

Brant cannot make out a substantial showing of the denial of a constitutional right and cannot meet his burden to receive a certificate of appealability on Ground Two.

C.

Brant's third claim is that his counsel failed to sufficiently advise him about the consequences of waiving a sentencing phase jury because, among other things, his counsel did not hire a jury consultant or develop a better rapport with him. The Supreme Court of Florida denied this claim by concluding that Brant's counsel had not deficiently performed under *Strickland* in these respects. Based on trial counsel's testimony at the postconviction hearing, it concluded that Brant's counsel "had a long discussion with Brant during which they laid out all the pros and cons of waiving a jury recommendation, but neither of them advised Brant to do so." *Brant II*, 197 So. 3d at 1076. The district court denied this claim on the merits.

Nothing about the district court's disposition of this claim is debatably incorrect, and this claim does not deserve further encouragement. *See Jones*, 607 F.3d at 1349. There is no support in this extensive record that Brant's counsel failed to develop a rapport with him. There is also no evidence—and Brant does not even argue that there is in his application for a certificate of appealability—that Brant's counsel failed to advise him about mitigation evidence. Finally, there is no basis for Brant's claim that experienced counsel must hire a jury consultant before advising a client about whether to request a penalty-phase jury.

Brant cannot meet his burden to receive a certificate of appealability on Ground Three.

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D.

Brant also seeks a certificate of appealability regarding the district court's denial of his Federal Rule of Civil Procedure 59(e) motion. A Rule 59(e) motion to amend a judgment is treated as part of the original habeas petition rather than a second or successive petition. *See Banister v. Davis*, 140 S. Ct. 1698, 1702 (2020). Thus, it was properly before the district court; and the district court had jurisdiction to deny it. A certificate of appealability is required to appeal the denial of a Rule 59(e) motion in a habeas proceeding under § 2254. *See Perez v. Sec'y, Fla. Dep't of Corr.*, 711 F.3d 1263, 1264 (11th Cir. 2013) (citing 28 U.S.C. § 2253(c)(1)); *Jackson v. Albany Appeal Bureau Unit*, 442 F.3d 51, 54 (2d Cir. 2006); *Williams v. Thaler*, 602 F.3d 291, 300 (5th Cir. 2010), *abrogated on other grounds* by *Thomas v. Lumpkin*, 995 F.3d 432 (5th Cir. 2021); *United States v. Lambros*, 404 F.3d 1034, 1036 (8th Cir. 2005); *Williams v. Woodford*, 384 F.3d 567, 585 n.4 (9th Cir. 2005); *Gonzalez v. Sec'y for the Dep't of Corr.*, 366 F.3d 1253, 1263–64 (11th Cir. 2004) (en banc)). Therefore, I apply our usual application for a certificate of appealability standard of review to the Rule 59(e) issue.

The district court concluded that Brant's Rule 59(e) motion effectively asked the district court to reread his petition for a writ of habeas corpus and redo the analysis. But “[a] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument[,] or present evidence that could have been raised prior to the entry of judgment.” *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (second alteration in original) (quoting *Michael Linet, Inc. v. Vill. of*

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Wellington, 408 F.3d 757, 763 (11th Cir. 2005)). Jurists could not debate denying Brant's Rule 59(e) motion, and this issue does not deserve further encouragement.

IV.

Brant's application for a certificate of appealability is **DENIED**.

/s/ Andrew L. Brasher
UNITED STATES CIRCUIT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

February 29, 2024

Marie-Louise Samuels Parmer
Parmer DeLiberato, PA
PO BOX 18988
TAMPA, FL 33679

Appeal Number: 23-13124-P
Case Style: Charles Grover Brant v. Secretary, Department of Corrections, et al
District Court Docket No: 8:16-cv-02601-KKM-JSS

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-13124

CHARLES GROVER BRANT,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:16-cv-02601-KKM-JSS

Before NEWSOM, LAGOA, and BRASHER, Circuit Judges.

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BY THE COURT:

Appellant's motion for reconsideration of the February 29, 2024, single judge's order denying motion for a certificate of appealability is **DENIED**.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

April 10, 2024

Marie-Louise Samuels Parmer
Parmer DeLiberato, PA
PO BOX 18988
TAMPA, FL 33679

Appeal Number: 23-13124-P
Case Style: Charles Grover Brant v. Secretary, Department of Corrections, et al
District Court Docket No: 8:16-cv-02601-KKM-JSS

The enclosed order has been ENTERED.

Electronic Filing

All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

MOT-2 Notice of Court Action

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHARLES GROVER BRANT,
Petitioner,

v.

CASE NO. 8:16-cv-2601-KKM-JSS
DEATH CASE

SECRETARY, Department of Corrections,
Respondent.

ORDER

Charles Grover Brant was convicted of murder and sentenced to death in state court. (Doc. 1.) Brant unsuccessfully appealed his sentence to the Florida Supreme Court and unsuccessfully applied for state postconviction relief. (*Id.*) Brant now challenges his conviction and his sentence of death under 28 U.S.C. § 2254(d). (*Id.*) Because the state courts' decisions are neither contrary to, nor an unreasonable application of, controlling authority nor based on an unreasonable determination of facts, Brant is not entitled to relief.

I. BACKGROUND

On July 2, 2004, law enforcement officers found Sara Radfar dead inside her home. *Brant v. State*, 21 So. 3d 1276, 1277 (Fla. 2009) ("*Brant I*"). When the officers discovered

Radfar's body, Radfar was laying in the bathtub with the water running, her head was covered by a plastic bag, and her neck was wrapped in a dog leash, an electrical cord, and a woman's stocking. *Id.* A medical examiner determined that the cause of death was strangulation and suffocation. *Id.* While canvassing the area later that day, law enforcement officers spoke with Charles Brant, who was Radfar's neighbor. *Id.* Brant claimed that on the night of the homicide, he saw a man with the victim, and the man had long hair and was wearing a white button-down shirt. *Id.* Brant also claimed that the next day, he saw the man run behind his residence while wearing black pants and a yellow raincoat. *Id.* Law enforcement officers described Brant as "calm, cordial, and coherent" and Brant "did not appear to be under the influence of drugs or alcohol." *Id.*

As part of the general investigation, officers collected evidence from Brant's porch and Brant's garbage can. Officers retrieved "a debit card with the victim's name and photograph on it, a man's white cotton shirt, a yellow raincoat, a pair of black pants, a mass of long brown hair, four latex gloves, and a box that had contained women's stockings." *Id.*

Two days later, a Hillsborough County detective interviewed Brant and Brant voluntarily responded to the detective's questions. *Id.* at 1278. Initially, Brant repeated his original story, but after the detective confronted Brant with the evidence recovered from his garbage, Brant admitted his involvement in the homicide. *Id.* He told the detective that Radfar allowed him to enter her home to take pictures of tile that Brant installed. *Id.* When

Radfar walked to the bathroom, Brant grabbed her, dragged her into a bedroom, and sexually assaulted her. *Id.* To keep her quiet, Brant stuffed a sock into her mouth. *Id.* Then, he started to choke and suffocate her. *Id.* Radfar became unconscious, and after Brant suspected that she was dead, Brant started walking around Radfar's house. *Id.* At one point, Radfar regained consciousness and ran to the front door, but Brant dragged her back into the bedroom and choked and suffocated her again. Later, Brant took Radfar to the bathroom, threw her in the bathtub, and wrapped a stocking, a dog leash, and an electrical cord around Radfar's neck. *Id.* After Radfar died, Brant cleaned her house, changed into clothing he found, moved Radfar's car, left through the front door, and then walked home. *Id.* The next day, Brant reentered Radfar's home to wipe away fingerprints, but when he saw a police officer approaching her house, he locked the front door and exited through a rear window. *Id.*

The State of Florida charged Brant with murder in the first degree, sexual battery, kidnapping, grand theft of a motor vehicle, and burglary with assault or battery. (Doc. 55-1 at 40–42.) Brant moved to suppress his statements, but after an evidentiary hearing, the court denied Brant's motion. (*Id.* at 198, 360.) On May 25, 2007, Brant pleaded guilty to all charges except the kidnapping charge, to which he pleaded *nolo contendere*. (*Id.* at 420.) The defense stipulated that the DNA in the semen recovered on the victim matched Brant's DNA. (*Id.* at 876–77.)

Jury selection for the penalty phase began on August 21, 2007. (*Id.* at 1794.) But the trial judge discharged the jury panel because several prospective jurors made prejudicial comments that the entire venire heard. (Doc. 55-3 at 1966–68.) The court scheduled a new jury selection with a different venire for the following morning. (*Id.* at 1977.) However, Brant decided to waive a penalty phase jury and opted to proceed with a bench trial. Respondent’s Ex. A-7 (Doc. 55-2) at 2. On November 30, 2007, the court sentenced Brant to death because three statutory mitigating factors¹ and ten non-statutory mitigating factors² did not outweigh the two aggravating circumstances of Brant’s crime; specifically, that the murder was heinous, atrocious, or cruel and that Brant committed a capital felony while engaging in a sexual battery. (Doc. 55-1 at 640–83.).

Brant I affirmed Brant’s murder conviction and his death sentence on direct appeal. 21 So. 3d at 1289. Brant moved for postconviction relief under Rule 3.851, FLA. R. CRIM. P., but the postconviction court denied Brant’s motion, (Doc. 55-9 at 3380–3498), and the

¹ The trial judge found (1) that Brant had no significant history of prior criminal activity; (2) that Brant’s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (3) that Brant was thirty-nine years old at time of the offense. (Doc. 55-1 at 680–81.)

² The trial judge found (1) that Brant is remorseful; (2) that he cooperated with law enforcement officers, admitted the crimes, pleaded guilty, and waived a penalty-phase jury; (3) that he has borderline verbal intelligence; (4) that he has a family history of mental illness; (5) that he is not a sociopath or psychopath and does not have antisocial personality disorder; (6) that he has diminished impulse control and exhibits periods of psychosis due to methamphetamine abuse, recognized his drug dependence problem, sought help for his drug problem, and used methamphetamine before, during, and after the murder; (7) that he has been diagnosed with chemical dependence and sexual obsessive disorder, and he has symptoms of attention deficit disorder; (8) that he is a good father; (9) that he is a good worker and craftsman; and (10) that he has a reputation for being a nonviolent person. (Doc. 55-1 at 680–81.)

Florida Supreme Court affirmed on appeal. *Brant v. State*, 197 So. 3d 1051 (Fla. 2016) (“*Brant II*”). Brant’s second postconviction motion was also denied (Doc. 55-13 at 414–19), and the denial was affirmed on appeal. *Brant v. State*, 284 So. 3d 398 (Fla. 2019) (“*Brant III*”). The respondent agrees that Brant timely filed his petition for the writ of habeas corpus under § 2254. (Doc. 53 at 56–58). Brant alleges nine grounds for relief.

II. CLAIMS BARRED FROM FEDERAL REVIEW

A. Procedurally Defaulted Claims

1) Ground One:

Brant argues that his trial counsel ineffectively assisted him during the guilt phase by advising him to plead guilty “without conducting a reasonable investigation, consulting a jury expert or doing any investigation, research or reading on the basics of jury decision making.” (Doc. 1 at 11.) Brant asserts that, but for his counsel’s deficient performance at the guilt phase, he would have pleaded “not guilty” and would not have waived his right to a jury during the penalty phase. (*Id.* at 6.) The respondent argues that Brant failed to previously argue that he was prejudiced as to the *penalty phase* because of his trial counsel’s performance during the *guilt phase*. (Doc. 53 at 67–68.)

A federal habeas petitioner must present his federal claims by raising them in state court before bringing them in a federal petition. *See* 28 U.S.C. § 2254(b)(1)(A); *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) (“[T]he state prisoner must give the state courts an

opportunity to act on his claims before he presents those claims to a federal court in a habeas petition.”). A petitioner satisfies this requirement if he fairly presents the claim in “the state’s highest court” with proper jurisdiction and alerts the court to the federal nature of the claim. *Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010). “[M]ere similarity of claims is insufficient.” *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *Picard v. Connor*, 404 U.S. 270, 276 (1971) (“[W]e have required a state prisoner to present the state courts with the same claim he urges upon the federal courts.”).

In his reply, (Doc. 57 at 12), Brant contends that he presented a claim about the prejudicial effect of trial counsel’s deficient performance on the penalty phase in his initial brief on appeal from the denial of postconviction relief in state court; specifically, both in the “Summary of Argument” and on pages 75 and 77. In the “Summary of Argument,” Brant asserted:

Brant’s counsel rendered ineffective assistance in advising him to enter a guilty plea . . . Counsel was wrong and the jurors were irate that Brant had pled guilty and still wanted a penalty phase trial. As a result, Brant then waived a penalty phase jury. But for counsel’s deficient performance, Brant would not have pled guilty but would have exercised his right to a trial.

Respondent’s Ex. B-58 (Doc. 55-12) at 68. To be sure, Brant argued that trial counsel deficiently performed by advising him to plead guilty and Brant claimed that this prejudiced his decision to plead guilty. (*Id.* at 68–75.) However, Brant never argued that

counsel's deficient performance in advising him to plead guilty prejudiced him at the penalty phase by causing him to waive a penalty phase jury.

Further, even if Brant did advance this claim on appeal, Brant procedurally defaulted the claim because he never presented this claim to the postconviction court. (Doc. 55-6 at 1016-25;) *Mendoza v. State*, 87 So. 3d 644, 660 (Fla. 2011) ("A defendant may not raise a claim for the first time on postconviction appeal in a Florida court."). Additionally, even if Brant raised this claim in the postconviction court and presented it in the "Summary of Argument," Brant failed to discuss this claim in the body of his brief. Page 75 and page 77 of Brant's brief dealt with counsel's deficient performance at the penalty phase, not the guilt phase. Respondent's Ex. B-58 (Doc. 55-12) at 75, 77. Because Brant never discussed the prejudicial effect of counsel's guilt-phase performance on the penalty phase, he failed to fairly present the claim in state court. *See Shere v. State*, 742 So. 2d 215, 217 n.6 (Fla. 1999) ("In a heading in his brief, Shere asserts that the trial court erred by summarily denying nineteen of the twenty-three claims raised in his 3.850 motion. However, for most of these claims, Shere did not present any argument or allege on what grounds the trial court erred in denying these claims. We find that these claims are insufficiently presented for review."); *cf. Sweet v. State*, 810 So. 2d 854, 870 (Fla. 2002) ("[B]ecause on appeal Sweet simply recites these claims from his postconviction motion in a sentence or two, without elaboration or explanation, we conclude that these instances of alleged

ineffectiveness are not preserved for appellate review.”); *Duest v. Dugger*, 555 So. 2d 849, 851–52 (Fla. 1990) (“Merely making reference to arguments below without further elucidation does not suffice to preserve issues.”).

This portion of Ground One was thus not presented to the state court and now is procedurally defaulted because Brant cannot return to state court to raise it. Believing that he exhausted the claim in state court, Brant does not attempt to overcome the procedural default by arguing that either of the procedural default exceptions apply. *See Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001) (holding that a procedural default “will bar federal habeas relief” “unless either the cause and prejudice or the fundamental miscarriage of justice exception is established”). Brant is procedurally barred from advancing this claim on federal review.

2) Ground Nine:

Brant argues that his direct appellate counsel ineffectively assisted him by not appealing the trial court’s denial of Brant’s motion to suppress his confession. (Doc. 1 at 102.) Additionally, Brant claims that his postconviction counsel failed to effectively assist him by not raising the deficient performance of Brant’s direct appellate counsel. (*Id.*)

Brant failed to present this claim in state court. “[A] petitioner must fairly present every issue raised in his federal petition to the state’s highest court, either on direct appeal or on collateral review.” *Ward*, 592 F.3d at 1156. Yet, Brant’s habeas petition concedes

that “[d]irect appeal counsel failed to raise [Ground Nine] in their initial brief and first-tier postconviction counsel failed to raise it.” (Doc. 1 at 102–03.) Further, Brant never raised this issue during a second round of post-conviction proceedings. (*See* Doc. 55-13 at 202–21; Doc. 55-14.) Finally, in his reply brief, Brant concedes that he procedurally defaulted Ground Nine, and that Ground Nine is therefore “foreclosed” by the Supreme Court’s decision in *Davila v. Davis*, 137 S. Ct. 2058 (2017). (Doc. 57 at 30.) Thus, Brant is procedurally barred from advancing this claim on federal review.

B. Premature

1) Ground Six:

Brant alleges that he “suffers from brain damage and depression [and his] fragile mental condition could” “deteriorate under the circumstances of death row.” (Doc. 50 at 82.) *Ford v. Wainwright*, 477 U.S. 399, 401 (1986), and *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), held that the Eighth Amendment prohibits executing someone who is mentally incompetent.

Brant stipulated that Ground Six is not ripe, but he “raises it here to preserve it for federal review” if he becomes incompetent at the time of his execution. (Doc. 50 at 82.) *See In re Provenzano*, 215 F.3d 1233, 1235 (11th Cir. 2000) (“[A] competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. § 2244(b)(2), and [] such a claim cannot meet either of the exceptions set out in

that provision.”). Ground Six is dismissed without prejudice under the parties’ stipulation that the claim is premature.

III. STANDARDS OF REVIEW UNDER SECTION 2254

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs this proceeding. *Carroll v. Sec’y, DOC*, 574 F.3d 1354, 1364 (11th Cir. 2009). Courts grant relief under AEDPA only if a petitioner is in custody “in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). “The power of the federal courts to grant a writ of habeas corpus setting aside a state prisoner’s conviction on a claim that his conviction was obtained in violation of the United States Constitution is strictly circumscribed.” *Green v. Sec’y, Dep’t of Corr.*, 28 F.4th 1089, 1093 (11th Cir. 2022).

Section 2254(d) provides that federal habeas relief cannot be granted on a claim adjudicated on the merits in state court unless the state court’s adjudication:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

For purposes of § 2254(d)(1), the phrase “clearly established Federal law” encompasses the holdings only of the United States Supreme Court “as of the time of the

relevant state-court decision.” *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Section 2254(d)(1) “defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court.” *Id.* at 404. First, a decision is “contrary to” clearly established federal law “if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” *Id.* at 413. Second, a decision involves an “unreasonable application” of clearly established federal law “if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* AEDPA was meant “to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693 (2002). Accordingly, “[t]he focus . . . is on whether the state court’s application of clearly established federal law is objectively unreasonable, and . . . an unreasonable application is different from an incorrect one.” *Id.* at 694. As a result, to obtain relief under the AEDPA, “a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011); *see also Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (“The ‘unreasonable

application’ clause requires the state court decision to be more than incorrect or erroneous. The state court’s application of clearly established law must be objectively unreasonable.”).

When the last state court to decide a federal claim explains its decision in a reasoned opinion, a federal habeas court reviews the specific reasons stated in the opinion and defers to those reasons if they are reasonable. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). But the habeas court is “not limited by the particular justifications the state court provided for its reasons, and [it] may consider additional rationales that support the state court’s determination.” *Jennings v. Secretary, Fla. Dep’t of Corr.*, 55 F.4th 1277, 1292 (11th Cir. 2022).

For purposes of § 2254(d)(2), “it is not enough to show that ‘reasonable minds reviewing the record might disagree about the finding in question.’” *Brown v. Davenport*, 142 S. Ct. 1510, 1525 (2022) (quotations omitted). “An unreasonable determination of the facts occurs when the direction of the evidence, viewed cumulatively, was too powerful to conclude anything but the petitioner’s factual claim.” *Teasley v. Warden, Macon State Prison*, 978 F.3d 1349, 1355 (11th Cir. 2020) (internal quotation marks and alterations omitted). A state court’s findings of fact are presumed correct, and a petitioner can rebut the presumption of correctness afforded to a state court’s factual findings only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Even if a petitioner succeeds in rebutting the presumption, he must show that the state court's decision is "based on" the incorrect factual determination. *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1035 (11th Cir. 2022) (en banc). This is because a state court decision may still be reasonable "even if some of the state court's individual factual findings were erroneous—so long as the decision, taken as a whole, doesn't constitute an 'unreasonable determination of the facts' and isn't 'based on' any such determination." *Id.* (quoting *Hayes v. Sec'y, Fla. Dep't of Corr.*, 10 F.4th 1203, 1224–25 (11th Cir. 2021) (Newsom, J., concurring)).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

Brant asserts several ineffective assistance of counsel claims under the Sixth Amendment. To succeed, Brant must show (1) deficient performance by his counsel and (2) prejudice resulting from those errors. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The first part "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The linchpin of this analysis is whether counsel's conduct "was reasonable considering all the circumstances." *Id.* at 688. A petitioner establishes deficient performance if "the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance." *Id.* at 690. A court "must judge the reasonableness of counsel's

challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.*

The second part requires showing that the deficient performance prejudiced the defense. *Id.* at 687. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. To demonstrate prejudice, a petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

"The question [on federal habeas review of an ineffective assistance claim] 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable—a substantially higher threshold.' " *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). Consequently, federal petitioners rarely prevail on claims of ineffective assistance of counsel because "[t]he standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Richter*, 562 U.S. at 105 (quotation and citations omitted).

Both the postconviction court, (Doc. 55-9 at 3381), and *Brant II*, 197 So. 3d at 1063, recognized that *Strickland* governs a claim of ineffective assistance of counsel. Consequently, Brant cannot meet the “contrary to” standard under § 2254(d)(1). Instead, Brant must show that the state courts either unreasonably applied *Strickland* or based their decision on an unreasonable determination of fact.

V. ANALYSIS

Seven of Brant’s nine grounds for relief remain. Grounds One, Two, and Three allege that Brant’s trial counsel ineffectively assisted his defense. (Doc. 1 at 6–89.) Ground Four alleges a *Brady* violation. (*Id.* at 89–93.) Ground Five alleges the denial of a fundamentally fair trial based on cumulative errors. (*Id.* at 94–95.) Ground Seven alleges that Brant’s death sentence was based on a proportionality review scheme that is unconstitutional under the Eighth Amendment. (*Id.* at 96–99.) Finally, Ground Eight alleges that appellate counsel performed deficiently. (*Id.* at 100–02.)

A. Grounds One, Two, and Three:

Ground One challenges counsel’s performance at the guilt phase and Grounds Two and Three challenge counsel’s performance at the penalty phase. (*See id.* at 6–89.) The postconviction court determined that the performance of Brant’s trial counsel was neither deficient nor prejudicial. (Doc. 55-9 at 3382–3493.) Before coming to this conclusion, the court considered the testimony of more than forty lay and expert witnesses that Brant

presented. (*Id.* at 3410–72.) *Brant II* affirmed that Brant failed to meet his burden to prove both deficient performance and resulting prejudice. 197 So. 3d at 1063–76.

This Court begins by summarizing Brant’s arguments under Grounds One, Two and Three, and by summarizing the state court’s resolution of Brant’s claims. The Court then explains why Grounds One, Two, and Three do not present a basis for relief under § 2254(d)(1) or under § 2254(d)(2).

1) Ground One:

For reasons already discussed, part of Ground One is procedurally barred from federal review. But the remaining portion of Ground One is addressed below. Brant argues that trial counsel deficiently performed during the guilt phase by advising Brant to plead guilty “without conducting a reasonable investigation [and] without consulting a jury expert or doing any investigation, research or reading on the basics of jury decision making.” (Doc. 1 at 11.)

The postconviction court found (1) that Brant’s trial counsel were credible; (2) that after an unsuccessful attempt to suppress Brant’s confession, Brant and his counsel agreed that pleading guilty was the best strategy; (3) that Brant intended to plead guilty “from day one” and not to proceed to a jury trial; and (4) that there is no reasonable probability that Brant would have insisted on going to a guilt-phase trial even if trial counsel consulted a

jury selection expert. (Doc. 55-9 at 3397–99.) *Brant II*, summarized the reason why pleading guilty was Brant’s best option:

Brant has not suggested that there was any particular defense available to him that was likely to succeed at trial. In light of his confession, which was corroborated by the crime scene, the DNA evidence, and the presence of items taken from the victim’s home in his trash, it does not appear that any defense would have been available to Brant and likely to succeed at trial.

197 So. 3d at 1066.

Moreover, counsel’s “decision to advise Brant to plead guilty was reasonable given that the original defense strategy to attack the confession was unsuccessful, the advice was given after alternatives were considered and rejected, and the State was proceeding on theories of both premeditated and felony murder with very strong evidence.” *Brant II*, 197 So. 3d at 1065. Brant’s intent to plead guilty “from day one” also influenced counsel’s decisions. *See Strickland*, 466 U.S. at 691 (“The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.”).

The state courts largely based their “reasonableness” determination on the ample experience of the two attorneys who represented Brant. Rick Terrana, Brant’s guilt-phase

counsel, had been a criminal defense attorney for over fifteen years and had tried between fifteen and twenty-five death penalty cases. *Brant II*, 197 So. 3d at 1064. Also, Terrana only “had one client sent to death row” when he was penalty phase counsel. Respondent’s Ex. B-43 (Doc. 55-11) at 497–98. Bob Fraser, Brant’s penalty-phase counsel, had twenty years of experience and had tried at least twenty-five first-degree murder cases. *Brant II*, 197 So. 3d at 1064. Also, Terrana testified that he and Fraser worked together as co-counsel in “a hundred cases,” including at least two death penalty cases. Respondent’s Ex. B-43 (Doc. 55-11) at 453–54. The state court accepted Terrana’s explanation that, “if Brant waived the guilt phase and did not contest his guilt, the jury might be more kindly disposed to the mitigating circumstances presented at the penalty phase” and Fraser’s explanation that, “by pleading guilty, Brant ‘would be less likely to incur the ire of the jury’ during the penalty phase.” *Brant II*, 197 So. 3d at 1064.

For reasons explained below, Brant fails to show that the state court’s determination was unreasonable under § 2254(d).

2) Ground Two:

Brant argues that trial counsel ineffectively assisted during the penalty phase by failing to thoroughly investigate the case and failing to present mitigation evidence. (Doc. 1 at 14.) Specifically, Brant identifies five instances.

(1) Brant’s Conception: Brant argues that his counsel failed to adequately investigate his paternity because his counsel did not know that Brant was conceived in a rape. (Doc. 1 at 16.) The postconviction court and *Brant II* found that Brant’s mother kept this fact a secret—from everyone but her husband and “a few distant relatives”—until the postconviction proceedings. 197 So. 3d at 1067.

Brant II held (1) that trial counsel did not perform deficiently because they “had no reason to” question Brant’s paternity, and (2) that Brant was not prejudiced by the new information about the circumstances of Brant’s conception because “any mitigating value of the circumstances of his conception would be negligible at best.” 197 So. 3d at 1067.

(2) Methamphetamine Expert: Brant argues that trial counsel rendered ineffective assistance by not retaining a methamphetamine expert witness. (Doc. 1 at 16–21.) *Brant II* rejected this claim because trial “counsel presented expert testimony regarding the extent of Brant’s methamphetamine use, the effects of it, and the behavior of persons who abuse methamphetamine through Dr. Maher—who was deemed by the trial court to be an expert in that field—and [through] Dr. McClain.” 197 So. 3d at 1069. Based on the testimony presented at the penalty phase, “the trial court found that multiple mitigating circumstances relating to Brant’s methamphetamine use were established and gave those circumstances moderate weight.” *Id.* Moreover, *Brant II* noted that “trial counsel is not ineffective for failing to present cumulative evidence,” and that “trial counsel is not deficient because the

defendant is able to find postconviction experts that reach different and more favorable conclusions than the experts consulted by trial counsel.” *Id.* Thus, *Brant II* determined that counsel’s performance was not deficient.

Also, *Brant II* ruled that Brant “failed to establish prejudice because it is questionable whether [the postconviction expert’s] testimony could have established the existence of the extreme emotional disturbance mitigating circumstance.” *Id.* For example, “testimony at the penalty phase from Brant’s former wife that he was able to interact pleasantly with her, wash dishes, clean up the kitchen, watch the evening news, and sleep in bed next to her the night he committed the murder would have refuted the allegation that he was under an extreme emotional disturbance.” *Id.*

(3) Prison Adjustment Expert: Brant argues that trial counsel assisted ineffectively by failing to call a prison adjustment expert to testify about Brant’s ability to positively adjust to a prison environment. (Doc. 1 at 43–44.) However, Brant’s trial counsel presented testimony that Brant was a nonviolent person and documentary evidence that Brant was a trustee in the jail notwithstanding his charges for capital murder and the other violent felonies. Based on this evidence, the trial court found as mitigating circumstances that Brant “has a reputation of being a non-violent person,” and that until the murder, Brant “had led a crime-free life.” (Doc. 55-1 at 739–40.) Consequently, the Florida Supreme Court held that trial counsel “did not perform deficiently in failing to present a prison

adjustment expert,” and Brant was not prejudiced by the absence of such an expert because the expert’s testimony would have been cumulative. *Brant II*, 197 So. 3d at 1070.

(4) Brain Damage and PET Scan Evidence: Brant argues that trial counsel ineffectively assisted by failing to reasonably investigate and present evidence about Brant’s brain damage. (Doc. 1 at 37–43.) Specifically, Brant notes that his trial counsel did not call two experts to testify: Dr. Wood, a clinical neuropsychologist and forensic psychologist who conducted the PET scan, and Dr. Wu, an expert in brain imaging technology who reviewed the PET scan. (Doc. 50 at 32–37.) Trial counsel presented the brain damage and PET scan evidence through Dr. Maher instead of Dr. Wood and Dr. Wu, both of whom trial counsel had consulted. According to trial counsel, “Dr. Wood agreed with his decision not to present the PET scan images.” *Brant II*, 197 So. 3d at 1072. Counsel chose (1) not to call Dr. Wood because the doctor’s “ego and gamesmanship [might] obscure his message;” (2) not to call Dr. Wu because the doctor’s accent made communications difficult, such that during other trials, people in the courtroom could be heard asking, “What is he saying?”; and (3) not to call either doctor because, in trial counsel’s opinion, the expert witnesses that the State would call in rebuttal (doctors whom Brant’s counsel had deposed) “would win in a credibility battle with Drs. Wood and Wu.” *Id.* at 1072–73.

Brant II determined that trial counsel “made a reasonable, strategic decision to present the PET scan evidence only through Dr. Maher based on his concerns about the

credibility of Drs. Wood and Wu and his belief that he could establish the mitigating circumstances he intended to establish through Dr. Maher.” *Id.* at 1073. Based on the testimony trial counsel presented during the penalty phase, the trial court found (1) the statutory mitigating circumstance “that Brant’s capacity to appreciate the criminality of his conduct and his capacity to conform his conduct to the requirements of law were substantially impaired” and (2) the non-statutory mitigating circumstance “that he had a diminished ability to control his impulses.” *Id.* Because of trial counsel’s success, *Brant II* determined that Brant failed to show any prejudice since the testimony of Dr. Wood and Dr. Wu would have been cumulative. 197 So. 3d at 1073–74.

Brant also faults his counsel for not informing Dr. Wood and Dr. Wu about his history of eating plaster and lead paint, head banging as a child, a head wound as an adult, and his heavy use of methamphetamine. (Doc. 50 at 35.) But both doctors stated that “the testimony they gave at the [postconviction] evidentiary hearing would have been essentially the same testimony they would have given at the penalty phase, despite the new information they learned during the postconviction proceedings.” 197 So. 3d at 1074. Consequently, *Brant II* held that Brant failed to show prejudice. *Id.*

(5) Background and Mental Health Investigation: Brant argues that trial counsel rendered ineffective assistance by not conducting a reasonable investigation into his childhood, family, and multi-generational background of addiction, abuse, neglect, and

sexual exposure. (Doc. 50 at 37–41.) The postconviction court found that much of the testimony and evidence presented during the evidentiary hearing about Brant’s background and mental health was cumulative, (Doc. 55–9 at 3475–76), and *Brant II* ruled that “[m]ost of Brant’s claims regarding the deficiencies of trial counsel’s investigation are refuted by the record.” 197 So. 3d at 1075. Specifically, trial counsel “presented testimony from family members, friends, peers, a professional associate, and spiritual advisors.” *Id.* Brant’s counsel also “presented academic records and a plethora of information regarding Brant’s struggles with substance abuse.” *Id.* Based on the evidence trial counsel presented, the postconviction court found, as a mitigating circumstance, “that Brant had a family history of mental illness.” *Id.* *Brant II* ruled that Brant showed neither deficient performance nor prejudice, and that “the few pieces of noncumulative evidence” were insufficient to undermine “confidence in the outcome.” *Id.*

3) Ground Three:

Brant argues that his trial counsel deficiently performed by failing to develop better rapport with him, failing to investigate and advise him about the mitigation evidence discussed in Ground Two, and failing to consult an expert on jury selection. (Doc. 50 at 68–75.) *Brant II* summarily rejects these claims because the first is refuted by the record, and the “other two claims are without merit [because] counsel conducted a reasonable

mitigation investigation and did not perform deficiently in failing to consult with a jury selection expert.” 197 So. 3d at 1076.

* * * *

Brant is not entitled to relief on Grounds One, Two, or Three under § 2254(d) because all three Grounds allege strategic errors. “[S]trategic choices . . . are virtually unchallengeable,” *Strickland*, 466 U.S. at 690, and Brant cannot demonstrate ineffective assistance of counsel by alluding to best practice. *White v. Singletary* explains:

The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial . . . We are not interested in grading lawyers’ performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

972 F.2d 1218, 1220–21 (11th Cir. 1992); accord *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc) (“To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable . . . [T]he issue is not what is possible or ‘what is prudent or appropriate, but only what is constitutionally compelled.’”) (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)). To show deficient performance, a petitioner must show “that no competent counsel would have made such a choice.” *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998). And a court’s “strong reluctance to second guess strategic decisions is

even greater where those decisions were made by experienced criminal defense counsel.”

Id.

Brant’s trial counsel had extensive experience litigating criminal and death penalty cases. “[T]hat matters.” *Butts v. GDCP Warden*, 850 F.3d 1201, 1205 (11th Cir. 2017); *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000) (en banc) (“When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.”); *Williams v. Head*, 185 F.3d 1223, 1229 (11th Cir. 1999) (“It matters to our analysis that Richard Allen is an experienced criminal defense attorney.”); *Provenzano v. Singletary*, 148 F.3d at 1332 (“Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel.”). Brant’s attorneys were more experienced than the attorneys that the Eleventh Circuit lauded in *Butts*:

Butts contends that his trial team, and particularly its lead counsel, Robert Westin, was inexperienced. To the contrary, we rarely see a trial attorney who is more experienced in capital defense, or has a better record in capital trials, than Westin. As the district court pointed out, Westin had represented five capital defendants before Butts (and an additional three after him), and none of his other clients received a death sentence. Westin was assisted by a co-counsel who had handled at least 25 to 50 felony cases before the Butts case.

850 F.3d at 1205. Comparatively, Rick Terrana, Brant’s guilt-phase counsel, previously tried between fifteen and twenty-five death penalty cases, and had only “one client sent to

death row” when he was penalty phase counsel. Respondent’s Ex. B-43 (Doc. 55-11) at 497–98. Bob Fraser, Brant’s penalty-phase counsel, had tried at least twenty-five first-degree murder cases. *Brant II*, 197 So. 3d at 1064. Also, Terrana and Fraser worked together as co-counsel in “a hundred cases,” including at least two death penalty cases. Respondent’s Ex. B-43 (Doc. 55-11) at 453–54. In the light of Terrana’s and Fraser’s experience, the state court reasonably applied appropriate deference to Brant’s experienced counsel. *See Brant II*, 197 So. 3d at 1065.

The state court also properly rejected Brant’s contention that his attorneys should have conducted a more thorough investigation. To prove that his attorneys’ investigation was deficient, Brant presented the testimony of more than forty witness who testified about what could have been discovered. But Brant cannot obtain relief under § 2254(d) based on what “could have been” discovered. *Waters v. Thomas* explained:

The widespread use of the tactic of attacking trial counsel by showing what ‘might have been’ proves that nothing is clearer than hindsight—except perhaps the rule that we will not judge trial counsel’s performance through hindsight . . . We reiterate: ‘The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.’

46 F.3d 1506, 1514 (11th Cir. 1995) (en banc) (quoting *Foster v. Dugger*, 823 F.2d 402, 406 (11th Cir. 1987); accord *Spaziano v. Singletary*, 36 F.3d 1028, 1040 (11th Cir. 1994) (“The fact that a criminal defense attorney could have conducted a more thorough

investigation that might have borne fruit does not establish that that attorney's performance was outside the wide range of reasonably effective assistance.").

The Florida Supreme Court recognized "that a trial counsel's decision to not call certain witnesses to testify at trial can be reasonable trial strategy." *Brant II*, 197 So. 3d at 1073 (quotation omitted). The court's deference to trial counsel's strategic decisions is consistent with federal practice. *See Dingle v. Sec'y, Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007) ("Even if counsel's decision [to not call a certain witness] appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was so patently unreasonable that no competent attorney would have chosen it.") (quotation omitted); *Waters*, 46 F.3d at 1512 ("Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess."); *Blanco v. Singletary*, 943 F.2d 1477, 1495 (11th Cir. 1991) ("The decision as to which witnesses to call is an aspect of trial tactics that is normally entrusted to counsel."). *Brant II* afforded proper deference to trial counsels' strategic decisions.

Under § 2254(d), "the only question that matters" is whether the state court's decision was "so obviously wrong as to be 'beyond any possibility for fairminded disagreement.'" *Shinn v. Kayer*, 141 S. Ct. 517, 526 (2020) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). *Brant* is not entitled to relief on Grounds One, Two, or Three because he fails to show that the state court's determinations were unreasonable.

B. Ground Four:

Brant alleges that the State violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing the identity of a confidential informant (“CI”). (Doc. 1 at 89–94.) “There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

The day after Sara Radfar’s murder, Brant visited Garrett Coleman, his half-brother, in Orange County, Florida. (Doc. 55-9 at 3400.) Two days after the murder, Brant (with Coleman) attempted to surrender at the Orange County jail, but because there was no outstanding warrant for Brant’s arrest, Brant was turned away. (*Id.*) The two brothers then went to their parents’ home. (*Id.*) Later that evening, Coleman saw deputies of the Orange County Sheriff’s Office at a gasoline station, informed them of Brant’s desire to “turn himself in peacefully,” and revealed that Brant was at his parents’ home. (*Id.* at 3400–01.) Coleman also told the Orange County deputies to call Agent Neil Clarke—who Coleman worked for as a CI—to verify his credibility. *Id.* at 3401.

The postconviction court held that Brant failed to prove a *Brady* violation because he never established that Coleman was a confidential informant. (Doc. 55-9 at 3404–05.) Further, the postconviction court held that even if Coleman was a confidential informant,

Brant's defense was not prejudiced. (*Id.* at 3405.) On appeal, Brant did not "contest the postconviction court's finding that [Coleman] was not a CI in 2004," nor did Brant explain how Coleman's alleged CI status would have been favorable to Brant's defense. *Brant II*, 197 So. 3d at 1077. Further, Coleman testified that Brant believed that Coleman was a CI in 2004. *Id.* at 1078. Thus, *Brant II* concluded that even if the information about Coleman's CI status was "favorable and material," Brant could not advance a *Brady* claim because he "knew of the evidence that he alleged was withheld." *Id.*

Brant II's determination is not unreasonable under § 2254(d). A defendant cannot advance a *Brady* claim if he knew about, or should have known about, the evidence that the government withheld. *Maharaj v. Sec'y, Dep't of Corr.*, 432 F.3d 1292, 1315 (11th Cir. 2005) ("Our case law is clear that '[w]here defendants, prior to trial, had within their knowledge the information by which they could have ascertained the alleged *Brady* material, there is no suppression by the government.' ") (quoting *United States v. Griggs*, 713 F.2d 672, 674 (11th Cir. 1983)); *LeCroy v. Sec'y, Dep't of Corr.*, 421 F.3d 1237, 1268 (11th Cir. 2005) (noting that there was no *Brady* violation because the defendant could have obtained the information had he used "reasonable diligence"). Brant is not entitled to relief under Ground Four because he fails to show that the state courts unreasonably applied *Brady*.

C. Ground Five:

Brant argues that the cumulative error asserted in Grounds One through Four caused a fundamentally unfair trial. (Doc. 1 at 94–95.) However, Brant can prove cumulative error only by showing two or more errors. “Without harmful errors, there can be no cumulative effect compelling reversal.” *United States v. Barshov*, 733 F.2d 842, 852 (11th Cir. 1984); *see also Conklin v. Schofield*, 366 F.3d 1191, 1210 (11th Cir. 2004) (“[T]he court must consider the cumulative effect of [the alleged errors] and determine whether, viewing the trial as a whole, [the petitioner] received a fair trial as is [his] due under our Constitution.”); *Lucas v. Warden, Georgia Diagnostic & Classification Prison*, 771 F.3d 785, 802 (11th Cir. 2014) (“We are equally unpersuaded that the cumulative effect from Lucas’s *Strickland* and *Brady* claims entitles him to relief.”). Because Brant fails to prove that any of his individual claims have merit, Brant shows no cumulative prejudicial effect. *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) (“Mullen cites no authority in support of his assertion, which, if adopted, would encourage habeas petitioners to multiply claims endlessly in the hope that, by advancing a sufficient number of claims, they could obtain relief even if none of these had any merit. We receive enough meritless

habeas claims as it is; we decline to adopt a rule that would have the effect of soliciting more and has nothing else to recommend it. Twenty times zero equals zero.”).

D. Ground Seven:

Brant argues that his death sentence violates the Eighth Amendment of the U.S. Constitution because the proportionality review employed by the Florida Supreme Court in *Brant I*, 21 So. 3d at 1284–88, was arbitrary and capricious. (Doc. 1 at 96–99; Doc. 50 at 82–91.) Brant notes that *Godfrey v. Georgia* held that “the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner.” 446 U.S. 420, 427 (1980) (plurality opinion). Brant argues that the Florida Supreme Court affirmed an arbitrary and capricious death sentence because it did not consider “sexual assault/first-degree murder cases where the defendant did not receive death.” (Doc. 50 at 90.)

Brant’s argument fails for a couple reasons. First, although the Florida Supreme Court analyzed the proportionality of Brant’s sentence under Florida law, *Brant I*, 21 So. 3d at 1284–88, “proportionality review is not” “required” by the U.S. Constitution in capital cases. *Lewis v. Jeffers*, 497 U.S. 764, 779 (1990); *Murray v. Giarratano*, 492 U.S. 1, 9 (1989). In *Pulley v. Harris*, the U.S. Supreme Court characterized state proportionality review as an “additional safeguard” against arbitrary and capricious death sentences, not a

constitutional requirement. 465 U.S. 37, 45 (1984). In other words, under the U.S. Constitution, Florida is not required to impose any proportionality review scheme. *Id.*

Second, Brant's characterization of the Florida Supreme Court's proportionality review is misleading. *Brant I* did address the "numerous cases" that Brant cited "to support his claim that his death sentence is disproportionate." 21 So. 3d at 1284. The Florida Supreme Court specifically named and distinguished five prior cases holding that the defendant's death sentence was disproportionate. *Id.* at 1284–86 (citing *Crook v. State*, 908 So. 2d 350 (Fla. 2005); *Cooper v. State*, 739 So. 2d 82 (Fla. 1999); *Morgan v. State*, 639 So. 2d 6 (Fla. 1994); *Kramer v. State*, 619 So. 2d 274, 278 (Fla. 1993); *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990)). None of this analysis was required by the U.S. Constitution. *See Pulley*, 465 U.S. at 45. And the fact that *Brant I* carefully conducted this review demonstrates that *Brant I* was not arbitrary and capricious under the Eighth Amendment.

Finally, this Court notes that Brant referenced the Fifth and Fourteenth Amendments, and an ineffective assistance of counsel claim in the header of Ground Seven.³ However, Brant never explains why Florida's proportionality review violates the

³ In full, Brant's header states, "GROUND SEVEN: Mr. Brant's sentence of death was obtained in violation of his rights guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution because the Florida Supreme Court's proportionality review fails to properly narrow the class of offenders who are sentenced to death by not considering murder/rape cases where the defendant did not receive death. Brant asserted this claim as both a substantive claim based on evolving standards of decency and as a claim of ineffective assistance of appellate counsel for failing to raise the claim that this Court's appellate process violates Brant's rights to Equal Protection of the laws, Procedural and Substantive Due Process, and Brant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. The Florida Supreme Court's analysis and ruling on this Claim rose to the level of an objectively unreasonable determination of the facts in light of the State Court record and an objectively unreasonable determination of clearly established federal law." (Doc. 50 at 82–83)

Fifth or Fourteenth Amendments. (*See* Doc. 1 at 96–99; Doc. 50 at 82–91.)⁴ Moreover, Brant never discusses his ineffective assistance of counsel claim anywhere in the body of his argument under Ground Seven. (*See* Doc. 1 at 96–99; Doc. 50 at 82–91.) Brant fails to demonstrate that the state courts’ decisions were unreasonable under § 2254(d).

E. Ground Eight:

Brant alleges that appellate counsel deficiently performed by not appealing the trial court’s denial of his motion to dismiss the kidnapping charge. (Doc. 1 at 100–02.) “The standards applicable to [a defendant’s] claims of ineffectiveness against trial counsel apply equally to the charges leveled against his appellate lawyer.” *Johnson v. Alabama*, 256 F.3d 1156, 1187 (11th Cir. 2001). But to demonstrate deficient performance by appellate counsel, a habeas petitioner must prove more than that their appellate counsel failed to raise a particular issue on appeal. *See Hittson v. GDCP Warden*, 759 F.3d 1210, 1263 (11th Cir. 2014). “Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.” *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983). “[T]o show that . . . counsel failed to provide the level of representation required by *Strickland*, [a petitioner] must show more than the mere fact [counsel] failed to raise potentially meritorious claims; he must show that no competent counsel, in the exercise of

⁴ Brant vaguely alludes to the Equal Protection Clause once, (Doc. 1 at 97), and conclusively asserts that the Florida Supreme Court’s analysis violated his right to “Due Process.” (Doc. 50 at 91.)

reasonable professional judgment, would have omitted those claims.” *Hittson*, 759 F.3d at 1263. If “appellate counsel fails to raise a claim on appeal that is so obviously valid that any competent lawyer would have raised it, no further evidence is needed to determine whether counsel was ineffective for not having done so . . . Her failure to raise it, standing alone, establishes her ineffectiveness.” *Eagle v. Linahan*, 279 F.3d 926, 943 (11th Cir. 2001)

Brant argues that appellate counsel performed deficiently by not appealing the denial of his motion to dismiss the kidnapping charge. (Doc. 1 at 100–02.) Brant claims that the kidnapping charge was dismissible under Florida law. (*Id.*) *Brant II* rejected this ineffective assistance claim because even if Brant appealed the denial of his motion to dismiss, Brant’s argument would have been “meritless” under state law. 197 So. 3d at 1079. Consequently, the state court determined that Brant proved neither deficient performance nor prejudice. The Florida Supreme Court is the final arbiter of Florida law, and it “is not the province of a federal habeas court to reexamine state-court determinations on state law questions.” *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010); *Pinkney v. Sec’y, Dep’t of Corr.*, 876 F.3d 1290, 1299 (11th Cir. 2017). Because Brant’s appellate counsel did not deficiently perform, the state court reasonably concluded that Brant failed to prove his ineffective assistance of appellate counsel claim.

VI. CERTIFICATE OF APPEALABILITY

A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Instead, a district court or court of appeals must first issue a certificate of appealability (COA). *Id.* "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To obtain a COA, Brant must show that reasonable jurists would find debatable both the merits of the underlying claims and the procedural issues he seeks to raise. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Brant has not made the requisite showing. Finally, because Brant is not entitled to a COA, he is not entitled to appeal *in forma pauperis*.

It is therefore **ORDERED** that Ground Six is **DISMISSED WITHOUT PREJUDICE** as premature, and Ground One in part and Ground Nine are **DISMISSED AS PROCEDURALLY BARRED**. Brant's Petition for Writ of Habeas Corpus (Doc. 1) is otherwise **DENIED**. The Clerk is directed to enter **JUDGMENT** against Brant and in Respondents' favor and to **CLOSE** this case.

ORDERED in Tampa, Florida, on March 24, 2023.


 Kathryn Kimball Mizelle
 United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHARLES GROVER BRANT,
Petitioner,

v.

CASE NO. 8:16-cv-2601-KKM-JSS
DEATH CASE

SECRETARY, Department of Corrections,
Respondent.

ORDER

Charles Grover Brant was convicted of murder and sentenced to death in state court. (Doc. 1.) Brant unsuccessfully appealed his sentence to the Florida Supreme Court and unsuccessfully applied for state postconviction relief. (*Id.*) An earlier Order denies Brant's petition under 28 U.S.C. § 2254(d) because the state courts' decisions are neither contrary to, nor an unreasonable application of, controlling authority nor based on an unreasonable determination of facts. (Doc. 58.) Pending is Brant's "Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. Pro. 59(e)" and the response. (Docs. 60 and 62.) The motion is denied for the following reasons.

Brant brutally raped and murdered his neighbor, he confessed to the murder to the police, and he was unquestionably the assailant as proven by the physical evidence. Because

he was “adamant” “from day one” that he did not want a guilt-phase trial and based on the advice of two very experienced capital-murder trial attorneys, Brant pleaded guilty to the murder. After unsuccessfully seating a penalty-phase jury, Brant decided to waive the jury and proceeded with sentencing by the judge only. The trial judge found two aggravating circumstances, three statutory mitigating circumstances, and ten non-statutory mitigating circumstances and, based on these findings, sentenced Brant to death, which was affirmed on appeal. *Brant v. State*, 21 So. 3d 1276, 1277 (Fla. 2009) (“*Brant I*”).

The post-conviction proceedings were substantial, which included the testimony of nearly 70 witnesses¹ during more than two weeks of evidentiary hearings on Brant’s claims of ineffective assistance of counsel. The post-conviction court denied relief in a thorough, detailed, 119-page opinion (Doc. 55-9 at 182) and the Florida Supreme Court affirmed in a 30-page opinion. *Brant v. State*, 197 So. 3d 1051 (Fla. 2016) (“*Brant II*”). The state court record as filed by Respondent is nearly 10,000 pages. (Doc. 55.) Brant’s petition under § 2254 and the supporting memorandum are each more than 100 pages and the response is more than 175 pages. In his pending Rule 59(e) motion Brant correctly characterizes this case as “massive” (Doc. 60 at 6, ¶16) and accurately states “that meaningfully considering Brant’s arguments and engaging in the factual record is time-consuming” (Doc. 60 at 67, ¶16.) The above-described record from the state court and briefs in this federal

¹ Forty-eight experienced/expert witnesses (attorneys and law enforcement personnel) and twenty-one lay witnesses.

action are what this Court reviewed before determining that Brant has failed to meet his burden under § 2254(d) that the state courts' decisions are contrary to, or an unreasonable application of, controlling federal law or are based on an unreasonable determination of facts.

In his pending Rule 59(e) motion, Brant criticizes this Court's denial of relief and asserts that this Court "misapprehended [his] arguments [and] thereby fail[ed] to address significant arguments and facts," "failed to meaningfully address" his disagreement with the state courts' decisions, and "appears to have mixed the performance and prejudice prongs of *Strickland*."² (Doc. 60 at 2–3, ¶¶6–8.) Without identifying a specific ground for relief or a specific determination in this Court's Order, Brant generally refers to issues that this Court determined did not warrant relief. Instead of providing specific argument in the pending motion, Brant "requests that this Court address his arguments as presented in his Memorandum of Law, where he set out how the State courts misapplied clearly established federal law[,], misappl[ied] the facts and ma[de] unreasonable factual determinations" (*Id.* at 6, ¶17.) Brant concludes with this remarkable statement: "should this Court conduct a careful and meaningful review of the record and Brant's arguments, this Court would find that AEDPA deference does not apply" (*Id.* at ¶18.) In other words, Brant's Rule

² To the contrary, Respondent's opposition to the pending motion correctly notes that the earlier Order analyzes each of Brant's grounds and that Brant never identifies his basis for asserting a "mixing" of *Strickland's* performance and prejudice prongs. (Doc. 62.)

59(e) motion essentially asks this Court to re-read his petition and re-do its analysis. That is not a proper use of Rule 59(e).

In his pending motion, Brant cites no law governing the breadth of review under Rule 59(e), and Respondent's opposition contains a single—yet salient—quotation from *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007): “The only grounds for granting a [Rule 59] motion are newly-discovered evidence or manifest errors of law or fact. [A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.” (Doc. 62 at 8) (brackets by Respondent in the opposition.)

Additionally, “whether to alter or amend a judgment pursuant to Rule 59(e) is committed to the sound discretion of the district judge,” *Mincey v. Head*, 206 F.3d 1106, 1137 (11th Cir. 2000), and that discretion is sharply limited as described above in *King*. To prevail on a post-judgment motion, the losing party “must do more than show that a grant of [the] motion might have been warranted; [he] must demonstrate a justification for relief so compelling that the court was required to grant [the] motion.” *Rice v. Ford Motor Co.*, 88 F. 3d 914, 919 (11th Cir. 1996).

Brant fails that standard. He neither asserts an intervening change in controlling law nor demonstrates a manifest error of law or fact resulting from the denial of his § 2254 petition. Moreover, Brant shows no compelling justification for granting him relief.

CERTIFICATE OF APPEALABILITY

“Because the denial of a Rule 59(e) motion constitutes a ‘final order’ . . . a COA is required before [an] appeal may proceed.” *Perez v. Sec’y, Dep’t of Corr.*, 711 F.3d 1263, 1264 (11th Cir. 2013); *see also Williams v. Chatman*, 510 F.3d 1290, 1294 (11th Cir. 2007). A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court’s denial of his petition. 28 U.S.C. § 2253(c)(1). Instead, a district court or court of appeals must first issue a certificate of appealability (COA). *Id.* “A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To obtain a COA, Brant must show that reasonable jurists would find debatable both the merits of the underlying claims and the procedural issues he seeks to raise. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Brant has not made the requisite showing. Finally, because Brant is not entitled to a COA, he is not entitled to appeal *in forma pauperis*.

It is therefore **ORDERED** that Brant’s Motion to Alter or Amend Judgment Pursuant to Rule 59(e) (Doc. 60) is **DENIED**.

DONE and **ORDERED** in Tampa, Florida on August 23, 2023.


Kathryn Kimball Mizelle
United States District Judge

**PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY
CAPITAL CASE**

United States District Court	District: Middle District of Florida
Name: Charles Grover Brant	Docket or Case No.: 8:16cv2601 T23 MAP
Place of Confinement: Union Correctional Institution, Raiford, FL	Prisoner No.: 588873
Petitioner, Charles Grover Brant v. Respondents, Julie Jones, Sec. Dept. of Corrections, & Pamela Jo Bondi, Attorney General, Florida.	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: Thirteenth Judicial Circuit, in and for Hillsborough County, Florida

(b) Criminal docket or case number: 04-CF-12631
2. (a) Date of the judgment of conviction: May 25, 2007

(b) Date of sentencing: Nov. 30, 2007
3. Length of sentence: Death Sentence, 3 life sentences and 1 5- year sentence.
4. In this case, were you convicted on more than one count or of more than one crime?

Yes

Handwritten signature/initials

5. Identify all crimes of which you were convicted and sentenced in this case: First degree murder; sexual battery; kidnapping, burglary, and grand theft.

6. (a) What was your plea? Guilty on all counts

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

(c) If you went to trial, what kind of trial did you have? Judge only on capital sentencing.

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing? Yes

8. Did you appeal from the judgment of conviction? Yes.

9. If you did appeal, answer the following:

(a) Name of court: The Supreme Court of Florida.

(b) Docket or case number: SC07-2412

(c) Result: Denied

(d) Date of result: Nov. 12, 2009

(e) Citation to the case: *Brant v. State*, 21 So. 3d 1276 (Fla. 2009)

(f) Grounds raised: The death sentence imposed in this case is disproportionate. The court sua sponte considered whether Mr. Brant's guilty plea was knowing, intelligent and voluntary on the face of the record.

(g) Did you seek further review by a higher state court? N/A. The Florida Supreme Court is the highest state court in Florida and had jurisdiction over the direct appeal of the conviction and death sentence.

(h) Did you file a petition for certiorari in the United States Supreme Court? No.

If yes, answer the following:

(1) Docket or case number:

(2) Result: Denied,

(3) Date of result:

(4) Citation to the case:

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? Yes.

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: State Circuit Court, Thirteenth Circuit, in and for Hillsborough County, Florida

(2) Docket or case number: 04-CF-12631

(3) Date of filing: Feb. 9, 2011

(4) Nature of the proceeding: Motion for Postconviction Relief pursuant to Fla. R. Crim. Pro. 3.851

(5) Grounds raised:

A. Mr. Brant was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the guilt phase of his capital trial, in violation of Mr. Brant's Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment Rights Under the United States Constitution and his corresponding rights under the Declaration of Rights of the Florida Constitution.

B. Mr. Brant was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the penalty phase of his capital trial, in violation of Mr. Brant's Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment Rights Under the United States Constitution and his corresponding rights under the Declaration of Rights of the Florida Constitution and under Florida Common Law.

C. Counsel's performance in failing to investigate and prepare for jury selection and develop and inform Mr. Brant of mitigation in the penalty phase fell below prevailing professional norms. Counsel's failure prejudiced Mr. Brant and violated his Sixth Amendment right to effective

assistance of counsel. But for counsel's deficient performance, Mr. Brant would have exercised his right to a sentencing phase jury. Confidence in the outcome is undermined.

D. Counsel's performance in failing to investigate, consult with and present the testimony of a neuropharmacologist to address the interrogation tactics of the investigators and explain the effect of methamphetamine in the motion to suppress Mr. Brant's statement was deficient performance. Further, counsel failed to obtain objective scientific evidence to show that Mr. Brant was under the effects of meth and/or other drugs at the time of his confession. Counsel's failure prejudiced Mr. Brant and violated his Fifth Amendment right to Due Process and his Sixth Amendment right to effective assistance of counsel. But for counsel's deficient performance, Mr. Brant would have exercised his right to a sentencing phase jury. Confidence in the outcome is undermined.

E. Cumulatively, the combination of procedural and substantive errors deprived Mr. Brant of a fundamentally fair trial guaranteed under the Sixth, Eighth and Fourteenth Amendments.

F. Mr. Brant's Eighth Amendment right against cruel and unusual punishment will be violated as Mr. Brant may be incompetent at the time of the execution.

G. The prosecution withheld evidence material to guilt and sentencing in violation of Mr. Brant's Fifth, Sixth, Eighth and Fourteenth Amendment rights as set out under *Brady v. Maryland* and its progeny.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes

(7) Result: Denied.

(8) Date of result: Feb. 5, 2014, Rehearing denied March 12, 2014.

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: The Supreme Court of Florida.

(2) Docket or case number: SC14-2278

(3) Date of filing: Nov. 20, 2014

(4) Nature of the proceeding: State Petition for Writ of Habeas Corpus.

(5) Grounds raised: Appellate counsel was ineffective for failing to raise the claim that Florida's Proportionality Review violates federal due process and is unconstitutional; appellate counsel was ineffective for failing to raise the claim that the trial court erred in failing to grant Mr. Brant's motion to dismiss the kidnapping count; the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) renders Brant's death sentence unconstitutional and jury waiver unknowing and involuntary (supplemental briefing).

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? No

(7) Result: Denied.

(8) Date of result (if you know): June 30, 2016; rehearing denied August 23, 2016; mandate issued September 8, 2016.

(c) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes.

(2) Second petition: No.

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: The Second Petition was a State Petition for Writ of Habeas Corpus filed in the Florida Supreme Court which had original jurisdiction.

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE

Mr. Brant was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the guilt phase of his capital trial, in violation of Mr. Brant's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution. But for counsel's deficient performance, Mr. Brant would not have plead guilty but would have exercised his right to a trial and would not have waived a penalty phase jury. The Florida Supreme Court's analysis and ruling on this claim was premised on an objectively unreasonable determination of the facts in light of the state court record and an objectively unreasonable determination of clearly established federal law.

This court should grant the Writ.

(a) Supporting facts:

39-year-old Charles Brant, a devoutly religious, married father of two sons, with no prior criminal history, went on a methamphetamine-fueled- binge that raged out of control and resulted in the tragic rape-murder that is the basis of this case. Brant's court -appointed counsel's constitutionally deficient performance resulted in Mr. Brant pleading guilty as charged and waiving a penalty phase jury. Trial counsel's documented and specific failings, as will be set out more fully throughout this Petition, fell below the wide range of professional norms. Trial counsel's failures prejudiced Brant in both the guilt and penalty phases of his case.

Charles Grover Brant was charged by Indictment on July 14, 2004 with one count each of first degree premeditated murder, sexual battery, kidnapping, grand theft auto and burglary of a dwelling with assault and/or battery which occurred on July 1, 2004. Brant and the victim, Sara Radfar, were neighbors. On July 1, 2004, after being up for five or more days on methamphetamine, Brant went inside Ms. Radfar's home after telling her he wanted to take some photos of the tile work he had previously done for her. Once inside, he raped her and then strangled her twice, using a plastic bag, an electrical cord, stockings and a dog leash. He left her body in the bathtub. He then left the residence in Ms. Radfar's car. He returned home later and asked his wife to cut his long hair. His hair, and items belonging to Ms. Radfar, were found in Brant's garbage. Mr. Brant was questioned by the police and did not admit to the crimes, claiming instead that he saw a man in a yellow raincoat near the victim's apartment. A few days later, after unsuccessfully attempting to turn himself in to authorities in Orlando, Brant was arrested at his parents' home in Orlando in the early morning hours and interrogated by law enforcement. Strung out and extremely remorseful, Mr. Brant gave a statement to law enforcement admitting to the crimes.

The Office of the Public Defender was initially appointed to represent Brant but withdrew. The court appointed attorney Rick Terrana, on July 19, 2004, to represent Brant. Terrana subsequently moved to have Robert Fraser appointed to handle the penalty phase. Prior to Terrana's appointment, Brant's mother, Crystal Coleman, had retained attorney Jerry Luxenberg. Crystal told Luxenberg that Brant was a heavy user of methamphetamine. RV 43, p. 445. Luxenberg did not stay on the case because Crystal could not afford to pay him. However, Luxenberg gave Crystal a newspaper article about the effects of methamphetamine on a person's brain: "This is Your Brain on Meth, A Forest Fire of Damage." RV 14, 264-67; RV 43, p. 449. He gave her the article because it was "quite germane to this case" based on Brant's drug use *Id.* at 449. Had he stayed on the case, he would have investigated the effects of methamphetamine on

Brant's brain. *Id.* Crystal gave the article to Terrana because she thought it was important. RV 50, p. 1508-09. Luxenberg never spoke to Terrana or Fraser but would have done so had they called him. RV. 43, p. 449.

Terrana represented Brant on the guilt phase. *Id.* at 445. Fraser and Terrana did not work together on both phases, as recommended under prevailing norms in effect at the time and still in effect, but separated their obligations by guilt and penalty phase. Both lawyers had prior capital experience. However, Terrana had no experience, prior to Brant's case, with having a capital client plead guilty as charged without an agreement for a life sentence. *Id.* at 18. He also had never had a client plead guilty and waive a sentencing phase jury. *Id.*

Terrana testified in postconviction that he focused his theory of defense in the guilt phase on trying to attack Brant's confession and on his methamphetamine use. *Id.* at 455-57. Terrana said that it was "obvious" that they needed a "drug expert." *Id.* at 458. Terrana claimed he sent out form letters to a "number of psychologists and/or psychiatrists and/or toxicologists seeing if they could help." *Id.* at 22. At the postconviction hearing Terrana and Fraser also said that after they lost the motion to suppress, they met with Brant and advised him to plead guilty, a fact which the State courts credited as reasonable strategy because counsel investigated and considered alternatives. "Defendant and his trial counsels (sic) considered the alternatives to entering a guilty plea; however, after their original strategy to attack the confession was unsuccessful and after further discussions, they agreed defendant would plead guilty and proceed with a penalty phase jury." Order Deny 3.851(p. 18 of 119). The Florida Supreme Court credited this finding, determining that "Counsel's decision to advise Brant to plead guilty was reasonable given that the original defense strategy to attack the confession was unsuccessful [and] the advice was given after alternatives were considered and rejected . . ." . Opinion denying appeal of denial of postconviction relief (p. 17).

The motion to suppress was filed January 27, 2006, TR ROA V. 1, p. 198-207, and was set for hearing May 10, 2006. Terrana had not retained or consulted an expert prior to filing the motion. TR ROA Supp. V. 14, p. 1310 – 11. On April 24, 2006, Mr. Fraser sought a continuance on behalf of Mr. Terrana, who was not present in court that day, so that Terrana could find an expert. *Id.* The court continued the motion hearing to June 23, 2006. Mr. Fraser also announced in court on May 10, 2006, prior to a ruling on the motion to suppress and prior to obtaining an expert on the effects of methamphetamine on Brant's ability to waive his rights prior to being interrogated, that Brant was going to plead guilty and waive a sentencing jury. *Id.* at 1320-21. Mr. Fraser also said at that hearing that he had trouble contacting the mitigation specialist and meeting with her. *Id.* at 1320.

The issue raised in the motion to suppress was that Brant was "under the influence" of "methamphetamine." *Id.* at 1323. Terrana asked Dr. Maher, the psychiatrist appointed by the court to evaluate and present mitigation and who was made to testify about methamphetamine in the penalty phase, to assist with the motion. Maher told Terrana he "couldn't provide any meaningful insight." *Id.* at 1324. On June 22, 2006, the motion hearing was continued again and reset for August 3, 2006. *Id.* at 1331. At the June 22, 2006 court appearance, Fraser told the court that, "[T]he posture we're in right now, and Mr. Brant, the last time I discussed it with him agreed, we're going to enter a plea of guilty to the charge of first-degree murder, proceed to a penalty

phase before your honor.” The motion to suppress had not been heard and would not be heard for almost three more months. On June 22, 2006, Fraser also told the court, “And Mr. Terrana just asked what is the point of having a motion to suppress at all in that event. Well, that’s true, and the reason we’re having the motion to suppress is because of all of the United States and Florida Supreme Court cases putting out the ineptitude of counsel in first-degree murder cases, which has made us extremely cautious and we have to file every conceivable motion.” *Id.* at 1335-36.

Terrana agreed that Brant’s methamphetamine use could have been used as a mitigator in the penalty phase. *Id.* at 463. However, any decisions on how to present Brant’s methamphetamine use in the penalty phase would have been made by Fraser. *Id.* at 464. Fraser and Terrana did not coordinate their defense strategy or participate in each other’s efforts at retaining or consulting with experts.

Terrana used an expert to testify about Brant’s drug use in his motion to suppress Brant’s statements, but that expert, Dr. Fred Farzanegan, was not involved at all with any penalty phase issues. The motion to suppress statements was heard on September 8, 2006. Dr. Farzanegan’s direct testimony comprises seven (7) pages total in the record. Trial ROA Supp. V. 15, p. 1468-1475. Farzanegan met with Brant in June 9th and 14th of 2006. He did not talk to any of Brant’s family – all of whom were with him shortly before he was arrested and interrogated. *Id.* at 1477. On cross-examination, the State elicited that the only evidence Brant has ingested methamphetamine was his own self-report and there were no toxicology reports to substantiate Brant’s self-report. *Id.* at 1479. Trial counsel, as was shown in postconviction, never looked at the evidence in the evidence locker so did not know Mr. Brant’s hair was available for chemical analyses. The court reserved ruling and later issued a written order denying the motion to suppress.

After the motion was denied, counsel sent a letter dated November 17, 2006 (Def. Ex. 10 in postconviction), that memorialized the advice that counsel gave Brant to plead guilty because he was “less likely to incur the jury’s ire.” The letter explained that “having a full-blown trial on guilt would predispose the jury to impose death.” *Id.* at 72. “In the interest of not angering the jury,” Fraser advised Mr. Brant to enter a guilty plea. *Id.* at 73. Fraser admitted that the November 17th letter accurately reflected his advice to Brant about pleading guilty.

Upon advice of counsel, Mr. Brant pled guilty to all crimes as charged on May 25, 2007. He received no negotiated benefit for his guilty plea and continued to face the death penalty.

Fraser did not do any research or reading of scholarly journals to see what the effect of pleading guilty would have on a jury in a capital case or what a juror’s perceptions would be of a defendant who had already pled guilty. *Id.* at 73-74. He also did not consult with a jury expert. *Id.* at 74. Fraser stated that it would be “virtually impossible to get [a jury selection expert] on the public dole.” *Id.* at 100. Fraser, however, conceded he had never filed a motion seeking the appointment of a jury selection expert. *Id.* Fraser does not recall any discussions among the defense team about preparing a juror questionnaire in this case. *Id.* at 76. No meaningful juror questionnaire was ever prepared. Fraser could not recall what his thought processes were at the time of trial as to whether the sexual nature of the crime should have been addressed with the jury. *Id.* at 76-77. He likewise could not recall any discussions or his thought processes as to addressing the issue of drug use with the jury. *Id.* at 78-79. Terrana stated that he and Fraser did not retain or

file a motion for a jury selection expert. *Id.* at 471-72. Terrana “loved jury selection experts,” had used them and thought there was no downside to using them. *Id.* Terrana did not remember the theories or discussions he had with Fraser about how to address the jury in light of the fact that Brant had already pled guilty. *Id.* at 471. The decision about the strategy of questioning the jurors was “left up to Fraser.” *Id.*

Jury selection began August 20, 2007 and continued to August 21, 2007. TR V. 17, p. 1651. (Supp). Upon being informed that Brant had already been found guilty, Juror Brenda Ricci stated, “He’s guilty, he’s guilty and I’m really tired of the system being wasted, to be honest with you.” TR V. 18, p. 1816-17. Ms. Ricci continued, “Yes, I was upset just hearing what the judge described ... *and the five guilty verdicts that were already decided.* I mean, this was three years ago. I don’t understand due process to me. (sic).” *Id.* at 1817-18. Upon request by counsel, the trial judge inquired of the Panel if anyone else agreed with Juror Ricci. *Id.* at 1820. Approximately 19 potential jurors agreed with Ms. Ricci. *Id.* at 1828, 1830-1832.

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

Defense counsel renewed the motion to strike noting that the jurors had laughed after Juror Parker’s comment. The trial judge agreed: “Then there was laughter, yes.” *Id.* at 1954. The court “reluctantly” granted the defense motion over the State’s objection, determining that the jurors “starting with Ms. Ricci,” created an “atmosphere” that warranted striking the panel. *Id.* at 1964-1966.

The next day, August 22, 2007, Brant waived his right to a penalty phase jury and proceeded to a bench trial. Brant told the court he had stopped taking his depression medication about two months prior to waiving the jury. *Id.* at 11-12. The following day, the State put on the record that in a recorded jail phone call made by Mr. Brant the night before, Mr. Brant told a friend that, “pleading guilty was a big mistake.” TR V. 8, p. 244. The court conducted a bench trial and heard evidence over the course of two and a half days. The court sentenced Brant to death.

Terrana said at the postconviction hearing that jury selection was a “debacle. We had jurors standing up.” TR (Supp.) V. 18, p. 1958. He said that when the jurors found out Brant had already pled guilty, the “overwhelming response” of the jurors was that “it looked like a riot was about to take place.” *Id.* The jurors were angry and questioned why the court was “wasting their time.” Since Brant was guilty, they wanted to “fry him.” *Id.* at 474. It was a “fiasco.” *Id.* at 37.

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

Mr. Brant presented attorney Terence Lenamon to establish prevailing norms in effect at the time of Brant’s trial. Lenamon has been practicing law for 20 years. RV. 44, p. 684-85. He is

board certified. *Id.* His work is almost exclusively capital court appointed work in state court. *Id.* Lenamon has tried over 100 jury trials. *Id.* at 686. He has been involved in 80 to 85 first degree homicide cases where death was a possibility and has tried 13 death penalty cases to verdict. *Id.* Lenamon was allowed to render opinions in the area of prevailing norms in Florida between 2004 and 2007. *Id.* at 699-70. The 2003 ABA Guidelines were in effect at the time of Brant's trial and are a guide a court can look to in assessing counsel's performance. *Id.* Other guides include case law and seminars. *Id.*

Mr. Lenamon offered the following testimony which was not contradicted. Prevailing norms establish that capital lawyers should present an integrated defense and "front load mitigation" where possible. *Id.* at 700-05. Capital lawyers are to work together as a team with an integrated defense. *Id.* at 706-07. Florida lawyers have been taught that advising a client to plead guilty and waive a sentencing jury is a "really bad idea." *Id.* at 724-28. Such advice should only be given after a thorough investigation, based on identifiable facts. *Id.* Lenamon explained that the Commentary to ABA Guideline 10.9.2 instructs that when "no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should *be extremely reluctant* to participate in the waiver of the client's rights." *Id.* Prevailing norms also instruct lawyers that when they have a client who is depressed it is important to provide support to help the client from making poor decisions. *Id.* at 730-31. Mr. Lenamon also stated that he had successfully argued for the court to appoint a jury selection expert in a capital case in Florida state court.

Mr. Brant also presented the testimony of jury selection expert, Toni Blake. Ms. Blake has consulted on more than 35 capital murder jury selections throughout the South, including in Florida. *Id.* Blake was retained by post-conviction counsel to review the jury selection and waiver in Brant's case, and the mitigation investigation.

Ms. Blake presented the following testimony without contradiction. Ms. Blake testified that if she had been consulted in this case by the trial attorneys, she would have advised against entering a guilty plea based on the "research in the field about guilty pleas." *Id.* at 768-72. The research, which was widely known and available at the time of the entry of Mr. Brant's guilty plea, shows that jurors have a different understanding of the law than lawyers and judges and think that premeditated murder, for example, requires advance planning and do not understand that it can be based on a snap-second decision. *Id.* When a client has pled guilty to premeditated murder or kidnapping, the jurors do not have the benefit of the law to understand what the elements of the crime are. *Id.* The research also shows that when a juror spends time with a defendant in close proximity, they are more likely to find a similarity or factor in that defendant's life that makes it more likely that the juror will render a life verdict. *Id.* at 770-71. The longer a juror gets to watch a defendant in court – two days versus ten days for example – the longer the juror has to develop familiarity in a positive way. *Id.* Repeated exposure to bad facts is actually helpful in the jury context because the jurors experience "systematic desensitization." *Id.* at 771-73. Exposing a jury over and over to stimuli reduces the emotional impact. *Id.*

In terms of advising a client as to whether to waive a sentencing jury and be sentenced by a judge who has imposed the death penalty before, she would strongly advise a client not to do so

because *the research shows* that once someone has effectuated or voted for death, it is much easier to do it the second time than it was the first time. *Id.* at 774.

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

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

Brant argued to the State courts that his counsel rendered ineffective assistance in advising him to enter a guilty plea. Counsel gave the advice - that the jury would be less likely to be angry with Brant - without conducting a reasonable investigation, without consulting a jury expert or doing any investigation, research or reading on the basics of jury decision making. Counsel's ill-informed or uninformed advice was patently misguided. The jurors were irate that Brant had pled guilty and still wanted a penalty phase trial. As a result, Brant then waived a penalty phase jury. Brant argued that but for counsel's deficient performance, Brant would not have pled guilty but would have exercised his right to a jury trial at both guilt and penalty phase.

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

The Florida Supreme Court affirmed the State postconviction court's ruling and denied Brant's claim ruling on both *Strickland* prongs:

The evidence presented at the evidentiary hearing established that trial counsel were seasoned criminal trial attorneys with experience handling both phases of capital trials. They were not constitutionally required to consult an outside expert in order to gauge a jury's likely reaction to Brant pleading not guilty to a crime of which he was clearly guilty. Their own expertise and experience in trying capital first-degree murder cases rendered them sufficiently qualified to advise Brant that a guilty plea would limit the jury's exposure to the damaging nature of

his confession and may help him avoid the ire that a jury might hold if he tried to contest his guilt.

Counsel's decision to advise Brant to plead guilty was reasonable given that the original defense strategy to attack the confession was unsuccessful, the advice was given after alternatives were considered and rejected, and the State was proceeding on theories of both premeditated and felony murder with very strong evidence. Moreover, counsel's advice and Brant's decision to follow that advice provided a benefit to Brant because the trial court considered his guilty plea to be a mitigating circumstance of moderate weight.

Brant also asserts that the postconviction court erred in failing to consider the American Bar Association Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines) regarding the hiring of a jury consultant. The only reference to the hiring of a jury consultant in the ABA Guidelines is in the commentary to section 10.10.2—titled Voir Dire and Jury Selection—which states, “Given the intricacy of the process and the sheer amount of data to be managed [in voir dire and jury selection], counsel should consider obtaining the assistance of an expert jury consultant.” The ABA Guidelines merely recommend that counsel consider consulting with a jury expert. Moreover, the ABA Guidelines are neither rules nor requirements, and the failure to comply with them is not necessarily deficient. *See Mendoza v. State*, 87 So.3d 644, 653 (Fla.2011) (“The ABA Guidelines are not a set of rules constitutionally mandated under the Sixth Amendment and that govern the Court's *Strickland* analysis.”). Under the circumstances presented, we find no merit to the claim that counsel were deficient for failing to retain a jury consultant in compliance with the ABA Guidelines.

Brant also failed to establish that he was prejudiced by counsel's failure to conduct research on jury decision-making or consult with a jury selection expert. In order to establish prejudice, Brant was required to show that had counsel researched jury decision-making or consulted with a jury selection expert, there was a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial.

“[I]n determining whether a reasonable probability exists that the defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial[and] the colloquy between the defendant and the trial court at the time of the plea....” *Grosvenor*, 874 So.2d at 1181–82. Brant has not suggested that there was any particular defense available to him that was likely to succeed at trial. In light of his confession, which was corroborated by the crime scene, the DNA evidence, and the presence of items taken from the victim's home in his trash, it does not appear that any defense would have been available to Brant and likely to succeed at trial.

The postconviction court found Terrana's testimony that "from day one" Brant did not want to have a guilt-phase jury trial more credible than Brant's testimony that he did not remember telling his attorneys that he wanted to plead guilty and he was just doing what his attorneys told him to do during the plea colloquy. This Court has stated that it will not substitute its judgment for that of the postconviction court as to the credibility of witnesses so long as the findings are supported by competent, substantial evidence. *See Long*, 118 So.3d at 804; *Lowe v. State*, 2 So.3d 21, 29–30 (Fla.2008).

The postconviction court's finding as to Terrana's credibility was supported by the fact that within a few days of the murder, Brant attempted to turn himself in to law enforcement, confessed to the crimes, and requested the death penalty. The postconviction court's finding that Brant was not credible is supported by the fact that his plea colloquy contradicted his evidentiary hearing testimony. The plea colloquy between Brant and the trial court does not indicate that Brant had any hesitation regarding his plea. Instead, it demonstrates that the decision to plead guilty was Brant's alone, that he was fully aware of the consequences of his plea, and that he was satisfied with the representation provided by his attorneys. Additionally, we concluded on direct appeal "that Brant's plea was knowingly, intelligently, and voluntarily made." *Brant*, 21 So.3d at 1288.

Brant has not established that counsel would have advised him not to plead guilty had they consulted with a jury selection expert or researched jury decision-making. Nor has he established, under the totality of the circumstances, that there is a reasonable probability that had he been advised not to plead guilty, he would have insisted on going to trial. We affirm the denial of relief as to this claim.

Brant v. State, 2016 WL 3569418, at *9–10 (Fla. June 30, 2016), *reh'g denied*, 2016 WL 4446453 (Fla. Aug. 23, 2016).

In denying this claim, the Florida Supreme Court made unreasonable factual determinations in light of the state court record and unreasonably applied clearly established federal law. Mr. Brant, through a separate motion filed contemporaneously with his Petition, seeks leave to file a Memorandum of Law, setting out argument and legal authority for this claim.

(b) If you did not exhaust your state remedies on Ground One, explain why:

(c) Direct Appeal of Ground One:

- (1) If you appealed from the judgment of conviction, did you raise this issue? No
- (2) If you did not raise this issue in your direct appeal, explain why: Florida law requires claims of ineffective assistance of counsel to be raised in postconviction proceedings.

(d) Post-Conviction Proceedings:

- (1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Motion for Post-Conviction Relief Pursuant to Fla. R. Crim. Pro. 3.851.

Name and location of the court where the motion or petition was filed: Thirteenth Judicial Circuit, In and For Hillsborough County, Florida

Docket or case number (if you know): 04-CF-12631

Date of the court's decision: Feb. 5, 2014, Rehearing denied March 12, 2014.

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? Yes

(4) Did you appeal from the denial of your motion or petition? Yes

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Florida Supreme Court, Tallahassee, Florida

Docket or case number (if you know): SC14-787

Date of the court's decision: June 30, 2016; Rehearing denied, August 23, 2016.

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: None

GROUND TWO

Mr. Brant was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the penalty phase of his capital trial, in violation of Mr. Brant's Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment Rights Under the United States Constitution. The Florida Supreme Court's analysis and ruling on this Claim was premised on an objectively unreasonable determination of the facts in light of the State Court record and an objectively unreasonable determination of clearly established federal law. This court should grant the Writ.

(a) Supporting facts:

Court appointed counsel rendered ineffective assistance in failing to investigate and present mitigation. Counsel's deficiencies rendered the proceeding unreliable and undermine confidence in the outcome. There exists a reasonable probability of a different result. The following facts, with some repetition to other grounds in this Petition, support this claim. The facts are repeated in various grounds to avoid any waiver.

I. Facts Relevant to Deficient Performance

Mr. Brant presented attorney Terence Lenamon to establish prevailing norms in effect at the time of Brant's trial. Lenamon has been practicing law for 20 years. RV. 44, p. 684-85. He is board certified. *Id.* His work is almost exclusively capital court appointed work in state court. *Id.* Lenamon has tried over 100 jury trials. *Id.* at 686. He has been involved in 80 to 85 first degree

homicide cases where death was a possibility and has tried 13 death penalty cases to verdict. *Id.* Lenamon was allowed to render opinions in the area of prevailing norms in Florida between 2004 and 2007. *Id.* at 699-70. The 2003 ABA Guidelines were in effect at the time of Brant's trial and are a guide a court can look to in assessing counsel's performance. *Id.* Other guides include case law and seminars. *Id.*

Mr. Lenamon offered the following testimony which was not contradicted. Prevailing norms establish that capital lawyers should present an integrated defense and "front load mitigation" where possible. *Id.* at 700-05. Capital lawyers are to work together as a team with an integrated defense. *Id.* at 706-07. Florida lawyers have been taught that advising a client to plead guilty and waive a sentencing jury is a "really bad idea." *Id.* at 724-28. Such advice should only be given after a thorough investigation, based on identifiable facts. *Id.* Lenamon explained that the Commentary to ABA Guideline 10.9.2 instructs that when "no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should *be extremely reluctant* to participate in the waiver of the client's rights." *Id.* Prevailing norms also instruct lawyers that when they have a client who is depressed it is important to provide support to help the client from making poor decisions. *Id.* at 730-31.

Mitigation investigation *at a minimum* requires counsel to investigate both parents and their multi-generational history. *Id.* at 708-09. The mitigation should include looking at the client's life prior to conception to the present day, including while he is incarcerated awaiting trial. *Id.* at 706-07. Lawyers should look for a family history of mental illness, alcoholism, addiction and other patterns of behavior.

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

When a capital attorney is court-appointed, the attorney must file the appropriate motions with the court in order to obtain the resources they need in order to constitutionally represent their client. *Id.* at 716-17. Capital attorneys should seek "specialist experts" when needed. *Id.* at 717-18.

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

Mr. Brant also presented the testimony of jury selection and mitigation expert, Toni Blake. Ms. Blake has consulted on more than 35 capital murder jury selections throughout the South, including in Florida and worked as a mitigation consultant on many capital cases. *Id.* Blake was retained by post-conviction counsel to review the mitigation investigation in Brant's case.

Ms. Blake presented the following testimony without contradiction. In a mitigation investigation it is important to get information from both sides of a client's family, and talk to multiple sources to discover the family rumors and mental health issues within the family. *Id.* at 778. It is important to go back multiple generations, if possible, and look at genetic issues and environmental issues. *Id.* This is true even if the father and the child never met. *Id.* at 780. It is also important not to rely solely on a capital defendant's mother. Mothers of capital defendants often want to hide their own deficiencies or keep family secrets. *Id.* "So mom alone, obviously, or dad alone would never suffice." *Id.*

Evidence adduced at postconviction hearing regarding trial counsel's investigative efforts or lack of investigative efforts as to mitigation and failure to inform Brant of available mitigation

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

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

Fraser suggested the following explanation for his failure to investigate: "So what I'm suggesting is, I didn't know about the father. If I did know about the father it was like too many cooks spoil the broth. I only needed a certain number of mitigation witnesses. I'm not going to parade his family tree through the penalty phase." *Id.* at 526-27.

Fraser conceded that the ABA Guidelines stress the importance of investigating a client's life from conception, or earlier, and understanding the client's family background from *both* sides. *Id.* Fraser also conceded that as "a practical matter or maybe as a legal matter [contact with Brant's father] *should have been done, could have been done.*" *Id.*

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

Fraser stated that he did not consider Brant's methamphetamine addiction an important mitigating factor in this case because Brant used "methamphetamine so he could work more, not because he was an addict." *Id.* When asked if his investigation about methamphetamine stopped

there, Fraser said he *could not remember what his thought processes were*. *Id.* at 532-33. Fraser said he didn't know if there was a genetic link to addiction but he thought that "some people, like alcoholics, have a predisposition to drug abuse or alcohol abuse and it runs in families." *Id.* at 533.

Fraser had a conversation with Hillsborough Circuit Judge Debra Behnke about Brant's case. Judge Behnke suggested Fraser consult a methamphetamine expert and gave Fraser the names of two experts on methamphetamine addiction. *Id.* at 564. Fraser indicated that Judge Behnke was "particularly impressed" with the experts' explanation of "how methamphetamine affects the brain." *Id.* at 537-38. As a result of his conversation with Behnke, Fraser sent a letter to Toni Maloney, his mitigation investigator, with the experts' CVs attached and asked her to contact them. (RV 43, p. 534; V 10, p. 1875-79.). Fraser thought he spoke to one of the experts and they said they couldn't appear for reasons he didn't remember. *Id.* at 540-41. **He had no other explanation for why they weren't retained** and none was contained in his file. *Id.* Fraser agreed that it would have been helpful to find a person who had used methamphetamine with Brant within a week or two of the crime and had asked his investigator to find such a witness but waited until two months prior to the trial. *Id.* at 542. No such witness was presented at trial.

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

Fraser conceded that no one from the defense team went to the evidence locker to look at the evidence seized by law enforcement. *Id.* at 543. Fraser was not aware that there was a clump of Brant's hair in evidence. *Id.* He was not able to say whether hair can be tested for the presence of methamphetamine. *Id.* The hair tested positive for methamphetamine and MDMA in post-conviction.

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

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

The witnesses mitigation investigator Toni Maloney located and spoke to were: Crystal Coleman, Garrett Coleman, Melissa McKinney, Gloria Milliner, the Lipmans, the Hardens, Steve

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

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

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

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

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

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

McClain testified that it was widely known in 2004-2007 among mental health professionals that meth use can cause brain damage. *Id.* at 609-10. McClain agreed that ingesting plaster and lead-based paint is also a risk factor. *Id.* at 610. McClain knew Brant had ingested plaster as a child but was not asked about it, even though she regarded it as relevant. *Id.* McClain was aware that Brant repeatedly banged his head as a young child but was not asked about it. *Id.* at 611. McClain testified that this was also a risk factor. *Id.* McClain's opinion "couched within the confines of a psychologist," was that Brant had "areas of very significant impairment in the brain that would suggest he had memory problems, language problems, or other areas that had been affected by brain trauma." *Id.* at 611-12. McClain also diagnosed Brant with depression. *Id.* at 612-13.

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

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

Maher agreed that it was widely known among mental health professionals in 2004-2007 that childhood abuse and neglect can have lifelong effects on an individual's emotional and psychological development. *Id.* Maher was asked at trial about Brant's meth use and how it affected him at the time of the crime. *Id.* Maher stated that he had "general experience as a physician" and "some specific knowledge" as a psychiatrist on "amphetamine use" but that he has not engaged in research on severe abuse "as was present in this case," and does not have special credentials in the area of substance abuse. *Id.* at 641-42. He also does not have research experience on the effect meth use has on the brain. *Id.* Maher "made it clear" to Fraser that he lacked "specialized" knowledge and that he thought the case was "very much about amphetamine abuse and its effect on the brain," and suggested Fraser should find other experts with more familiarity with methamphetamine for this case. *Id.* at 642-43.

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

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

Wu was contacted by Wood and Maloney in January of 2007. RV 46, p. 965-64. Wu's role was to provide a second opinion on the PET scan abnormalities of Brant. *Id.* at 973. He was not sent any additional information about Brant's psychological or neuropsychological history or assessment. *Id.* at 974. He did receive prison records which showed Brant was prescribed Wellbutrin, Trazodone and Haldol, suffered from depression and that he had used crystal meth, ecstasy, and methamphetamines. *Id.* at 977. Wu only spoke with the trial attorney once - on August 24, 2007. *Id.* at 978. He was scheduled to fly from California to Tampa but found out at the last minute that he would not be called as a witness. *Id.*

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

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

Wood was retained by trial counsel in late 2006 to conduct a PET scan of Brant's brain. The scan was administered in January 2007. *Id.* at 1662. Wood attended the administration of the scan, observed the reconstruction of the three-dimensional images and concluded that the images were sound and without any "artifact." *Id.* at 1662-63. He concluded that Brant's scan was a valid scan. *Id.* Wood then interpreted the PET scan and took measurements of the areas of the brain that were behaviorally important in the case to assess whether those areas of the brain were showing normal or abnormal activity. *Id.* at 1664. Wood determined that there were "very striking abnormalities" in the "frontal lobes bilaterally right at the pole, right at the very tip of the frontal lobes on both sides, and in the middle of the frontal lobes where the two sides of the brain meet in the middle. . . ." *Id.* at 1665.

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

Wood recalled that a phone call to review the PET scan images via computer with Wu and Fraser was scheduled to occur after Fraser had finished selecting a jury. *Id.* at 1679-80. The phone call "never happened." *Id.* at 1680. He has no recollection of ever sitting down with Fraser and going over the PET scan images in any detail. *Id.* Wood does not know why he was not asked to testify. *Id.* at 1681-82. If he had been called to testify, he would have given the same testimony he provided at the evidentiary hearing but would have also included the risk factors for brain damage

he was not told about until post-conviction: the lead-paint exposure, the head-banging, the elevator accident, and the chronic methamphetamine use. *Id.*

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

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

II. Facts Relevant to Prejudice

The evidence presented at the bench trial

The entire trial, including the State's case in aggravation, lasted a mere two and a half days. The State presented a number of witnesses to establish aggravation. The testimony established that the victim, Sara Radfar, had been raped and strangled, through the use of a dog leash, electrical cord and stocking. There was also a plastic bag over her head. Brant confessed to the crime. Brant was high on methamphetamine at the time of the offense. He had been on a methamphetamine binge for eight days. Prior to the crime, he had acted out a series of escalating rape fantasies with his wife. He had no prior record and was the father of two young boys who he loved very much. He had met his wife at a Christian college and was deeply religious. Brant told law enforcement that he persuaded Radfar to allow him into her home, and then sexually assaulted her and started to choke and suffocate her. When she regained consciousness he started to choke her again and placed her in the bathtub where he strangled her with the leash, cord and stocking. See also, *Brant v. State*, 21 So.3d 1276, 1277-1283 (Fla. 2009); see also TR V., 7, p. 21-128; TR V. 8, p. 131-240 (Brant's ex-wife described Brant's drug-use and frequent and escalating pattern of acting out rape fantasies); TR. V. 9, p. 248. In spite of the tragic details of the crime, **the trial court only found only two aggravating factors:** 1) Heinous, atrocious and cruel (HAC), and, 2) Murder in the course of a felony, e.g. sexual battery.

On the first afternoon of the bench trial, August 22, 2007, the State presented Deputy Fitzpatrick, who responded to the scene and discovered Ms. Radfar's body; Steven Ball, Ms. Radfar's ex-fiancée, who had lived with her for a period of time at the crime scene; Det. Kathy Frank Smith, who spoke to Brant at the scene and said he was "lucid" and "coherent"; Deputy Rodney Riddle, who spoke to a co-worker of Ms. Radfar's who had called her in as missing from work and who also spoke to Mr. Brant at the scene; and John Burt, a neighbor, who spoke to Brant after police discovered Ms. Radfar's body.

The following morning, August 23, 2007 the State called Melissa McKinney, Brant's wife, to establish aggravation and rebut mitigation. McKinney testified about their marriage, how they met, Brant's escalating pattern of acting out rape fantasies during their marriage just prior to the murders and Brant's use of methamphetamine. McKinney also testified about Brant's actions just after the murder. The next State witness was called on the afternoon of August 23, 2007, Dr. Lee, the medical examiner, who testified that Miss Radfar was raped and then died from strangulation and suffocation.

Brant's counsel then presented five witnesses on the afternoon of August 23, 2007 who were taken out of order. The first witness, Reverend Hess testified that Brant and his wife were students at the Blue Ridge School of the Prophets. Hess said he was aware of Brant's drug use prior to attending the school and that Brant was a likeable and friendly person. Brant did some electrical wiring for Rev. Hess. He was only at the school a short time. Brant called Hess about reapplying to the school and in so doing told Hess that he had gotten involved in illegal drugs again but was trying to straighten out his life. Brant did not reenroll. TR ROA V. 9, p. 281- 87. On cross-examination, the State suggested that Brant was kicked out of the school due to forbidden sexual activity. Id. p 288-91. The second witness, James Harden, testified that he knew Brant because he was in the same Bible School as his son, also named James Harden. He met Brant at a church function in Bradenton. Brant had an "odd hairdo." He then saw him two other times, at his son's graduation and at a cookout after graduation. Harden also knew Brant's wife and Brant would later live with Mr. Harden while he was dating Missy. Brant was a clean and respectful house guest. Harden was floored when he heard what had happened. Harden and his wife visited Brant in jail prior to his trial. Brant had good days and bad days, sometimes breaking down and "weeping for his sons." Id. at 299.

The State then recalled Ms. McKinney (Missy) to testify that Brant wore gloves when he acted out his rape fantasies and that they had a cleaner in their home similar to that used at the crime scene. Id. at 304-05.

The defense then called their next witness, Steve Alvord. Alvord was an elevator mechanic who worked with Mr. Brant. He testified that Mr. Brant was a good worker. Id. at 308-09. He never knew Brant to be violent. He visited Mr. Brant at jail. Id. at 312-13.

The State then called Det. Ratcliffe, who took photos inside the crime scene. Id. at 319. The State then called Deputy Sheriff Christi Esquinaldo. Id. at 323. Dep. Esquinaldo testified about evidence she collected and Brant's confession.

The defense then called Thomas Rabeau, a retired volunteer chaplain at the county jail. He described his visits with Brant. He said Brant was having a hard time and he met with him every Wednesday for three years. At the first visits Brant cried a lot. He and Rabeau discussed forgiveness and other aspects of Christianity. Id. at 334-42.

The State then called Det. Losat who had interrogated Brant. Losat said Brant did not appear to be under the influence of drugs. Losat also summarized Brant's confession. Losat was the last witness for the day.

The next day, August 24, 2007, the Defense called Pastor Leon Jackson. TR ROA V. 10, p. 378. Pastor Jackson was the youth minister at his church when he first met Brant and his wife, Missy. Brant sought marriage counseling at the church in 2003. They prayed together. Brant also confided that he had a drug problem. Pastor Jackson thought Brant had "a hole in his heart," which he described as a need to impress people and over compensate due to insecurity. Pastor Jackson thought this was because Brant grew up in a "dysfunctional family," "not having a great relationship" with his stepfather and a mother who over lavished her children with things but who didn't provide much substance. Id. at 378-87, Jackson said he believes that Chuck has knowledge of God and "he's probably never gonna get out of [prison], that God could use him to maybe prevent young men from doing the – going down the road he went." Id. at 387.

The Defense then called Dr. Michael Maher, a psychiatrist. Dr. Maher met with Brant and also interviewed Brant's wife. The description of documents he reviewed is at TR ROA V. 10, p. 388- 89. He did not review any medical records, or even talk to Brant's mother. Maher was asked to speak about Brant's methamphetamine use, his brain damage and his background.

Maher explained that his primary method of learning about methamphetamine abuse was through evaluating individuals with substance abuse problems. He would testify in postconviction that he was not an expert in methamphetamine and had suggested to trial counsel that they should retain an expert in methamphetamine. Dr. Maher testified that Brant used meth to work and developed a methamphetamine dependence. Id. at 400-03. He said Brant would feel energized, would have racing thoughts, difficulty sitting still, he might hear noises that he wasn't sure were completely real and have tactile misperceptions and auditory hallucinations. Id.

Maher also talked very generally about the brain and executive functioning as it relates to impulse control. Id. at 404-05. He would testify in postconviction, as noted above, that he was surprised when he was told by trial counsel that counsel would not be calling Drs. Wood and Wu, the PET scan experts and that counsel would ask Maher to testify about the PET scan of Brant's brain. Maher was asked about Dr. McClain's IQ testing and Dr. wood's finding of four identifiable areas of the brain "primarily in the frontal lobe and then secondarily in the thalamus that showed abnormal patterns of glucose uptake on the PET scan. These are areas of the brain that are important in impulse control and executive functioning and are fundamental to reasoning, good judgment." Id. at 408-09. As evidenced by decreased glucose uptake, those areas of the brain that affect impulse control, decision-making and judgment have a "problem of some significance." Id. at 408. Maher also said he was "generally familiar" with PET scans. He then said that Brant's PET scan showed an abnormal brain but "what that means and what the clinical diagnosis

associated with that is just a bit beyond current medical science.” Id. at 410. Maher said that the PET scan was “consistent with a diagnosis that includes an impulse control element.” Id. at 413.

Maher was asked about Brant’s background, but had only spoken to Brant and his wife, as noted above, and had not spoken to Brant’s mother, sister or any extended family members or friends. Maher testified generally about Brant’s background, stating he had a “history of problems going back into childhood,” that were consistent with depression and “relationship issues.” Id. at 414. He had a “pattern of sexual behavior with his wife which predated this incident and his --- certainly his severe use of methamphetamines, which are consistent with an obsessive pattern of sexual interest.” Id. at 415. Maher said: “His relationship with his mother, his grandmother, his stepfather, his wife. All of those relationships show significant patterns of pathology.” Id. Maher testified that Brant used drugs to escape from his “chronically depressed and anxious state of mind” Id. Maher concluded by stating that he diagnosed Brant with methamphetamine dependence, severe, associated with a psychotic episode, sexual obsessive disorder and chronic depression. Id. at 416. Maher also said that “as a result of mental disease, defect” Brant was substantially impaired and limited in his ability to conform his conduct to the law. Id. at 418.

The Defense then called Gloria Millner. Id. at 464. Millner, who was very close friends with Crystal Coleman, Brant’s mother was asked about Brant and Brant’s stepfather but nothing about Crystal. Millner talked about how Marvin Coleman kicked Brant out of his house when Brant was an adult and married to Missy. Id. at 466. Millner described Marvin Coleman as a “very controlling person,” but didn’t want to “put him down” because he had passed away. Id. at 468. She did admit to being familiar with the time Marvin Coleman was arrested for domestic violence in Virginia. Id. at 469. Millner also said she never saw Brant drink or use drugs and that he was an “awesome” father. On cross, Millner stated that Crystal favored Garrett. Id. at 474. She admitted that she never saw Marvin “lay hands” on Brant or Crystal but she saw the bruises on Crystal. Id. at 475-76.

The Defense then called Crystal Coleman, Mr. Brant’s mother. Id. at 479. Crystal testified that she had three children, Chuck, Sherry and Garrett. She said her own mother suffered depression for 25 years and her father, “I guess if it’s called an illness, was an alcoholic.” Id. at 481. She said, “her father drank every day, beat my mother half to death every night, and no one took care of the children.” Id. at 481. She was not asked to describe her childhood in any detail or elaborate on what she meant by that. She then testified that her grandmother was placed in a mental institution for depression, although she probably meant her own mother, who was Brant’s grandmother. She was not asked any further details about that. Crystal then described Eddie Brant, Charles Brant’s father, as a quiet person who worked a lot of hours and had a low IQ. Id. at 482. Crystal said their marriage ended because her Aunt Jenny “took [Eddie Brant] away from me.” Id. at 482. This happened when Charles Brant was seven or eight weeks old. Id. at 483. Crystal attributed her problems after giving birth to being “snake bit.” Id. at 483. She described a traumatic birth, “an all-night thing, which I died twice. I don’t know how long I died, but I did die twice.” Id. at 483. She continued to have problems after giving birth to Charles Brant, her “nerves were real bad and the house was quite ugly.” Id. at 484. She ended up walking the streets at night and eventually being admitted into a mental hospital because she wanted to kill herself. Id. at 484. She said that Charles Brant was sent to the paternal grandparents and Eddie Brant kept Sherry, their daughter. Crystal said she was diagnosed with post-natal depression and given shock

treatments. Id. at 487. She is still under medical care more than 40 years later and has been prescribed Xanax, Prozac and Effexor. Id. Crystal said that she had an “animosity” with her son from infancy, that he would kick her and didn’t want her to care for him. Id. at 489. She also said he banged his head against the wall and ingested lead paint. Id. at 489. As noted above, she did not speak to any experts to convey this crucial piece of information to them. Crystal stated that she remarried when Charles Brant was five years old. Id. at 492. Crystal was shown some school records which she did not recognize. Id. at 495. Crystal then said that life with her second husband, Marvin Coleman, was horrible. It was as if she had “married a monster.” Id. at 496. Marvin would call her names and he would spank and whip Charles Brant so hard that “blood would go down the back of his legs.” Id. at 496. Marvin drank and was arrested in Baltimore for domestic violence. Id. at 497. Crystal also stated that Marvin drank more when they moved to Florida and he would come home drunk and “mentally and physically torture me up until four or five in the morning, at which time I would take a shower and go to work and leave the house.” Id. at 499. She was not asked to describe or explain what she meant by this. Crystal also said that Marvin was “negative and derogatory” to Brant. Id. He only went to one of Brant’s football games but he made so much fun of Brant that she and Marvin left and Marvin never went to another game. Id. at 501. Brant moved out when he was 17. Id. at 502.

The Defense next called Sherry Coleman, Brant’s older sister. Id. at 516. Sherry said Marvin Coleman was a bully towards her brother and verbally and mentally abusive to her mother. Id. at 517. Marvin would make such cruel comments at dinner that eight-year-old Brant would cry and not be able to eat. Id. at 518. She never saw Marvin physically abuse Brant. Id. at 520. She never saw him abuse her mother but was aware of it. Id. at 521. Sherry said that Marvin abused her sexually when she was 13 to 16 years of age. Id. at 522-23. She was told by trial counsel to “give [the court] some idea of what that consisted of . . . without getting into a lot of unnecessary detail.” Id. at 523. She said Marvin “attacked” her. Id. at 523. She also described taking Brant to the police station when he tried to turn himself in. Id. at 528. She also said that her brother Garrett has a “crack” problem. Id. at 528.

The trial reconvened on Monday August 27, 2007. The Defense called Dr. Valerie McClain, a forensic neuropsychologist. TR ROA Vol. 10, p. 550. Dr. McClain conducted a clinical interview and administered several tests. As far as being given information about Brant’s background, she read depositions from Sherry and Garrett and interviewed Crystal. Id. at 553-54. Brant’s testing showed that he had problems with “learning and memory.” Id. at 554. He had a 25 point verbal-performance IQ split which is statistically significant and caused her to recommend trial counsel to request a brain scan. Id. at 555. She diagnosed Brant with a learning disorder based on testing and the school records she reviewed. Id. at 556. McClain diagnosed Brant with polysubstance dependence, major depression and cognitive disorder NOS. Id. at 558. Cognitive disorder “simply refers to areas of problems in the brain,” such as “memory, language, attention, [and] concentration . . .” Id. at 558. McClain opined that Brant’s ability to conform his conduct to the requirements of the law was substantially impaired based on his brain functioning and academic records. Id. at 558-59. She was not asked by counsel to comment or educate the court about methamphetamine and its overpowering addictive qualities or effect on the brain. The Defense announced rest. Id. at 581.

The State called James Harden in rebuttal. *Id.* at 596. He is the son of James Harden who testified earlier. Mr. Harden reported Mr. Brant's "messing up" while at Bible school to the principal of the school. That resulted in Mr. Brant and Missy Brant's dismissal from the school. *Id.* at 600.

The State then called Dr. Donald Taylor, a state forensic psychiatrist. Dr. Taylor interviewed Brant and diagnosed him with substance dependence, learning disorder and sexual sadism. *Id.* at 608-09. Dr. Taylor opined that during the sexual battery Brant had a substantial impairment in the ability to conform his conduct to the law but did not have that problem or impairment with regards to the murder. *Id.* at 612.

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

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

The court conducted a Spencer Hearing on October 8, 2007. The court took additional testimony from Brant's ex-wife who spoke about Brant's relationship with his two young sons, TR V. p. 1181-1185, and the State introduced transcripts of Garrett Coleman's statements given to the State on August 27, 2004 and July 19, 2006. TR V. 7, p. 1188-1189, which the State used to rebut mitigation.

On November 30, 2007, the court sentenced Brant to death finding two aggravating factors - that the murder was committed during a sexual battery and HAC and 13 mitigating factors. TR. V. 4, P. 640 – 683; TR V. 7, p. 1191-1212. The 13 mitigating circumstances are set out in the Florida Supreme Court's Opinion on direct appeal, the trial court's Sentencing Order, and the Order denying post- conviction relief. *Brant v. State*, 21 So.3d 1276 (Fla. 2009); R V. 18, p. 3472-75. All but four of the mitigating circumstances were given "little weight." Some of the circumstances were duplicative, such as Mr. Brant's lack of prior criminal history and that he was 39-years-old and "had led a crime-free life," both of which were given little weight. The court also gave Brant's remorse, family history of mental illness, borderline verbal intelligence and the fact that he is not a sociopath or psychopath little weight. Likewise, the trial court gave the fact that Brant was a good father, a good worker and a non-violent person little weight. The court gave moderate weight to the fact that Brant sought help for his drug-dependence, that he was using "methamphetamine before, during and after the murder and other crimes." The court found as a

separate mitigating factor that Brant's "chemical dependence, sexual obsessive disorder," and "symptoms of attention deficit disorder" were deserving of moderate weight. The court gave Brant's confession, guilty plea and jury waiver moderate weight. Lastly, the court gave moderate weight to the combined facts that Brant "was emotionally, mentally and physically abused by his stepfather from age 5 to 17; he has diminished impulse control due to drug dependency, and as a result, his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired. He has a diagnosed sexual obsessive disorder."

Lay witness mitigation testimony offered at postconviction

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

Eddie Brant

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

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

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

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

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

Annice Crookshanks, Eddie Brant's younger sister, "was 13, 14 or 15" when Chuck was born. *Id.* at 1199; 1207. She remembered her "mother getting a call [on New Year's Eve] to come to Ohio and pick up [Chuck]." *Id.* All Annice knew at the time was that Crystal was in the hospital. *Id.* She later learned that Crystal had been in a mental hospital having suffered a nervous breakdown after giving birth to Chuck. *Id.* at 1208. A few years after that, when she was 17 or so, she learned that Eddie was not Chuck's father. *Id.* at 1209. She never knew who Chuck's father was. *Id.* "Everybody" in her family knew that Eddie was not Chuck's father. *Id.*

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

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

After the DNA results came back, Sherry wanted to be the one who confronted her mother. The DNA sibship testing confirms Chuck and Sherry are half-siblings with an 87% probability of accuracy. RV 52, p. 1588-1621 *Id.* at 1446. At first Crystal was angry and insisted the DNA was wrong. *Id.* at 1447. A few days later Crystal told her that she had been raped and that the rapist was Chuck's father. *Id.* "She said it was something that she had buried and just never ever wanted to think about. She spent a long time burying it." *Id.* at 1448.

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

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

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

Shortly after that she realized she was pregnant and felt the baby was a result of the rape because she and Eddie had been using condoms. *Id.* at 1495-96. She was sad throughout her pregnancy. She had nobody to talk to. “Eddie and I just didn’t have a relationship.” *Id.* at 1497.

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

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

At trial, Crystal testified that Eddie Brant was Chuck Brant’s father. *Id.* at 1068. That was not true. *Id.* at 1505. She didn’t want to admit the truth because it was so “horrible” and she felt “so bad and so intimidated, that [she] just couldn’t tell anybody.” *Id.* She didn’t want anybody to know what had happened to her because she was so embarrassed. *Id.* at 1505-06. She had never told her children or her mother. *Id.*

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

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

Milliner had a child out of wedlock when she was a young woman. Her family had wanted her to put her son up for adoption but she wouldn’t do it. So when she heard Crystal talking about Chuck, Milliner couldn’t understand it, “because [she] knew how much her son meant to [her]. And [she] would have gone to the end of the world for him.”

When Milliner testified in 2007, she believed that Eddie was Chuck’s father. About three weeks prior to the post-conviction hearing, Crystal called her and told her she wanted to tell her a

secret of which she was ashamed. She told Milliner that “she was raped when Chuckie was conceived.” *Id.* at 840. Milliner and Crystal are about the same age. In 1965, when Crystal was raped, Milliner explained that things were different and young woman kept rape very quiet because “things like that just weren’t accepted.” In addition, in 1965, when a woman claimed rape but had no injuries, people would tend not to believe her.

Maternal Multi-Generational History

Jerry Crane is approximately one year older than his sister Crystal Coleman. RV 48, p. 1158. Their parents were Lawrence William Crane and Delphia Gertrude Cooper. Jerry and Crystal were both born in West Virginia. *Id.* The family had moved 12 times by the time Jerry was in fifth grade. *Id.* at 1159. The family lived in cheap rental housing, sometimes living in a one room house. *Id.* Larry Crane was an alcoholic who had trouble keeping a job and providing for his family. *Id.* Jerry’s paternal grandfather was also an alcoholic who was “completely nasty,” and chased Jerry trying to whip him. *Id.* at 1170-71. He died when Jerry was seven. *Id.* That night, while the grandfather was in the hospital and about to die, Crystal slept with the grandmother, who died in the bed while Crystal slept next to her. *Id.* at 1172. Crystal was six years old. *Id.* The grandparents were well off and left an upholstery business and buildings worth “lots and lots of money.” *Id.* at 1177-79. His parents squandered all of it so that the inheritance “got dranked up.” *Id.* at 1179.

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

Jerry spent a lot of his childhood in beer joints. *Id.* at 1165-66. His father drank every day and drank anything he could get his hands on, from whiskey to shaving lotion and rubbing alcohol. *Id.* His mother was the same. *Id.* On at least three occasions she drank until she was in a coma and her father called an ambulance to come get her. *Id.* Jerry and Crystal often went hungry. His parents spent the weekends drinking and driving and his father “drove like an idiot.” *Id.* at 1167. If they told their parents they were hungry, their parents would give them “10 or 15 cents for a candy bar and a pop.” *Id.*

Larry was cruel to Delphia. They fought constantly. Delphia was crippled from the car accident. *Id.* at 1169-70. Eventually, family members came and got the children and they were put in the care of their Aunt Hazel. *Id.* at 1171-72. While under Hazel’s care, Jerry and Crystal went to the doctor for the first time, had plenty to eat anytime they were hungry and had new clothes. *Id.* Eventually Delphia came to be with her children; she had quit drinking so Aunt Hazel “set them up in housekeeping.” *Id.* at 1173. Larry was in jail, probably for non-support, car wrecks and other stuff. *Id.* After Delphia divorced Larry, she was able to get surgery on her hip through Medicaid

and walk again. *Id.* at 1175-76. She got a job working in the laundry at the Greenbriar Hotel. *Id.* Larry never quit drinking. *Id.* at 1177.

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

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

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

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

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

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

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

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

Crystal and Berry graduated in 1961. Berry also knew Eddie. He was quiet and didn’t talk much but he was popular, very handsome and “all the girls liked Eddie.” *Id.* at 1190. Crystal and Eddie didn’t date until their senior year. *Id.* at 1191. Eddie got a football scholarship to Marshall

but the principal, teachers and coach talked him out of it because he lacked the educational skills. *Id.*

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

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

Had trial counsel made a single ten-minute phone call to Mary Kay Brant, they would have discovered Eddie was not Chuck’s father. And, had they investigated Crystal’s own tragic life, they would have been able to explain to a jury why she had a nervous breakdown and endured shock treatments, why she rejected and refused to love her son, and why she married and stayed with Marvin Coleman.

Brant’s childhood years with Marvin Coleman

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

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

At trial she was asked about Marvin and stated that he mentally and physically tortured her until 4 or 5 a.m. *Id.* She was never asked to describe what that was like. *Id.* In post-conviction she described it. Marvin would drink at a bar until about 2 a.m. and then he would come home. Crystal would “shake” and “pray” when she heard him pulling up in the driveway. *Id.* at 1502-03. Marvin would demand food and then accuse of her being unfaithful. *Id.* He held knives to her throat to make her admit she had done “things.” *Id.* The tirades ended with sex but Crystal never told him “no” because she was afraid he would beat her or kill her and the kids. *Id.* at 1503-05.

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

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

Marvin sexually abused Sherry, *id.* at 1423-25, including acting out a rape scenario with her under the pretense he was helping her.¹ He attacked her by surprise - in her bed while Crystal was in the hospital after giving birth to Garret, when she was sleeping while her mother was out of the home working, and exposed himself to her and aggressively attacked her in the kitchen, although she was able to get away from him that time. *Id.* She didn’t tell her mother because she was afraid it would “break her heart.” *Id.* at 1423-24. Sherry eventually gained the courage to confront Marvin. The abuse stopped after that. *Id.* at 1425. Delphia later told Crystal. Crystal never took Sherry to get counseling. *Id.* at 1426.

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

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

He would come home drunk and demand that she cook for him. When she refused, he would “smack [her] around.” *Id.* at 1304. One night, shortly after she had left him, he entered her house after a night of drinking. She was asleep on the couch. He grabbed her by her crotch, said the men in the bar had been telling him he wasn’t “man enough to keep [his] wife,” and then beat her “really bad.” *Id.* at 1306. Marvin ended up in a mental institution during their divorce. *Id.* at 1307. The psychiatrist warned her that Marvin was mentally ill and could end up killing her. *Id.*

Dawn Masters is the daughter of Meszaros and Marvin. She is three years younger than Brant, her step-brother, she was eight years old when she found out that Marvin was her father. *Id.*

¹ She testified at trial that Marvin molested her, but she was not asked to describe the nature of the attacks.

at 1321. She was looking through a box of photos and saw a picture of her mother with her face “badly mangled and bruised.” *Id.* at 1322. Her mother said, “that’s why I never stayed with your Dad because he hurt me really bad and he was a real bad drinker. And when he would drink, he would hit me. And he would hurt me real bad.” *Id.*

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

During the trip, she became ill and was diagnosed with mononucleosis. Marvin offered her a joint to help her feel better. *Id.* at 1330. Her throat was sore so she had a bowl of chicken noodle soup. She left the bowl in the sink. When Marvin saw it, he became enraged and smacked and shoved Crystal around the kitchen. *Id.* at 1331. The fight seemed to go on all night, it was “really violent,” and she was “scared.” *Id.* at 1331-32. Garrett was home, watching “cartoons nonchalantly” as if it was, “no big deal.” *Id.*

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

Brant’s school life/friends

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

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

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

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

Brant's Drug Use Just before the Crimes

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

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

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

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

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

Dr. Cunningham, a capital forensic expert, explained Chuck was turned in by his brother and family, even though Chuck was also trying to turn himself in, and this factor has a number of implications should Chuck be executed. This is a betrayal of Chuck by his brother, and there is a sense of guilt for Garrett. But also there is a societal interest in supporting the integrity of the sanctity of family relationships and in protecting the community. So it is important for family members to have a sense of a larger obligation to the community to turn in a family member who has committed a serious act of criminal violence to prevent future injuries on innocent victims. But, it is also important to foster family integrity and encourage people to come forward who might not otherwise do so upon learning that someone else came forward and the prosecution still sought death against their family member.

Mental Health Expert Testimony Presented at Post-Conviction

Overview of Mental Health Issues

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

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

Hanlon learned that Chuck had been conceived in a rape. *Id.* at 625. Hanlon also determined that Chuck's mother and maternal grandparents had mental health and addiction issues, although Crystal's addiction issue was compulsive shopping and gambling, not alcoholism. *Id.* at 1064-68. Chuck's maternal grandmother suffered from depression and had been prescribed Thorazine (an antipsychotic) and Elavil (an antidepressant). *Id.* She also drank excessively, had to be hospitalized for drinking rubbing alcohol, and smoked marijuana late in life. *Id.* Chuck's maternal grandfather was also violent and abusive. *Id.*²

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

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

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

² That the family had a history of mental illness and substance abuse was presented at trial, see *Brant v. State*, 21 So. 3d at 1280 ("Brant's mother testified that their family had a history of depression and other mental health conditions," and Sherry Coleman testified that Marvin Coleman "was an alcoholic and a 'bully.'"). However, the connection between mental illness, substance abuse, brain damage and the genetic component of addiction was not addressed through expert testimony, nor were details of the abuse presented to the extent in post-conviction.

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

In addition, Chuck was teased by his peers, made fun of at the bus stop, and was made to wear a dunce cap at school while in first grade. *Id.* at 1070-81. Marvin punished Chuck by cutting off all his hair and making him wear plaid pants to school. *Id.* at 1087. When Chuck wet the bed as a first-grader, Marvin humiliated him by making him wear a diaper. *Id.* at 1082-83. Chuck couldn't read or write very well until after high school. *Id.* All of this is important for many reasons, including that these incidents lower a person's self-esteem and people with low self-esteem often turn to substance abuse. *Id.* at 1081-82. Hanlon summed up the theme of Chuck's life: "rejection, abuse." *Id.* at 1087. "There [was] no solid foundation for him in any way that he turned." *Id.*

Brain Damage

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

Wu agreed that eating plaster and lead paint as a child, head banging as a child, methamphetamine use and a head injury as an adult are all events that could have caused brain metabolic abnormalities. *Id.* at 1032-33. In addition, sleep deprivation is also known to depress frontal lobe activity. *Id.* at 1033-34. In an individual such as Brant who has abnormal brain function, "when you add sleep deprivation on top of the matters that were present, it would have a negative kinesic effect in terms of *significantly compounding impairment of the frontal lobe.*" *Id.* at 1045. Given Brant's PET scan abnormality, meth use and sleep deprivation, Wu opined that Brant's capacity to have a normally functioning frontal lobe would have been substantially impaired and would have significantly impaired his ability to conform his behavior to the requirements of the law. *Id.* at 1045-46.

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

The additional information Wood received in post-conviction about Brant's lead exposure, head banging and head injury was significant. "[W]hen you combine all of that you begin to get

strong certainty that there is brain damage . . . each of them adds its own degree of probability . . . [which is a] *multiplicative, not an additive increase in probability* ... of brain damage.” *Id.* at 1683-84.

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

Dr. Gur described the anatomy of the brain and explained that the entire brain is “amazingly connected.”

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

Gur’s review of Brant’s PET **showed a striking abnormality in his hippocampus of almost 15 standard deviations below normal.** *Id.* at 2102-04. The amygdala and left insula are also low, six and four deviations below normal respectively. *Id.* The frontal lobe shows three to four standard deviations below normal, mostly on the left side of the dorsolateral prefrontal regions as well as the dorsomedial prefrontal regions. *Id.* at 1204.

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

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

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

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

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

Dr. Morton explained that there are a number of important considerations in the medical-legal arena when assessing an individual who has been using methamphetamine prior to and/or during a crime, the first of which is that meth is known to lead to violence. *Id.* at 1968-69. Meth is a very old drug that has been around for one hundred years. The information about its violent effect has been widely documented and known even in the 1930s. *Id.* at 1969-70. “We knew that methamphetamine and violence go hand in hand.” *Id.* Scientists now have a better idea of why and what part of the brain methamphetamine affects, but its link to violence and murder has been known. *Id.* at 1969.

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

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

Meth is an extremely potent central nervous system stimulant “of almost every nerve cell in the brain.” *Id.* at 1979. It stimulates dopamine, epinephrine, norepinephrine and serotonin, and “causes all of these nerve cells to release all of their stored chemical at once.” *Id.* Having all of these chemicals released simultaneously in a manner the brain is not prepared for is what causes the damage and side effects. *Id.* at 1980. Methamphetamine stays in the body longer than cocaine and may stay in the body for three to five days. *Id.* People can take meth by swallowing it, injecting it, inhaling it, smoking the vapor, even putting it in their food. *Id.* at 1987.

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

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

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

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

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

Based on scientific research, Cunningham explained that it is critically important that the sentencing judge or jury has an understanding of the relationship of damaging or impairing factors to choice and moral culpability. *Id.* at 1715-18. It is vitally important that the jury be educated on why they should care, or even consider, whether a capital defendant had a difficult childhood. *Id.* In the face of the notion in popular culture referred to as “the abuse excuse,” it is important to explain to a fact finder how a capital defendant’s background has a nexus to criminal violence. *Id.* at 1716. It is to remind jurors of what they know about their own children – that childhood is “profoundly important.” *Id.* at 1717. Children are “delicate” and childhood trauma can leave an “indelible imprint on them.” *Id.* “So the task for defense counsel is to illuminate” the defendant’s background and childhood with “the best available science that is essentially consistent with what jurors are thinking about their own kids but are unlikely to apply to a [capital] defendant.” *Id.* at 1717-18.

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

First, under neurodevelopmental factors which were discussed briefly at trial, Cunningham identified that Crystal smoking during her pregnancy, experienced a snakebite during her pregnancy, that Chuck was engaged in severe head banging, suffered lead exposure, and breech birth accompanied by emergency procedures. In addition to those factors, Cunningham identified that Charles Brant suffered from a socialization spectrum disorder as demonstrated by his inability to be soothed as a baby, and his difficulty in making friendships. *Id.* at 1729. Brant also exhibited symptoms of attention deficit/hyperactivity disorder. *Id.* at 1728. Other neurodevelopmental factors include the abnormal PET scan, MRI and neuropsychological testing. This was discussed but not well linked to Brant's behavior during the offense. *Id.* at 1729. Additional factors were Brant's genetic predisposition to drug and alcohol use and his methamphetamine dependence. *Id.* at 1731-37.

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

In addition, Brant was exposed to Marvin's verbal abuse of Crystal, which was sexually accusing and demeaning in its content, Marvin's physical abuse and rape of Crystal, and Marvin's sexual abuse of Sherry. While some of that was touched on at trial, the implications of that on a child with sexually aggressive fantasies was not explained. *Id.* at 1737-40. "As we are trying to understand where does Chuck's sexuality --- how did he fall off the rails here in terms of the development of his own sexuality, this kind of family history is critically important in illuminating ... [Chuck's] moral culpability about that sexual orientation." *Id.* The same was true of the next factor, domestic violence; while it was discussed it was not linked to criminal violence. *Id.* at 1740. There was also generational family dysfunction in Brant's family including substance abuse and domestic violence. *Id.* at 1743.

The final arena Dr. Cunningham addressed was disturbed trajectory. *Id.* Dr. Cunningham identified two factors under this arena – aggressive sexual fantasies from early childhood and multiple risk factors for drug dependence. *Id.* at 1743-45. Dr. Cunningham concluded that the developmental damage and impairing factors that Charles Brant experienced as a child are "extraordinary in nature," and "very significant." *Id.* at 1746.

Cunningham also explained that Brant's social difficulties as a child were consistent with research that shows sexual offenders are likely to have serious social difficulties and exhibit deficits in basic social skills. *Id.* at 1748-50. Cunningham also explained that heredity is the most

powerful risk factor in identifying who might become alcohol or drug dependent. Both of Brant's maternal grandparents and Crystal had addictive issues around spending and gambling. In addition, Marvin Coleman, while not genetically linked, had addiction problems. If you have a first-degree relative who is an alcoholic or drug-abuser, you are three to five times more likely yourself to be an alcohol or drug abuser.

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

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

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

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

In addition, the sequential damage Crystal suffered as a result of her own traumatic childhood, left Crystal injured so that she comes into parenting as an injured person, and then goes about parenting with diminished capability to be a good, nurturing parent. *Id.* at 1823-27. This is why it is important in a capital sentencing investigation to obtain a multi-generational history. *Id.* So, for example, Crystal grew up in a house where Delphia was horribly abused, and then Crystal marries and remains with Marvin, who also horribly abuses her. *Id.* It was as if it was part of Crystal's life script. *Id.* A juror would not know that absent trial counsel investigating and presenting a generational understanding of a family system. *Id.* Crystal also neglected Chuck in two ways. *Id.* at 1831-35. First, she isn't emotionally available to love him. A child senses the quality of feeling that the adult has for them and when a child senses a void, that is a "deeply disturbing and anxiety provoking experience" for the child. *Id.* at 1832. The other aspect of neglect is that Crystal stays in the relationship with Marvin, serving her own disturbed needs, "at the

expense of protecting and providing stability” for her children. *Id.* The household was a “profoundly chaotic context” in which the children grew up. *Id.* This kind of neglect creates a “sense of terror that the child has that their world is out of control.” *Id.* at 1832-33. This damage is observable in Chuck as he enters middle childhood. *Id.* And, children who have been emotionally neglected are at increased risk for psychological disorders and for criminal behavior in adulthood. *Id.* at 1833-34.

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

Cunningham explained that cumulative and synergistic action of the neglect, abuse, neurological and psychological deficits that Brant experienced affected his conduct at the time of the crime and resulted in a psychological state so that Brant’s capacity to appreciate the criminality of his conduct and conform his conduct to the requirements of the law was substantially impaired and that the capital felony was committed while Brant was under *the influence of an extreme emotional disturbance*. RV 56, p. 1897-1900.

Positive Prison Adjustment Testimony

Prison Adjustment Testimony

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

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

Records Custodian Jan Bates reviewed Brant’s HCSO jail records. RV 45, p. 871-80. Brant was initially placed in confinement due to the high profile nature of his case but was later moved to general population even though he was considered a maximum security inmate due to the severity of his charges. The jail classifications staff later allowed Brant to be a “close supervision trustee.” Trustees were allowed to clean the Pod, heat meals in an oven and serve them, and do laundry using a washer and dryer kept in the Pod.

James Aiken is a nationally respected expert on prisons and prison adjustment, with decades of experience as a warden and secretary of departments of corrections. RV 47, p. 1102-50. While he was a warden, Mr. Aiken personally put two people to death. He was able to come

to Florida to observe an execution prior to performing the two executions in South Carolina. *Id.* at 1111. He was appointed by President George W. Bush to serve on the Prison Rape Elimination Commission. *Id.* at 1115. He has classified “literally thousands and thousands of inmates, developed classification systems and revalidated classification systems in a number of jurisdictions.” *Id.* at 1116. He was accepted as an expert in the areas of prison operations and classifications of inmate’s adaptability to the prison setting. *Id.* at 1116-17.

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

In assessing Brant’s ability to adapt to prison, Aiken made a number of determinations. First, because Brant’s crimes include a rape, Brant is actually coming into the prison system with a high degree of vulnerability. He has seen inmates attacked because they are sex offenders. “They are at the lowest ebb of the prison hierarchy.” *Id.* at 1121. His concern about Brant is that he is someone who, “doesn’t know how to pull time. In other words, he has to learn how to survive in this abnormal environment.” *Id.* at 1121-22. Aiken, however, was intrigued by how well Brant did. He obtained trustee status in a Pod setting and had, “only two altercations when he was standing charges as a sex offender. That tells me something. . . . [H]e is evidently doing something correct in order to avoid trouble,” *Id.*

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

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

Dr. Cunningham was also asked to address positive prisoner adjustment. Even if future dangerousness is not a specific aggravating factor that jurors are required to find before rendering a death verdict, research suggests *that it is always an issue of consideration for the jury*. RV 14, p. 1464-1468. “It’s the elephant in the room.” *Id.* at 1464. Jurors overestimate the likelihood of a defendant committing another homicide in prison by up to 250-fold. *Id.* at 1466. The actual rate of homicide is 1%-5%, but studies show that jurors believe it is 50%. *Id.*

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

The Florida Supreme Court Opinion

Brant argued in his Brief that trial counsel failed to conduct a reasonable investigation and therefore failed to identify and present significant and compelling mitigation and give meaning and significance to the mitigation through meaningful expert and lay witness testimony in the areas of family background, the effects of methamphetamine, the extent of Brant's brain damage, and his ability to adapt to prison. Brant further argued that the State postconviction court's analysis was an unreasonable application of law because the postconviction court addressed Brant's sub claims in a piecemeal fashion when assessing prejudice. The Florida Supreme Court described his claims as alleging that:

[T]rial counsel rendered ineffective assistance during the penalty phase by failing to: (1) learn and present evidence that Brant was conceived during a rape; (2) present a methamphetamine expert; (3) present a prison expert; (4) present images from Brant's PET scan and additional experts to describe the findings from the PET scan; and (5) conduct an adequate background and mental health investigation. Each alleged deficiency will be discussed in turn.

The court then gave the following analyses in denying Brant's claim:

1. Brant's Conception

During the penalty phase in 2007—and in several other sworn statements—Brant's mother, Crystal Coleman, testified that her ex-husband, Eddie Brant, was Brant's biological father. When postconviction counsel first spoke with Crystal in 2009 or 2010, she still claimed that Eddie was Brant's father. Even after postconviction counsel confronted Crystal in late 2012 with the results of a DNA analysis that revealed that Brant and his sister, Sherry, were only half-siblings, Crystal continued to insist that Eddie was Brant's father. Eventually, in January 2013, Crystal finally admitted that Eddie was not Brant's father. During the postconviction proceedings, Crystal testified that Brant was actually conceived when she was raped by a neighbor while she was married to Eddie. When asked why she lied at the penalty phase, she responded that she did not want Brant or anyone else to know about the circumstances of his conception. Crystal testified that she kept her secret about the rape long after Brant was convicted and sentenced to death.

In concluding that counsel was not deficient for failing to discover the circumstances of Brant's conception, the postconviction court noted that Eddie essentially had no contact with Brant after the age of seven weeks and that Eddie died approximately eight months after Brant's arrest. The postconviction court found that it was clear that Crystal kept the identity of Brant's biological father and the rape a secret from everyone except Eddie and a few distant relatives. Neither Brant, his half-sister, his half-brother, nor Crystal's best friend knew that Eddie was not Brant's father.

We agree with the postconviction court that Brant failed to show that counsel performed deficiently in failing to discover the circumstances of Brant's conception. Counsel had no reason to believe that Eddie was not Brant's father, and Crystal testified several times under oath that Eddie was Brant's father. Under these circumstances, counsel cannot be expected to verify paternity through other family members or DNA testing.

We also conclude that Brant was not prejudiced by trial counsel's failure to discover the circumstances of his conception. Brant does not allege that he was aware that he was conceived during a rape at the time he committed the murder, during the 2007 trial, or any time prior to the DNA analysis in 2012; therefore, any mitigating value of the circumstances of his conception would be negligible at best. *Cf. State v. Conaway*, 339 N.C. 487, 453 S.E.2d 824, 854 (1995) (“[T]he fact that defendant was conceived through a rape has no logical relationship to his moral culpability for these murders.... [T]here was no evidence that defendant even knew of the circumstances of his conception prior to the murders.”). Brant's position is that the circumstances of his conception would have been “mitigating evidence of a disadvantaged or abusive childhood,” but even without knowing about the rape, the trial court found as mitigating that Brant had an abusive childhood. *See State v. Brant*, No. 04–12631 (Fla. 13th Cir.Ct. Dec. 4, 2007) (Corrected Sentencing Order at 41) (“Defendant was emotionally, mentally, and physically abused by his stepfather from age 5 to 17[.]”). There is no reasonable probability that Brant would have received a life sentence had the circumstances of his conception been presented to the trial court.

2. Methamphetamine Expert

Brant next argues that trial counsel was deficient for failing to retain a methamphetamine expert to explain the effects of methamphetamine on Brant's brain. Brant alleges that trial counsel's decision “not to present a specialist expert on meth use cannot fairly be considered a reasonable strategic decision because Fraser never spoke to such an expert and therefore would not have been able to make a reasonably informed strategic decision whether to present such testimony.”

In preparation for trial, both of the doctors hired by the defense to evaluate Brant were asked to address Brant's methamphetamine use as part of their evaluations. At the penalty phase, Dr. Maher testified that he diagnosed Brant as suffering from severe methamphetamine dependence associated with psychotic episodes and discussed the effects of methamphetamine on Brant's brain. *Brant*, 21 So.3d at 1281. In the sentencing order, the trial court regarded Dr. Maher as “ha[ving] expertise in the behavior of persons who abuse methamphetamine.”

Dr. McClain testified at the penalty phase that she diagnosed Brant with polysubstance dependence and that his use of methamphetamine leading up to the murder rendered him more impulsive or unable to control his anger, which resulted in his capacity to conform his conduct to the requirements of the law being substantially impaired at the time of the murder. *Id.* at 1282. At the evidentiary

hearing, Dr. McClain testified that she considers addiction and the effects of methamphetamine use as an area of expertise for her.

Based on the testimony at the penalty phase regarding Brant's methamphetamine use, the trial court found one statutory mitigating circumstance and two nonstatutory mitigating circumstances—all of which were accorded moderate weight: (1) his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (2) he has diminished impulse control and periods of psychosis due to methamphetamine abuse, has recognized and sought help for his drug dependence problem, and used methamphetamine before, during, and after the murder; and (3) he has been diagnosed with chemical dependence. *Id.* at 1283. Despite the expert testimony presented at the penalty phase and the mitigating circumstances found by the trial court relating to his use of methamphetamine, Brant claims that counsel performed deficiently in failing to present this testimony through an expert who specializes in methamphetamine. Brant also claims that had counsel utilized an expert who specializes in methamphetamine, the trial court would have found the existence of the statutory mitigating circumstance of extreme emotional disturbance.

At the evidentiary hearing, Brant presented testimony from William Alexander Morton, Ph.D., an expert in psychopharmacology and addiction. Dr. Morton testified that because Brant's methamphetamine use was causing psychotic symptoms at the time of the murder, he would have testified at the penalty phase that Brant was under an extreme emotional disturbance. When asked to explain what he meant by “extreme emotional disturbance,” Dr. Morton responded:

I mean inability to think logically; to make decisions logically; to be extremely upset and engaging in something very impulsive that starts off this chain of events, at least leading to the rape of [the victim]. So mainly thinking of paranoid thoughts, of illogical thoughts. I asked him, “Were you hallucinating at that time?” He said, “No, I was not having hallucinations,” but he ... did report being suspicious and paranoid and agitated.

Finding that trial counsel did not perform deficiently, the postconviction court concluded that “[t]he postconviction testimony was essentially cumulative; the crux of Dr. Morton's testimony—that Defendant's methamphetamine use and abuse diminished his ability to control his impulses—was conveyed through Dr. Maher.”

We agree with the postconviction court's conclusion that counsel did not render deficient performance in failing to present a “specialist expert on meth use.” Trial counsel presented expert testimony regarding the extent of Brant's methamphetamine use, the effects of it, and the behavior of persons who abuse methamphetamine through Dr. Maher—who was deemed by the trial court to be an expert in that field—and Dr. McClain. As a result, the trial court found that multiple mitigating circumstances relating to Brant's methamphetamine use were

established and gave those circumstances moderate weight. Testimony from a “specialist expert” on methamphetamine would have been mostly cumulative, and trial counsel is not ineffective for failing to present cumulative evidence. *Darling v. State*, 966 So.2d 366, 378 (Fla.2007). Although Dr. Morton would have testified that Brant's psychotic symptoms constituted an extreme emotional disturbance, we have repeatedly stated that trial counsel is not deficient because the defendant is able to find postconviction experts that reach different and more favorable conclusions than the experts consulted by trial counsel. *E.g.*, *Diaz v. State*, 132 So.3d 93, 113 (Fla.2013); *Wyatt v. State*, 78 So.3d 512, 533 (Fla.2011); *Asay v. State*, 769 So.2d 974, 986 (Fla.2000).

Brant also failed to establish prejudice because it is questionable whether Dr. Morton's testimony could have established the existence of the extreme emotional disturbance mitigating circumstance based on Brant's report of “being suspicious and paranoid and agitated.” Dr. Morton found that Brant was not hallucinating at the time of the murder, but that he was suffering from an extreme emotional disturbance. On the other hand, Dr. Maher, who testified at the penalty phase that Brant was hallucinating at the time of the murder, did not find that Brant was suffering from an extreme emotional disturbance. Further, testimony at the penalty phase from Brant's former wife that he was able to interact pleasantly with her, wash dishes, clean up the kitchen, watch the evening news, and sleep in bed next to her the night he committed the murder would have refuted the allegation that he was under an extreme emotional disturbance. *See Nelson v. State*, 850 So.2d 514, 530 (Fla.2003) (concluding that there was competent, substantial evidence to refute allegation that defendant was under extreme mental or emotional disturbance where witnesses who encountered the defendant before and after murder testified he was acting normally). Thus, Brant has not shown that there is a reasonable probability that he would have received a life sentence had counsel presented a different expert who would have opined that Brant was under an extreme emotional disturbance at the time of the murder.

3. Prison Adjustment Expert

Brant asserts that trial counsel was ineffective for failing to present testimony during the penalty phase from a prison adjustment expert regarding Brant's ability to adjust positively to a prison environment.

At the evidentiary hearing, Brant presented James Aiken, an expert in prison operations and classification of an inmate's adaptability to a prison setting. In preparation for the evidentiary hearing, Aiken reviewed materials provided by postconviction counsel, including the sentencing order and jail records, and interviewed Brant and correctional staff from the Hillsborough County Jail. Aiken testified that, in his opinion, Brant had the ability to “adjust very well [in the prison system] from the standpoint he can be housed in a high security facility for the remainder of his life without causing an unusual risk of harm to staff, inmates, or the public.” Also at the evidentiary hearing, Brant presented Dr. Mark Cunningham,

a clinical and forensic psychologist and expert in prison risk assessment, who opined that “there is very little likelihood that [Brant] would commit serious violence [if] confined for life in the Florida Department of Corrections.” The postconviction court concluded that Brant failed to establish prejudice because in light of the aggravating circumstances that the murder was HAC and committed during a sexual battery, there was no reasonable probability that Brant would have received a life sentence had positive prison adjustment testimony been presented at the penalty phase.

We agree that Brant is not entitled to relief. The positive prison adjustment testimony that Brant claims should have been presented is that Brant can be safely incarcerated for the rest of his life without presenting a risk of harm to staff or other inmates. Based on this testimony, Brant’s argument would have essentially been that except for the murder and sexual battery in this case, he is generally a nonviolent person who would not be violent in a prison setting.

At the penalty phase, trial counsel presented testimony from two witnesses that Brant was a nonviolent person who did not have any problems getting along with others. Trial counsel also introduced into evidence Brant’s records from the Hillsborough County Jail, which showed that Brant was a trustee at the jail despite being charged with capital murder and other violent offenses. As a result, the trial court found as mitigating circumstances that Brant “has a reputation of being a non-violent person” and until the murder “had led a crime-free life.”

In light of the evidence presented at the penalty phase, we conclude that counsel did not perform deficiently in failing to present a prison adjustment expert. Evidence presented by counsel that Brant was a well-behaved prisoner—by virtue of his trustee status at the jail—got along well with others, and had a reputation for being nonviolent was evidence of a positive ability to adjust to a prison environment. *See Skipper v. South Carolina*, 476 U.S. 1, 7 n. 2, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (noting that evidence suggesting that defendant had been a well-behaved and disciplined prisoner in jail was evidence of adjustability to life in prison). That counsel did not present this evidence through an expert witness does not render counsel’s performance deficient.

Nor was Brant prejudiced by the lack of expert prison adjustment testimony. Specific testimony that Brant was generally a nonviolent person and a good prisoner who would likely be able to adapt to prison life without causing any further harm to anyone would have added little to the evidence that was presented. Brant has not demonstrated a reasonable probability that had such expert testimony been presented, he would have received a life sentence, especially in light of the RAC aggravating circumstance, which is “among the weightiest in Florida’s death penalty scheme [.]” *Martin v. State*, 151 So.3d 1184, 1198 (Fla.2014). Our confidence in the outcome is not undermined.

4. Brain Damage and PET Scan Evidence

Next, Brant asserts that trial counsel was ineffective for failing to reasonably investigate and present evidence that he has brain damage. Specifically, Brant asserts that counsel was deficient in failing to present images from his PET scan at the penalty phase and in failing to identify and inform defense experts of his risk factors for brain damage, i.e., head banging, ingestion of plaster and lead paint as a toddler, and a head injury in 2001.

After evaluating Brant, Dr. McClain recommended to trial counsel that Brant undergo a PET scan. Trial counsel retained Dr. Frank Wood, a clinical neuropsychologist and forensic psychologist, to conduct the PET scan and also consulted with Dr. Joseph Chong Sang Wu, an expert in brain imaging technology, regarding the results of the PET scan. Trial counsel ultimately decided not to have Drs. Wood or Wu testify at the penalty phase and to introduce the results of the PET scan through Dr. Maher instead.

Dr. Maher testified at the penalty phase that the PET scan showed four areas of suppressed glucose uptake that could indicate underactivity in those parts of the brain. Dr. Maher identified those areas of the brain as being important to impulse control and good judgment. While he could not identify the abnormalities as the cause of Brant's criminal acts, he did conclude that the PET scan was consistent with a diagnosis that includes a problem with impulse control. In reaching this conclusion, Dr. Maher relied, in part, on the depositions and reports of the other psychological and brain experts consulted in this case, including Drs. Wood, Wu, McClain, and the State's experts, Drs. Mayberg and Taylor. Dr. Maher testified at the evidentiary hearing that although he was not aware of Brant's childhood head banging and ingestion of lead paint, or his 2001 head injury at the time of the penalty phase, those circumstances would have corroborated his findings.

Dr. McClain testified at the penalty phase that Brant suffered from a cognitive disorder and that there were areas of the brain with very significant impairment. Dr. McClain opined that due to Brant's brain damage or deficits in brain functioning, his capacity to conform his conduct to the requirements of law was substantially impaired when he committed the murder. Dr. McClain said that she consulted and reviewed the PET scan with Dr. Wu and reviewed the depositions of Drs. Wood and Wu, which confirmed that the PET scan was consistent with her neuropsychological data and that it showed abnormal brain function impairment in certain areas of his brain. Dr. McClain testified at the evidentiary hearing that she was aware of Brant's head-banging and ingestion of plaster at the time of trial.

Both Drs. Wood and Wu testified at the evidentiary hearing. Dr. Wood testified that Brant's PET scan revealed abnormalities in four areas of Brant's brain. He prepared a PowerPoint with images from the scan to accompany the testimony he planned to present at Brant's trial. He would have testified at the penalty phase that Brant had abnormalities indicative of "true disability in behavioral impulse control." Dr. Wood testified that he could not be 100% certain that Brant has brain damage, but he would estimate his certainty prior to Brant's trial at 90%. With the

addition of new information he learned during postconviction—that Brant ate plaster with lead-based paint, engaged in head banging as a child, had a head injury in 2001, and was not just an occasional but rather a heavy user of methamphetamine at the time of the murder—his certainty would increase to 93 or 94%. Dr. Wood could not say that any of these factors actually caused the brain damage. Dr. Wood defined the term brain “damage” as “damage, disease, or dysfunction,” and stated that damage, disease, and dysfunction are all “abnormalities.”

Dr. Wu testified that he was contacted in 2007 to provide a second opinion in regards to Brant's PET scan. He reviewed the PET scan and determined that Brant's brain was abnormal in three different regions, including a region which helps regulate violent, aggressive impulses. Dr. Wu was not aware at the time of Brant's penalty phase that Brant had a history of eating plaster and lead paint as a child, head banging as a child, a head injury in 2001, or the extent of his methamphetamine use, and he testified at the evidentiary hearing that “[a]ll of those items are certainly things that could have caused brain metabolic abnormalities,” but that new information would not have changed the testimony he planned to give in 2007.

Brant also introduced hospital records related to his 2001 head injury at the evidentiary hearing. The records revealed that the injury was a two-centimeter laceration that occurred when Brant hit his head on a metal door while climbing out of an elevator. The records also indicated that a CT scan was performed, which revealed no abnormal findings. Brant was discharged from the hospital on the day of the injury, less than three hours after he arrived.

Penalty-phase counsel Fraser testified at the evidentiary hearing that there were a number of reasons why he decided not to call Drs. Wood and Wu at the penalty phase, which he documented in a memo to his file, dated August 27, 2007, that was entered into evidence at the evidentiary hearing. In the memo, Fraser wrote:

First, the opinion of Dr. Wood and a frank discussion on the limitations of the PET scan, both through Dr. Maher, established the bulk of what I intended to show through Doctors Wood and Wu. Dr. Maher testified that the PET scan could not link the underutilization of glucose in portions of the brain with behavior for any specific reason. It can only show glucose underutilization in regions of the brain normally associated with “executive” functions.

Fraser indicated that Dr. Wood agreed with his decision not to present the PET scan images during a conversation on August 24, 2007, to a greater extent than did Dr. Wu. Fraser was also concerned, after taking the deposition of the State's expert, Dr. Mayberg, that Dr. Mayberg would win in a credibility battle with Drs. Wood and Wu. In his August 27, 2007, memo, Fraser wrote that Dr. Wood “demonstrated a game-like approach to the use of PET evidence ... his ego and gamesmanship obscure his message.... In addition, he tends to be long-winded and oblique in his responses while speaking very slowly,” which caused listeners “to

drift away from him mentally.” Fraser also indicated that he sometimes had difficulty communicating with Dr. Wu because of his accent, which left Fraser feeling that he lagged behind in their conversations because it took several seconds to process Dr. Wu's words.

Investigator Maloney also testified at the evidentiary hearing that she told Fraser that the defense attorneys in another capital case—in which she was involved at the same time she was involved in Brant's case—had concerns that the jury in that case was not receptive to Dr. Wu. Maloney shared that concern as she was watching that jury's reaction to Dr. Wu's testimony in that other case. She said the jurors had puzzled looks on their faces as Dr. Wu was testifying and “appeared to be struggling to grasp the content of what he was presenting.” Maloney also had a hard time understanding Dr. Wu because English is not his first language and she heard other people in the courtroom ask each other, “What is he saying?”

The postconviction court found Fraser's testimony credible and concluded that Fraser's decision not to present the PET scan images or the testimony of Dr. Wood or Dr. Wu at the penalty phase was a reasonable strategic decision. The postconviction court found Fraser's strategy particularly advantageous to Brant because the decision not to call Dr. Wu or Dr. Wood resulted in the State declining to call Dr. Mayberg to rebut the PET scan evidence.

The postconviction court did not err in denying this claim. Fraser's memo documenting his reasons for not presenting testimony from Drs. Wood and Wu provides competent, substantial evidence to support the postconviction court's credibility finding, and the record refutes Brant's claim that counsel was deficient for presenting the PET scan evidence only through Dr. Maher. We agree that after consulting with Drs. Wood, Wu, and Maher, and deposing Dr. Mayberg, Fraser made a reasonable, strategic decision to present the PET scan evidence only through Dr. Maher based on his concerns about the credibility of Drs. Wood and Wu and his belief that he could establish the mitigating circumstances he intended to establish through Dr. Maher.

As a result of the testimony from Drs. Maher and McClain at the penalty phase regarding Brant's brain abnormalities, the trial court found that Brant's capacity to appreciate the criminality of his conduct and his capacity to conform his conduct to the requirements of law were substantially impaired and that he had a diminished ability to control his impulses. Had Drs. Wood and Wu testified at the penalty phase, their testimony would have been that Brant had brain abnormalities that affected his ability to control his impulses and exercise good judgment, which would have been cumulative to the testimony that was offered.

Because counsel was able to establish the existence of the intended mitigating circumstances without presenting Drs. Wood and Wu or the actual images from the PET scan, there was no deficient performance even if Drs. Wood and Wu would have testified in more detail or presented the images. “As this Court

has held, ‘even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence.’ ” *Wheeler v. State*, 124 So.3d 865, 881 (Fla.2013) (quoting *Darling*, 966 So.2d at 377). We have also “consistently held that a trial counsel’s decision to not call certain witnesses to testify at trial can be reasonable trial strategy.” *Everett v. State*, 54 So.3d 464, 474 (Fla.2010). Because Fraser made a reasonable strategic decision in light of his concerns about the credibility and presentation of Drs. Wu and Wood, he did not render deficient performance. *See Occhicone v. State*, 768 So.2d 1037, 1048 (Fla.2000) (“[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel’s decision was reasonable under the norms of professional conduct.”).

Brant also failed to demonstrate that he was prejudiced by trial counsel’s decision not to have Drs. Wood and Wu testify because the crux of their testimony would have been largely cumulative to that which was offered through Dr. Maher, and there is no reasonable probability that Brant would have received a life sentence had counsel presented the testimony of Drs. Wood and Wu or introduced the PET scan images themselves. *See Dufour v. State*, 905 So.2d 42, 61 (Fla.2005) (holding that defendant failed to demonstrate prejudice where additional mitigating evidence did not substantially differ from that presented during the penalty phase); *Atwater v. State*, 788 So.2d 223, 234 (Fla.2001) (“There is no reasonable probability that re-presenting virtually the same evidence through other witnesses would have altered the outcome in any manner.”).

Brant has also failed to show that counsel was deficient in failing to discover and inform the experts of Brant’s history of eating plaster or lead paint, head banging as a child, head injury in 2001, and heavy meth use. Dr. Wood testified that such information would have only provided a negligible increase in his certainty that Brant had brain damage, but still would not have rendered him able to determine the cause of the damage. And although Dr. Wu testified that those factors could have caused Brant’s brain metabolic abnormalities, he testified that it may be impossible to identify any of those factors as actual causes of the abnormalities. Both doctors testified that the testimony they gave at the evidentiary hearing would have been essentially the same testimony they would have given at the penalty phase, despite the new information they learned during the postconviction proceedings.

Furthermore, Dr. McClain testified at the evidentiary hearing that she was aware that Brant had been exposed to lead paint and had a history of head banging as a child. Dr. Maher testified that even if he had been aware of the head banging, head injury, and lead paint ingestion at the time of the penalty phase, those circumstances would not have altered his conclusions. And both Drs. McClain and Maher were aware of the extent of Brant’s meth use.

5. Background and Mental Health Investigation

Brant contends that trial counsel performed deficiently by failing to conduct a reasonable investigation into his childhood, family, and multi-generational background of addiction, abuse, neglect, and sexual exposure. In denying this claim, the postconviction court stated:

[M]uch of the testimony and evidence presented during the instant postconviction proceedings is cumulative. For example, during the penalty phase, witnesses testified to the following: Defendant's maternal family history of mental health issues, alcohol abuse and physical violence, including [Brant's maternal grandfather]'s alcoholism and mental and physical abuse of [Brant's maternal grandmother] and the children, [Brant's maternal grandmother]'s history of depression for which she was medicated, Crystal's grandmother's hospitalization in a mental institution, and Crystal's own history of depression, hospitalization and psychotropic medications; Marvin's verbal and physical abuse of both Crystal and Defendant, and his sexual abuse of Sherry; Marvin's alcohol and substance abuse; Defendant's birth complications; Crystal's separation from and lack of bonding with Defendant; Defendant's history of attention deficit disorder; Defendant's substance abuse history and diagnoses of substance abuse or dependence; Defendant's use of methamphetamines at the time of the offenses and its effects, i.e., diminished impulse control; Defendant's brain abnormalities and difficulties with impulse control due to his brain deficits; Defendant's diagnoses of a sexual disorder and the genetic and environmental (factors over which Defendant had no control) link associated with sexual disorders; Defendant's own diagnosis and history of depression; Defendant was remorseful; and that Defendant's capacity to conform his conduct to the requirements of law was substantially impaired. Consequently, the Court further finds Defendant has failed to establish that counsel performed deficiently.

With respect to the investigation and presentation of mitigation evidence, the United States Supreme Court observed that “*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case.” *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). “In reviewing a claim that counsel's representation was ineffective based on a failure to investigate or present mitigating evidence, the Court requires the defendant to demonstrate that the deficient performance deprived the defendant of a reliable penalty phase proceeding.” *Whitton v. State*, 161 So.3d 314, 332 (Fla.2014) (quoting *Simmons v. State*, 105 So.3d 475, 503 (Fla.2012)).

Most of Brant's claims regarding the deficiencies of trial counsel's investigation are refuted by the record. The record reflects that counsel did conduct a reasonable investigation into Brant's childhood, family, and multi-generational background of addiction, abuse, neglect, and sexual exposure. Counsel presented testimony at the penalty phase regarding Brant's grandparents and great-grandmother and their problems with regard to mental health, substance abuse,

domestic violence, and low intelligence. The trial court took notice of this testimony and as one of the mitigating circumstances found that Brant had a family history of mental illness. The record also reveals that trial counsel did investigate and present at the penalty phase the circumstances of Brant's life in utero and during his childhood, including the abuse and neglect he suffered and the sexual abuse he witnessed. Counsel presented testimony from family members, friends, peers, a professional associate, and spiritual advisors. Counsel presented academic records and a plethora of information regarding Brant's struggles with substance abuse.

We agree with the trial court's conclusion that Brant failed to establish that counsel rendered deficient performance in investigating Brant's background. The evidence presented to the postconviction court demonstrated that trial counsel conducted a reasonable mitigation investigation. *See Stewart v. State*, 37 So.3d 243, 258 (Fla.2010) (holding that the defendant did not show deficiency or prejudice where "the mental health experts and lay witnesses who testified during the penalty phase conveyed the substance, though perhaps not all of the details, of the proposed mitigating circumstances to the penalty phase jury"). And our confidence in the outcome is not undermined by the few pieces of noncumulative evidence presented at the evidentiary hearing.

Brant v. State, 2016 WL 3569418, at *11–20 (Fla. June 30, 2016), *reh'g denied*, 2016 WL 4446453 (Fla. Aug. 23, 2016).

Concluding Facts

The State courts' determination of this claim was objectively unreasonable. Mr. Brant, through a separate motion filed contemporaneously with his Petition, seeks leave to file a Memorandum of Law, setting out argument and legal authority for this claim.

(b) If you did not exhaust your state remedies on Ground Two, explain why:

(c) Direct Appeal of Ground Two:

- (1) If you appealed from the judgment of conviction, did you raise this issue? No
- (2) If you did not raise this issue in your direct appeal, explain why: Florida law requires claims of ineffective assistance of counsel to be raised in postconviction proceedings.

(d) Post-Conviction Proceedings:

- (1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes

- (2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Motion for Post-Conviction Relief Pursuant to Fla. R. Crim. Pro. 3.851.

Name and location of the court where the motion or petition was filed: Thirteenth Judicial Circuit, In and For Hillsborough County, Florida

Docket or case number (if you know): 04-CF-12631

Date of the court's decision: Feb. 5, 2014, Rehearing denied March 12, 2014

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? Yes

(4) Did you appeal from the denial of your motion or petition? Yes

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Florida Supreme Court, Tallahassee, Florida

Docket or case number (if you know): SC14-787

Date of the court's decision: June 30, 2016; Rehearing denied, August 23, 2016.

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: None.

GROUND THREE

Counsel's performance in failing to investigate and prepare for jury selection and develop and inform Mr. Brant of mitigation prior to waiving a sentencing phase jury fell below prevailing professional norms. Counsel's failure prejudiced Mr. Brant and violated his Sixth Amendment right to effective assistance of counsel. But for counsel's deficient performance, Mr. Brant would have exercised his right to a sentencing phase jury. Confidence in the outcome is undermined. The Florida Supreme Court's analysis and ruling on this Claim rose to the level of an objectively unreasonable determination of the facts in light of the State Court record and an objectively unreasonable determination of clearly established federal law. This court should grant the Writ.

(a) Supporting facts:

As set out above, but repeated here to avoid any waiver of facts, upon advice of counsel, Mr. Brant pled guilty to all crimes as charged on May 25, 2007. He received no negotiated benefit for his guilty plea and continued to face the death penalty.

Terrana testified in postconviction that he focused his theory of defense in the guilt phase on trying to attack Brant's confession and on his methamphetamine use. *Id.* at 455-57. Terrana said that it was "obvious" that they needed a "drug expert." *Id.* at 458. Terrana claimed he sent out form letters to a "number of psychologists and/or psychiatrists and/or toxicologists seeing if they could help." *Id.* at 22. At the postconviction hearing Terrana and Fraser also said that after they lost the motion to suppress, they met with Brant and advised him to plead guilty, a fact which the State courts credited as reasonable strategy because counsel investigated and considered alternatives. Counsel also testified at postconviction, and the State courts credited counsel's testimony that they didn't advise Brant to waive a jury.

The motion to suppress had been filed and was set for hearing May 10, 2006. Terrana had not retained or consulted an expert prior to filing the motion. TR ROA Supp. V. 14, p. 1310 – 11. On April 24, 2006, Mr. Fraser sought a continuance on behalf of Mr. Terrana, who was not present in court that day, so that Terrana could find an expert. *Id.* The court continued the motion hearing to June 23, 2006. Mr. Fraser also announced in court on May 10, 2006, prior to a ruling on the

motion to suppress and prior to obtaining an expert on the effects of methamphetamine on Brant's ability to waive his rights prior to being interrogated, that Brant was going to plead guilty and waive a sentencing jury. *Id.* at 1320-21. Mr. Fraser also said at that hearing that he had trouble contacting the mitigation specialist and meeting with her. *Id.* at 1320.

The issue raised in the motion to suppress was that Brant was "under the influence" of "methamphetamine." *Id.* at 1323. Terrana asked Dr. Maher, the psychiatrist appointed by the court to evaluate and present mitigation and who was made to testify about methamphetamine in the penalty phase, to assist with the motion. Maher told Terrana he "couldn't provide any meaningful insight." *Id.* at 1324. On June 22, 2006, the motion hearing was continued again and reset for August 3, 2006. *Id.* at 1331. At the June 22, 2006 hearing, Fraser told the court that, "[T]he posture we're in right now, and Mr. Brant, the last time I discussed it with him agreed, we're going to enter a plea of guilty to the charge of first-degree murder, proceed to a penalty phase before your honor."

On June 22, 2006, Fraser also told the court, "And Mr. Terrana just asked what is the point of having a motion to suppress at all in that event. Well, that's true, and the reason we're having the motion to suppress is because of all of the United States and Florida Supreme Court cases putting out the ineptitude of counsel in first-degree murder cases, which has made us extremely cautious and we have to file every conceivable motion." *Id.* at 1335-36.

Counsel advised Mr. Brant, in a letter dated November 17, 2006 (Def. Ex. 10 in postconviction; PC ROA v. 10, p. 1882-83), that Brant should plead guilty because he was "less likely to incur the jury's ire." The letter explained that "having a full-blown trial on guilt would predispose the jury to impose death." *Id.* at 72. "In the interest of not angering the jury," Fraser advised Mr. Brant to enter a guilty plea. *Id.* at 73. Fraser admitted that the October 17th letter accurately reflect his advice to Brant about pleading guilty.

Fraser did not do any research or reading of scholarly journals to see what the effect of pleading guilty would have on a jury in a capital case or what a juror's perceptions would be of a defendant who had already pled guilty. *Id.* at 73-74. He also did not consult with a jury expert. *Id.* at 74. Fraser stated that it would be "virtually impossible to get [a jury selection expert] on the public dole." *Id.* at 100. Fraser, however, conceded he had never filed a motion seeking the appointment of a jury selection expert. *Id.* He also conceded that the Office of the Public Defender had a jury consultant on staff. Fraser does not recall any discussions among the defense team about preparing a juror questionnaire in this case. *Id.* at 76. No meaningful juror questionnaire was ever prepared. Fraser could not recall what his thought processes were at the time of trial as to whether the sexual nature of the crime should have been addressed with the jury. *Id.* at 76-77. He likewise could not recall any discussions or his thought processes as to addressing the issue of drug use with the jury. *Id.* at 78-79.

Terrana stated that he and Fraser did not retain or file a motion for a jury selection expert. Terrana testified that he had used a jury selection expert before, including in another capital case in Hillsborough County, the Eddie Lee Sexton case, although that expert had worked *pro bono*. "Jury selection experts. I love jury selection experts. *I've used them.* You know, there's no downside to using them." Terrana did not remember the theories or discussions he had with Fraser about how to address the jury in light of the fact that Brant had already pled guilty. *Id.* at 471. The decision about the strategy of questioning the jurors was "left up to Fraser." *Id.*

Jury selection began August 20, 2007 and continued to August 21, 2007. TR V. 17, p. 1651. (Supp). There was no individual voir dire and jurors were not given a questionnaire about the case prior to jury selection or anytime thereafter. Upon being informed that Brant had already been found guilty, Juror Brenda Ricci stated, "He's guilty, he's guilty and I'm really tired of the system being wasted, to be honest with you." TR V. 18, p. 1816-17. Ms. Ricci continued, "Yes, I was upset just hearing what the judge described ... *and the five guilty verdicts that were already decided*. I mean, this was three years ago. I don't understand due process to me. (sic)." Id. at 1817-18. Upon request by counsel, the trial judge inquired of the Panel if anyone else agreed with Juror Ricci. Id. at 1820. Approximately 19 potential jurors agreed with Ms. Ricci. Id. at 1828, 1830-1832.

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

Defense counsel renewed the motion to strike noting that the jurors had laughed after Juror Parker's comment. The trial judge agreed: "Then there was laughter, yes." Id. at 1954. The court "reluctantly" granted the defense motion over the State's objection, determining that the jurors "starting with Ms. Ricci," created an "atmosphere" that warranted striking the panel. Id. at 1964-1966.

The next day, August 22, 2007, as a direct result of the "debacle" of jury selection, Brant waived his right to a penalty phase jury and proceeded to a bench trial. Brant told the court he had stopped taking his depression medication about two months prior to waiving the jury. TR ROA V. p. 1-20. The penalty phase began that afternoon.

The following day, the State put on the record that in a recorded jail phone call made by Mr. Brant the night before, Mr. Brant told a friend that, "pleading guilty was a big mistake." TR V. 8, p. 244.

The court conducted a bench trial and heard evidence over the course of two and a half days. The first afternoon, August 22, 2007, the State presented Deputy Fitzpatrick, who responded to the scene and discovered Ms. Radfar's body; Steven Ball, Ms. Radfar's ex-fiancée, who had lived with her for a period of time at the crime scene; Det. Kathy Frank Smith, who spoke to Brant at the scene and said he was "lucid" and "coherent"; Deputy Rodney Riddle, who spoke to a co-worker of Ms. Radfar's who had called her in as missing from work and who also spoke to Mr. Brant at the scene; and John Burt, a neighbor, who spoke to Brant after police discovered Ms. Radfar's body.

The following morning, August 23, 2007 the State called Melissa McKinney, Brant's wife, to establish aggravation and rebut mitigation. McKinney testified about their marriage, how they met, Brant's escalating pattern of acting out rape fantasies during their marriage just prior to the murders and Brant's use of methamphetamine. McKinney also testified about Brant's actions just after the murder. The next State witness was called on the afternoon of August 23, 2007, Dr. Lee,

the medical examiner, who testified that Miss Radfar was raped and then died from strangulation and suffocation.

Brant's counsel then presented five witnesses on the afternoon of August 23, 2007 who were taken out of order. The first witness, Reverend Hess testified that Brant and his wife were students at the Blue Ridge School of the Prophets. Hess said he was aware of Brant's drug use prior to attending the school and was a likeable and friendly person. Brant did some electrical wiring for Rev. Hess. He was only at the school a short time. Brant called Hess about reapplying to the school and in so doing told Hess that he had gotten involved in illegal drugs again but was trying to straighten out his life. Brant did not reenroll. TR ROA V. 9, p. 281- 87. On cross-examination, the State suggested that Brant was kicked out of the school due to forbidden sexual activity. Id. p 288-91. The second witness, James Harden, testified that he knew Brant because he was in the same Bible School as his son. He met Brant at a church function in Bradenton. Brant had an "odd hairdo." He then saw him two other times, at his son's graduation and at a cookout after graduation. Harden also knew Brant's wife and Brant lived with Mr. Harden while he was dating Missy. Brant was a clean and respectful house guest. Harden was floored when he heard what had happened. Harden and his wife visited Brant in jail prior to his trial. Brant had good days and bad days, sometimes breaking down and "weeping for his sons." Id. at 299.

The State then recalled Ms. McKinney (Missy) to testify that Brant wore gloves when he acted out his rape fantasies and that they had a cleaner in their home similar to that used at the crime scene. Id. at 304-05.

The defense then called their next witness, Steve Alvord. Alvord was an elevator mechanic who worked with Mr. Brant. He testified that Mr. Brant was a good worker. Id. at 308-09. He never knew Brant to be violent. He visited Mr. Brant at jail. Id. at 312-13.

The State then called Det. Ratcliffe, who took photos inside the crime scene. Id. at 319. The State then called Deputy Sheriff Christi Esquinaldo. Id. at 323. Dep. Esquinaldo testified about evidence she collected and Brant's confession.

The defense then called Thomas Rabeau, a retired volunteer chaplain at the county jail. He described his visits with Brant. He said Brant was having a hard time and met with him every Wednesday for three years. At the first visits Brant cried a lot. He and Rabeau discussed forgiveness and other aspects of Christianity. Id. at 334-42.

The State then called Det. Losat who had interrogated Brant. Losat said Brant did not appear to be under the influence of drugs. Losat also summarized Brant's confession. Losat was the last witness for the day.

The next day, August 24, 2007, the Defense called Pastor Leon Jackson. TR ROA V. 10, p. 378. Pastor Jackson was the youth minister at his church when he first met Brant and his wife, Missy. Brant sought marriage counseling at the church in 2003. They prayed together. Brant also confided that he had a drug problem. Pastor Jackson thought Brant had "a hole in his heart," which he described as a need to impress people and overcompensate due to insecurity. Pastor Jackson thought this was because Brant grew up in a "dysfunctional family," "not having a great

relationship” with his stepfather and a mother over lavished her children with things but who didn’t provide much substance. Id. at 378-87, Jackson said he believes that Chuck has knowledge of God and “he’s probably never gonna get out of [prison], that God could use him to maybe prevent young men from doing the – going down the road he went.” Id. at 387.

The Defense then called Dr. Michael Maher, a psychiatrist. Dr. Maher met with Brant and also interviewed Brant’s wife. The description of documents he reviewed is at TR ROA V. 10, p. 388- 89. He did not review any medical or school records, or even talk to Brant’s mother. Maher was asked to speak about Brant’s methamphetamine use, his brain damage and his background.

Maher explained that his primary method of learning about methamphetamine abuse was through evaluating individuals with substance abuse problems. He would testify in postconviction that he was not an expert in methamphetamine and had suggested to trial counsel that they should retain an expert in methamphetamine. Dr. Maher testified that Brant sued meth to work and developed a methamphetamine dependence. Id. at 400-03. He said Brant would feel energized, would have racing thoughts, difficulty sitting still, he might hear noises that he wasn’t sure were completely real and have tactile misperceptions and auditory hallucinations. Id.

Maher also talked very generally about the brain and executive functioning as it relates to impulse control. Id. at 404-05. He would testify in postconviction that he was surprised when he was told by trial counsel that counsel would not be calling Drs. Wood and Wu, the PET scan experts and that counsel would ask Maher to testify about the PET scan of Brant’s brain. Maher was asked about Dr. McClain’s IQ testing and dr. wood’s finding of four identifiable areas of the brain “primarily in the frontal lobe and then secondarily in the thalamus that showed abnormal patterns of glucose uptake on the PET scan. These are areas of the brain that are important in impulse control and executive functioning and are fundamental to reasoning, good judgment.” Id. at 408-09. As evidenced by decreased glucose uptake, those areas of the brain that affect impulse control, decision-making and judgment have a “problem of some significance.” Id. at 408. Maher also said he was “generally familiar” with PET scans. He then said that Brant’s PET scan showed an abnormal brain but “what that means and what the clinical diagnosis associated with that is just a bit beyond current medical science.” Id. at 410. Maher said that the PET scan was “consistent with a diagnosis that includes an impulse control element.” Id. at 413.

Maher was asked about Brant’s background, but had only spoken to Brant and his wife, as noted above, and had not spoken to Brant’s mother, sister or any extended family members or friends. Maher testified generally about Brant’s background, stating he had a “history of problems going back into childhood,” that were consistent with depression and “relationship issues.” Id. at 414. He had a “pattern of sexual behavior with his wife which predated this incident and his --- certainly his severe use of methamphetamines, which are consistent with an obsessive pattern of sexual interest.” Id. at 415. Maher said: “His relationship with his mother, his grandmother, his stepfather, his wife. All of those relationships show significant patterns of pathology.” Id. Maher testified that Brant used drugs to escape from his “chronically depressed and anxious state of mind” Id. Maher concluded by stating that he diagnosed Brant with methamphetamine dependence, severe, associated with a psychotic episode, sexual obsessive disorder and chronic depression. Id. at 416. Maher also said that “as a result of mental disease, defect” Brant was substantially impaired and limited in his ability to conform his conduct to the law. Id. at 418.

The Defense then called Gloria Millner. Id. at 464. Millner, who was very close friends with Crystal Coleman, Brant's mother was asked about Brant and Brant's stepfather but nothing about Crystal. Millner talked about how Marvin Coleman kicked Brant out of his house when Brant was an adult and married to Missy. Id. at 466. Millner described Marvin Coleman as a "very controlling person," but didn't want to "put him down" because he had passed away. Id. at 468. She did admit to being familiar with the time Marvin Coleman was arrested for domestic violence in Virginia. Id. at 469. Millner also said she never saw Brant drink or use drugs and that he was an "awesome" father. On cross, Millner stated that Crystal favored Garrett. Id. at 474. She admitted that she never saw Marvin "lay hands" on Brant or Crystal but she saw the bruises on crystal. Id. at 475-76.

The Defense then called Crystal Coleman, Mr. Brant's mother. Id. at 479. Crystal testified that she had three children, Chuck, Sherry and Garrett. She said her own mother suffered depression for 25 years and her father, "I guess if it's called an illness, was an alcoholic." Id. at 481. She said, "her father drank every day, beat my mother half to death every night, and no one took care of the children." Id. at 481. She was not asked to describe her childhood in any detail or elaborate on what she meant by that. She then testified that her grandmother was placed in a mental institution for depression. She was not asked any further details about that. Crystal then described Eddie Brant, Charles Brant's father, as a quiet person who worked a lot of hours and had a low IQ. Id. at 482. Crystal said their marriage ended because her Aunt Jenny "took [Eddie Brant] away from me." Id. at 482. This happened when Charles Brant was seven or eight weeks old. Id. at 483. Crystal attributed her problems after giving birth to being "snake bit." Id. at 483. She described a traumatic birth, "an all-night thing, which I died twice. I don't know how long I died, but I did die twice." Id. at 483. She continued to have problems after giving birth to Charles Brant, her "nerves were real bad and the house was quite ugly." Id. at 484. She ended up walking the streets at night and eventually being admitted into a mental hospital because she wanted to kill herself. Id. at 484. She said that Charles Brant was sent to the paternal grandparents and Eddie Brant kept Sherry, their daughter. Crystal was diagnosed with post-natal depression and given shock treatments. Id. at 487. She is still under medical care and has been prescribed Xanax, Prozac and Effexor. Id. Crystal said that she had an "animosity" with her son from infancy, that he would kick her and didn't want her to care for him. Id. at 489. She also said he banged his head against the wall and ingested lead paint. Id. at 489. As noted above, she did not speak to any experts to convey this crucial piece of information to them. Crystal stated that she remarried when Charles Brant was five years old. Id. at 492. Crystal was shown some school records which she did not recognize. Id. at 495. Crystal then said that life with her second husband, Marvin Coleman, was horrible. It was as if she had "married a monster." Id. at 496. Marvin would call her names and he would spank and whip Charles Brant so hard that "blood would go down the back of his legs." Id. at 496. Marvin drank and was arrested in Baltimore for domestic violence in Baltimore. Id. at 497. Crystal also stated that Marvin drank more when they moved to Florida and he would come home drunk and "mentally and physically torture me up until four or five in the morning, at which time I would take a shower and go to work and leave the house." Id. at 499. She was not asked to describe or explain what she meant by this. Crystal also said that Marvin was "negative and derogatory" to Brant. Id. He only went to one of Brant's football games but he made so much fun of Brant that she and Marvin left and Marvin never went to another game. Id. at 501. Brant moved out when he was 17. Id. at 502.

The Defense next called Sherry Coleman, Brant's older sister. Id. at 516. Sherry said Marvin Coleman was a bully towards her brother and verbally and mentally abusive to her mother. Id. at 517. Marvin would make such cruel comments at dinner that eight-year-old Brant would cry and not be able to eat. Id. at 518. She never saw Marvin physically abuse Brant. Id. at 520. She never saw him abuse her mother but was aware of it. Id. at 521. Sherry said that Marvin abused her sexually when she was 13 to 16 years of age. Id. at 522-23. She was told by trial counsel to "give [the court] some idea of what that consisted of . . . without getting into a lot of unnecessary detail." Id. at 523. She said Marvin "attacked" her. Id. at 523. She also described taking Brant to the police station when he tried to turn himself in. Id. at 528. She also said that her brother Garrett has a "crack" problem. Id. at 528.

The trial reconvened on Monday August 27, 2007. The Defense called Dr. Valerie McClain, a forensic neuropsychologist. TR ROA Vol. 10, p. 550. Dr. McClain conducted a clinical interview and administered several tests. As far as being given information about Brant's background, she read depositions from Sherry and Garrett and interviewed Crystal. Id. at 553-54. Brant's testing showed that he had problems with "learning and memory." Id. at 554. He had a 25 point verbal-performance IQ split which is statistically significant and caused her to recommend trial counsel to request a brain scan. Id. at 555. She diagnosed Brant with a learning disorder based on testing and the school records she reviewed. Id. at 556. McClain diagnosed Brant with polysubstance dependence, major depression and cognitive disorder NOS. Id. at 558. Cognitive disorder "simply refers to areas of problems in the brain," such as "memory, language, attention, [and] concentration . . ." Id. at 558. McClain opined that Brant's ability to conform his conduct to the requirements of the law was substantially impaired based on his brain functioning and academic records. Id. at 558-59. The Defense announced rest. Id. at 581.

The State called James Harden in rebuttal. Id. at 596. He is the son of James Harden who testified earlier. Mr. Harden reported Mr. Brant's "messing up" while at Bible school to the principal of the school. That resulted in Mr. Brant and Missy Brant's dismissal from the school. Id. at 600.

The State then called Dr. Donald Taylor, a state forensic psychiatrist. Dr. Taylor interviewed Brant and diagnosed him with substance dependence, learning disorder and sexual sadism. Id. at 608-09. Dr. Taylor opined that during the sexual battery Brant had a substantial impairment in the ability to conform his conduct to the law but did not have that problem or impairment with regards to the murder. Id. at 612.

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

Evidence adduced at postconviction hearing regarding trial counsel's investigative efforts or lack of investigative efforts as to jury waiver.

Terrana said at the postconviction hearing that jury selection was a “debacle. We had jurors standing up.” TR (Supp.) V. 18, p. 1958. He said that when the jurors found out Brant had already pled guilty, the “overwhelming response” of the jurors was that “it looked like a riot was about to take place.” *Id.* The jurors were angry and questioned why the court was “wasting their time.” Since Brant was guilty, they wanted to “fry him.” *Id.* at 474. It was a “fiasco.” *Id.* at 37.

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

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

Brant testified that had he known of all the mitigation available he would not have waived a sentencing phase jury. The State postconviction court determined this statement to be not credible but did not set out any reasons for her credibility determination.

Testimony on prevailing norms

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

Mr. Lenamon offered the following testimony which was not contradicted. Prevailing norms establish that capital lawyers should present an integrated defense and “front load mitigation” where possible. *Id.* at 700-05. Capital lawyers are to work together as a team with an integrated defense. *Id.* at 706-07. Florida lawyers have been taught that advising a client to plead guilty and waive a sentencing jury is a “really bad idea.” *Id.* at 724-28. Such advice should only be given after a thorough investigation, based on identifiable facts. *Id.* Lenamon testified that he has successfully argued for the court to appoint a jury selection expert in a capital case in Florida. Lenamon explained that the Commentary to ABA Guideline 10.9.2 instructs that when “no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should *be extremely reluctant* to participate in the waiver of the client’s rights.” *Id.* Prevailing norms also

instruct lawyers that when they have a client who is depressed it is important to provide support to help the client from making poor decisions. *Id.* at 730-31.

Mitigation investigation *at a minimum* requires counsel to investigate both parents and their multi-generational history. *Id.* at 708-09. The mitigation should include looking at the client's life prior to conception to the present day, including while he is incarcerated awaiting trial. *Id.* at 706-07. Lawyers should look for a family history of mental illness, alcoholism, addiction and other patterns of behavior.

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

When a capital attorney is court-appointed, the attorney must file the appropriate motions with the court in order to obtain the resources they need in order to constitutionally represent their client. *Id.* at 716-17. Capital attorneys should seek "specialist experts" when needed. *Id.* at 717-18.

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

Mr. Brant also presented the testimony of jury selection and mitigation expert, Toni Blake. Ms. Blake has consulted on more than 35 capital murder jury selections throughout the South, including in Florida and worked as a mitigation consultant on many capital cases. *Id.* Blake was retained by post-conviction counsel to review the jury selection and waiver in Brant's case, and the mitigation investigation.

Ms. Blake presented the following testimony without contradiction. Ms. Blake testified that if she had been consulted in this case by the trial attorneys, she would have advised against entering a guilty plea based on the "research in the field about guilty pleas." *Id.* at 768-72. The research shows that jurors have a different understanding of the law than lawyers and judges and think that premeditated murder, for example, requires advance planning and do not understand that it can be based on a snap-second decision. *Id.* When a client has pled guilty to premeditated murder or kidnapping, the jurors do not have the benefit of the law to understand what the elements of the crime are. *Id.* The research also shows that when a juror spends time with a defendant in close proximity, they are more likely to find a similarity or factor in that defendant's life that makes it more likely that the juror will render a life verdict. *Id.* at 770-71. The longer a juror gets to watch a defendant in court – two days versus ten days for example – the longer the juror has to develop familiarity in a positive way. *Id.* Repeated exposure to bad facts is actually helpful in the jury context because the jurors experience "systematic desensitization." *Id.* at 771-73. Exposing a jury over and over to stimuli reduces the emotional impact. *Id.*

In terms of advising a client as to whether to waive a sentencing jury and be sentenced by a judge who has imposed the death penalty before, she would strongly advise a client not to do so because *the research shows* that once someone has effectuated or voted for death, it is much easier to do it the second time than it was the first time. *Id.* at 774. Judge Fuente had sentenced other defendants to death prior to presiding over Mr. Brant's case.

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

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

Blake also explained that in a mitigation investigation it is important to get information from both sides of a client's family, and talk to multiple sources to discover the family rumors and mental health issues within the family. *Id.* at 778. It is important to go back multiple generations, if possible, and look at genetic issues and environmental issues. *Id.* This is true even if the father and the child never met. *Id.* at 780. It is also important not to rely solely on a capital defendant's mother. Mothers of capital defendants often want to hide their own deficiencies or keep family secrets. *Id.* "So mom alone, obviously, or dad alone would never suffice." *Id.*

Evidence adduced at postconviction hearing regarding trial counsel's investigative efforts or lack of investigative efforts as to mitigation and failure to inform Brant of available mitigation

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

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

Fraser suggested the following explanation for his failure to investigate: "So what I'm suggesting is, I didn't know about the father. If I did know about the father it was like too many

cooks spoil the broth. I only needed a certain number of mitigation witnesses. I'm not going to parade his family tree through the penalty phase." *Id.* at 526-27.

Fraser conceded that the ABA Guidelines stress the importance of investigating a client's life from conception, or earlier, and understanding the client's family background from *both* sides. *Id.* Fraser also conceded that as "a practical matter or maybe as a legal matter [contact with Brant's father] *should have been done, could have been done.*" *Id.*

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

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

Fraser had a conversation with Hillsborough Circuit Judge Debra Behnke about Brant's case. Judge Behnke gave Fraser the names of two experts on methamphetamine addiction. *Id.* at 564. Fraser indicated that Judge Behnke was "particularly impressed" with the experts' explanation of "how methamphetamine affects the brain." *Id.* at 537-38. As a result of his conversation with Behnke, Fraser sent a letter to Toni Maloney, his mitigation investigator, with the experts' CVs attached and asked her to contact them. (RV 43, p. 534; V 10, p. 1875-79.). Fraser thought he spoke to one of the experts and they said they couldn't appear for reasons he didn't remember. *Id.* at 540-41. **He had no other explanation for why they weren't retained** and none was contained in his file. *Id.* Fraser agreed that it would have been helpful to find a person who had used methamphetamine with Brant within a week or two of the crime and had asked his investigator to find such a witness about two months prior to the trial. *Id.* at 542. No such witness was presented at trial.

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

Fraser conceded that no one from the defense team went to the evidence locker to look at the evidence seized by law enforcement. *Id.* at 543. Fraser was not aware that there was a clump of Brant's hair in evidence. *Id.* He was not able to say whether hair can be tested for the presence of

methamphetamine. *Id.* The hair tested positive for methamphetamine and MDMA in post-conviction.

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

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

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

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

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

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

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

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

McClain testified that it was widely known in 2004-2007 among mental health professionals that meth use can cause brain damage. *Id.* at 609-10. McClain agreed that ingesting plaster and lead-based paint is also a risk factor. *Id.* at 610. McClain knew Brant had ingested plaster as a child but was not asked about it, even though she regarded it as relevant. *Id.* McClain was aware that Brant repeatedly banged his head as a young child but was not asked about it. *Id.* at 611. McClain testified that this was also a risk factor. *Id.* McClain's opinion "couched within the confines of a psychologist," was that Brant had "areas of very significant impairment in the brain that would suggest he had memory problems, language problems, or other areas that had been affected by brain trauma." *Id.* at 611-12. McClain also diagnosed Brant with depression. *Id.* at 612-13.

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

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

Maher agreed that it was widely known among mental health professionals in 2004-2007 that childhood abuse and neglect can have lifelong effects on an individual's emotional and psychological development. *Id.* Maher was asked at trial about Brant's meth use and how it affected him at the time of the crime. *Id.* Maher stated that he had "general experience as a physician" and "some specific knowledge" as a psychiatrist on "amphetamine use" but that he has

not engaged in research on severe abuse “as was present in this case,” and does not have special credentials in the area of substance abuse. *Id.* at 641-42. He also does not have research experience on the effect meth use has on the brain. *Id.* Maher “made it clear” to Fraser that he lacked “specialized” knowledge and that he thought the case was “very much about amphetamine abuse and its effect on the brain,” and suggested Fraser should find other experts with more familiarity with methamphetamine for this case. *Id.* at 642-43.

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

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

Wu was contacted by Wood and Maloney in January of 2007. RV 46, p. 965-64. Wu’s role was to provide a second opinion on the PET scan abnormalities of Brant. *Id.* at 973. He was not sent any additional information about Brant’s psychological or neuropsychological history or assessment. *Id.* at 974. He did receive prison records which showed Brant was prescribed Wellbutrin, Trazodone and Haldol, suffered from depression and that he had used crystal meth, ecstasy, and methamphetamines. *Id.* at 977. Wu only spoke with the trial attorney once - on August 24, 2007. *Id.* at 978. He was scheduled to fly from California to Tampa but found out at the last minute that he would not be called as a witness. *Id.*

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

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

Wood was retained by trial counsel in late 2006 to conduct a PET scan of Brant’s brain. The scan was administered in January 2007. *Id.* at 1662. Wood attended the administration of the scan, observed the reconstruction of the three-dimensional images and concluded that the images were sound and without any “artifact.” *Id.* at 1662-63. He concluded that Brant’s scan was a valid scan. *Id.* Wood then interpreted the PET scan and took measurements of the areas of the brain that were behaviorally important in the case to assess whether those areas of the brain were showing normal or abnormal activity. *Id.* at 1664. Wood determined that there were “very striking abnormalities” in the “frontal lobes bilaterally right at the pole, right at the very tip of the frontal

lobes on both sides, and in the middle of the frontal lobes where the two sides of the brain meet in the middle. . .” *Id.* at 1665.

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

Wood recalled that a phone call to review the PET scan images via computer with Wu and Fraser was scheduled to occur after Fraser had finished selecting a jury. *Id.* at 1679-80. The phone call “never happened.” *Id.* at 1680. He has no recollection of ever sitting down with Fraser and going over the PET scan images in any detail. *Id.* Wood does not know why he was not asked to testify. *Id.* at 1681-82. If he had been called to testify, he would have given the same testimony he provided at the evidentiary hearing but would have also included the risk factors for brain damage he was not told about until post-conviction: the lead-paint exposure, the head-banging, the elevator accident, and the chronic methamphetamine use. *Id.*

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

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

Lay witness mitigation testimony offered at postconviction

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

Eddie Brant

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

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

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

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

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

Annice Crookshanks, Eddie Brant's younger sister, "was 13, 14 or 15" when Chuck was born. *Id.* at 1199; 1207. She remembered her "mother getting a call [on New Year's Eve] to come to Ohio and pick up [Chuck]." *Id.* All Annice knew at the time was that Crystal was in the hospital. *Id.* She later learned that Crystal had been in a mental hospital having suffered a nervous breakdown after giving birth to Chuck. *Id.* at 1208. A few years after that, when she was 17 or so, she learned that Eddie was not Chuck's father. *Id.* at 1209. She never knew who Chuck's father was. *Id.* "Everybody" in her family knew that Eddie was not Chuck's father. *Id.*

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

In the Fall of 2012, post-conviction counsel contacted Sherry and asked if she would give a DNA sample to see if she and Chuck were full or half-siblings. It did not come as a total shock

to her. She had received some pictures of Eddie from Mary Kay after Eddie died and had teased her Mom about the fact that Eddie and Chuck didn't look alike. Crystal had responded with an angry look. RV 50, p. 1445.

After the DNA results came back, Sherry wanted to be the one who confronted her mother. *Id.* at 1446. The DNA sibship testing confirms Chuck and Sherry are half-siblings with an 87% probability of accuracy. RV 52, p. 1588-1621. At first Crystal was angry and insisted the DNA was wrong. *Id.* at 1447. A few days later Crystal told her that she had been raped and that the rapist was Chuck's father. *Id.* "She said it was something that she had buried and just never ever wanted to think about. She spent a long time burying it." *Id.* at 1448.

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

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

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

Shortly after that she realized she was pregnant and felt the baby was a result of the rape because she and Eddie had been using condoms. *Id.* at 1495-96. She was sad throughout her pregnancy. She had nobody to talk to. "Eddie and I just didn't have a relationship." *Id.* at 1497.

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

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

At trial, Crystal testified that Eddie Brant was Chuck Brant's father. *Id.* at 1068. That was not true. *Id.* at 1505. She didn't want to admit the truth because it was so "horrible" and she felt "so bad and so intimidated, that [she] just couldn't tell anybody." *Id.* She didn't want anybody to know what had happened to her because she was so embarrassed. *Id.* at 1505-06. She had never told her children or her mother. *Id.*

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

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

Milliner had a child out of wedlock when she was a young woman. Her family had wanted her to put her son up for adoption but she wouldn't do it. So when she heard Crystal talking about Chuck, Milliner couldn't understand it, "because [she] knew how much her son meant to [her]. And [she] would have gone to the end of the world for him."

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

Maternal Multi-Generational History

Jerry Crane is approximately one year older than his sister Crystal Coleman. RV 48, p. 1158. Their parents were Lawrence William Crane and Delphia Gertrude Cooper. Jerry and Crystal were both born in West Virginia. *Id.* The family had moved 12 times by the time Jerry was in fifth grade. *Id.* at 1159. The family lived in cheap rental housing, sometimes living in a one room house. *Id.* Larry Crane was an alcoholic who had trouble keeping a job and providing for his family. *Id.* Jerry's paternal grandfather was also an alcoholic who was "completely nasty," and chased Jerry trying to whip him. *Id.* at 1170-71. He died when Jerry was seven. *Id.* That night, while the grandfather was in the hospital and about to die, Crystal slept with the grandmother, who died in the bed while Crystal slept next to her. *Id.* at 1172. Crystal was six years old. *Id.* The grandparents

were well off and left an upholstery business and buildings worth “lots and lots of money.” *Id.* at 1177-79. His parents squandered all of it so that the inheritance “got drank up.” *Id.* at 1179.

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

Jerry spent a lot of his childhood in beer joints. *Id.* at 1165-66. His father drank every day and drank anything he could get his hands on, from whiskey to shaving lotion and rubbing alcohol. *Id.* His mother was the same. *Id.* On at least three occasions she drank until she was in a coma and her father called an ambulance to come get her. *Id.* Jerry and Crystal often went hungry. His parents spent the weekends drinking and driving and his father “drove like an idiot.” *Id.* at 1167. If they told their parents they were hungry, their parents would give them “10 or 15 cents for a candy bar and a pop.” *Id.*

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

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

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

Crystal recalled the car accident and the ambulance taking her and her mother to the hospital. *Id.* 1466-67. Like Jerry, she also remembered that father checked Delphia out against the doctors’ orders. *Id.* Delphia had a broken hip and leg and couldn’t walk. *Id.* She would lay in bed a lot and then Lawrence would force her to get up and then would start beating her. He knocked her into the heater which burnt “a perfect pitch fork on her face.” *Id.* at 1467. Her father said it was

the mark of the devil. *Id.* After that, Delphia would drag herself around, but Crystal was unsure how she ate or survived during that time because her father would leave for weeks at a time. *Id.* She and Jerry were not getting baths and went to school dirty and hungry. *Id.*

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

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

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

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

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

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

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

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

Had trial counsel made a single ten-minute phone call to Mary Kay Brant, they would have discovered Eddie was not Chuck's father. And, had they investigated Crystal's own tragic life, they would have been able to explain to a jury why she had a nervous breakdown and endured shock treatments, why she rejected and refused to love her son, and why she married and stayed with Marvin Coleman.

Brant's childhood years with Marvin Coleman

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

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

At trial she was asked about Marvin and stated that he mentally and physically tortured her until 4 or 5 a.m. *Id.* She was never asked to describe what that was like. *Id.* In post-conviction she described it. Marvin would drink at a bar until about 2 a.m. and then he would come home. Crystal would "shake" and "pray" when she heard him pulling up in the driveway. *Id.* at 1502-03. Marvin would demand food and then accuse of her being unfaithful. *Id.* He held knives to her throat to make her admit she had done "things." *Id.* The tirades ended with unwanted sex but Crystal never told him "no" because she was afraid he would beat her or kill her and the kids. *Id.* at 1503-05.

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

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

Marvin sexually abused Sherry, *id.* at 1423-25, including acting out a rape scenario with her under the pretense he was helping her. She testified at trial that Marvin molested her, but she was not asked to describe the nature of the attacks. He attacked her by surprise - in her bed while Crystal was in the hospital after giving birth to Garret, when she was sleeping while her mother was out of the home working, and exposed himself to her and aggressively attacked her in the kitchen, although she was able to get away from him that time. *Id.* She didn't tell her mother because she was afraid it would "break her heart." *Id.* at 1423-24. Sherry eventually gained the courage to confront Marvin. The abuse stopped after that. *Id.* at 1425. Delphia later told Crystal. Crystal never took Sherry to get counseling. *Id.* at 1426.

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

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

He would come home drunk and demand that she cook for him. When she refused, he would "smack [her] around." *Id.* at 1304. One night, shortly after she had left him, he entered her house after a night of drinking. She was asleep on the couch. He grabbed her by her crotch, said the men in the bar had been telling him he wasn't "man enough to keep [his] wife," and then beat her "really bad." *Id.* at 1306. Marvin ended up in a mental institution during their divorce. *Id.* at 1307. The psychiatrist warned her that Marvin was mentally ill and could end up killing her. *Id.*

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

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

During the trip, she became ill and was diagnosed with mononucleosis. Marvin offered her a joint to help her feel better. *Id.* at 1330. Her throat was sore so she had a bowl of chicken noodle soup. She left the bowl in the sink. When Marvin saw it, he became enraged and smacked and shoved Crystal around the kitchen. *Id.* at 1331. The fight seemed to go on all night, it was "really violent," and she was "scared." *Id.* at 1331-32. Garrett was home, watching "cartoons nonchalantly" as if it was, "no big deal." *Id.*

The next morning, Dawn apologized to Crystal. Crystal just said, "'Honey, it's not your fault. Your Dad is just under a lot of stress right now. It's going to be okay.'" *Id.* at 1332-33. And then Crystal "put on these big, dark sunglasses like an owl and wore them over her face and went on to work like it was no big deal." *Id.* The glasses concealed the bruises above her cheekbone

and beside her eye, “where he hit her so hard that it broke the skin. . .” *Id.* After seeing that, Dawn called her mother and arranged to go home early even though she was still very ill. *Id.* at 1334.

Brant’s school life/friends

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

Sloan worked as a teacher’s aide. She tutored students who had fallen behind in reading and math in a “learning lab.” Chuck was in the program when he was in sixth grade. Chuck didn’t mind being in the program like some of the other kids; he was eager to learn and was always polite. The last time she saw Chuck was in 1999. He stopped by their house and told her that he had gotten into drugs but was trying to kick the habit and was doing pretty good. She and her husband tried to encourage him.

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

Brant’s Drug Use Just before the Crimes

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

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

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

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

Sherry and Garrett both testified to the trauma and sorrow the family experienced upon learning what Brant had done. Brant went to a church and spoke to a priest. The family cried,

hugged and prayed after agreeing Brant should turn himself in. Garret, who testified he was a CI for the Orange County Sheriff's Office at the time, and himself abusing drugs, testified that he spoke to OCSO Deputies who confirmed he was a CI working for an undercover agent named "Neil." After that conversation with the OCSO deputies, HCSO arrested Brant at his parents' home in Orange County.

Dr. Cunningham, a capital forensic expert, explained Chuck was turned in by his brother and family, even though Chuck was also trying to turn himself in, and this factor has a number of implications should Chuck be executed. This is a betrayal of Chuck by his brother, and there is a sense of guilt for Garrett. But also there is a societal interest in supporting the integrity of the sanctity of family relationships and in protecting the community. So it is important for family members to have a sense of a larger obligation to the community to turn in a family member who has committed a serious act of criminal violence to prevent future injuries on innocent victims. But, it is also important to foster family integrity and encourage people to come forward who might not otherwise do so upon learning that someone else came forward and the prosecution still sought death against their family member.

Mental Health Expert Testimony Presented at Post-Conviction

Overview of Mental Health Issues

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

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

Hanlon learned that Chuck had been conceived in a rape. *Id.* at 625. Hanlon also determined that Chuck's mother and maternal grandparents had mental health and addiction issues, although Crystal's addiction issue was compulsive shopping and gambling, not alcoholism. *Id.* at 1064-68. Chuck's maternal grandmother suffered from depression and had been prescribed Thorazine (an antipsychotic) and Elavil (an antidepressant). *Id.* She also drank excessively, had to be hospitalized for drinking rubbing alcohol, and smoked marijuana late in life. *Id.* Chuck's maternal grandfather was also violent and abusive. *Id.* That the family had a history of mental illness and substance abuse was presented at trial, see *Brant v. State*, 21 So. 3d at 1280 ("Brant's mother testified that their family had a history of depression and other mental health conditions," and Sherry Coleman testified that Marvin Coleman "was an alcoholic and a 'bully.'"). However, the connection between mental illness, substance abuse, brain damage and the genetic component of addiction was not addressed through expert testimony, nor were details of the abuse presented to the extent in post-conviction.

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

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

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

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

In addition, Chuck was teased by his peers, made fun of at the bus stop, and was made to wear a dunce cap at school while in first grade. *Id.* at 1070-81. Marvin punished Chuck by cutting off all his hair and making him wear plaid pants to school. *Id.* at 1087. When Chuck wet the bed as a first-grader, Marvin humiliated him by making him wear a diaper. *Id.* at 1082-83. Chuck couldn't read or write very well until after high school. *Id.* All of this is important for many reasons, including that these incidents lower a person's self-esteem and people with low self-esteem often turn to substance abuse. *Id.* at 1081-82. Hanlon summed up the theme of Chuck's life: "rejection, abuse." *Id.* at 1087. "There [was] no solid foundation for him in any way that he turned." *Id.*

Brain Damage

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

Wu agreed that eating plaster and lead paint as a child, head banging as a child, methamphetamine use and a head injury as an adult are all events that could have caused brain

metabolic abnormalities. *Id.* at 1032-33. In addition, sleep deprivation is also known to depress frontal lobe activity. *Id.* at 1033-34. In an individual such as Brant who has abnormal brain function, “when you add sleep deprivation on top of the matters that were present, it would have a negative kinesic effect in terms of *significantly compounding impairment of the frontal lobe.*” *Id.* at 1045. Given Brant’s PET scan abnormality, meth use and sleep deprivation, Wu opined that Brant’s capacity to have a normally functioning frontal lobe would have been substantially impaired and would have significantly impaired his ability to conform his behavior to the requirements of the law. *Id.* at 1045-46.

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

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

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

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

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

Gur’s review of Brant’s PET showed *a striking abnormality in his hippocampus of almost 15 standard deviations below normal.* *Id.* at 2102-04. The amygdala and left insula are also low, six and four deviations below normal respectively. *Id.* The frontal lobe shows three to four standard deviations below normal, mostly on the left side of the dorsolateral prefrontal regions as well as the dorsomedial prefrontal regions. *Id.* at 1204.

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

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

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

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

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

Dr. Morton explained that there are a number of important considerations in the medical-legal arena when assessing an individual who has been using methamphetamine prior to and/or during a crime, the first of which is that meth is known to lead to violence. *Id.* at 1968-69. Meth is a very old drug that has been around for one hundred years. The information about its violent effect has been widely documented and known even in the 1930s. *Id.* at 1969-70. "We knew that methamphetamine and violence go hand in hand." *Id.* Scientists now have a better idea of why and what part of the brain methamphetamine affects, but its link to violence and murder has been known. *Id.* at 1969.

The second factor about meth is that and it damages people's brains. *Id.* at 1970-72. At first medical experts did not know where the brain was affected, but with the advent of scanning and neuroimaging, experts can see "more or less where the changes are occurring." *Id.* at 1971. Meth

reduces the volume of the brain. *Id.* Methamphetamine is one of the most powerful stimulants and it acts on the brain in a very powerful way. *Id.* at 1976.

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

Meth is an extremely potent central nervous system stimulant "of almost every nerve cell in the brain." *Id.* at 1979. It stimulates dopamine, epinephrine, norepinephrine and serotonin, and "causes all of these nerve cells to release all of their stored chemical at once." *Id.* Having all of these chemicals released simultaneously in a manner the brain is not prepared for is what causes the damage and side effects. *Id.* at 1980. Methamphetamine stays in the body longer than cocaine and may stay in the body for three to five days. *Id.* People can take meth by swallowing it, injecting it, inhaling it, smoking the vapor, even putting it in their food. *Id.* at 1987.

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

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

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

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

Dr. Mark Cunningham is a nationally recognized forensic psychologist with a focus on capital cases. Dr. Cunningham was allowed to render opinions in the field of capital forensic sentencing evaluations, forensic psychology, and risk assessment as it relates to capital defendants and their conduct in prison. Cunningham was asked to identify whether there were any adverse developmental factors in Mr. Brant's background that were relevant to an analysis of moral

culpability and death-worthiness and Brant's likelihood of making a positive adjustment to life in prison without parole. RV 53, p. 1708.

Based on scientific research, Cunningham explained that it is critically important that the sentencing judge or jury has an understanding of the relationship of damaging or impairing factors to choice and moral culpability. *Id.* at 1715-18. It is vitally important that the jury be educated on why they should care, or even consider, whether a capital defendant had a difficult childhood. *Id.* In the face of the notion in popular culture referred to as "the abuse excuse," it is important to explain to a fact finder how a capital defendant's background has a nexus to criminal violence. *Id.* at 1716. It is to remind jurors of what they know about their own children – that childhood is "profoundly important." *Id.* at 1717. Children are "delicate" and childhood trauma can leave an "indelible imprint on them." *Id.* "So the task for defense counsel is to illuminate" the defendant's background and childhood with "the best available science that is essentially consistent with what jurors are thinking about their own kids but are unlikely to apply to a [capital] defendant." *Id.* at 1717-18.

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

First, under neurodevelopmental factors which were discussed briefly at trial, Cunningham identified that Crystal smoking during her pregnancy, experienced a snakebite during her pregnancy, that Chuck was engaged in severe head banging, suffered lead exposure, and breech birth accompanied by emergency procedures. In addition to those factors, Cunningham identified that Charles Brant suffered from a socialization spectrum disorder as demonstrated by his inability to be soothed as a baby, and his difficulty in making friendships. *Id.* at 1729. Brant also exhibited symptoms of attention deficit/hyperactivity disorder. *Id.* at 1728. Other neurodevelopmental factors include the abnormal PET scan, MRI and neuropsychological testing. This was discussed but not well linked to Brant's behavior during the offense. *Id.* at 1729. Additional factors were Brant's genetic predisposition to drug and alcohol use and his methamphetamine dependence. *Id.* at 1731-37.

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

In addition, Brant was exposed to Marvin's verbal abuse of Crystal, which was sexually accusing and demeaning in its content, Marvin's physical abuse and rape of Crystal, and Marvin's sexual abuse of Sherry. While some of that was touched on at trial, the implications of that on a child with sexually aggressive fantasies was not explained. *Id.* at 1737-40. "As we are trying to

understand where does Chuck's sexuality --- how did he fall off the rails here in terms of the development of his own sexuality, this kind of family history is critically important in illuminating ... [Chuck's] moral culpability about that sexual orientation." *Id.* The same was true of the next factor, domestic violence; while it was discussed it was not linked to criminal violence. *Id.* at 1740. There was also generational family dysfunction in Brant's family including substance abuse and domestic violence. *Id.* at 1743.

The final arena Dr. Cunningham addressed was disturbed trajectory. *Id.* Dr. Cunningham identified two factors under this arena – aggressive sexual fantasies from early childhood and multiple risk factors for drug dependence. *Id.* at 1743-45. Dr. Cunningham concluded that the developmental damage and impairing factors that Charles Brant experienced as a child are "extraordinary in nature," and "very significant." *Id.* at 1746.

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

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

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

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

Another important factor is Crystal's failure to bond to Chuck and the sequential care Chuck received in infancy. An infant's lack of a chance to bond to a single caregiver who is nurturing is a psychological injury to a child that is profound in nature, even though the child will

have no memory of it. *Id.* at 1817-19. Primary attachment disorder has significant and lasting effects and impairs a child's ability to empathize in adulthood. *Id.* There is also a nexus between disrupted attachment and sexual offending. *Id.* at 1837-39.

In addition, the sequential damage Crystal suffered as a result of her own traumatic childhood, left Crystal injured so that she comes into parenting as an injured person, and then goes about parenting with diminished capability to be a good, nurturing parent. *Id.* at 1823-27. This is why it is important in a capital sentencing investigation to obtain a multi-generational history. *Id.* So, for example, Crystal grew up in a house where Delphia was horribly abused, and then Crystal marries and remains with Marvin, who also horribly abuses her. *Id.* It was as if it was part of Crystal's life script. *Id.* A juror would not know that absent trial counsel investigating and presenting a generational understanding of a family system. *Id.* Crystal also neglected Chuck in two ways. *Id.* at 1831-35. First, she isn't emotionally available to love him. A child senses the quality of feeling that the adult has for them and when a child senses a void, that is a "deeply disturbing and anxiety provoking experience" for the child. *Id.* at 1832. The other aspect of neglect is that Crystal stays in the relationship with Marvin, serving her own disturbed needs, "at the expense of protecting and providing stability" for her children. *Id.* The household was a "profoundly chaotic context" in which the children grew up. *Id.* This kind of neglect creates a "sense of terror that the child has that their world is out of control." *Id.* at 1832-33. This damage is observable in Chuck as he enters middle childhood. *Id.* And, children who have been emotionally neglected are at increased risk for psychological disorders and for criminal behavior in adulthood. *Id.* at 1833-34.

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

Cunningham explained that cumulative and synergistic action of the neglect, abuse, neurological and psychological deficits that Brant experienced affected his conduct at the time of the crime and resulted in a psychological state so that Brant's capacity to appreciate the criminality of his conduct and conform his conduct to the requirements of the law was substantially impaired and that the capital felony was committed while Brant was under *the influence of an extreme emotional disturbance*. RV 56, p. 1897-1900.

Positive Prison Adjustment Testimony

Prison Adjustment Testimony

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

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

Records Custodian Jan Bates reviewed Brant's HCSO jail records. RV 45, p. 871-80. Brant was initially placed in confinement due to the high profile nature of his case but was later moved to general population even though he was considered a maximum security inmate due to the severity of his charges. The jail classifications staff later allowed Brant to be a "close supervision trustee." Trustees were allowed to clean the Pod, heat meals in an oven and serve them, and do laundry using a washer and dryer kept in the Pod.

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

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

In assessing Brant's ability to adapt to prison, Aiken made a number of determinations. First, because Brant's crimes include a rape, Brant is actually coming into the prison system with a high degree of vulnerability. He has seen inmates attacked because they are sex offenders. "They are at the lowest ebb of the prison hierarchy." *Id.* at 1121. His concern about Brant is that he is someone who, "doesn't know how to pull time. In other words, he has to learn how to survive in this abnormal environment." *Id.* at 1121-22. Aiken, however, was intrigued by how well Brant did. He obtained trustee status in a Pod setting and had, "only two altercations when he was standing charges as a sex offender. That tells me something. . . .[H]e is evidently doing something correct in order to avoid trouble," *Id.*

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

The significance of Brant being a trustee is that trustees have access to contraband or the dissemination of contraband within a facility. So Aiken saw that Brant was an inmate who gained a level of professional trust from the staff. *Id.* at 1129-31. When you put that on top of a sex offender charge, this tells Aiken "volumes." *Id.* This is "an inmate that is above the regular inmates.

“*Id.* Aiken opined that Brant can be housed and managed and secured in the Florida Department of Corrections for the remainder of his life without causing an undue risk of harm to staff, inmates, or the community. *Id.* at 1131.

Dr. Cunningham was also asked to address positive prisoner adjustment. Even if future dangerousness is not a specific aggravating factor that jurors are required to find before rendering a death verdict, research suggests *that it is always an issue of consideration for the jury*. RV 14, p. 1464-1468. “It’s the elephant in the room.” *Id.* at 1464. Jurors overestimate the likelihood of a defendant committing another homicide in prison by up to 250-fold. *Id.* at 1466. The actual rate of homicide is 1%-5%, but studies show that jurors believe it is 50%. *Id.*

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

The State Courts’ Determination of this Claim

The Florida Supreme Court denied this claim, making a factual determination that “Terrana and Fraser had a long discussion with Brant during which they laid out all the pros and cons of waiving a jury recommendation, but neither of them advised Brant to do so.” (Opinion denying postconviction appeal, p. 43). The court further stated that “counsel conducted a reasonable mitigation investigation and did not perform deficiently in failing to consult with a jury selection expert.” *Id.* at 43-44. The State Court’s determination of this claim was an unreasonable determination of the facts in light of the state court record and an objectively unreasonable application of clearly established federal law.

Hurst Claim

In January of 2016, the United States Supreme Court held the Florida death penalty scheme unconstitutional because it diminished the decision-making role of the jury in violation of a defendant’s Sixth Amendment right to be sentenced by a jury. *Hurst v. Florida*, 136 S. Ct. 616 (2016). Brant sought and was granted supplemental briefing. Brant argued that his jury waiver should be set aside because he was waiving a mere recommendation by the jury and was not advised of his constitutional right to a meaningful jury sentencing. Trial counsel correctly stated at a pretrial hearing ROA, Supp. V. 12, p. 1276-77 that the Florida Supreme Court had ruled that it was an abuse of discretion for a trial court to allow an interrogatory verdict with findings of fact. Trial counsel also stated, and the court agreed, that under Florida Supreme Court case law in effect at the time, “*Ring* is inapplicable to Florida’s death penalty scheme.” *Id.* at 1287. The court noted that it had been three years since *Ring* had been decided – two years prior to Mr. Brant’s offense - and no Florida court had found the Florida scheme unconstitutional. *Id.* 1289-92. The Florida Supreme Court denied this claim finding *Hurst* inapplicable to jury waiver cases. (Opinion, p. 50.)

Concluding Facts

Brant argued to the State courts that his counsel rendered ineffective assistance in investigating mitigation and consulting with or researching the effects of pleading guilty so that but for counsel’s deficient performance, Brant would not have waived a sentencing phase jury.

Mr. Brant, through a separate motion filed contemporaneously with his Petition, seeks leave to file a Memorandum of Law, setting out argument and legal authority for this claim.

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue? No.

(2) If you did not raise this issue in your direct appeal, explain why: Florida law requires claims of ineffective assistance of counsel to be raised in postconviction proceedings.

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Motion for Post-Conviction Relief Pursuant to Fla. R. Crim. Pro. 3.851

Name and location of the court where the motion or petition was filed: Thirteenth Judicial Circuit, In and For Hillsborough County, Florida

Docket or case number (if you know): 04-CF-12631

Date of the court's decision: Feb. 5, 2014, Rehearing denied March 12, 2014

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? Yes

(4) Did you appeal from the denial of your motion or petition? Yes

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Florida Supreme Court, Tallahassee, Florida

Docket or case number (if you know): SC14-787

Date of the court's decision: June 30, 2016; Rehearing denied, August 23, 2016.

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: None.

GROUND FOUR

The prosecution withheld evidence material to guilt and sentencing in violation of Mr. Brant's Fifth, Sixth, Eighth and Fourteenth Amendment rights as set out under *Brady v. Maryland* and its progeny. The Florida Supreme Court's analysis and ruling on this Claim rose to the level of an objectively unreasonable determination of the facts in light of the State Court record and an objectively unreasonable determination of clearly established federal law. This court should grant the Writ.

(a) Supporting facts:

The State never told defense counsel at any time during or prior to trial that Garrett Coleman was a Confidential Informant and for two years objected in post-conviction to turning over complete records about Garret's status and the names of the OCSO officers on duty in Pine Hills the night Brant was arrested. RV 5, p. 895-905. After repeated objections to public records requests and questioning of Garret in the back of a car, the State turned over minimal records – which appear to be incomplete – that showed Garret was a CI during Brant's trial in 2007. RV. 4, p. 610-645, RV 4, p. 672-681, RV 13, p. 2430-2465. Neil Clarke, a narcotics agent with OCSO confirmed Garret's status as a CI at the time of trial but claimed Garret only started as a CI in 2006. Hillsboro County Detectives in the case, testified in post-conviction based on hearsay and conjecture and a "review" of the police reports, that they did not think they obtained Brant's location through Garret Coleman. *Id.* at 401 to 430.

The testimony as to this issue was as follows:

Patricia Mack is an Investigative Analyst at the Orange County Sheriff's Office (OCSO). ROA V. 3, p. 371. Mack enters the names of Confidential Informants (CIs) in the database after the agent gives her the paperwork. *Id.* at 372. There is a difference between a CI and a Casual Source (CS). *Id.* at 372-373. A CI's information is kept secret, a casual source is anyone who wants to provide information. The CI is actually working with the police doing controlled buys and that sort of thing. *Id.* at 373. The information on a CI form is handwritten by the agent. Absent a form from the agent, Mack cannot enter a CI's name in the database. *Id.* at 374.

Neil Clarke is a narcotics agent with the OCSO. *Id.* at 376-377. In late 2005, Agent Clarke was working in the "tact" or "bike" unit. *Id.* at 379. He came into contact with Garrett Coleman during a "consensual encounter" at a bus stop in Orange County. *Id.* He made contact with Garrett and the others because, "[t]hey just happened to be out there." *Id.* He was prompted to have a conversation with them as part of his responsibility to "fight . . . the war on drugs," and to see if a person's license is valid, ask for identification, and "ask to search their person, possibly finding narcotics on them as a result of [his] request." *Id.*

As a result of this contact with Garrett, Agent Clarke "documented" him later and completed the "documentation paperwork in January of '06." *Id.* at 381. Agent Clarke's goal was to go into narcotics so he thought it was "great" when he had Garrett as a contact. *Id.* Agent Clarke had Garrett complete paperwork and arranged for him to work with Agent Mohny. *Id.* at 382. Agent Clarke didn't go into narcotics until 2007. *Id.* In July of 2007, Agent Clarke filled out paperwork indicating that Garrett had been a reliable CI for the past year, had "been useful on controlled buys. His controlled buys had resulted in four search warrants, resulted in nine felony arrests, and three misdemeanor arrests." *Id.* at 384. Based on the paperwork disclosed to post conviction counsel and presented at the hearing, Garrett was employed continuously as a CI from January 2006 through June of 2008. *Id.* at 385. He may have been reactivated after that. *Id.* Agent Clarke described Garrett as an "awesome" CI. *Id.* at 387. Agent Clarke would not disclose the identity of a CI if asked at a deposition and would request that a Judge order the disclosure prior to Agent Clarke revealing the CI's name. *Id.* at 387-388.

Christi Esquinaldo is a Lieutenant at the Hillsborough County Sheriff's Office (HCSO). *Id.* at 401. Esquinaldo was the lead detective in Brant's case. She wrote a report. She testified that based on her review of the case file, the information as to Brant's location was obtained by Detective Matera who told Detective Lewis that he was approached by someone in Brant's family and was told that Brant's brother contacted him and gave a phone number as to Mr. Brant's location. *Id.* at 404. Det. Matera did not write a report. *Id.* at 404. Det. Lewis' report does not provide information as to Brant's location although it does reference a conversation between Garrett and James McKinney. *Id.* at 410. Esquinaldo has no personal knowledge of the exchange between Lewis, Matera and James McKinney. *Id.* at 414.

Frank Losat is a Lieutenant at the HCSO. *Id.* at 415. In July, 2004 he was a detective assigned to the homicide division and was a co-case agent with Esquinaldo. *Id.* at 416. He has no independent recollection of how the information about Brant's location was received. *Id.* at 418.

J.R. Burton is a Major with the HCSO. He was the sergeant of the homicide section at the time of Brant's crime and arrest. *Id.* at 424. Burton has no independent recollection of the events but offered his "opinion" as to how he obtained the information on Brant's location. *Id.* at 425. He believed, based on his "review" of the reports, that the information "came from Mr. McKinney ultimately to Detective Lewis from Mr. Coleman, who I believe is the defendant's half-brother or stepbrother or something." *Id.* at 426. Burton did not recall stating in a previous phone call to defense counsel that the information came from Brant's brother. *Id.* Burton wrote down notes which include the phone number of the OCSO but did not have a good memory of whether he called OCSO or OCSO called him. *Id.* at 429. Burton did not have an independent recollection of where the information came from as to Brant's location, he just "kind of pieced it together." *Id.* at 430.

Garrett Carlos Coleman is Charles Brant's half-brother. ROA V. 4, p. 448. They share the same mother, Crystal Coleman. Garrett's father is Marvin Coleman. *Id.* Garrett is nine years younger than Charles Brant. *Id.*

In July of 2004, Garrett was abusing drugs and alcohol. *Id.* at 449. He was also working with the OCSO providing them with information about drug dealers and the locations of drug houses. *Id.* The agent he was working with was a man named "Neil." *Id.* He only knew him by his first name. *Id.* at 449-450.

On July 2, 2004, his brother Charles Brant, who he called "Chuck", called him at about 1 or 2 in the afternoon sounding "distraught," "shook up," and "possibly sad." *Id.* at 450. Garrett ultimately told Chuck to come to Orlando, which he did. *Id.* at 450-452. When Chuck arrived he was very "sweaty" and "clammy." *Id.* at 452. He looked like he had lost a lot of weight and he was very emotional. *Id.* He also appeared to be "pretty messed up on something." *Id.* Chuck told Garrett he had been using methamphetamine for four to six months. *Id.* at 452-453. Garrett was shocked to hear that Chuck was using what Garrett knew to be a "very bad drug." *Id.* at 453.

Chuck eventually told him about the murder and that he was "strung out on crystal meth." *Id.* at 454 -455. Chuck was very remorseful and the two brothers talked for several hours. *Id.* Garrett

cried and fell to the floor as he listened to what his brother told him. *Id.* at 455. Garrett decided he wanted to go to the beach with him the next day and that is what they decided to do. *Id.* at 456. The next morning they got up at 3 or 4 a.m., loaded up their surfboards and Garrett drove them to the beach. *Id.* at 456. Chuck was still “very emotional, very tore up.” *Id.* at 456. Garrett was close to his brother as Chuck had been there for Garrett all his life when Marvin had been an alcoholic. *Id.* at 457. On the way to the beach, Chuck wanted to stop at a church and talk to a priest or a preacher. *Id.* at 458. They saw a large Catholic church and Chuck went in and spoke to the priest in private. *Id.* at 457. After that, the brothers continued on their way and went surfing. Even though Chuck had not used any meth since coming to Orlando, Garrett thought he still seemed very high as though the meth was not “leaving his system.” *Id.* at 458.

After surfing, the brothers returned to Orlando and went to their parents’ house. Their sister Sherry was also there. *Id.* at 458. Chuck had decided to turn himself in and the family agreed. *Id.* at 459. Garrett and Chuck went to the Orange County Jail but were turned away. *Id.* at 459. So they returned to Crystal and Marvin’s house. The family spent some time together. “It was very sad, you know, holding each other, taking some pictures.” *Id.* at 460. As it got late, their sister Sherry and her partner Robin, left to go home. *Id.* At approximately 9 p.m. Garrett decided to leave to go home also. *Id.* at 461.

On his way home, Garrett stopped at a BP gas station in the Pine Hills neighborhood to get gas for his car. *Id.* at 461. He saw two uniformed OCSO deputies who were also getting gas. *Id.* at 461. Garrett decided to tell them about Chuck and where he was because he was worried about the police arresting Chuck at his parents’ house without the police knowing he was there, he thought it could be a very scary situation for his elderly parents and he also didn’t want the police to tear up and destroy the house and he felt that was a possibility. *Id.* at 461-462. He did not tell Chuck or his family that he was going to go to the police. *Id.*

Garrett told the deputies Chuck’s location and that he may have been involved in a homicide. At first they didn’t believe him but he told them if they doubted his credibility they could call Neil because he worked at that time for OCSO Narcotics Division as a CI for Neil. *Id.* at 462. Garrett had Neil’s cellphone number in his phone. *Id.* at 464. The officers called Neil and confirmed who Garrett was. *Id.* at 462. He does not know if those officers were the arresting officers or not because he wasn’t there when Chuck was arrested. *Id.* at 463-464. Garrett found out the next morning that the police had arrested Chuck at his parents’ house that night. *Id.* at 465. Garrett remained a CI for the OCSO and was still a CI for them during the time of Chuck’s trial. *Id.* at 467-468. As a CI, he was told not to disclose his CI status to anyone, including in court. *Id.* at 468. Garrett did not have much contact at all with Chuck’s trial lawyers. *Id.* at 467. He never had any sit down meetings with them. *Id.* at 468. He was subpoenaed by the State and ordered to come in and give a statement in August of 2004 and again in July of 2006. *Id.* at 468-469. His brother’s lawyers were not present either time. *Id.* at 469-470. Garrett was made to give another statement by the State again in January of 2012. *Id.* at 472. As he was leaving his mother’s house at 7 or 8 p.m., two men came out from behind an oak tree, one was a uniformed officer and the other was wearing a suit, and asked him to get in the back of their vehicle. *Id.* at 472-473. Garrett was uncomfortable and intimidated and had his own legal problems at the time. *Id.* at 473. At first he wasn’t even sure who the men were. *Id.*

Garett also described his childhood. Marvin was particularly critical and abusive to Chuck and Chuck felt like an outcast in his own family. *Id.* at 476. Garrett didn't know until he was 15 or 16 that Chuck and Sherry were not his full siblings. *Id.* Garrett described his parents' fighting, with Marvin coming home at midnight, intoxicated and fighting with his mother until 3 or 4 in the morning with "screaming, yelling, cussing." *Id.* at 477. He felt he had to walk on eggshells around Marvin. *Id.* at 478. Marvin was drunk every day and also smoked marijuana. *Id.* at 479. Marvin expected both boys to be out of the house when they turned 18. They could join the military or work in the coal mines or whatever, but they had to leave. *Id.* at 481. Chuck moved out, moved close to the beach and got a job at a restaurant as a server/cook/dishwasher. He paid his own bills. *Id.*

If Chuck's trial lawyers had sat down with Garrett and explained to him how important his testimony was, he would have appeared at Chuck's trial and given the same information he gave at the hearing. *Id.* at 486-487. He also would have spoken to a mental health expert. *Id.* at 487.

The Florida Supreme Court denied this claim because it determined that Brant was not a CI in 2004, and regardless, if he was, the evidence was known to the defense and therefore not Brady. (Opinion denying, p. 47).

Mr. Brant, through a separate motion filed contemporaneously with his Petition, seeks leave to file a Memorandum of Law, setting out argument and legal authority for this claim.

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) Direct Appeal of Ground Four:

- (1) If you appealed from the judgment of conviction, did you raise this issue? No
(2) If you did not raise this issue in your direct appeal, explain why: Because the prosecution withheld the evidence, Mr. Brant was unaware of the Brady/Giglio violations until postconviction proceedings.

(d) Post-Conviction Proceedings:

- (1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes

- (2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Motion for Post-Conviction Relief Pursuant to Fla. R. Crim. Pro. 3.851

Name and location of the court where the motion or petition was filed: Thirteenth Judicial Circuit, In and For Hillsborough County, Florida

Docket or case number (if you know): 04-CF-12631

Date of the court's decision: June 30, 2016; Rehearing denied, August 23, 2016.

Result (attach a copy of the court's opinion or order, if available):

- (3) Did you receive a hearing on your motion or petition? Yes
(4) Did you appeal from the denial of your motion or petition? Yes
(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes
(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Florida Supreme Court, Tallahassee, Florida

Docket or case number (if you know): SC14-787

Date of the court's decision: June 30, 2016; Rehearing denied, August 23, 2016.

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: None

GROUND FIVE

Cumulatively, the combination of procedural and substantive errors deprived Mr. Brant of a fundamentally fair trial guaranteed under the Sixth, Eighth and Fourteenth Amendments. The Florida Supreme Court's analysis and ruling on this Claim rose to the level of an objectively unreasonable determination of the facts in light of the State Court record and an objectively unreasonable determination of clearly established federal law. This court should grant the Writ.

(a) Supporting facts:

Mr. Brant adopts the facts set out in Grounds 1, 2 3 and 4 of this Petition. Trial counsel's deficiencies in failing to investigate mitigation, consult with experts or conduct their own research on pleading guilty, advising Brant to plead guilty and waive a jury well before hiring an expert to challenge his confession and before speaking to mitigation witnesses, and the resulting failure in presenting mitigation, and the Brady violations, considered cumulatively, rendered his trial unreliable. In addition, because the postconviction court and the Florida Supreme court conducted a piecemeal Strickland analysis, the failure to conduct a meaningful cumulative analysis was objectively unreasonable.

Mr. Brant, through a separate motion filed contemporaneously with his Petition, seeks leave to file a Memorandum of Law, setting out argument and legal authority for this claim.

(b) If you did not exhaust your state remedies on Ground Five, explain why:

(c) **Direct Appeal of Ground Five:**

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: Florida law requires claims of ineffective assistance of counsel to be raised in postconviction proceedings and because the prosecution withheld the evidence, Mr. Brant was unaware of the Brady/Giglio violations until postconviction proceedings.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Motion for Post-Conviction Relief Pursuant to Fla. R. Crim. Pro. 3.851

Name and location of the court where the motion or petition was filed: Thirteenth Judicial Circuit, In and For Hillsborough County, Florida

Docket or case number (if you know): 04-CF-12631

Date of the court's decision: June 30, 2016; Rehearing denied, August 23, 2016.

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? Yes

(4) Did you appeal from the denial of your motion or petition? Yes

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Florida Supreme Court, Tallahassee, Florida

Docket or case number (if you know): SC14-787

Date of the court's decision: June 30, 2016; Rehearing denied, August 23, 2016.

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Five: None.

GROUND SIX

Mr. Brant's Eighth Amendment right against cruel and unusual punishment will be violated as Mr. Brant may be incompetent at the time of the execution.

(a) Supporting facts:

This claim was raised in the State post-conviction court and the Florida Supreme Court and stipulated as not ripe. However, Brant must raise it here to preserve it for federal review. *In Re: Provenzano*, 215 F.3d 1233 (11th Cir., 2000).

Brant has been incarcerated since 2004 and in isolation on Death Row since 2007. Research has shown that incarceration – especially in solitary confinement - over a long period of time will diminish an individual's mental capacity and is likely unconstitutional. Brant suffers from brain damage and depression. The conditions on Death Row are particularly harsh. Mr. Brant is confined in a cell that is approximately 6 feet wide and 9 feet long. Union Correctional Institution is located in central Florida near Raiford. Death Row is not air conditioned or heated, even during dangerously hot weather in the summer and dangerously cold weather in the winter. The food is of extremely poor quality and bouts of food poisoning among the inmates are not uncommon. Mr. Brant, at most, has yard twice a week and showers every other day, although this schedule is frequently interrupted or not followed. Many of Brant's fellow Death Row inmates, the people with whom he must regularly talk and interact, also suffer various forms of mental illness and depression. Some commit suicide. Some are beaten and bullied by callous guards. Mr. Brant's already fragile mental condition could deteriorate under the circumstances of death row causing his mental condition to decline to the point that he is incompetent to be executed.

Mr. Brant, through a separate motion filed contemporaneously with his Petition, seeks leave to file a Memorandum of Law, setting out argument and legal authority for this claim.

(b) If you did not exhaust your state remedies on Ground Six, explain why:

(c) Direct Appeal of Ground Six:

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: This issue is required to be raised in post-conviction, although it is not ripe until a death warrant has been signed.

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Motion for Post-Conviction Relief Pursuant to Fla. R. Crim. Pro. 3.851

Name and location of the court where the motion or petition was filed: Thirteenth Judicial Circuit, In and For Hillsborough County, Florida

Docket or case number (if you know): 04-CF-12631

Date of the court's decision: June 30, 2016; Rehearing denied, August 23, 2016.

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? Yes

(4) Did you appeal from the denial of your motion or petition? Yes

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Florida Supreme Court, Tallahassee, Florida

Docket or case number (if you know): SC14-787

Date of the court's decision: June 30, 2016; Rehearing denied, August 23, 2016.

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Six: None

GROUND SEVEN

Mr. Brant's sentence of death was obtained in violation of his rights guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution because the Florida Supreme Court's proportionality review fails to properly narrow the class of offenders who are sentenced to death by not considering murder/rape cases where the defendant did not receive death. Brant asserted this claim as both a substantive claim based on evolving standards of decency and as a claim of ineffective assistance of appellate counsel for failing to raise the claim that this Court's appellate process violates Brant's rights to Equal Protection of the laws, Procedural and Substantive Due Process, and Brant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. The Florida Supreme Court's analysis

and ruling on this Claim rose to the level of an objectively unreasonable determination of the facts in light of the State Court record and an objectively unreasonable determination of clearly established federal law. This court should grant the Writ.

(a) Supporting facts:

The Florida Supreme Court has conducted “proportionality review” of death sentences for forty years. Fla. Stat. 921.141 and Fla. R. App. Pro. 9.142(a)(5) require proportionality review in capital cases. *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973). More recently, in *Yacob v. State*, 136 So. 3d 539 (Fla. 2014), the Florida Supreme Court reaffirmed the importance of proportionality review. “Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases.” *Yacob*, 136 So. 3d at 546-47 (quoting *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990) (citations omitted)). The purported purpose of this function is to “ensure the uniformity of death-penalty law,” and a “high degree of certainty in procedural fairness as well as substantive proportionality.” *Id.* at 547 (citations omitted).

The Supreme Court of the United States upheld Florida’s death penalty statute against constitutional attack, in part because of the proportionality review set out in *Dixon, supra*. *Id.* at 548 (citing *Profitt v. Florida*, 428 U.S. 242, 251 (1976)). Moreover, Equal Protection requires that “persons similarly situated be treated similarly.” *Duncan v. Moore*, 754 So. 2d 708, 712 (2000).

Moreover, the “concept of proportionality is central to the Eighth Amendment,” *Yacob*, at 553 (Labarga, J., concurring). The Eighth Amendment calls for a “precept of justice that punishment for crime should be graduated and proportioned” to both the offender and the offense. *Id.* (citing *Weems v. United States*, 217 U.S. 349, 367 (1910)). While the Supreme Court has stated that comparative proportionality review is not essential to the constitutionality of a capital sentencing scheme, *Pulley v. Harris*, 465 U.S. 37 (1984), in a state such as Florida, where the scheme is an outlier which allows for the sentence of death by a mere majority of jurors, the Florida Supreme Court’s proportionality analysis is even more necessary. *State v. Steele*, 921 So. 2d 538 (Fla. 2005). Further, evolving standards of decency require a court to continually consider whether a certain class of offenders may be sentenced to death and adjust its proportionality analysis accordingly, e.g. juveniles and thus 18-21 year olds eligibility; the intellectually disabled and thus, the severely mentally ill’s eligibility.

Unlike the more familiar proportionality analysis under the Eighth Amendment, which involves the “abstract evaluation of the appropriateness of a sentence for a particular crime . . . , comparative proportionality review presumes that the death penalty is not disproportionate to the crime in the traditional sense.” *State v. Godsey*, 60 S.W.3d 759, 782 (Tenn. 2001)(quotations omitted). Rather, it requires an appellate court to determine whether a death sentence is excessive “in a particular case because similarly situated defendants convicted of similar crimes have received lesser sentences.” Donald H. Wallace & Jonathan R. Sorensen, *A State Supreme Court’s Review of Comparative Proportionality: Explanations for Three Disproportionate and Executed Death Sentences*, 20 T. Jefferson L. Rev. 207, 207 (1998)(studying executions in Missouri). “By comparing any given death sentence with the penalties imposed on others convicted of death-eligible crimes, proportionality review is intended to ensure, first, that there is a rationally

defensible basis for distinguishing those sentenced to die from those who are not, and second, that death sentences predicated on constitutionally impermissible factors, such as economic status or racial identity, whether of the defendant or the victim, are overturned.” Timothy V. Kaufman-Osborn, *Proportionality Review and the Death Penalty*, 29 Just. Syst. J. 257, 257-58 (2008); see also Hon. David S. Baime, *Comparative Proportionality Review: The New Jersey Experience*, 41 No. 2 Crim. Law Bull. 7, at 2 (April 2005) (purpose of proportionality review is “to ensure that a specific defendant’s death sentence is not disproportionate when compared to similarly situated defendants”); Richard Van Duizend, *Comparative Proportionality Review in Death Sentence Cases; What? How? Why?*, 8 St. Ct. J. 9, 10 (1984)(noting that role of court is “to determine whether the distinctions made between those who are given a life sentence and those who are given a death sentence are rational and consistent with state practice”). “Proportionality review has a function entirely unique among the review of proceedings in a capital proceeding.” *State v. DiFrisco*, 900 A.2d 820, 830 (N.J. 2006)(quoting *State v. Ramseur*, 524 A.2d 188, 291 (N.J. 1987), *cert. denied sub nom. Ramseur v. Beyer*, 508 U.S. 947 (1993)).

The Florida Supreme Court, while continuing to recognize the essential link between proportionality review and the risk of the arbitrary imposition of the death penalty, did not, however, consider in its proportionality review of Brant’s case, those classes of first-degree murder/rape cases where the defendant did not receive death, either through the standardless prosecutorial decision-making which exists in this State, or through a jury verdict of life. This results in a death sentence for Brant – who has no prior record and extensive mitigation - that is random, arbitrary and capricious. Due to the prosecutor’s decision-making, which varies widely by county in this State, a murder defendant in Miami is many times less likely to face the death penalty than a murder defendant in Duval County/Jacksonville for the same or similar murder with the same or similar aggravating factors. Thus, Mr. Brant argued, the death penalty in Florida is applied discriminatorily against certain classes of defendants in violation of the due process and equal protection clauses of the Constitution of the State of Florida and the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States as a result of the unbridled prosecutorial discretion which allows prosecutors to determine which defendant deserves death without any written guidelines or standards.

The Florida statutory scheme grants such broad discretion to prosecutors and juries, that there is no meaningful narrowing of the class of persons against whom the death penalty can be sought and obtained. Cases that are noticed and receive death penalty sentences in one jurisdiction are not noticed for death in other jurisdictions. This is particularly true in cases such as the case *sub judice* where there is only a single victim and a resulting wide disparity between circuits as to whether the death penalty is sought.

Likewise, there is a wide disparity even within the Thirteenth Judicial Circuit, in that not all rape/murder cases are death noticed. In fact, at the time of Brant’s case, another defendant, *with a prior record*, murdered a man while his wife was made to watch and then raped her repeatedly. He received a life sentence. See Hillsborough County Circuit Court, Case# 03-CF-017367, *State v. Chatsiam Adam Liroy*. There is no rational distinction between those cases that are death noticed and those that are not death noticed among prosecutors within the State. Likewise, there is no distinction between those cases that get the death penalty and those that receive a lesser sentence, either through the plea bargaining process or through trial. More egregious cases than

the case *sub judice* are often not death noticed or receive a sentence less than death. Indeed, in 2001, Meldon Rich raped and strangled a woman in Escambia County and was sentenced to life in prison. *Rich v. State*, 21 So. 3d 842 (Fla. 1st DCA 2009). Unlike Mr. Brant, but like Mr. Lioy, Rich had a prior history of rape and other violent crimes. See: <http://www.dc.state.fl.us/ActiveInmates/detail.asp?Bookmark=1&From=list&SessionID=666863106>.

Mr. Brant, through a separate motion filed contemporaneously with his Petition, seeks leave to file a Memorandum of Law, setting out argument and legal authority for this claim.

(b) If you did not exhaust your state remedies on Ground Seven, explain why:

(c) Direct Appeal of Ground Seven:

(1) If you appealed from the judgment of conviction, did you raise this issue? Direct appeal counsel raised whether Mr. Brant's sentence was proportional but did not challenge the constitutionality of Florida's proportionality review.

(2) If you did not raise this issue in your direct appeal, explain why: Direct appeal counsel rendered ineffective assistance in failing to challenge the constitutionality of Florida's proportionality review.

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? N/A

(4) Did you appeal from the denial of your motion or petition? N/A

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? N/A

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: Ineffective assistance of capital appellate counsel claims must be raised in a State Habeas Petition filed directly with the Florida Supreme Court.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Seven: State Habeas Petition filed with the Florida Supreme Court, Tallahassee, FL. Case No. SC14-2278, filed Nov. 20, 2014, denied, June 30, 2016; rehearing denied, August 23, 2016.

GROUND EIGHT

Appellate counsel rendered deficient performance in failing to raise the claim that the State failed to prove the crime of kidnapping.

(a) Supporting facts:

On April 12, 2007, Mr. Brant filed a Motion to Dismiss- Kidnapping. TR V 2, p. 398 – 400. The State filed a traverse. TR V 3, p. 401-04. On May 14, 2007, the trial court entered a written order denying Mr. Brant's motion. Id. at 412- 418. Mr. Brant subsequently entered a plea of guilty to all counts, including the kidnapping count, but expressly reserved his right to appeal the denial of his Motion to Dismiss. TR V. 4, p. 644, 785-87.

Brant argued that based on his statement to law enforcement, the movement of the victim in her home did not rise to the level of kidnapping as it was “merely incidental to the felony, inherent in the nature of the felony and had no significance independent of the felony by making it substantially easier” to commit or lessened the risk of detection. Id. TR V. 2, p. 398-99. Brant relied on this court's opinion in *Faison v. State*, 426 So. 2d 963 (Fla. 1983), *Gray v. State*, 939 So. 2d 1095 (Fla. 1st DCA 2006) and *Carron v. State*, 414 So. 2d 288 (Fla. 2d DCA 1982). The State argued that Brant was charged with kidnapping to commit bodily harm or terrorize and relied on this Court's opinion in *Bedford v. State*. TR V. 3, p. 403 -04.

The trial court denied Brant's Motion but in so doing allowed the State to proceed with a charge in which it was unable to establish a prima facie case. The facts as set out in Brant's statement – the only evidence of the kidnapping as conceded by both parties – fail to establish a prima facie case of kidnapping with intent to commit bodily harm or terrorize the victim. This was a Due process violation as Brant later pled to a crime which the State could not prove. There was simply not enough evidence before the Court to establish this crime. Although the Florida Supreme Court found the plea colloquy to be sufficient, Brant argued in his State Habeas that that the factual basis failed to sufficiently establish this crime.

The State gave the following factual basis:

As to Count 3, which was the subject of a motion to dismiss *** the State alleged that the defendant forcibly, secretly and by threat confined and abducted and imprisoned the victim with the intent to inflict bodily harm and to terrorize the victim. The facts of the case, Your Honor, in addition to grabbing the victim as she came out of the bathroom, leading her to the bathroom – to the bedroom and throwing her on the bed, the defendant came at a time where he thought that she was either unconscious or dead. While the defendant was searching or going through the victim's residence, she got up, she managed to get up and attempt her way out towards the front door whereby the defendant grabbed her, took her back to the bedroom and proceeded to choke her to death. And then at that point, he picked her body up and took her to the bathroom. [The victim was still alive, and then Brant] attempted to clean her.

TR V 4, p. 753- 789.

While the facts of the crime are very sad and one cannot help but feel for the *victim and* her family in this case, the factual description fails to establish a kidnapping – as any movement was inherent in the crimes and, there is no testimony that Brant moved the victim to terrorize her. As such, appellate counsel should have raised and preserved the denial of Brant's Motion to Dismiss the Kidnapping charge. Failure to do so was deficient performance which prejudiced Mr. Brant. But for counsel's deficient performance, there exists a reasonable probability Brant would have received a life sentence on appeal, as his was not the most aggravated and least mitigated of cases. *See Brant v. State*, 21 So. 3d 1276, 1283 (Fla. 2009) (the trial court found only two aggravating circumstances).

Mr. Brant, through a separate motion filed contemporaneously with his Petition, seeks leave to file a Memorandum of Law, setting out argument and legal authority for this claim.

(b) If you did not exhaust your state remedies on Ground Eight, explain why:

(c) Direct Appeal of Ground Eight:

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: Direct appeal counsel rendered ineffective assistance in failing to raise this issue.

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? N/A

(4) Did you appeal from the denial of your motion or petition? N/A

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? N/A

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: Ineffective assistance of capital appellate counsel claims must be raised in a State Habeas Petition filed directly with the Florida Supreme Court.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Eight: *State Habeas Petition* filed with the Florida Supreme Court, Tallahassee, FL. Case No. SC14-2278, filed Nov. 20, 2014, denied, June 30, 2016; rehearing denied, August 23, 2016.

GROUND NINE

Mr. Brant's confession was unconstitutionally obtained. Direct Appeal counsel rendered deficient performance in failing to raise this issue. First tier postconviction counsel rendered deficient performance in failing to raise the issue in Mr. Brant's State Habeas Petition.

(a) Supporting facts:

Trial counsel filed a motion to suppress Mr. Brant's statements. TR ROA V. 1, p. 198 - 207, and a Memorandum of Law in support of the Motion, p. 208 -220. The court conducted a hearing on September 8, 2006 and heard the testimony of Detective Frank, Detective Losat, Detective Esquinaldo, Dr. Farzanegan and Dr. Taylor.

Det. Losat described Brant's demeanor as "very sociable, coherent and not dozing." Det. Losat testified he read Mr. Brant his Miranda warnings, although this was not recorded. Brant signed a consent to be interviewed form. When the questioning turned to the homicide, Brant said he wanted to talk but wanted his attorney present. This also was not recorded. Det. Losat said he stopped the questioning but then Brant reinitiated the questioning by asking about the legal system. Losat then left but Brant told him he wanted to speak further. This also was not recorded. Det. Losat said Brant was lucid and coherent during the interview. Det. Esquinaldo said Brant was normal and not high or drunk.

Dr. Farzanegan testified that based on Brant's self- report, Brant had not slept for six days as he had been high on methamphetamine. The effects of lack of sleep, combined with withdrawals from the methamphetamine would have made him unable to knowingly consent. Dr. Taylor. Dr. Taylor noted that Brant's own brother, Garret Coleman, had said in a statement to the State Attorney that Brant had slept for 8 or 9 hours, and while Brant may have been tired and depressed, he was able to knowingly and intelligently waive his rights.

The trial court "invited counsel to submit written arguments," but defense counsel "elected to not submit written arguments." TR ROA V. 2, p. 369. The court found that law enforcement gave Brant Miranda warnings and that Brant failed to show that he was impaired to such a degree that he could not understand his rights. Id. at 369-79.

Direct appeal counsel failed to raise this argument in their initial brief and first-tier postconviction counsel failed to raise it in Mr. Brant's state habeas. Mr. Brant, through a separate motion filed contemporaneously with his Petition, seeks leave to file a Memorandum of Law, setting out argument and legal authority for this claim.

(b) If you did not exhaust your state remedies on Ground Nine, explain why: Direct Appeal counsel rendered deficient performance in failing to raise this issue. First tier postconviction counsel rendered deficient performance in failing to raise the issue in Mr. Brant's State Habeas Petition.

(c) Direct Appeal of Ground Nine:

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: Direct Appeal counsel rendered deficient performance in failing to raise this issue.

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? N/A

(4) Did you appeal from the denial of your motion or petition? N/A

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? N/A

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: Direct Appeal counsel rendered deficient performance in failing to raise this issue. First tier postconviction counsel rendered deficient performance in failing to raise the issue in Mr. Brant's State Habeas Petition.

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Nine: None

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes, except for Ground Nine.

(b) Is there any ground in this petition that has not been presented in some state or federal court? No.

If so, ground or grounds have not been presented, and state your reasons for not presenting them:

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? No.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? **Section 1983 claim challenging method of execution, *Brant v. Palmer, et. al.*, Case No. 3:13-cv-00412-TJC-MCR, Middle District of Florida, Jacksonville Division.**

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:\

(a) At preliminary hearing:
Office of the Public Defender, 13th Judicial Circuit
PO Box 172910
Tampa, FL 33672-0910

(b) At arraignment and plea:
Rick Terrana
2917 W Kennedy Blvd Ste 120
Tampa, FL 33609-3163;
Robert Frazer
Wells Law Group
1206 Millennium Pkwy
Brandon, FL 33511-3895

(c) At trial:
Rick Terrana
2917 W Kennedy Blvd Ste 120
Tampa, FL 33609-3163;
Robert Frazer
Wells Law Group
1206 Millennium Pkwy
Brandon, FL 33511-3895

(d) At sentencing:
Rick Terrana
2917 W Kennedy Blvd Ste 120
Tampa, FL 33609-3163;
Robert Frazer
Wells Law Group

1206 Millennium Pkwy
Brandon, FL 33511-3895

(e) On appeal:
Theda James
Office of the Public Defender, 13th Judicial Circuit
PO Box 172910
Tampa, FL 33672-0910

John C. Fisher
550 Westover Pkwy
Bartow, FL 33830-6945

(f) In any post-conviction proceeding:
Marie-Louise Samuels Parmer,
P.O. Box 18988
Tampa, FL 33679;
Maria DeLiberato
CCRC - Middle Region
12973 N Telecom Pkwy
Temple Terrace, FL 33637-0907

(g) On appeal from any ruling against you in a post-conviction proceeding:
Marie-Louise Samuels Parmer
Samuels Parmer Law Firm, PA
P.O. Box 18988, Tampa, FL 33679

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? No

- (a) If so, give name and location of court that imposed the other sentence you will serve in the future:
- (b) Give the date the other sentence was imposed:
- (c) Give the length of the other sentence:
- (d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Following direct appeal Mr. Brant properly filed an application for State postconviction relief before the AEDPA limitation period expired, thus tolling the limitation period. The Florida Supreme Court issued the mandate affirming the denial of his postconviction appeal on September 8, 2016, recommencing the remaining AEDPA limitations period. This Petition was filed within the remaining time after the issuance of the mandate on September 8, 2006. Thus, this Petition is timely.

Relief Requested

Petitioner asks that the Court grant the following relief:

1. Grant Mr. Brant the opportunity to file a memorandum of law applying the applicable law to the grounds raised in this Petition and arguing for an evidentiary hearing as appropriate.
2. Following the State's submission of a response and the record from this case, allow Mr. Brant to respond.
3. Grant all appropriate relief Mr. Brant is entitled in the interests of justice and under the United States Constitution.

Respectfully submitted,



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Verification

I, Marie-Louise Samuels Parmer, as a person authorized to sign this Petition, hereby declare under penalty of perjury that the forgoing is true and correct.

Date: September 9, 2016



Marie-Louise Samuels Parmer
Fla. Bar No. 0005584
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* As Attorney of Record I am authorized to sign this Petition under 28 U.S.C. § 2242.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

**CHARLES GROVER BRANT,
Petitioner,**

v.

CASE NO. 8:16-cv-2601-KKM-JSS

DEATH PENALTY CASE

**SECRETARY, DEPARTMENT
OF CORRECTIONS, et al.,**

Respondents.

_____ /

**MEMORANDUM OF LAW IN SUPPORT OF PETITION UNDER 28
U.S.C. §2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN
STATE CUSTODY**

Submitted by:

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GROUND TWO: Mr. Brant was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the penalty phase of his capital trial, in violation of Mr. Brant’s Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment Rights Under the United States Constitution. The Florida Supreme Court’s analysis and ruling on this Claim was premised on an objectively unreasonable determination of the facts in light of the State Court record and an objectively unreasonable determination of clearly established federal law. This court should grant the Writ..... 13

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CONSTITUTIONAL PROVISIONS

U.S. Const. amend V, which reads in pertinent part, “No person shall be held to answer for a capital . . . crime . . . nor be deprived of life, liberty or property, without due process of law”*passim*

U.S. Const. amend VI, which reads in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right to...the assistance of counsel”..... *passim*

U.S. Const. amend VIII, which reads in pertinent part, “Cruel and unusual punishment [should not be] inflicted.” *passim*

U.S. Const. amend XIV Sec. 1, which reads in pertinent part, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law”.*passim*

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STANDARD OF REVIEW

This Petition falls under 28 U.S.C. § 2254 as modified by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). AEDPA sets the following standard for review:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. §2254(d)(1)-(2). The Supreme Court has explained this standard as follows:

Under the “contrary to” clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the “unreasonable application” clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle but unreasonably applies that principle to the facts of the case.

(*Terry Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). “AEDPA does not require state and federal courts to wait for some nearly identical fact pattern before a legal rule must be applied.” *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in the judgment). “Nor does AEDPA prohibit

a federal court from finding an application of a principle unreasonable when it involves a set of facts ‘different from those of the case in which the principle was announced.’” *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007), citing *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003).

Under 28 U.S.C. 2254(d)(2), a federal court may grant a writ of habeas corpus with respect to a claim adjudicated on the merits in a state court proceeding where the adjudication of the claim “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” Defects in the state court’s fact-finding can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable. *Wiggins v. Smith*, 539 U.S. 510, 528-29 (2004). “[W]hen a state court’s adjudication of a habeas claim results in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding, this Court is not bound to defer to unreasonably-found facts or to the legal conclusions that flow from them.” *Jones v. Walker*, 540 F.3d 1277, 1288 n. 5 (11th Cir. 2008) (*en banc*) (quotations, citations and alterations omitted). When a state court’s decision amounts to an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d), a federal reviewing court undertakes *de novo* review of the record below. *McGahee v. Alabama Department of Corrections*, 560 F.3d 1252 (11th Cir. 2009).

As to all claims, the facts set out in Mr. Brant's Petition are hereby incorporated into this memorandum.

GROUND ONE: Mr. Brant was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the guilt phase of his capital trial, in violation of Mr. Brant's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution. But for counsel's deficient performance, Mr. Brant would not have plead guilty but would have exercised his right to a trial and would not have waived a penalty phase jury. The Florida Supreme Court's analysis and ruling on this claim was premised on an objectively unreasonable determination of the facts in light of the state court record and an objectively unreasonable determination of clearly established federal law.

The Florida Supreme court and the State post-conviction court denied this Claim finding that trial counsel made a reasonable strategic decision to advise Brant to plead guilty after their motion to suppress Brant's confession had been denied, specifically finding counsel's testimony credible as to this point. *Brant v. State*, 197 So. 3d 1051 (Fla. 2016). In so doing, the Florida Supreme Court made a number of objectively unreasonable factual determinations in light of the state court record and objectively and unreasonably applied clearly established federal law. Where a State court, as here, has made unreasonable factual determinations, and, while having identified the correct governing principle of law but applied that law in an objectively unreasonable manner, AEDPA is not a bar to relief; this Court must apply *de novo* review.

Objectively Unreasonable State Court Determinations

In denying this claim, the Florida Supreme Court, adopting the reasoning of the lower state court, determined as fact and law that trial “[c]ounsel’s decision to advise Brant to plead guilty was reasonable *given that the original defense strategy to attack the confession was unsuccessful*, [and] the advice was given *after alternatives were considered and rejected*[.]” *Brant v. State*, 197 So. 3d at 1065 (emphasis added). (See also petition, Doc. 1, p. 11-13). The State courts’ determination hinged on Mr. Terrana’s testimony at post-conviction that “he and penalty-phase counsel, Bob Fraser, discussed the prospect of a guilty plea with Brant *after the motion to suppress was denied*.” *Id.* at 1064 (emphasis added). Indeed, both the post-conviction court, and the Florida Supreme Court, credited trial counsel’s testimony on this issue.

The record, however, demonstrates that trial counsel’s explanation for their “strategy decision” was inconsistent with the facts as set out in the state trial court record. The record of the actual trial proceedings “underscores the unreasonableness of counsel’s conduct by suggesting that [counsel’s decision to advise Brant to plead guilty and waive a sentencing jury] resulted from inattention, not reasoned strategic judgment.” *Wiggins v. Smith*, 539 U.S. at 526. This Court need not find that trial counsel lied, rather as in *Wiggins*, counsel’s post- conviction testimony “may simply reflect a mistaken memory shaped by the passage of time.” *Id.* at 533. Trial counsel filed a motion to

suppress Mr. Brant's confession, that part is accurate, but counsel advised Mr. Brant to plead guilty and waive a sentencing jury many months before the motion was ever heard and well before counsel had even retained an expert to assess Brant's state of mind at the time of his confession.

As set out in his Petition, trial counsel filed the motion to suppress on January 27, 2006; the court set the motion for hearing May 10, 2006. (Doc. 1, p. 7). On May 10, 2006, Mr. Fraser sought a continuance on behalf of Mr. Terrana, who was not in court, because Mr. Terrana had *not yet obtained an expert* to evaluate Petitioner and the effects of methamphetamine on his ability to waive Miranda and knowingly waive his rights against self-incrimination. At that same hearing, Fraser announced that Brant was going to plead guilty and waive a sentencing jury --- all prior to any hearing on the motion to suppress and even prior to obtaining an expert. (Doc. 1, p. 7).

Trial counsel moved to continue the motion hearing again on June 22, 2006, Mr. Fraser telling the court, "[T]he posture we're in right now, and Mr. Brant, the last time I discussed it with him agreed, we're going to enter a plea of guilty to the charge of first-degree murder, proceed to a penalty phase before Your Honor." (Doc. 1, p. 7-8). Fraser also said at that hearing that he and Mr. Terrana saw no point in even having the suppression hearing because of the decision to plead guilty and waive a penalty jury, but that the "reason we're having the motion to suppress is because of all the United

States and Florida Supreme Court cases putting out the ineptitude of counsel in first-degree murder cases, which has made us extremely cautious and we have to file every conceivable motion.” (Doc. 1, p. 8). The motion to suppress, which trial counsel essentially believed to be meaningless, would not be heard, let alone ruled upon, for three more months.

Counsel’s claim at post-conviction that they only advised Brant to plead guilty and waive a penalty phase jury after denial of the motion to suppress, which they perceived to be a crucial and significant aspect of their defense, is simply not supported by the trial court record. Trial counsel misremembered when testifying in the post-conviction proceedings.

The State courts’ factual determination that trial counsel made a reasonable decision to advise their client to plead guilty after their strategy of attacking the confession failed and after investigating and having considered other alternatives cannot stand and is an objectively unreasonable factual determination in light of the State court record and an objectively unreasonable application of clearly established federal law.

Controlling Law

When a defendant challenges a guilty plea under an ineffective assistance of counsel claim, the two-part *Strickland* standard applies. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985). To show deficient performance in the context of a guilty plea, a defendant “must demonstrate that the advice

was not within the range of competence demanded of attorneys in criminal cases.” *Id.* at 58, 370. When as here, an attorney induces his client into entering a blind guilty plea before fully investigating his case and obtaining mental health experts, automatically qualifying him for the death penalty, and obtaining no benefit for his client’s plea, the attorney fails to perform as required by the Sixth Amendment. Brant need not prove his defenses would prevail – and in this case that includes whether he would be sentenced to death - but only that, had he been correctly advised, there exists a reasonable probability he would have proceeded to trial.

In determining whether a reasonable probability exists that the defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial.

Grovesnor v. State, 874 So. 2d 1176, 1181-82 (Fla. 2004) (collecting state and federal cases). As emphasized in *Hill*, the analysis should be “objectively” made without regard for the idiosyncrasies of the decision maker. *Hill*, 474 U.S. at 59-60.

Application of Law to the Case

The Florida courts’ ruling is an objectively unreasonable application of the law to the facts. The Florida Supreme Court’s determination that,

“Counsel’s decision to advise Brant to plead guilty was reasonable given that *the original defense strategy to attack the confession was unsuccessful, the advice was given after alternatives were consider and rejected*, and the state was proceeding on theories of both premeditated and felony murder with very strong evidence[,]” *Brant v. State*, 197 So. 3d 1051, 1065 (Fla. 2016), was objectively unreasonable in light of the trial court record.

Trial counsel’s investigation fell below prevailing norms. Trial counsel had already advised Brant to plead guilty in May of 2006. It is uncontested that trial counsel failed to conduct any analysis or research into whether their advice to Brant to plead guilty *because they believed the jury would be less angry* was grounded in science and jury research, or even in any analysis by experts, because they hadn’t even obtained an expert for the motion to suppress. The potential sentencing jurors’ comments and conduct illustrate the extent to which counsel’s advice was uninformed. (Doc. 1, p. 9).

Strategic decisions are only reasonable to the extent they are based on a reasonable investigation. “*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy.” *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Here, counsel attempted “to justify their limited investigation as reflecting a tactical judgment.” *Id.* at 522. Where, as

here, counsel's claim that they only advised Brant to plead guilty after their strategy of attacking his confession failed, and, where they conducted no investigation into jury decision-making, it cannot be said that counsel's decision was based on an informed judgment. *Strickland v. Washington*, 466 U.S. 668, 690-91(1984). The State court unreasonably applied clearly established federal law in assessing counsel's performance.

Further, the State courts' dismissal of the legitimacy of the ABA Guidelines as a guide to assessing counsel's performance conflicts with clearly established federal law. "[W]e have long referred to [these ABA standards] as 'guides to determining what is reasonable' and the [State] has come up with no reason to think the quoted standard impertinent here." *Rompilla v Beard*, 545 U.S. 374, 387 (2005) citing *Wiggins v. Smith*, 539 U.S. at 524 (quoting *Strickland v. Washington*, 466 U.S. at 688). *See also Porter v. McCollum*, 130 S.Ct. 447, 453 (2009) (finding counsel's performance "fell short of . . . professional standards.") (quoting *Wiggins v. Smith*, 539 U.S.510, 524 (2003)). Brant did not ask the court to treat the Guidelines as "inexorable commands," but as "guides to determining what is reasonable in the defense" of capital cases. The State courts' addressed only that part of the Guidelines about a jury selection expert, finding it un compelling, and in so doing, wholly failed to give meaningful consideration to the Guidelines' admonition about advising or allowing a client to enter a guilty plea in a capital case without

written assurance of avoidance of the death penalty. This is an objectively unreasonable application of the Strickland performance standard as set out in clearly established federal law.

Trial counsel testified that they discussed entering a guilty plea with Mr. Brant. Neither attorney could recall the specifics of the discussion but Fraser said that the letter he sent to Brant – in November of 2006 - detailing the conversation was the most accurate rendition of the conversation. PCR V. 10, p. 1880-83. In the letter, Fraser and Terrana advised Brant that by entering a guilty plea, he was “less likely to incur the jury’s wrath.” *Id.* But that letter was sent almost six months after Fraser first announced on the record that counsel had spoken to their client and that Brant had agreed to plead guilty and waive a sentencing jury. Terrana and Fraser advised Brant to plead guilty and waive a sentencing jury in early 20006 even though they had not fully investigated Mr. Brant’s case, had not consulted with an expert as to his state of mind, had not litigated the motion to suppress, had not consulted with a jury selection expert about the effects of pleading guilty and had conducted no review of the available literature to see if their *guess* was supported by research or other objective facts. Neither lawyer had ever employed this strategy before. This was not a reasoned strategic decision; this was no more than guess work made early on in a case prior to any

meaningful investigation. Counsel rendered deficient performance, well below prevailing norms in a capital case.

Unrebutted testimony by Terry Lenamon (Petition, Doc. 1, p. 9-10) established that advising a client to enter a guilty plea as charged without an agreement for a life sentence is something capital lawyers are strongly urged not to do because it is a “really bad idea.” *Id.* at 10. Such advice should only be given after a thorough investigation based on identifiable facts. *Id.* The ABA Guidelines, likewise, establish that counsel “should be extremely reluctant” to enter a guilty plea absent a “written guarantee” of withdrawal of death. *Id.* While it is the client who ultimately makes the decision, the client doesn’t do so in a vacuum. The client relies on the advice of his attorneys. The advice the attorney gives, based on prevailing norms, must be based on a reasonable investigation.

Unrebutted testimony by jury selection expert Toni Blake further supports a determination that counsel’s performance fell below prevailing norms. Well-established scientific research shows that jurors are more likely to sentence a defendant to death when he has entered a guilty plea and proceeds to sentencing. *Id.* at 10.

In addition, the trial lawyers were also unaware of extensive mitigation in this case—including the fact Brant was conceived during a rape and the significance of that fact in how his mother related to him throughout his life.

Counsel lacked an understanding of the extent of Brant's brain damage and childhood experiences and failed to comprehend the mitigating value of Brant's methamphetamine use. Because their investigation was deficient, the advice they gave Brant about entering a plea was likewise deficient.

In this case, the unique facts of pleading guilty are inextricably intertwined with the lawyers' advice and decision-making on avoiding a death sentence. Counsel's mitigation investigation was so deficient and so flawed in this case, that their advice to plead guilty was based on an unreasonable judgment that there wasn't anything compelling about the mitigation. (Doc. 1, p. 16).

There exists a reasonable probability that Brant would not have entered a guilty plea, absent counsel's mis advice or lack of knowledge about the strength of the mitigating evidence available in Brant's case, and their uninformed guess work that the jury would be less angry if Brant pled guilty. Based on an objective assessment of the case, particularly the facts that his lawyers advised him to plead guilty well before the hearing on the motion to suppress, that Brant received no benefit for his guilty plea and was exposed to the maximum penalty under law, and that his lawyers' advice about the jury not being angry with him was not supported by any scientific or objective data about jury decision-making, there exists a reasonable probability that but for counsel's mis advice Brant would not have pled guilty but would have

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

GROUND TWO: Mr. Brant was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the penalty phase of his capital trial, in violation of Mr. Brant's Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment Rights under the United States Constitution. The Florida Supreme Court's analysis and ruling on this Claim was premised on an objectively unreasonable determination of the facts in light of the State Court record and an objectively unreasonable determination of clearly established federal law. This court should grant the Writ.

The facts set out in Ground Two of Mr. Brant's Petition are hereby incorporated into this memorandum. Both the post-conviction court and the Florida Supreme Court denied this claim, analyzing it in piece-meal fashion. In so doing, the State courts' made unreasonable determinations of fact in light of the state court record and unreasonably applied clearly established federal law.

Almost forty years ago, the Court set out the *Strickland* standard. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Id.* at 688. Specifically, counsel has a

duty to investigate in order to make the adversarial testing process work in the particular case. *Id.* at 690.

“An ineffective assistance of counsel claim has two components: A petitioner must show that counsel’s performance was deficient and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel’s representation ‘fell below an *objective standard of reasonableness*.’” *Strickland* at 687-688 (internal citations omitted) (emphasis added). The proper measure of an attorney’s performance remains “simply reasonableness under prevailing norms.” *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court *must* consider the reasonableness of the investigation said to support that strategy. “[S]trategic choices made after less than complete investigation are reasonable’ only to the extent that ‘reasonable professional judgments support the limitations on investigation.’ *** A decision not to investigate thus ‘must be directly assessed for reasonableness in all the circumstances.’” *Wiggins*, 539 U.S. at 533.

To establish prejudice, “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result

of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland* at 694. In explaining how it reached this standard, the Court stated:

An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

* * * *

Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, *United States v. Agurs*, 427 U.S. [97, 104]... [(1976)], and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness. *United States v. Valenzuela-Bernal*, 458 U.S. [858,] at 872-74 . . . [(1982)].

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel’s errors.

Id. at 694-695. The Court further explained that some of counsel’s errors will affect inferences drawn from the evidence in different ways – some will be “trivial” and some will be “pervasive.” *Id.* at 695-96. The Court further clarified, that in making the prejudice determination, “a court hearing an ineffectiveness claim *must* consider the *totality of the evidence* before the judge or jury.” *Id.* at 695 (emphasis added).

Over the years, the Court has reaffirmed this legal standard. In (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 395 (2000), the Court found that the state trial judge, unlike the Virginia Supreme Court, had stated the correct prejudice standard and properly concluded that “the entire post-conviction record, viewed as a whole and cumulative of mitigation evidence presented originally,” justifies a new sentencing. *Id.* at 398-99. The state trial court’s “predictive judgment rested on his assessment of the totality of the omitted evidence rather than on the notion that a single item of omitted evidence, no matter how trivial, would require a new hearing.” *Id.* at 397. The Virginia State Supreme Court, however, conducted an unreasonable prejudice determination “insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation.” *Id.* at 397-98.

The Court again reaffirmed these principles, stating, “[W]e evaluate the totality of the evidence—both that adduced at trial, *and the evidence adduced in the habeas proceeding[s].*” *Wiggins v. Smith*, 539 U.S. 510, 536 (2003) (emphasis in original) (quoting *Williams v. Taylor*, 529 U.S. at 397-98). “Had the jury been able to place petitioner’s excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one

juror would have struck a different balance.” *Id.* at 537. The Court further concluded that the available mitigating evidence, “taken as a whole,” might have made a difference in the jury’s assessment. *Id.* at 538. And in *Rompilla v. Beard*, 545 U.S. 374, 393 (2005), the Court reiterated that, “although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered ‘mitigating evidence, taken as a whole, ‘might well have influenced the jury’s appraisal,’ of [the defendant’s] culpability,’ and the likelihood of a different result if the evidence had gone in is ‘sufficient to undermine confidence in the outcome’ actually reached at sentencing.” (internal citations omitted).

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

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

The Florida Supreme Court repeated these errors and wholly failed to address Brant's arguments about the post-conviction court's objectively unreasonable application of clearly established federal law. Additionally, the Florida Supreme Court made an unreasonable determination of the facts in light of the State court record and unreasonably applied both the *Strickland* deficient performance analysis and the prejudice analysis.

In assessing performance, the Florida Supreme Court wholly ignored unrebutted testimony in the record as to prevailing norms and testimony from witnesses about basic efforts in a capital investigation and the concrete

evidence of counsel's efforts and lack of effort in investigating Brant's life.

This is inconsistent with Strickland's admonition that:

[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690.

As to the prejudice prong, the Florida Supreme Court divided Brant's penalty phase ineffective assistance of counsel claim into five sub-claims: 1) Brant's conception during a rape, 2) expert testimony on methamphetamine use, 3) failure to present testimony about positive prison adjustment, 4) failure to present PET scan images and an expert qualified to discuss those images, and 5) failure to conduct an adequate "background and mental health investigation." *Brant*, 197 So. 3d at 1066-67. In so doing, the court failed to recognize that the additional mitigation was important and compelling not just on its own, but because the additional evidence reinforced other evidence, both that at trial and in post-conviction, and created a mitigation case more compelling than the sum of its parts. This was unreasonable.

Under *Strickland*, 466 U.S. at 687, a court views the “totality of the evidence,” keeping in mind that “[s]ome errors [] have ... a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture....” *Id.* at 695-96. Errors of counsel are therefore considered in the aggregate, not one by one. *Goodman v. Bertrand*, 467 F.3d 1022 (6th Cir. 2006) (unreasonable application of *Strickland* because the state court weighed each error individually when the “cumulative effect” of the errors required reversal. Rather than evaluating each error in isolation, . . . the pattern of counsel's deficiencies must be considered in their totality.”) *Id.* at 1030; *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999) (holding that the court should examine cumulative effect of errors committed by counsel across both the trial and sentencing); *Stouffer v. Reynolds*, 168 F.3d 1155, 1163-64 (10th Cir. 1999) (“Taken alone, no one instance establishes deficient representation. However, cumulatively, each failure underscores a fundamental lack of formulation and direction in presenting a coherent defense.”); *Cargle v Mullin*, 317 F.3d 1196, 1212 (10th Cir. 2003) (“However, our decision to grant relief on ineffective assistance grounds is a function of the prejudice flowing from all of counsel's deficient performance--as *Strickland* directs it to be. See *Strickland*, 466 U.S. at 694-96, 104 S.Ct. 2052 (repeatedly stating prejudice inquiry in aggregate terms of reasonable probability counsel's errors affected outcome of proceeding))”; *Fisher v.*

Gobson, 282 F3d 1283, 1307-11 (10th Cir. 2002) (assessing prejudice from counsel's "numerous shortcomings [and] omissions," and holding "these errors" had a "devastating impact on the defense").

The Florida Supreme Court's Deficient Performance Analysis

Conceived During a Rape

The Florida Supreme Court assessed the performance prong of the sub-claim that Brant was conceived during a rape, stating: "We agree with the post-conviction court that Brant failed to show that counsel performed deficiently in failing to discover the circumstances of Brant's conception. Counsel had no reason to believe that Eddie was not Brant's father, and Crystal testified several times under oath that Eddie was Brant's father. Under these circumstances, counsel cannot be expected to verify paternity through other family members or DNA testing." *Brant*, 197 So. 3d at 1067. This is an unreasonable application of *Strickland*.

Counsel failed to conduct a reasonable investigation into Brant's background, including his conception and his purported father's family history. Counsel thought there wasn't anything compelling about the mitigation in Brant's case and spoke to only two, maybe three, mitigation witnesses. (Doc. 1, p. 16) Counsel bizarrely stated that he wasn't going to "parade [Brant's] family tree through the penalty phase." *Id.* And, yet of

course, as is widely known and accepted, presenting a client's extended family history to lessen a defendant's moral culpability is precisely what capital mitigation is all about. In fact, when pressed, counsel conceded that the ABA Guidelines stress the importance of investigating a client's life from birth to conception and understanding the client's background from both sides of the family, and that contacting Brant's father "should have been done, could have been done." (Doc. 1, p. 16).

Despite prevailing norms and unrebutted testimony at post-conviction from multiple witnesses as set out above and in Brant's Petition (Doc. 1, p. 14-16) that a basic capital mitigation investigation should include a multi-generational assessment of *both sides of a capital defendant's family*, including an investigation of the defendant's life from "conception" to the present, counsel wholly failed to even try to speak to Eddie Brant or, later, Eddie Brant's widow. Trial counsel obtained a mitigation specialist and a fact investigator yet inexplicably and unreasonably limited their investigation to witnesses in Florida. Had counsel, or his investigator, simply picked up the phone and had a ten-minute phone call with Eddie Brant or, after mid-2005, his widow, Mary Kay Brant, counsel would have been put on notice that Eddie Brant was not Chuck's father. Had counsel spoken to other witnesses in Ohio and West Virginia, including Brant's maternal uncle, Jerry Crane, or

paternal aunt, Annice Crookshanks, he would have been aware that this was common knowledge within both families. Armed with this information, trial counsel could have confronted Crystal, who admitted she would have come forward with the fact that Chuck was conceived in a rape if approached with the fact that both families knew Eddie wasn't Chuck's father.

The significance of this mitigation cannot be overstated in a rape-murder. As Dr. Cunningham explained, the rape illuminates the tragic trajectory of Brant's life, starting with his conception, his mother's difficult chain-smoking pregnancy, and her rejection of him from infancy forward – none of which was presented at trial. The fact that Brant was conceived in a rape, and the expert testimony explaining the significance of that on Brant's physical, emotional and neurological development, would have had a profound effect on a reasonable juror in light of the facts of the crime.

The court's analysis is inconsistent with *Strickland* and directly contradicts the unrebutted testimony regarding prevailing norms in Florida and the ABA Guidelines and trial counsel's own admission that it "should have been done." It is rudimentary that counsel is expected to make efforts to speak to a capital defendant's father. Counsel's failure to do so falls well below the wide range of prevailing norms.

The State court is also mistaken in stating that trial counsel would have had to obtain DNA testing to discover Brant's paternity.¹ The court's finding is refuted by Mary Kay Brant's testimony that she voluntarily "opened a can of worms," in a ten-minute phone call and Crystal's testimony that she would have come forward. The testimony squarely established that the information was there for the taking in a brief phone call – and Crystal expressly testified that she would have told the truth about being raped if she had been confronted with the fact that almost everybody in West Virginia and Ohio knew Eddie wasn't Chuck's father. Also, it is standard practice in a capital investigation to develop rapport with family members in order to obtain information about the intimate details of a family's history. This is especially true when dealing with a sexual assault victim – such as Crystal. The Florida Supreme Court's analysis is an unreasonable application of *Strickland* and is refuted by the facts in the State court record.

The Florida Supreme Court also assessed the prejudice flowing from this failure piece-meal and unreasonably discounted it to irrelevance. The Florida Supreme Court opined that because Brant did not know he was conceived during a rape, "any mitigating value of the circumstances of his conception would be negligible *at best*." *Brant*, 197 So. 3d at 1067. The court

¹ Indeed, Brant never once argued or suggested that counsel needed to obtain DNA.

further opined that “[t]here is no reasonable probability that Brant would have received a life sentence had the circumstances of his conception been presented to the trial court[,]” because it was already in the record that Brant had an abusive childhood. *Id.* at 1067-68. “The Florida Supreme Court’s decision that [Brant] was not prejudiced by his counsel’s failure to conduct a thorough—or even cursory—investigation is unreasonable. The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing.” *Porter v. McCollum*, 558 U.S. 30, 42 (2009). As will be addressed more fully below, the evidence of Brant’s conception – and the significance of that on his life trajectory- cannot be understated. Additionally, because the additional mitigation must be considered in its totality – not in the piece- meal fashion conducted by the Florida courts – Brant will present his prejudice argument in totality.

Failure to Present a Methamphetamine Expert

The Florida Supreme Court assessed this sub-claim, stating; “We agree with the post-conviction court’s conclusion that counsel did not render deficient performance in failing to present a ‘specialist expert in meth use.’” *Brant*, 197 So. 3d 1069. The court based this decision on a determination that trial counsel presented testimony about methamphetamine use through Drs.

McClain and Maher so testimony on this issue by a “specialist expert” would have been “mostly cumulative, and trial counsel is not ineffective in failing to present cumulative evidence.” *Id.* In so doing, just like the post-conviction court before it, the Florida Supreme Court unreasonably applied clearly established federal law by mixing the performance and prejudice prongs and made an unreasonable determination of the facts in light of the State court record. As to the prejudice analysis, the Florida Supreme Court failed to meaningfully compare the post-conviction testimony of Dr. Morton with the trial testimony about Brant’s methamphetamine use. Had the court done so, the court should have determined that the evidence was not mostly cumulative. This will be addressed more fully below.

Trial counsel knew evidence of Brant’s methamphetamine use was going to be admitted at his trial and Terrana, at least, recognized it as an important part of the mitigation theory. Fraser’s testimony on his thought processes, or more accurately lack of thought processes, is summarized in Brant’s Petition. (Doc. 1, p. 16-17). On November 6, 2006, Fraser sent a letter to Maloney, asking her to contact two methamphetamine experts that a capital-qualified State Circuit Judge, Judge Deborah Behnke, had recommended for this case. R V 10, p. 1875-79. Fraser’s own psychiatric expert, Dr. Maher, recommended Fraser seek a specialist expert on this

subject due to the significance of Brant's meth use in this case. Neither Fraser nor Maloney could clearly explain what happened or why neither of the potential methamphetamine experts were retained or consulted. Trial counsel's failure to investigate Brant's methamphetamine use and present a specialist expert on methamphetamine and its effect on Brant's brain was not a strategic decision but the result of inattention and neglect. Unrebutted testimony established that prevailing norms recommend that trial counsel should obtain specialist experts. Indeed, trial counsel recognized the need for it as evidenced by his own file notes and as recommended by a capital-qualified judge in the circuit.

The post-conviction court rejected this sub-claim, finding that "Fraser attempted to find a methamphetamine expert but ultimately made a strategic decision to introduce testimony regarding the effects of methamphetamine use through Dr. Maher." R. V. 18, p. 3479. Brant argued to the Florida Supreme Court that the post-conviction court's finding must fail under the facts and the law. The State court record established that Fraser's decision not to present a specialist expert on methamphetamine use cannot fairly be considered a reasonable strategic decision because Fraser never spoke to such an expert and therefore would not have been able to make a reasonably informed strategic decision whether to present such

testimony. Further, Fraser lacked an understanding of the effects of methamphetamine on his client when he stated he didn't think it was mitigating because Brant used it to work. The State court record shows that counsel performed deficiently in failing to have his mitigation expert follow up with the experts, or, upon her failing, failing to do so himself. The Florida Supreme Court's determination that counsel made an informed strategic decision after a thorough investigation – as required by clearly established federal law- is an unreasonable determination of the facts in light of the State court record and an unreasonable application of the performance prong of *Strickland*. This Court should conduct *de novo* review.

Failure to Present a Prison Adjustment Expert

The Florida Supreme Court denied this sub-claim finding that Brant failed to establish deficient performance or prejudice. The Florida Supreme Court's determination was an unreasonable determination of the facts in light of the State court record and an unreasonable application of clearly established federal law. The court also, once again, unreasonably limited its prejudice analysis by analyzing the effect of the mitigation evidence in piece-meal fashion.

Brant argued to the Florida Supreme Court that the record below (summarized in his Petition, Doc. 1, p. 17) established Fraser identified and

recognized the need for a prison expert. Fraser wrote a letter to Toni Maloney asking her to find the name and contact information for the prison adjustment expert they had discussed. RV 10, p. 1886. As far as Fraser knew, Maloney never did so. Fraser had thought Maloney had too many cases at the time she worked on Brant's case. Maloney claimed she spoke to James Aiken, the prison expert presented at post-conviction, but did not know why he was not retained. Aiken said he had no memory of ever being contacted on Brant's case prior to post-conviction counsel contacting him. Fraser said he never spoke to any jail guards or other inmates. He had no explanation for this failure. Terrana stated he always presented prison adjustment evidence, usually through his psychologist, and did not know why Fraser failed to do so in this case. There was no testimony at trial about Brant's status as a trustee or his potential adjustment to prison and no mention of that as a mitigating factor in the trial court's Sentencing Order.

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

Trial counsel was aware of and recognized the need to present Brant's potential to adjust favorably to prison through an expert, but trial counsel simply failed to investigate this mitigation. Counsel's failure was due to inadvertence and neglect and not based on a reasonable investigation sufficient to support a reasoned strategy decision. The State court record irrefutably demonstrates that counsel's performance fell below the wide-range of prevailing norms.

The post- conviction court determined the record was "unclear why counsel did not present *Skipper* evidence," but that counsel's "failure" to do so "did not affect the outcome of the proceedings." RV 18, p. 3477. The lower court, therefore, found counsel deficient in this regard but denied this sub claim by determining the evidence would not have persuaded the trial court to "impose a life sentence." *Id.*

The Florida Supreme Court determined that "in light of the evidence presented at the penalty phase, we conclude that counsel did not perform deficiently in failing to present a prison adjustment expert." *Brant*, 197 So. 3d 1070. In so doing, the Florida Supreme Court again mixed the performance and prejudice analysis of *Strickland* and failed to accurately credit the State court record. Both lawyers testified that this testimony was standard, identified as needed in this particular case as evidenced by notes in counsel's

file, and could not offer any explanation as to why they failed to pursue this avenue of mitigation. Their failure to do so was the result of inattention and neglect, rather than a reasoned strategic decision made after a thorough investigation as required under clearly established federal law. There can be no finding that counsel performed within prevailing norms in investigating Brant's ability to adjust to prison.

The Florida Supreme Court determined in its analysis that evidence of Brant's trustee status at the jail, that he got along well with others and had a reputation for being non-violent was consistent with *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986), and thus, the fact "that counsel did not present this evidence through an expert witness does not render counsel's performance deficient." *Brant*, 197 So. 3d at 1070. The court further opined that Brant was not prejudiced by the "lack of expert prison adjustment testimony." *Id.* The court again looked at the evidence in isolation and noted that the trial court had found the HAC aggravator and so the State court's "confidence in the outcome is not undermined." As will be set out below, while the court in this instance identified the correct legal standard, the court unreasonably applied clearly established federal law in weighing the mitigation in isolation and in a piece-meal fashion.

Failure to Present Brain Damage and Pet Scan Evidence

The Florida Supreme Court denied this sub-claim, finding that Brant failed to establish deficient performance because Fraser's file memo documented his thought processes in not calling Drs. Wood and Wu, and Brant failed to demonstrate prejudice "because the crux of their testimony would have been largely cumulative [] and there is no reasonable possibility that Brant would have received a life sentence[.]" *Brant*, 197 So. 3d at 1073-74. The Florida Supreme Court once again unreasonably assessed prejudice in isolation and in a piece-meal fashion. Additionally, while Fraser did write a contemporaneous file memo about his last-minute failure to present the PET scan evidence and testimony of the PET scan experts, his memo was refuted by the testimony at post-conviction.

Brant presented unrefuted evidence in post-conviction that prevailing norms establish that capital defense attorneys should investigate potential brain damage and that, if found, it should be presented in a cohesive manner that sets out the likely causes, the effects, and the nexus to the crime. When possible, counsel should also present neuro-imaging to provide visual evidence that studies have shown is particularly persuasive to jurors. Fraser recognized the need to investigate brain damage and retained neuropsychologist McClain. McClain recommended Fraser have Brant undergo a PET scan and McClain

swore in an affidavit that the PET scan was necessary. The scan demonstrated brain damage. Fraser, however, never presented the PET scan. Fraser also failed to present testimony about the numerous risk factors for brain damage that Brant had been exposed to, failed to clearly link the brain damage to Brant's severe and chronic methamphetamine abuse, and failed to present testimony of how Brant's brain damage was inexorably linked to the crime. This was deficient performance. The State post – conviction court denied this claim. RV p. 3478. The court found Fraser's testimony that he made a strategic decision to present the PET through Maher to be credible. Fraser was concerned that the State's expert, Helen Mayberg, would be more credible. *Id.* The court further found that all the experts acknowledged that the use of PET scans was “an issue of some debate in the scientific community.” *Id.*

The post-conviction court's findings in this regard were both an unreasonable application of the law and unsupported by the State court record. A comparison of Fraser's Memo, RV. 10, p. 1903, the trial record and the post-conviction record demonstrate that Fraser gave conflicting testimony about the circumstances of his decision, that he made the decision at the last minute after failing to speak to his experts or even view the PET images, that simple research would have demonstrated that his concern about Dr. Mayberg was unfounded and that he failed to recognize the risk factors Brant experienced.

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

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

In addition, Fraser failed to provide Drs. Wood, Wu and Maher with background information that supported the diagnosis of brain damage: the snake bite Crystal suffered during Brant's pregnancy, and that Brant engaged in head-banging, and ingested plaster, lead paint and fertilizer as a child. Fraser himself mistakenly thought Brant had no risk factors for brain damage, a misunderstanding contradicted by a wealth of evidence, and admitted at post-conviction that he never looked at the PET scan images. Trial counsel further failed to obtain records of a head injury Brant suffered as an adult or convey to Drs. Wood or Wu the extent of Brant's methamphetamine use.

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

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

The Florida Supreme Court determined that, as to deficient performance, Fraser's memo provided "competent, substantial evidence to support the post-conviction court's credibility findings, and the record refutes Brant's claim that counsel was deficient for presenting the PET scan evidence." *Brant*, 197 So. 3d at 1073. As to this sub-claim, the Florida Supreme Court once again mixed the Strickland prejudice and performance prongs, stating: "Brant has also failed to show that counsel was deficient in failing to discover and inform the experts of Brant's history of eating plaster or lead paint, head banging as a child, head injury in 2001, and heavy meth use," because "such information would have only provided a negligible increase" in the certainty of Brant's brain damage and would not have altered Drs. McClain or Maher's conclusions. *Id.* at 1074. The Florida Supreme Court's findings as to this sub-claim amount to an unreasonable application of clearly established federal law as the court identified the correct legal standard but misapplied that standard by mixing the prejudice and performance prongs, failing to give consideration

to the unrefuted testimony on prevailing norms, assessing counsel's performance based on an objective standard of reasonableness, and assessing prejudice in an isolated piece-meal fashion. This will be set out more fully below.

Failure to Conduct a Reasonable Background and Mental Health Investigation

The Florida Supreme Court denied this sub-claim, relying on the findings of the post-conviction court, and in so doing unreasonably applied clearly established federal, failed to assess counsel's performance against an objective standard of reasonableness and made clearly erroneous factual determinations in light of the State court record.

The Florida Supreme Court stated: "Most of Brant's claims regarding the deficiencies of trial counsel are refuted by the record. The record reflects that trial counsel did conduct a reasonable investigation into Brant's childhood family and multigenerational background of addiction, abuse, neglect and sexual exposure." *Brant*, 197 So. 3d 1075. The Florida Supreme Court agreed with the post-conviction court, quoting the post-conviction court's listing of mitigating evidence at trial and post-conviction, agreeing with the post-conviction court's conclusion that Brant failed to establish deficient performance and that the court's "confidence in the outcome is not

undermined by the few pieces of noncumulative evidence presented at the evidentiary hearing.” *Id.* The Florida Supreme Court’s finding as to this sub-claim amounts to an unreasonable application of clearly established federal law and an unreasonable determination of the facts in light of the State court record. The court once again analyzed performance by assessing prejudice and failed to meaningfully assess the evidence adduced at trial with that presented in post-conviction.

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

The post-conviction record establishes that trial counsel unreasonably limited their mitigation investigation to witnesses in Florida, failed to identify or find classmates and peers, and failed to communicate with the family in a consistent and meaningful manner as is required to develop rapport. As set out in Brant’s Petition (Doc. 1, p.15 -16), unrefuted testimony on prevailing norms established that counsel “at a minimum” needs to

investigate *both parents*, looking at a client's life from conception to the present day, including time when he is incarcerated awaiting trial, and that the defense team had minimal contact with the lay witnesses (Doc. 1, p. 21). Counsel gave his two mental health experts limited background information and only had them speak to one or two family members. Dr. Maher, the psychiatrist, only spoke to one family member, Brant's wife, and the background information he was given was limited to depositions of law enforcement officers and Drs. Wood, Wu and McClain. (Doc. 1, p. 19). No expert was asked to do a biopsychosocial history – a minimum standard of practice in capital defense – and Maher obtained background information solely from the client, a practice that is clearly below prevailing norms. *Id.* Fraser only spoke to Brant's mother twice. In so doing, trial counsel failed to investigate or discover significant mitigation.

The post-conviction court's reasoning on this sub-claim, which the Florida Supreme Court adopted, was that the testimony was cumulative and "[c]onsequently, the Court further finds Defendant has failed to establish that counsel performed deficiently." RV 18, p. 3475-76. In so doing, both courts mixed the prejudice and performance prongs and applied a circular analysis not supported by law, e.g., if the evidence is cumulative, counsel is not deficient. Rather, when analyzing counsel's performance, the question

must be, did counsel conduct a reasonable investigation based on the information he or she reasonably should have obtained or known? The court wholly fails to engage in an analysis of counsel's efforts and/or compare counsel's efforts to prevailing norms. The post-conviction court's analysis fails to comply with *Strickland*.

Had the Florida State courts applied the analysis compelled by *Strickland*, the courts would have concluded that counsel unreasonably curtailed their mitigation investigation after relying on rudimentary information obtained from a narrow set of sources. Counsel simply failed to 1) investigate any multi-generational history of either the Brants or the Cranes; 2) failed to obtain medical records documenting a head injury, even though the mitigation specialist said she was aware of it; 3) failed to convey to their experts risk factors for brain damage, such as Brant's childhood head-banging, ingestion of plaster, and Crystal's pregnancy history, where she was bitten by a venomous snake and chain-smoked cigarettes; 4) failed to speak to teachers or school age peers; 5) failed to speak to friends who used drugs with or observed Brant use drugs just prior to the crime; 6) failed to fully investigate the efforts of the family to turn Brant in to the authorities and the mitigating value of that, 7) failed to speak to Marvin's ex-wife and daughter who described the nature of Marvin's sadistic and sexually driven

cruelty in detail beyond the passing references offered at trial and, who corroborated Crystal's description of Marvin's rapes and abuse, and 8) failed to discover and elicit Marvin's "pretend rape" of Sherry and the fact his sexual assaults were initiated by "surprise." Counsel cannot be said to have performed within prevailing norms based on the evidence of their truncated, scattered and unfocused investigation described in post-conviction.

And, additionally, as in each sub-claim, the State courts engaged in a piece-meal prejudice analysis which is an unreasonable application of clearly established federal law.

Prejudice Analysis – Had A Jury Been Presented with The Totality of the Mitigation Presented at Trial and Post- Conviction, There Exists A Reasonable Probability Brant Would Have Received A Life Sentence.

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

The Supreme Court has "found deficiency *and* prejudice in cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase." *Sears v. Upton*, 130

S. Ct. 3259, 3266 (2010) (emphasis in original) (citing *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (remorse and cooperation with police); *Rompilla v. Beard*, 545 U.S. 374, 378 (2005) (residual doubt); *Porter v. McCollum*, 130 S.Ct. 447, 453-54 (2009) (per curiam) (diminished capacity based on drunkenness). The Court explained in *Sears* that “[w]e certainly have never held that counsel’s effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant.” *Sears*, 130 S. Ct. at 3266 (emphasis in original). “To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing fact-specific analysis that the [Florida Supreme Court] failed to undertake below. . . . ‘To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence. . . .’” *Sears*, 561 U.S. at 952.

Moreover, even where, as here, some of the subject matter of the trial and post-conviction evidence overlaps to some degree, prejudice may be established under *Strickland* where trial counsel fails to adequately describe the nature and extent of abuse the petitioner suffered. *See Wiggins v. Smith*, 539 U.S. 510, 535-36 (2003) (finding deficiency and prejudice “[g]iven both the *nature and extent* of the abuse petitioner suffered”) (emphasis added); *Williams*, 529 U.S. at 370, 398 (finding prejudice based on counsel’s omission

of “*graphic description* of [the petitioner’s] childhood” including “documents . . . that *dramatically described* mistreatment, abuse, and neglect”) (emphasis added).

Thus, the federal circuit courts have consistently granted *Strickland* relief where some evidence of childhood trauma was presented at trial, but the post-conviction evidence made clear that the jury never learned the full scope of that trauma. Applying that standard in *Cooper v. Secretary, DOC*, 646 F.3d 1328 (11th Cir. 2011), the Eleventh Circuit Court of Appeals recognized:

In the penalty phase of a trial, the major requirement is that the sentence be individualized by focusing on the particularized characteristics of the individual. Therefore, it is unreasonable to discount to irrelevance the evidence of [a defendant’s] abusive childhood. Background and character evidence is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background...may be less culpable than defendants who have no such excuse.

Id. at 1354. (internal quotations and citations omitted) (finding prejudice despite overwhelming evidence of guilt in a triple murder case). *See Williams v. Allen*, 542 F.3d 1326, 1329, 1342 (11th Cir. 2008) (even though petitioner’s mother testified at trial that the petitioner was subject to physical abuse as a child, the post-conviction investigation revealed “a vastly different picture of [the petitioner’s] background than that created by [the] abbreviated [trial]

testimony . . . [and] the violence experienced by Williams as a child far exceeded—in both frequency and severity—the punishments described at sentencing.”); *Johnson v. Secretary of DOC*, 643 F.3d 907, 936 (11th Cir. 2011) (“The description, details, and depth of abuse in Johnson’s background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told.”); *Foust v. Houk*, 655 F.3d 524, 539-40 (6th Cir. 2011) (trial testimony was that petitioner’s home was not “well kept,” that his mother did not clean the home, and that the children had head lice; post-conviction evidence depicted the squalor and chaos of the home in more vivid detail, and as a result, “[p]assing references at the mitigation hearing . . . in no way conveyed the abysmal condition” of the home); *Johnson v. Bagley*, 544 F.3d 592, 602 (6th Cir. 2008) (finding deficient performance where “the [trial] testimony only scratched the surface of Johnson’s horrific childhood.”); *Jermyn v. Horn*, 266 F.3d 257, 271, 310 (3d Cir. 2001) (where the defense presented evidence of petitioner’s mental illness and dysfunctional relationship with his parents, relief was granted because of unrepresented “strong and specific testimony about a horrific home life” and additional testimony that “would have strengthened the evidence pertaining to Jermyn’s mental illness”); *Stankewitz v. Woodford*, 365 F.3d 706, 724 (9th Cir. 2004) (explaining that a defendant is prejudiced when counsel introduces “some of the defendant’s social history” but does so “in a

cursory manner that was not particularly useful or compelling.”) (citations omitted). *See Correll v. Ryan*, 539 F.3d 938, 953 n.7 (9th Cir. 2008) (capital defendant prejudiced by failure to present corroborative mitigating evidence); *Lewis v. Dretke*, 355 F.3d 364 (5th Cir. 2003) (same); *Stewart v. Wolfenbarger*, 468 F.3d 338, 359 (6th Cir. 2006) (same, regarding guilt-phase evidence); *Washington v. Smith*, 219 F.3d 620, 634 (7th Cir. 2000) (same).

Similarly, in *Hardwick v. Crosby*, 320 F.3d 1127 (11th Cir. 2003), the court found a capital defendant was prejudiced when trial counsel failed to present expert testimony on drug and alcohol intoxication at the sentencing phase. The expert testimony of Dr. Levin presented at post-conviction supported a finding that the manner of killing, which involved shooting, then striking the victim with a tire iron and then trying to drown him and shoot him again, “reflected erratic behavior,” and thought processes. *Id.* at 1169. The defendant’s “cloudy” memory also evidenced diminished cognitive functioning. *Id.* Another expert called at post -conviction offered his opinion that the defendant was “acutely intoxicated” at the time, that the manner of death was consistent of an individual under the influence of drugs and alcohol, and that the defendant’s ability to form “specific intent was diminished.” *Id.* at 1170. Evidence was also offered that the defendant had a history of blackouts. *Id.* at 1174. The court also found that, “although the

[expert] conclusions as to mitigation factors under the Florida statute were essentially the same in [the post- conviction] proceeding, the judge and jury heard none of this testimony.” *Id.* at 1172. Basing its holding on *Williams v. Taylor*, 529 U.S. 420 (2000), the court found that due to trial counsel’s failure to understand the need for background testimony from additional family members and the failure to present evidence of the defendant’s drug and alcohol use, “confidence in the fundamental fairness of the state adjudication” is undermined. *Hardwick* at 1174.

Under *Strickland*, 466 U.S. at 687, a court views the “totality of the evidence,” keeping in mind that “[s]ome errors [] have ... a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture....” *Id.* at 695-96. Errors of counsel are therefore considered in the aggregate, not one by one. *Goodman v. Bertrand*, 467 F.3d 1022 (6th Cir. 2006) (unreasonable application of *Strickland* because the state court weighed each error individually when the “cumulative effect” of the errors required reversal. Rather than evaluating each error in isolation, . . . the pattern of counsel's deficiencies must be considered in their totality.”) *Id.* at 1030; *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999) (holding that the court should examine cumulative effect of errors committed by counsel across both the trial and sentencing); *Stouffer v. Reynolds*, 168 F.3d 1155, 1163-64

(10th Cir. 1999) ("Taken alone, no one instance establishes deficient representation. However, cumulatively, each failure underscores a fundamental lack of formulation and direction in presenting a coherent defense."); *Cargle v Mullin*, 317 F3d 1196, 1212 (10th Cir. 2003) ("However, our decision to grant relief on ineffective assistance grounds is a function of the prejudice flowing from all of counsel's deficient performance--as *Strickland* directs it to be. See *Strickland*, 466 U.S. at 694-96, 104 S.Ct. 2052 (repeatedly stating prejudice inquiry in aggregate terms of reasonable probability counsel's errors affected outcome of proceeding))"; *Fisher v. Gobson*, 282 F3d 1283, 1307-11 (10th Cir. 2002) (assessing prejudice from counsel's "numerous shortcomings [and] omissions," and holding "these errors" had a "devastating impact on the defense").

In spite of this well-established case law, the post-conviction court and Florida Supreme Court misapprehended the *Strickland* prejudice standard and evaluated the claims in a piece –meal fashion, not in the aggregate as required by *Strickland*. The post- conviction court and Florida Supreme Court failed to weigh the totality of the mitigation presented at trial and in post- conviction. The post- conviction court repeated this error throughout its Order, stating, by way of example as to counsel's failure to present positive prison adaption evidence, "in light of the trial court's finding of HAC and that

the murder was committed during a sexual battery, the Court finds there is no reasonable probability that the trial court would have imposed a life sentence if such *Skipper* evidence had been presented.” PCR V. 18, p. 3477. This is the sum of the court’s analysis as to this sub – claim. See also *Id.* at 3477-3483 (improper standard as to sub –claims, evaluation of prejudice limited to sub –claims). The court also improperly failed to assess or weigh evidence where the court found counsel to have made a strategic decision. *Id.* at 3476-77 (failure to investigate Brant’s father and discover he was conceived in a rape).

The Florida Supreme Court repeated many of these same errors. While a court may deny a claim on a single prong, it cannot use that technique to avoid weighing mitigating evidence where it has found counsel performed deficiently in some other regard. The Florida Supreme Court failed to recognize the errors in the post-conviction court’s Order, and, in so doing, failed to clarify the proper standard and engage in the necessary totality analysis required by the Supreme Court in *Strickland*, *Williams* and their progeny as cited above. Further, the Florida Supreme Court failed to fully assess in detail the differences between the testimony at trial and post-conviction and in so doing unreasonably discounted or reduced to irrelevance the additional mitigation evidence presented in post-conviction. The

additional evidence explained graphic details of emotional, physical and sexual abuse that were touched upon at trial in a superficial way.

Additionally, the expert testimony gave weight and meaning to the mitigation evidence, with thoughtful and detailed explanations of the effect of childhood trauma, neglect and rejection on a human being's emotional and psychological development; the link between childhood trauma, genetics and family history to addiction and sexual violence; a detailed explanation of the pronounced brain damage demonstrated by the PET scan, showing that Brant has pockets of dead grey matter in his brain; a detailed explanation of why Brant would be a low risk for violence if sentenced to life in prison; and an explanation of Brant's extreme remorse for his crime. The testimony presented at trial is detailed in Brant's Petition (Doc. 1, p. 21 to 27), as is the testimony and evidence presented at post-conviction (Doc. 1, p. 27-44).

In addressing prejudice, the Florida Supreme Court stated the following reasons for denying the individual sub-claims. As to the fact that Brant was conceived in a rape, the Florida Supreme Court unreasonably dismissed the value of this evidence because Brant was not "aware that he was conceived during the rape at the time he committed the murder," so the "evidence would be negligible at best." *Brant*, 197 So. 3d 1067. The court further found that because the trial court found that Brant was abused by his

step-father, there was “no reasonable probability that Brant would have received a life sentence.” *Id.* at 1067-68. As to the use of a specialist expert in the effects of methamphetamine on Brant’s brain and his risk for addiction, the Florida Supreme Court dismissed the value of this testimony as “merely cumulative,” and questioned whether Dr. Morton’s opinion that Brant met the statutory mental mitigator of extreme emotional disturbance “based on Brant’s report of ‘being suspicious and paranoid and agitated[,]’” would have sufficed to meet the standard. *Id.* at 1069. As to Brant’s ability to adapt to prison without being a risk of violence to staff or other inmates, the Florida Supreme Court remarkably concluded that evidence presented at trial that Brant was a “well-behaved prisoner,” that “got along well with others, and had a reputation for being non-violent,” essentially equaled the testimony of Dr. Cunningham and James Aiken. *Id.* at 1070. The court then also noted the HAC aggravator as a reason to discount this evidence in isolation. *Id.* at 1070-71. The Florida Supreme Court then unreasonably discounted the PET scan evidence, because the “crux of” Dr. Wood and Dr. Wu’s testimony “would have been largely cumulative.” *Id.* at 1073. In so doing, the Florida Supreme Court also wholly ignored the testimony of Dr. Gur. The Florida Supreme Court unreasonably discounted the weight of the additional background evidence, finding their “confidence in the outcome is not undermined by the few pieces of noncumulative evidence presented at the

evidentiary hearing.” *Id.* at 1075. The Florida Supreme Court’s prejudice assessment, even when taken as a whole, which cannot be done since the court itself failed to do so, still amounts to an unreasonable application of clearly established law and an unreasonable determination of the facts in the State court record.

As set out in detail in his Petition (Doc. 1, p. 21-44), Brant presented a wealth of mitigation in post –conviction which was not presented at trial and presented detailed, graphic details of abuse, neglect, and rejection, Brant’s drug use leading up to the crime, and other facts which the sentencing court never heard. Brant has established prejudice. The Florida Supreme Court’s assessment was objectively unreasonable.

The entire trial, including the State’s case in aggravation, lasted a mere two and a half days. The trial court found only two aggravating factors: 1) the murder was especially heinous, atrocious and cruel (HAC) and 2) the murder was committed during the course of a felony (sexual battery). Thus, Brant’s case is already not the most aggravated of murders.

At trial Brant presented the testimony of Reverend Hess and James Harden as to Brant’s life while enrolled at the Blue Ridge School of the Prophets and a Bible school in Bradenton. Harden and his wife visited Brant in jail. These witnesses testified essentially that Brant was a nice person who

had gotten involved with illegal drugs. The defense also called Steve Alvord, who testified that Brant was a good worker and non-violent. The Defense called Thomas Rabeau, a volunteer jail chaplain, who met with Brant every Wednesday for three years while he was awaiting trial and said Brant was having a hard time. The Defense then called Pastor Jackson who knew Brant and his wife and was aware of Brant's drug problem. Jackson thought Brant had a "whole in his heart. "

The Defense next called Dr. Maher, who explained his primary method of learning about methamphetamine abuse was through substance abuse evaluations of people with drug problems. He would of course testify in post-conviction that he was not an expert in methamphetamine use and had told trial counsel to look for an expert in that field. Maher said as to Brant's methamphetamine use that Brant used meth to work and would feel energized but with racing thoughts, difficulty sitting still and auditory, tactile and visual hallucinations.

Maher also testified generally about the brain and executive functioning and Brant's abnormal glucose uptake. Maher said he was "generally familiar" with PET scans but couldn't really say what Brant's Pet scan results mean but the results were consistent with an impulse control diagnosis.

Maher talked in general terms about Brant's background, sexual behavior and problems in his relationships with his mother, grandmother, wife and stepfather. He diagnosed Brant as depressed and anxious, with a methamphetamine dependence and sexual obsessive disorder.

The Defense then called Gloria Millner, who was asked about Brant and Marvin Coleman but not about Crystal. Millner described Marvin as a "very controlling person," and that she never saw Brant drink or do drugs and he was an "awesome father."

The Defense then called Crystal Coleman, who said her own mother had depression, her father drank every day, beat her mother every night and no one took care of the children. Counsel, however, failed to ask any follow up questions or get any details about Crystal's parents and her own childhood. Crystal also described her difficulties after giving birth to Brant, but the real reason she had the problems, that Brant was the product of a rape, was never discussed. Crystal described "animosity" towards Brant from infancy on but faulted Brant for being a difficult baby who would kick her and didn't want her to care for him. Crystal also stated that Marvin mentally and physically tortured her but was not asked to describe what she meant by this or the nature of the torture.

Sherry Coleman also testified about the fact that Marvin sexually abused her but was told by counsel to not get “into a lot of unnecessary details.” Of course, the missing detail was that Marvin attacked her by surprise to rape her while Brant was in the home.

The Defense then called Dr. McClain, a neuropsychologist, who testified as to Brant’s brain damage as demonstrated by neuropsychological testing. She diagnosed Brant with a learning disorder, polysubstance disorder, depression and cognitive disorder NOS. McClain opined that Brant’s ability to conform his conduct to the law was substantially impaired. She was not asked to testify or comment about methamphetamine and its addictive qualities or effect on the brain. The Florida Supreme Court, however, made an unreasonable determination of fact in light of the State court record, when it said that “[t]rial counsel presented expert testimony” “regarding Brant’s methamphetamine use, the effects of it and the behavior of persons who abuse methamphetamine,” through Drs. Maher and McClain. This finding overstates Dr. McClain’s testimony.

The Sentencing Court found 13 mitigating circumstances, most of which were given little weight – including Brant’s family history of mental illness. The court gave moderate weight to Brant’s methamphetamine use, that he sought help for his drug dependency, and that his “chemical

dependence, sexual obsessive disorder,” and “symptoms of attention deficit disorder” were deserving of moderate weight as well. The court also gave moderate weight to Brant’s guilty plea and waiver of a penalty phase jury. , Lastly, the court gave moderate weight to the *combined facts* that Brant “was emotionally, mentally and physically abused by his stepfather from age 5 to 17; he has diminished impulse control due to drug dependency, and as a result, his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired. He has a diagnosed sexual obsessive disorder.”

In light of the evidence presented at trial, the trial court’s Sentencing Order and a careful, detailed review of the evidence adduced at post-conviction as required by clearly established federal law, Brant has demonstrated a reasonable probability that had a reasonable decision maker heard all of the evidence adduced at trial and in post-conviction there exists a reasonable probability that Brant would have received a life sentence and confidence in the outcome is undermined. A review of the evidence presented at post-conviction demonstrates the defects in the State courts’ fact-finding process and application of the law.

While much of the evidence presented in post-conviction was powerful, perhaps the most powerful and compelling was that Brant was conceived

during a rape. The State courts discounted this evidence because Brant didn't know he was the product of a rape. This is the same type of error as in *Porter*, where the Florida Supreme Court unreasonably discounted and reduced to irrelevance testimony about Porter's abusive childhood. The State courts ignored the effects and implications of Brant's conception on his childhood and genetic make-up. This was objectively unreasonable.

The Florida Supreme Court wholly ignored the testimony of Dr. Cunningham as it relates to the additional evidence presented at post-conviction regarding Brant's background, including his conception, and thus reduced it to nothingness. As explained by Dr. Cunningham, the evidence of Brant's childhood- and why a juror or court should care – was crucial to defending Brant against the death penalty. Cunningham was asked to identify whether there were any adverse developmental factors in Mr. Brant's background that were relevant to an analysis of moral culpability and death-worthiness and Brant's likelihood of making a positive adjustment to life in prison without parole. RV 53, p. 1708. The Florida Supreme Court referred to his testimony about positive prison adjustment but in their analysis of the background and mental health claim it was as if Dr. Cunningham never testified. *Brant*, 197 So. 3d at 1074-75. Cunningham's testimony was crucial to the post-conviction proceedings.

Based on scientific research, Cunningham explained that it is critically important that the sentencing judge or jury has an understanding of the relationship of damaging or impairing factors to choice and moral culpability. *Id.* at 1715-18. It is vitally important that the jury or fact-finder be educated on why they should care, or even consider, whether a capital defendant had a difficult childhood. *Id.* In the face of the notion in popular culture referred to as “the abuse excuse,” it is important to explain to a fact finder how a capital defendant’s background has a nexus to criminal violence. *Id.* at 1716. It is to remind jurors of what they know about their own children – that childhood is “profoundly formative.” *Id.* at 1717. Children are “delicate” and childhood trauma can leave an “indelible imprint on them.” *Id.* “So the task for defense counsel is to illuminate” the defendant’s background and childhood with “the best available science that is essentially consistent with what jurors are thinking about their own kids but are unlikely to apply to a [capital] defendant.” *Id.* at 1717-18.

When assessing moral culpability to determine if a person is deserving of the death penalty, Cunningham looks at the developmental factors of the person to determine what was the quality of the raw material that this person brought to bear in their decision-making around the offense conduct. Cunningham identified four basic arenas of adverse developmental factors in

Brant's life— neurodevelopmental, family and parenting, community influence, and disturbed trajectory. RV 54, p. 1726.

First, under the neurodevelopmental factors which were discussed briefly at trial, Cunningham identified that Crystal smoked during her pregnancy, experienced a snakebite during her pregnancy, that Brant was engaged in severe head banging, suffered lead exposure, and had a breech birth accompanied by emergency procedures. In addition to those factors, Cunningham identified that Brant suffered from a socialization spectrum disorder as demonstrated by his inability to be soothed as a baby, and his difficulty in making friendships. *Id.* at 1729. Brant also exhibited symptoms of attention deficit/hyperactivity disorder. *Id.* at 1728. Other neurodevelopmental factors include the abnormal PET scan, MRI and neuropsychological testing. This was discussed at trial but not well linked to Brant's behavior during the offense. *Id.* at 1729. Additional factors were Brant's genetic predisposition to drug and alcohol use and his methamphetamine dependence. *Id.* at 1731-37.

The next arena that Dr. Cunningham addressed was family and parenting. *Id.* at 1735. He identified: product of a rape of his mother, Crystal; Crystal failed to bond to Brant as a result of the rape, her own postpartum depression and psychosis, her own psychological problems and

deficiencies based on her traumatic childhood and life, and Brant's own failure to form a bond to Crystal as a baby. *Id.* at 1735-37. In addition, Brant's purported father, Eddie Brant, abandoned him and Brant was cared for as a baby by sequential caretakers. *Id.* at 1738.

Brant was exposed to Marvin's verbal abuse of Crystal, which was sexually accusing and demeaning in its content, Marvin's physical abuse and rape of Crystal, and Marvin's sexual abuse of Sherry. While some of that was touched on at trial, the implications of that on a child with sexually aggressive fantasies was not explained. *Id.* at 1737-40. "As we are trying to understand where does [Brant's] sexuality --- how did he fall off the rails here in terms of the development of his own sexuality, this kind of family history is critically important in illuminating ... [Brant's] moral culpability about that sexual orientation." *Id.* The same was true of the next factor, domestic violence, while it was discussed it was not linked to criminal violence. *Id.* at 1740. There was also generational family dysfunction in Brant's family including substance abuse and domestic violence, but again not linked to the risk for criminal violence *Id.* at 1743.

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

dependence. *Id.* at 1743-45. Dr. Cunningham concluded that the developmental damage and impairing factors that Brant experienced as a child are “extraordinary in nature,” and “very significant.” *Id.* at 1746.

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

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

Cunningham then discussed the effects of methamphetamine abuse which have a “well-known nexus with heightened sexuality, aggressive reactivity, violence and homicide.” *Id.* at 1808-14. The fact that Brant said his

meth use was solely to help him with his work does not negate its mitigating value. *Id.* The issue is that this abuse, regardless of why it was used initially, “has the same destabilizing effects and the same potential for engendering violence if it’s used for recreational purposes. At the end of the day, it only matters what is the intensity and chronicity of the use, not the purpose for which it was started.” *Id.* at 1809.

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

Another important factor is Crystal’s failure to bond to Brant and the sequential care Brant received in infancy. An infant’s lack of a chance to bond to a single caregiver who is nurturing is a psychological injury to a child that

is profound in nature, even though the child will have no memory of it. *Id.* at 1817-19. Primary attachment disorder has significant and lasting effects and impairs a child's ability to empathize in adulthood. *Id.* There is also a nexus between disrupted attachment and sexual offending. *Id.* at 1837-39.

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

Crystal also neglected Brant in two ways. *Id.* at 1831-35. First, she wasn't emotionally available to love him. A child senses the quality of feeling that the adult has for them and when a child senses a void, that is a "deeply disturbing and anxiety provoking experience" for the child. *Id.* at 1832. The other aspect of neglect is that Crystal stays in the relationship with Marvin, serving her own disturbed needs, "at the expense of protecting and providing

stability” for her children. *Id.* The household was a “profoundly chaotic context” in which the children grew up. *Id.* This kind of neglect creates a “sense of terror that the child has that their world is out of control.” *Id.* at 1832-33. This damage is observable in Brant as he enters middle childhood. *Id.* And, children who have been emotionally neglected are at increased risk for psychological disorders and for criminal behavior in adulthood. *Id.* at 1833-34.

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

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

impaired and that the capital felony was committed while Brant was under *the influence of an extreme emotional disturbance*. RV 56, p. 1897-1900. None of this linking of childhood, family history and genetics to violent behavior was presented at trial. This hardly amounts to a “few pieces of noncumulative evidence.” *Brant*, 197 So. 3d at 1075.

Additional lay witness testimony not heard at trial included Crystal weeping when she told the post- conviction court that she *never loved Brant* and couldn’t bond with him. Crystal explained in post-conviction in detail the horrendous childhood of extreme poverty and abuse in the mountains of West Virginia. She was made to watch her father bury her cat “live.” She also witnessed her father push her crippled mother into a radiator, burning a perfect pitchfork mark into her mother’s face that her father later said was the sign of the devil. None of these graphic details were presented at trial. The prejudice as to this evidence can be found by the trial court’s giving Brant’s family history of mental illness only “little weight.” RV 18, p. 3474.

Gloria Millner testified in post-conviction how Crystal told her she didn’t like Brant, didn’t like him when he was a baby and didn’t like to be around him, and that she wished she had never had him, facts Millner had not testified to at trial.

While it was described at trial that Marvin was a “bully” who beat Brant twice with his fists, openly criticized Brant, and was not “affectionate,” RV 18, p. 3471, the trial court was not told that Marvin was a rapist himself, raping Crystal in a drunken rage almost nightly, “pretend raping” Brant’s sister and sexually assaulting her by surprise, and demeaning his first wife physically and sexually by grabbing her crotch or “smelling her privates,” then beating her so that her face was mangled and bruised.

In addition, a vivid picture of Marvin’s emotional cruelty to Brant was presented in post-conviction that was not presented at trial where Licensed Mental Health Counselor Heidi Hanlon described how Marvin made six-year-old Brant wear diapers after he wet the bed, punished him as an adolescent by cutting his hair in an embarrassing style and forcing him to wear plaid pants to school where he was cruelly teased by his classmates. Hanlon explained that Brant had both mental health issues and addiction issues and explained the difficulties a person with a dual diagnosis faces and how important it is to explain that to a jury. Hanlon also explained the genetic components of addiction, which was not addressed at trial.

Bryan Coggins, Brant’s friend, testified to Brant’s drug use shortly before the murders. Coggins stopped hanging out with Brant because his drug use had escalated to such a degree that Brant was using crystal meth

every day, staring in the morning by drinking it in his coffee and eating it in his pancakes.

In addition, in contrast with the description of the brain damage at trial where Dr. Maher said Brant had areas of “under- utilization of glucose” in his brain, Drs. Gur, Wu and Wood explained that Brant has, inter alia, actual “pockets of dead gray matter” in the parts of his brain associated with the ability to control anger and violence and linked this dysfunction to Brant’s behavior at the time of the offense. Dr. Gur explained that the imaging done in Brant’s case shows a dramatic difference in functioning between the left and right brain that is “very rare” and a striking abnormality in his hippocampus of 15 standard deviations below normal. Gur explained how these abnormalities would have affected Brant’s risk for criminal violence. The Florida Supreme Court doesn’t even acknowledge Dr. Gur’s testimony in its piece-meal prejudice analysis of the Pet scan sub-claim. This cannot be the full, detailed inquiry required by clearly established federal law when a court is assessing the prejudice prong in a capital case. to see.

Counsel’s failures prejudiced Brant so that the Sentencing Court was not informed about how Brant developed his deviant sexuality and how little he could control the risk factors that predisposed him to develop his

aggressive sexual desires. The trial court was given a frightening diagnosis of sexual sadism by the State expert but not an individualized explanation of how a devoutly religious, married father of two came to commit a sexual homicide. Nor was the court informed about the remorse that is common in sex offenders who have acted on impulse and harmed others. And, despite this tragic, horrific background, Brant is a passive, compliant inmate who poses no future risk.

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

about the mitigators, this was unreasonable as a reasonable juror may very well have credited Dr. Morton's testimony. And, as noted above, the Florida Supreme Court never addressed Dr. Cunningham's testimony in its prejudice analysis, other than his prison adjustment testimony.

Brant established prejudice. The post-conviction court and the Florida Supreme Court misapprehended the Strickland prejudice standard, misapplied the facts to the law, engaged in an improper piece –meal analysis and erroneously concluded the evidence in post-conviction was cumulative, which was an unreasonable determination of facts in light of the State court record. This Court should grant the Writ.

GROUND THREE: Counsel's performance in failing to investigate and prepare for jury selection and develop and inform Mr. Brant of mitigation prior to waiving a sentencing phase jury fell below prevailing professional norms. Counsel's failure prejudiced Mr. Brant and violated his Sixth Amendment right to effective assistance of counsel. But for counsel's deficient performance, Mr. Brant would have exercised his right to a sentencing phase jury. Confidence in the outcome is undermined. The Florida Supreme Court's analysis and ruling on this Claim rose to the level of an objectively unreasonable determination of the facts in light of the State Court record and an objectively unreasonable determination of clearly established federal law.

Brant pled guilty to first degree murder. After one attempt to secure a jury for the sentencing phase of his trial, upon advice of counsel, counsel either advised Brant to waive his right to a jury or failed to advise him

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

The Sixth Amendment provides that a defendant has a fundamental right to a jury trial during the penalty phase of a capital proceeding. *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Duncan v. Louisiana*, 391 U.S. 145 (1968). Fundamental constitutional rights can be waived, *Boykin v. Alabama*, 395 U.S. 238 (1969), but an effective waiver of a constitutional right must be knowing and intelligent. *Brady v. United States*, 397 U.S. 742 (1970). A citizen accused of a crime can waive his right to a jury but the waiver will be set aside upon a showing that the relinquishment of the right was not knowing and voluntary. *Patton v. United*

States, 281 U.S. 276 (1930) (*abrogated on other grounds by Williams v. Florida*, 399 U.S. 78 (1970)). There can be no effective waiver of a fundamental constitutional right unless there is an “intentional relinquishment or abandonment of a *known* right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) (emphasis added).

Because the right to jury trial is critical in protecting a defendant’s life and liberty, trial courts must apprise the defendant of the “relevant circumstances and likely consequences,” *Brady, supra*, 397 U.S. at 748, to determine whether the defendant’s waiver is made freely and intelligently. The decision to waive the right to jury sentencing may deprive a capital defendant of life saving advantages. As courts have recognized, the jury operates as an essential bulwark to “prevent oppression by the government.” *Duncan v. Louisiana*, 391 U.S. 145, 155, 88 S.Ct. 1444, 1450, 20 L.Ed. 2d 491 (1968) “[O]ne of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system,” *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.), quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519, n. 15 (1968). Juries are less

inclined to sentence a defendant to death than are judges. *See Spaziano v. Florida*, 468 U.S. 447, 488 n. 34 (1984)(Stevens, J., concurring in part and dissenting in part), citing H. Zeisel, *Some Data on Juror Attitudes Towards Capital Punishment* 37-50 (1968). *Jells v. Ohio*, 498 U.S. 1111 (1991) (Marshall, J., *dissenting on the denial of certiorari*).

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

There are certain fundamental decisions that a criminal defendant has the ultimate authority to make, including whether to plead guilty, waive a jury or take an appeal. Of course, a criminal defendant is entitled to effective assistance of counsel during all critical stages of the criminal process, including pre-trial decisions such as the decision to plead guilty or waive a jury trial. *Hill*, 474 U.S. at 56-57 . . . In the context of pre-trial ineffective assistance of counsel claims, such as alleged

ineffective assistance during plea negotiations, the fact that the defendant later receives a fair trial does not remedy a violation of the right to effective assistance of counsel..

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

Prevailing standards establish that entering a guilty plea and waiving a jury should only be done in the rarest of circumstances. *Defending a Capital Case in Florida 1992-2003*, (5th Ed. 1999) Chapter 6, p. 4, Guilt Phase Strategy, recommends an aggressive, attacking defense in spite of the fact that most capital cases present with overwhelming evidence of guilt. When counsel may be considering having their client enter a plea to the charges and proceed to bench trial on the penalty phase, prevailing norms “*strongly recommended that this rarely if ever should be done. This type of ‘trial plea’ can be as bad, if not worse, than adopting a strategy of a passive defense.*” Ch. 6, p. 10.

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

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

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

“knowing, intelligent and voluntary.” *Id.* The court further denied the claim because Brant failed to “demonstrate that the outcome of the proceedings would have been different had he proceeded to a penalty phase before a jury.” *Id.* at 3493.

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

The post – conviction court further critically erred by failing to give weight to the principle that Brant was entitled to have his lawyers provide constitutionally effective advice about whether or not to waive a jury. The right to effective assistance of counsel exists through all critical stages of a proceeding, including a pre-trial jury waiver. The post-conviction court’s conclusion that counsel wasn’t deficient because they didn’t offer Brant advice, but merely stood by while he made his own poor decision, cannot be reconciled with counsel’s obligations under the Sixth Amendment to provide effective assistance through all critical stages of a proceeding. Counsel is constitutionally mandated to guide their client through the legal process. The

post –conviction court’s finding amounts to a deprivation of the right to counsel, a more serious constitutional violation. Further, because the court premised its denial of this claim on its determination that counsel wasn’t deficient in failing to investigate mitigation – as set out in Claim 2, the court’s analysis of this claim is likewise premised on a flawed analysis.

The Florida Supreme Court found the post-conviction court’s findings were supported by the record and that counsel did not perform deficiently. *Brant*, 197 So. 3d at 1076. The court also rejected other issues within this claim finding trial counsel developed “rapport” with Brant as evidenced by the guilty plea and jury waiver colloquy. *Id.*

The State courts’ determination was an unreasonable application of clearly established federal law and an unreasonable determination of the state court record. This Court should grant the Writ.

GROUND FOUR: The prosecution withheld evidence material to guilt and sentencing in violation of Mr. Brant’s Fifth, Sixth, Eighth and Fourteenth Amendment rights as set out under *Brady v. Maryland* and its progeny. The Florida Supreme Court’s analysis and ruling on this Claim rose to the level of an objectively unreasonable determination of the facts in light of the State Court record and an objectively unreasonable determination of clearly established federal law. This court should grant the Writ.

The Supreme Court has held that the withholding of exculpatory evidence from a criminal defendant by a prosecutor violates the Due Process Clause of the Fourteenth Amendment. *Brady v. Maryland*, 373 U.S. 83, 86 (1963). “[T]he suppression by the prosecution of evidence favorable to an accused upon request violated Due Process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87. “Evidence is ‘exculpatory’ and ‘favorable’ if it ‘may make the difference between conviction and acquittal’ had it been ‘disclosed and used effectively.’” *United States v. Wilson*, 624 F.3d 640, 661 (4th Cir. 2010) (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)). In order to establish a *Brady* violation, a court must find that 1) the evidence is favorable to the accused because it is exculpatory in guilt or sentencing, 2) that it was suppressed by the State willfully or inadvertently, and 3) materiality. *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

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

Bagley, 473 U.S. 667, 682 (1985). Rather, a defendant can fulfill the materiality standard by showing that the cumulative effect of the suppressed evidence “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Id.* at 43-45. This cumulative effect analysis emphasizes the fact that when making a materiality finding, courts should consider the suppressed evidence collectively, rather than judging the materiality of each item of suppressed evidence. *Id.* at 436; *see also Id.* at 437, n. 10.

Knowing use of false testimony violates due process. *Giglio v. United States*, 405 U.S. 150, 153 (1972). This rule applies regardless of whether the false testimony is solicited, or merely allowed to stand uncorrected after it appears. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Non-disclosure of evidence affecting credibility also falls within this rule “when the ‘reliability of a given witness may well be determinative of guilt or innocence.’” *Giglio v. United States*, 405 U.S. at 154. In order to establish a *Giglio* violation, a defendant must demonstrate that 1) a state witness gave false testimony, 2) the prosecutor knew the testimony was false, and 3) the statement was material. *Id.* Under *Giglio*, where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material “if there is any reasonable likelihood

that the false testimony could have affected the judgment of [the finder of fact].” The *Giglio* standard has also been explained as a “materiality standard under which the fact that the testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.” *United States v. Bagley*, 473 U.S. at 679-80. The State bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt. *Id.* at 680, n. 9.

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

The Eighth and Fourteenth Amendments require that the sentencer be allowed to consider as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2965-2964, 57 L.Ed.2d 973 (1978). A defendant has a virtually unrestricted right to present any circumstance to a

jury for consideration as a reason to spare his life. *See Smith v. Texas*, 543 U.S. 37, 44, (2004); *Tennard v. Dretke*, 542 U.S. 274, 284-85, (2004). Any privilege against disclosure claimed by the State was waived under the facts of this case. *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957).

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

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

occurred. R V. 10, p. 3495-97. The Florida Supreme Court denied this claim stating that the testimony of the officers provided competent substantial evidence to support the post-conviction court's ruling. *Brant*, 197 So. 3d at 1077-78. The court further determined that if the evidence was known to the defense it cannot constitute *Brady* material. *Id.* at 1078.

This Court should grant the Writ and find that Garrett's status as a CI was not disclosed, that his status was material as a mitigating factor under the Eighth Amendment and that the State's failure to disclose Garrett's status as a CI violated Brant's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the Federal Constitution. This Court should further find that the State post-conviction court failed to ensure that the State complied with Rule 3.852 and that such failure rose to the level of a Due Process violation. This Court should grant Mr. Brant an evidentiary hearing so that OCSO and HCSO can be made to provide complete records as to when Garret Coleman first became a CI and the names of the officers on duty in Pine Hills the night Garret turned Brant in. The State's continuing refusal to turn over exculpatory evidence substantiating Garret's status as a CI has violated Brant's right to a full and fair evidentiary hearing in state court.

GROUND FIVE: Cumulatively, the combination of procedural and substantive errors deprived Mr. Brant of a fundamentally fair trial guaranteed under the Sixth, Eighth and Fourteenth Amendments. The Florida Supreme Court's analysis and ruling on this Claim rose to the level of an objectively unreasonable determination of the facts in light of the State Court record and an objectively unreasonable determination of clearly established federal law.

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

mitigators. Further, The State's *Brady* violation undermined the proceedings.

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

The Florida Supreme Court did not address this argument. Because the denial of this claim is an unreasonable application of clearly established federal law, this Court should grant the Writ.

GROUND SIX: Mr. Brant's Eighth Amendment right against cruel and unusual punishment will be violated as Mr. Brant may be incompetent at the time of the execution.

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

GROUND SEVEN: Mr. Brant's sentence of death was obtained in violation of his rights guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution because

the Florida Supreme Court’s proportionality review fails to properly narrow the class of offenders who are sentenced to death by not considering murder/rape cases where the defendant did not receive death. Brant asserted this claim as both a substantive claim based on evolving standards of decency and as a claim of ineffective assistance of appellate counsel for failing to raise the claim that this Court’s appellate process violates Brant’s rights to Equal Protection of the laws, Procedural and Substantive Due Process, and Brant’s rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. The Florida Supreme Court’s analysis and ruling on this Claim rose to the level of an objectively unreasonable determination of the facts in light of the State Court record and an objectively unreasonable determination of clearly established federal law.

The facts set out in Ground Seven in Mr. Brant’s Petition are hereby incorporated into this memorandum.

The Florida Supreme Court denied this claim, finding that the court’s proportionality review is “done for the purpose of fostering uniformity in death-penalty law,” that does not “include a comparison of the circumstances of capital cases of those with non-capital cases.” *Brant*, 197 So. 3d at 1078. Because the denial of this claim resulted in an arbitrary and capricious application of the death penalty in violation of clearly established federal law including *Proffitt v. Florida*, 428 U.S. 242 (1976), this Court should grant the Writ.

The law of Florida establishes that the death penalty is reserved for the most aggravated and the least mitigated of crimes. The Florida Supreme

Court unreasonably applied clearly established federal law when it upheld Mr. Brant's death sentence. The Supreme Court has repeatedly held that a death sentence may not be imposed in an arbitrary and capricious manner. *Furman v. Georgia*, 408 U.S. 238 (1972); *Godfrey v. Georgia*, 446 U.S. 420 (1980). The Constitution prohibits the arbitrary and irrational imposition of the death penalty. *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). The Supreme Court has emphasized the crucial nature of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. *Gregg v. Georgia*, 428 U.S. 153, 197 (1976).

Capital punishment must be reserved for those crimes that are “so grievous an affront to humanity that the only adequate response may be the penalty of death.” *Kennedy v. Louisiana*, 554 U.S. __ at 26 (2008); *see also* Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. Cal. L. Rev. 1143, 1162 (1980) (“[Death is] ‘enormous,’ mysterious, of overwhelming gravity, and incommensurate with prison, even for life.”) (citing *Furman v. Georgia*, 408 U.S. 238, 286-88 (1972)) (Brennan, J., concurring). Second, the exceptional nature of the punishment calls for appellate review that is exceptional in its range and intensity – indeed, after *Furman*, a court must address sentencing issues unlike those in other cases, by means rarely, if ever, employed in other cases. *See Caldwell*

v. Mississippi, 472 U.S. 320, 329 (1985) (“[T]he qualitative difference between death and all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.”) (quotation omitted).

Appellate review of a death sentence is among the most important safeguards against the unjust imposition of the death penalty. “[M]eaningful appellate review of death sentences promotes reliability and consistency.” *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990); *see also Parker v. Dugger*, 498 U.S. 308, 320-21 (1991) (“We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.”); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (“[A]lthough not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of every colorable claim of error.”); *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973) (holding that capital appellate review insures that “[n]o longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex.”), *cert. denied sub nom., Hunter v. Florida*, 416 U.S. 943 (1974).

As the United States Supreme Court has observed “[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special ‘need for reliability in

the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (citations omitted). Furthermore, when a defendant's life is at stake, a court must be "particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

This heightened standard of reliability is "a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

The United States Supreme Court has repeatedly emphasized the principle that because of the exceptional and irrevocable nature of the death penalty, our system of justice must go "to *extraordinary measures* to ensure that the prisoner [facing the possibility of being] sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake."

Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) (emphasis added). See also *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

While it is accurate that the Supreme Court has stated that comparative proportionality review is not essential to the constitutionality of a capital sentencing scheme, *Pulley v. Harris*, 465 U.S. 37 (1984), in a state such as Florida, where the scheme was an outlier which allowed for the sentence of death by a mere majority of jurors, proportionality analysis is even more necessary. *State v. Steele*, 921 So. 2d 538 (Fla. 2005). Further, evolving standards of decency require courts to continually consider whether a certain class of offenders may be sentenced to death and adjust its proportionality analysis accordingly, e.g., juveniles and thus 18-21 year old eligibility; the intellectually disabled and thus, the severely mentally ill's eligibility.

Unlike the more familiar proportionality analysis under the Eighth Amendment, which involves the “abstract evaluation of the appropriateness of a sentence for a particular crime . . . , comparative proportionality review presumes that the death penalty is not disproportionate to the crime in the traditional sense.” *State v. Godsey*, 60 S.W.3d 759, 782 (Tenn. 2001)(quotations omitted). Rather, it requires an appellate court to determine whether a death sentence is excessive “in a particular case because

similarly situated defendants convicted of similar crimes have received lesser sentences.” Donald H. Wallace & Jonathan R. Sorensen, *A State Supreme Court’s Review of Comparative Proportionality: Explanations for Three Disproportionate and Executed Death Sentences*, 20 T. Jefferson L. Rev. 207, 207 (1998)(studying executions in Missouri).

“By comparing any given death sentence with the penalties imposed on others convicted of death-eligible crimes, proportionality review is intended to ensure, first, that there is a rationally defensible basis for distinguishing those sentenced to die from those who are not, and second, that death sentences predicated on constitutionally impermissible factors, such as economic status or racial identity, whether of the defendant or the victim, are overturned.” Timothy V. Kaufman-Osborn, *Proportionality Review and the Death Penalty*, 29 Just. Syst. J. 257, 257-58 (2008); *see also* Hon. David S. Baime, *Comparative Proportionality Review: The New Jersey Experience*, 41 No. 2 Crim. Law Bull. 7, at 2 (April 2005) (purpose of proportionality review is “to ensure that a specific defendant’s death sentence is not disproportionate when compared to similarly situated defendants”); Richard Van Duizend, *Comparative Proportionality Review in Death Sentence Cases; What? How? Why?*, 8 St. Ct. J. 9, 10 (1984)(noting that role of court is “to determine whether the distinctions made between those who are given a life

sentence and those who are given a death sentence are rational and consistent with state practice”). “Proportionality review has a function entirely unique among the review of proceedings in a capital proceeding.” *State v. DiFrisco*, 900 A.2d 820, 830 (N.J. 2006)(quoting *State v. Ramseur*, 524 A.2d 188, 291 (N.J. 1987), *cert. denied sub nom. Ramseur v. Beyer*, 508 U.S. 947 (1993)).

After *Gregg*, many states adopted an appellate review statute modeled after Georgia’s, and the United States Supreme Court continued to tout the importance of proportionality review. *Zant*, 462 U.S. at 890 (“Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality.”); *Proffitt v. Florida*, 428 U.S. 242, 259 (1976) (“[Florida] has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences. . . By following this procedure, the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute.”).

Even when the Supreme Court held that comparative proportionality review was not required by the Eighth Amendment, it cited such review as “an additional safeguard against arbitrarily imposed death sentences. . . .”

Pulley v. Harris, 465 U.S. 37, 50 (1984); see Steven M. Sprenger, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 Iowa L. Rev. 719, 725 (1988) (“Though *Pulley* arguably departs from the Court’s previous ringing endorsement of proportionality review as a constitutional requirement, it does not contradict the language in *Gregg* indicating that proportionality review is important because it can eliminate ‘wanton’ and ‘freakish’ sentences.”). The American Bar Association has cited the lack of proportionality in capital sentencing, which is largely the product of either no or deficient appellate proportionality review, as one of the principal flaws in the administration of the death penalty. See Deborah Fleischaker, *ABA State Death Penalty Assessments: Facts (Un)discovered, Progress (To Be) Made, and Lessons Learned*, 34 Human Rights 10, 13-14 (Spring 2007).

The Florida Supreme Court, while continuing to recognize the essential link between proportionality review and the risk of the arbitrary imposition of the death penalty, did not, however, consider in its proportionality review of Brant’s case, those classes of sexual assault/first-degree murder cases where the defendant did not receive death, either through the standardless prosecutorial decision-making which exists in Florida, or through a jury verdict of life. This results in a death sentence for Brant – who has no prior

record and extensive mitigation - that is random, arbitrary and capricious. The process is a weighing process and not mere tabulation, therefore, a comparison of Mr. Brant's case to other cases shows that Mr. Brant's sentence is disproportionate because other similarly culpable defendants have been sentenced to life imprisonment.

The Florida Supreme Court's failure to set aside Mr. Brant's death sentence results in an arbitrary and capricious imposition of the death penalty. The proportionality review conducted by the Florida Supreme Court in Mr. Brant's case violated his Due Process and Eighth Amendment Rights because it failed to consider an entire universe of cases where a defendant may have committed a sexual assault murder with weighty aggravators but was not sentenced to death because either the individual prosecutor did not seek death or because trial counsel rendered effective assistance which resulted in either a plea to life in prison or a jury verdict of life. This failing skews the Florida Supreme Court's analysis.

Because the State court's decision resulted in the arbitrary and capricious imposition of the death penalty in violation of clearly established federal law and was and was an unreasonable determination of the facts in light of the state court record, this Court should grant the Writ.

GROUND EIGHT: Appellate counsel rendered deficient performance in failing to raise the claim that the State failed to prove the crime of kidnapping.

Appellate counsel has the “duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process.” *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that counsel was ineffective, *Strickland* requires a defendant to demonstrate (1) specific errors or omissions which show that appellate counsel’s performance deviated from the norm or fell outside the range of professionally acceptable performance, and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. *Wilson v. Wainwright*, 474 So.2d 1162, 1163 (Fla. 1985).

In order to grant habeas relief based on ineffectiveness of appellate counsel, a court must determine “whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.” *Pope v. Wainwright*, 496 So.2d 798, 800 (Fla. 1986).

Appellate counsel’s failure to raise the meritorious issue addressed in this claim proves his advocacy involved “serious and substantial deficiencies”

which establishes that “confidence in the outcome is undermined”.

Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla.1986); *Barclay v.*

Wainwright, 444 So.2d 956, 959 (Fla. 1984); *Wilson v. Wainwright*, 474 So.2d 1162 (Fla. 1985).

Prevailing norms require capital appellate counsel to be aware that it is crucial to preserve issues for appeal, especially in light of the procedural hurdles capital litigants face as a result of the AEDPA. Appellate Counsel was deficient in failing to preserve and litigate this issue before this Court. On April 12, 2007, Mr. Brant filed a Motion to Dismiss- Kidnapping. TR V 2, p. 398 – 400. The State filed a traverse. TR V 3, p. 401-04. On May 14, 2007, the trial court entered a written order denying Mr. Brant’s motion. *Id.* at 412-418. Mr. Brant subsequently entered a plea of guilty to all counts, including the kidnapping count, but expressly reserved his right to appeal the denial of his Motion to Dismiss. TR V. 4, p. 644, 785-87.

Brant argued that based on his statement to law enforcement, the movement of the victim in her home did not rise to the level of kidnapping as it was “merely incidental to the felony, inherent in the nature of the felony and had no significance independent of the felony by making it substantially easier” to commit or lessened the risk of detection. *Id.* TR V. 2, p. 398-99. Brant relied on this court’s opinion in *Faison v. State*, 426 So. 2d 963 (Fla.

1983), *Gray v. State*, 939 So. 2d 1095 (Fla. 1st DCA 2006) and *Carron v. State*, 414 So. 2d 288 (Fla. 2d DCA 1982). The State argued that Brant was charged with kidnapping to commit bodily harm or terrorize and relied on this Court's opinion in *Bedford v. State*. TR V. 3, p. 403 -04.

The trial court denied Brant's Motion but in so doing allowed the State to proceed with a charge in which it was unable to establish a prima facie case. The facts as set out in Brant's statement – the only evidence of the kidnapping as conceded by both parties – fail to establish a prima facie case of kidnapping with intent to commit bodily harm or terrorize the victim. This was a Due process violation as Brant later pled to a crime which the State could not prove. There was simply not enough evidence before the Court to establish this crime. Although this court found the plea colloquy to be sufficient, Brant argues that the factual basis failed to sufficiently establish this crime. The State gave the following factual basis:

As to Count 3, which was the subject of a motion to dismiss *** the State alleged that the defendant forcibly, secretly and by threat confined and abducted and imprisoned the victim with the intent to inflict bodily harm and to terrorize the victim. The facts of the case, Your Honor, in addition to grabbing the victim as she came out of the bathroom, leading her to the bathroom – to the bedroom and throwing her on the bed, the defendant came at a time where he thought that she was either unconscious or dead. While the defendant was searching or going through the victim's residence, she got up, she managed to get up and attempt her way out towards the front door whereby the defendant grabbed her, took her back to the bedroom and proceeded to choke her to

death. And then at that point, he picked her body up and took her to the bathroom. [The victim was still alive, and then Brant] attempted to clean her.

TR V 4, p. 753- 789.

While the facts of the crime are very sad and one cannot help but feel for the victim in this case, the factual description fails to establish a kidnapping – as any movement was inherent in the crimes and, there is no testimony that Brant moved the victim to terrorize her. As such, appellate counsel should have raised and preserved the denial of Brant’s Motion to Dismiss the Kidnapping charge. Failure to do so was deficient performance which prejudiced Mr. Brant. But for counsel’s deficient performance, there exists a reasonable probability Brant would have received a life sentence on appeal, as his was not the most aggravated and least mitigated of cases. *See Brant v. State*, 21 So. 3d 1276, 1283 (Fla. 2009) (the trial court found only two aggravating circumstances).

The Florida Supreme Court denied this claim finding that any motion to dismiss below would have been meritless. *Brant*, 197 So. 3d 1079. This was an unreasonable application of clearly established federal law and was based on an unreasonable determination of facts in light of the state court record. This Court should grant the Writ.

GROUND NINE: Mr. Brant’s confession was unconstitutionally obtained. Direct Appeal counsel rendered deficient performance in

failing to raise this issue. First tier postconviction counsel rendered deficient performance in failing to raise the issue in Mr. Brant's State Habeas Petition.

Counsel cannot brief this issue as counsel has a conflict of interest since counsel represented Petitioner in State court. Counsel will, through separate motion, ask the Court to appoint supplemental counsel in the interests of justice to address this Claim pursuant to 18 U.S.C. § 3599. *Speer v. Stephens*, 781 F. 3d 784, 786 (5th Cir. 2015) (denying a motion to withdraw and appointing supplemental counsel in a case “where present counsel has been actively engaged in this litigation for several years,” so that supplemental independent counsel would “benefit from the often rich resource of the counsel who has been there through the state habeas process and who has prosecuted the federal habeas action with no hint of inability.”)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 22, 2021 I filed the foregoing with the Clerk of the Court using the ECM/ECF system which simultaneously served Assistant Attorney General Rick Buchwalter, capapp@myfloridalegal.com and Rick.buchwalter@myfloridalegal.com.

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