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.

APPENDIX

VOL. II

INDEX TO APPENDIX

VOLUME I

VOLUME II

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Supreme Court of Florida

No. SC14-787

CHARLES GROVER BRANT,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC14-2278

CHARLES GROVER BRANT,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[June 30, 2016]

PER CURIAM.

Charles Grover Brant appeals an order denying his motion to vacate his convictions and sentences—including a conviction for first-degree murder and sentence of death—filed under Florida Rule of Criminal Procedure 3.851 and

petitions this Court for a writ of habeas corpus. We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const. For the reasons expressed below, we affirm the denial of postconviction relief and deny Brant's habeas petition.

I. BACKGROUND

On July 2, 2004, twenty-one-year-old Sara Radfar was found dead in her home. Brant v. State, 21 So. 3d 1276, 1277 (Fla. 2009). A rear window of her duplex was open, and the front door was locked from the inside. Id. Radfar's body was found in the bathtub with water running over it. Id. A plastic bag was found over her head, and a dog leash, an electrical cord, and a women's stocking were found around her neck. Id. The cause of death was determined to be strangulation and suffocation. Id.

During a canvas of the neighborhood, detectives spoke with Brant, who was a neighbor of the victim. Id. Brant initially denied any involvement in the murder and told the officers that on the night of the homicide, he saw a man with long hair in a white button-down shirt with Radfar and that the next day, he saw a man in a yellow raincoat and black pants running behind his residence. Id. As part of the homicide investigation, Brant's garbage was collected from outside his home. Id. In it, investigators discovered Radfar's debit card, 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.

Brant was interviewed again on July 4, 2004. Id. at 1278. During that interview, Brant confessed to Radfar's murder. Id. Brant explained that he went to Radfar's home on July 1, 2004, to take pictures of her tile floor, which he had installed, for his portfolio. Id. Radfar let him in, and while he was taking photographs, Brant grabbed Radfar, dragged her into one of the bedrooms, and sexually assaulted her. Id. He put a sock in her mouth to quiet her and then started to choke and suffocate her. Id. When he thought that she had either lost consciousness or died, he started walking around in the house. Id. When Radfar regained consciousness and ran to the front door, Brant dragged her back into the bedroom and again began to choke and suffocate her. Id. He stated that the choking and suffocation went on for some time. Id. Brant then took Radfar, who was still breathing and hiccupping, to the bathroom and put her in the tub. Id. He wrapped a stocking, a dog leash, and an electrical cord around her neck. Id. After Radfar died in the tub, Brant moved her car out of the driveway, cleaned up the duplex, changed his clothes, and walked home. Id. Brant also stated that he went back into Radfar's residence the next day and tried to wipe away his fingerprints. Id.

In May 2007, Brant pleaded guilty to first-degree murder, sexual battery, kidnapping, grand theft of a motor vehicle, and burglary with assault or battery. Id. at 1277. After a failed attempt to seat a penalty-phase jury in August 2007,

Brant waived his right to a jury, and the penalty phase proceeded before the trial judge. The evidence presented during the penalty phase was set forth in our opinion on direct appeal as follows:

> The State . . . called Melissa Ann McKinney, Brant's former wife, who testified that she and Brant were married from June 1991 until December 2004 and that they have two sons together. McKinney explained that she and Brant met in 1990 when they were students at a Bible college in Virginia but left the school voluntarily before either graduated. . . .
>
> McKinney explained that she and Brant separated eight or nine times during their thirteen-year marriage due to Brant's drug use. Brant used marijuana continuously and began using ecstasy around 1999. McKinney testified that Brant began using methamphetamine about six months before the murder. He obtained a package of it "like every week." McKinney explained that while using methamphetamine, Brant would stay up for four or five nights in a row without sleep and then crash. During the first few days of a cycle, he would be very productive and "cheerful . . . in a better mood but he was always fidgety." When Brant would start coming off the drug, he would not finish tasks because he was looking for more drugs. By day four or five, he was "[i]rritable, snappy." McKinney explained that during the six months Brant was using methamphetamine, "he became a different person" and "it seemed like he didn't care anymore. He didn't—all he wanted was that drug, and he didn't care if he finished jobs. He didn't care about his family. I mean, he just he became obsessed with sex." Beginning about two weeks before the murder, McKinney noticed Brant talking to himself while he worked.
>
> McKinney also testified that in approximately 2000, Brant asked her to participate in sex games involving force. About two years before the murder, the games became rougher, and because she was afraid she would be hurt, McKinney began to object. Brant would surprise McKinney by hiding in the house, wearing a mask and latex gloves, and grabbing her from behind. McKinney stated that she believed Brant sometimes would even hide his car to give the impression that he was not at home in order to surprise her more effectively. She explained that during that two-year period, they had

intercourse almost daily and that Brant "would get violent" and "do the scaring" every couple of weeks.

McKinney testified that Brant became sneakier and more violent when he began using methamphetamine. For example, on Wednesday, June 30, 2004, the night before the murder, Brant hid in a closet and attacked McKinney when she came into the room. He put her on her stomach on the bed, bound her hands, and attempted to put a sock in her mouth. McKinney explained that she was able to get away from Brant and stayed in the bathroom that night. McKinney stated that she believed Brant was on methamphetamine when he attacked her. He had started staying up on Sunday of that week and had "been up for quite a few days." McKinney further explained that on the morning of Thursday, July 1, 2004, she threatened to go to the police if the games did not stop.

McKinney further testified that on Thursday, Brant was at home when she returned from work at around 6 or 6:30 p.m. McKinney took their sons to see a movie that evening. Brant was invited to attend, but he declined. McKinney stated that they returned home at around 11 p.m. Brant was in the kitchen washing dishes. He was acting nice, which surprised McKinney because they had been angry with each other for a few days. McKinney testified that Brant seemed to be under the influence of drugs when she returned—he was "speedy" and "fidgeting." Brant asked McKinney to cut his hair, which she did. McKinney testified that Brant slept in the bed with her that night, but they did not have sex. McKinney testified that she next saw Brant between 6 and 7 p.m. on Friday. Brant was writing a statement for the police. McKinney testified that he appeared to be under the influence of drugs at that time. She said that "[h]e was acting nervous. He was just acting all over the place, like he was on the drug."

The defense called several lay witnesses and two mental health experts to establish mitigating circumstances.

Crystal Florence Coleman, Brant's mother, testified that their family had a history of depression and other mental health conditions. She also testified about Brant's childhood. She stated that once Brant could walk, "he started beating his head against the floor" and "pounding holes in the walls." She stated that Brant ate plaster and fertilizer as a child. When Brant was around five, Crystal married Marvin Coleman. Crystal testified that Marvin, who drank heavily,

would spank or whip Brant over trivial matters until he bled, would threaten Brant, and "was very derogatory toward" Brant.

Sherry Lee Brant-Coleman, Brant's older sister, similarly testified that Brant's stepfather was an alcoholic and "a bully" to Brant. Sherry testified that Marvin singled Brant out from the other children for more criticism and physical abuse. Sherry also testified about Brant's behavior shortly after the murder. She saw Brant at their mother's Orlando home in early July 2004. She was informed that Brant had told their half-brother, Gar[]ett Coleman, that he was involved in what happened to [the victim] and "that he was hallucinating and he had—was going to turn himself in." Sherry explained that she and several family members and friends went with Brant to a police substation, which was closed because it was a holiday weekend. They then drove to another station. Brant and Gar[]ett went into the station but returned twenty minutes later. They claimed that the law enforcement officers told them there was no information at that station about the [] homicide and that Brant would have to go to a Tampa area station.

Two witnesses, Reverend John Hess, III, a minister affiliated with Blue Ridge Bible College in Rocky Mount, Virginia, and Pastor Leon Wendall Jackson, of the Faith Family Worship Center Assembly of God Church in Citrus Park, testified that Brant had spoken to them about having a drug use problem. Reverend Hess testified that Brant was a student at the Bible college, then known by a different name, for one semester in 1990. Reverend Hess explained that in approximately 1997, Brant contacted Hess about reapplying to the school, stating that he had gotten reinvolved in drugs and was looking to straighten out his life. Hess assured Brant that he could reapply, but Brant did not pursue the option. Pastor Jackson met with Brant and McKinney in 2003 when they were having marital troubles and Brant was having problems with drugs, particularly cocaine. Pastor Jackson counseled Brant about his drug problem and looked into placing Brant in an eighteen-month treatment program. Brant declined to enter treatment because he did not think that he could afford to not work.

Other witnesses testified that they had known Brant to be a nonviolent person, a good father to his children, and a good craftsman. Still other witnesses testified about the grief and remorse that Brant had expressed since being incarcerated.

Defense expert witness Michael Scott Maher, M.D., a physician and psychiatrist, diagnosed Brant as suffering from severe methamphetamine dependence associated with psychotic episodes, sexual obsessive disorder, and chronic depression. Dr. Maher described Brant as a lifestyle user of methamphetamine and explained that lifestyle users begin using methamphetamine to support working long hours but that the use "almost inevitably results in a dependency and a deterioration," ultimately leading to psychosis. Dr. Maher opined that Brant's dependency had reached the point of causing psychosis . . . .

Dr. Maher explained that during a period of methamphetamine-induced psychosis, Brant would be highly energized, would have a pattern of irritability and behavioral fidgetiness, and would hear, see, or feel things that he was not entirely sure were real. Dr. Maher identified poor impulse control as "a substantial hallmark of methamphetamine abuse." Dr. Maher further explained that because Brant's "purpose and motivation for using the drugs was to work and ultimately to promote and participate in his idea of being a good husband and a good father and a good worker," Brant would have been "making a very substantial effort to use the mental functioning that he still had in a way to appear normal." Dr. Maher testified that after his arrest, Brant was given "antipsychotic medications and some other medications to help him calm down."

Dr. Maher concluded that Brant suffered from sexual obsessive disorder based on descriptions of the "psychological force of those sexual urges" provided by Brant and McKinney. Dr. Maher stated that Brant's "pattern of sexual behavior with his wife which predated this incident and . . . his severe use of methamphetamines . . . are consistent with an obsessive pattern of sexual interest." Dr. Maher explained that the sex games between Brant and his wife had "a general effect of creating lower inhibitions to this kind of link between surprise, violence and sex" and that these lowered inhibitions were "clinically significant in understanding" Brant's behavior at the time of the sexual battery and murder.

Dr. Maher further testified that Brant had a history of depression and relationship problems going back into childhood. Dr. Maher opined that Brant's relationships with his mother, grandmother, stepfather, and wife all showed significant patterns of pathology. Dr. Maher testified that Brant began to use marijuana and alcohol as an

adolescent to self-medicate and "escape from his chronically depressed and anxious state of mind."

Finally, Dr. Maher testified that Brant might suffer from abnormal brain functioning. Dr. Maher explained that the twenty-five point difference between Brant's verbal and performance IQs was indicative of abnormal brain functioning. He also stated that a PET scan of Brant's brain showed four areas of suppressed glucose uptake that could indicate underactivity in those parts of the brain. Dr. Maher identified those portions of the brain as being important to impulse control and good judgment. Dr. Maher stated that while Brant previously was diagnosed with attention deficit disorder, he did not think a diagnosis of adult attention deficit disorder was warranted.

Based on the foregoing, Dr. Maher opined that Brant, while legally sane at the time of the sexual battery and murder, "had, as a result of mental disease, defect, a substantial impairment and limitation in his ability to conform his behavior to the requirements of the law."

Another defense witness, Dr. Valerie R. McClain, a psychologist, testified as an expert in forensic neuropsychology. Dr. McClain diagnosed Brant with polysubstance dependence, major depression recurrent, and cognitive disorder not otherwise specified. Dr. McClain explained that Brant's overall intellectual functioning was in the "low average" range. She testified that school records documented signs of a learning disorder and that Brant's language skills were in the sixteenth percentile compared to other students and his non-language skills were in the sixth percentile. She explained that Brant had problems in the areas of learning, memory, and executive planning or organizational skills. Psychological testing showed signs of depression, pessimism, suicidal ideation, preoccupation with health problems, problems with poor judgment, passive, dependent style in relationships, and problems with insecurity, inadequacy, and a sense of inferiority. The testing also indicated that Brant was quick-tempered and may have had "some tendency to magnify or exaggerate his current difficulties." Dr. McClain further testified that at the time of their interview in October 2005, Brant was being prescribed Benadryl, Haldol, Pambalor, and Wellbutrin.

Dr. McClain testified that Brant stated that before the sexual battery and murder, he had consumed alcohol and had been "doing significant amounts" of crystal methamphetamine for approximately

eight days and ecstasy for two days. Brant also told Dr. McClain that he had not been sleeping well before the murder. Dr. McClain explained that in people such as Brant, who already have underlying anger problems, methamphetamine use is going to make them more likely to be "[i]mpulsive or to not be able to control their anger." Dr. McClain opined that due to Brant's deficits in brain functioning, Brant's capacity to conform his conduct to the requirements of law was substantially impaired on July 1, 2004.

After the defense rested, the State presented a witness to rebut witness McKinney's claim that she and Brant left college voluntarily. The State's witness established that Brant and McKinney may have been asked to leave the school for violating the school's policy against sexual activity among students. The State also presented a mental health expert and victim impact statements.

Specifically, Donald R. Taylor, Jr., M.D., an expert in forensic psychiatry, testified that in July 2004, Brant suffered from substance dependence disorder (primarily involving alcohol, cannabis, ecstasy, and methamphetamine), a learning disorder, and sexual sadism. Aside from rough sex with McKinney, Dr. Taylor was not aware of Brant acting violently prior to July 1, 2004. Dr. Taylor testified that during the first several days or weeks after arrest, Brant experienced symptoms of alcohol and drug withdrawal and that during the first several weeks or months, Brant experienced symptoms of anxiety or depression. Dr. Taylor stated that Brant was treated with psychotropic medications beginning after his arrest in July 2004 until May 2007. Dr. Taylor defined sexual sadism as a "type of sexual disorder in which somebody derives sexual arousal or pleasure from causing physical humiliation or suffering to a person that is not consenting to the sexual act." Dr. Taylor explained that in most cases, sexual sadism arises out of a genetic predisposition and unhealthy childhood environment. Dr. Taylor testified that Brant's childhood contained factors that can contribute to a diagnosis of sexual sadism.

Concerning the sexual battery, Dr. Taylor opined that Brant did have "a substantial impairment in his ability to conform his conduct with the requirements of the law" due to his sexual sadism and the influence of methamphetamine. Dr. Taylor explained that due to a sexual disorder, Brant had sexual impulses that were difficult for him to control and that this difficulty would have been exacerbated by the use of methamphetamine. With regard to the murder, in contrast, Dr. Taylor opined that Brant was not "substantially" impaired. He

> explained that there was no "similar disorder that was causing [Brant] any type of uncontrollable or difficult to control urges to kill." Moreover, Dr. Taylor stated that Brant's actions of preventing the victim from leaving the duplex, putting on gloves, putting the body in the tub and turning on the water, and changing clothes before leaving were not consistent with substantial impairment. Still, Dr. Taylor testified that there was "some level of impairment related to being under the influence of methamphetamines" during the murder. Dr. Taylor summarized that Brant "did have a mental disorder, which in my opinion substantially impaired his ability to refrain from committing rape but that he did not have any similar corresponding mental disorder which . . . caused a similar type of impairment in his able [sic] to refrain from committing murder."

Id. at 1278-83.

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). The trial court also found that three statutory mitigating circumstances[1] and ten nonstatutory mitigating circumstances[2]

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1. The three statutory mitigating circumstances specifically enumerated in section 921.141(6), Florida Statutes (2007), were: (1) Brant had no significant history of prior criminal activity (little weight); (2) Brant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (moderate weight); and (3) Brant was thirty-nine years old at time of the offense (little weight).

2. The ten nonstatutory mitigating circumstances were: (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

were established. Finding sufficient aggravating circumstances that were not outweighed by the mitigating circumstances, 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. The sole issue raised on direct appeal was that the death sentence was disproportionate. We affirmed the convictions and sentences in 2009, concluding that Brant's death sentence was proportionate and that his guilty plea was knowingly, intelligently, and voluntarily made. Id. at 1288-89.

II. POSTCONVICTION APPEAL

In 2011, Brant filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.851 raising, after several amendments, a total of seven claims.[3] An evidentiary hearing was held in 2013, during which Brant presented

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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).

3. The seven claims were: (1) ineffective assistance of counsel during the guilt phase; (2) ineffective assistance of counsel during the penalty phase; (3) counsel was ineffective for failing to prepare for jury selection; (4) counsel was ineffective for failing to present the testimony of a neuropharmacologist on the issue of the interrogation's effect on Brant; (5) cumulative ineffective assistance; (6) Brant will be incompetent at the time of execution; and (7) the State withheld

testimony from over forty lay and expert witnesses. In 2014, the trial court issued an order denying relief. This appeal follows.

A. Ineffective Assistance of Counsel During the Guilt Phase

In his first issue on appeal, Brant contends that trial counsel were ineffective for advising him to plead guilty without consulting a jury expert or researching jury decision-making, and without Brant receiving any benefit for his plea. Brant claims that if trial counsel had consulted with a jury expert or researched jury decision-making, there is a reasonable probability that he would have insisted on going to trial.

Under Strickland v. Washington, 466 U.S. 668, 686-88 (1984), a defendant alleging that he received ineffective assistance of counsel has the burden to demonstrate that counsel's performance fell below an objective standard of reasonableness. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687. "Both prongs of the Strickland test present mixed questions of law and fact." Johnson v. State, 135 So. 3d 1002, 1013 (Fla. 2014) (citing Sochor v. State, 883 So. 2d 766, 771 (Fla. 2004)). "In reviewing a trial court's ruling after an

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evidence that Brant's half-brother was a confidential informant in violation of Brady v. Maryland, 373 U.S. 83 (1963). Claim 4 was later withdrawn by Brant.

evidentiary hearing on an ineffective assistance of counsel claim, this Court defers to the factual findings of the trial court to the extent that they are supported by competent, substantial evidence, but reviews de novo the application of the law to those facts." Id. (quoting Mungin v. State, 932 So. 2d 986, 998 (Fla. 2006)).

As to the first prong, the defendant must establish "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. Generally, a court reviewing the second prong must determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697.

Where an ineffective assistance claim involves a guilty plea, the Strickland standard is slightly modified. While the deficient performance prong remains the same, the United States Supreme Court held in Hill v. Lockhart, 474 U.S. 52, 59 (1985), that when a defendant challenges his guilty plea based on ineffective assistance of counsel, under the prejudice prong of Strickland, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." We have

previously applied the standard announced in Hill to claims of ineffective assistance of counsel in cases in which the defendants entered guilty pleas. E.g., Allred v. State, 186 So. 3d 530, 535 (Fla. 2016); Long v. State, 118 So. 3d 798, 803 (Fla. 2013); Barnhill v. State, 971 So. 2d 106, 111 (Fla. 2007); Grosvenor v. State, 874 So. 2d 1176, 1181-82 (Fla. 2004).

At the evidentiary hearing, guilt-phase counsel, Rick Terrana, testified that he practiced primarily criminal defense since 1991 and tried between fifteen and twenty-five capital cases. His strategy in this case was to attack Brant's confession. His strategy in moving to suppress the confession involved Brant's methamphetamine use and how it affected him and his ability to give a voluntary statement. To that extent, he researched methamphetamines, sought input from a former prosecutor, and solicited the assistance of various experts, including psychologists, a toxicologist, and a psychiatrist.

Terrana testified that he and penalty-phase counsel, Bob Fraser, discussed the prospect of a guilty plea with Brant after the motion to suppress the confession was denied. They felt that Brant's confession was very damaging and it would have a major impact on a jury, which would hear it at both the guilt phase and the penalty phase. Terrana believed 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. This belief was based on Terrana's

twenty-five years of experience, during which he handled many successful penalty phases and had many opportunities to make observations about how jurors decide cases.

When asked whether Brant ever indicated that he wanted to have a guilt-phase trial, Terrana responded: "No. From day one he was adamant on that. That's one thing he put his foot down on[.]" Terrana attempted to negotiate a life sentence in exchange for Brant's guilty plea, but the State would not agree.

Fraser testified at the evidentiary hearing that at the time he was appointed to represent Brant, he had been handling court-appointed cases for nearly twenty years and had tried approximately twenty-five first-degree murder cases, including some where the defendant was clearly guilty. Based on his experience and the strong evidence in this case, Fraser believed that by pleading guilty, Brant "would be less likely to incur the ire of the jury" during the penalty phase. Fraser testified that all of Brant's options were explained to him, and Brant ultimately elected to plead guilty. A letter Fraser wrote to Brant on November 13, 2006, memorializing a discussion that occurred earlier that day between counsel and Brant was introduced at the evidentiary hearing. In the letter, Fraser explained to Brant the negative aspects of pleading guilty, the right to testify, and the unavailability of a voluntary intoxication defense. Both Terrana and Fraser testified that the letter

accurately summarized the discussions they had with Brant in regard to pleading guilty.

Brant testified at the evidentiary hearing that he did not remember telling his attorneys that he wanted to plead guilty. He said that during the plea colloquy he was just doing what his attorneys told him to do.

Brant also presented a jury consultant, Toni Blake, at the evidentiary hearing. She testified that if she had been retained by trial counsel, she would have advised them that it would not be "bad" for a jury to be exposed to the troubling or disturbing aspects of Brant's confession during the guilt phase and then again during the penalty phase because a jury becomes "systematically desensitized" by repeated exposure to disturbing facts, meaning that the second time the jury heard Brant's confession, it would have been less shocking and had less of an emotional impact. Blake acknowledged that even if she had consulted with trial counsel and advised them that Brant should not plead guilty, they would not have been obligated to advise Brant in accordance with her advice and that the attorneys with whom she does consult do not always follow her advice.

In denying relief on this claim, the postconviction court credited counsel's testimony that "from day one" Brant did not want to proceed to a jury trial and that the decision to plead guilty was ultimately made by Brant. The court discredited Brant's testimony that he did not recall telling his attorneys that he wanted to plead

guilty. The postconviction court concluded that Brant failed to establish both deficient performance and prejudice. We agree.

"Judicial scrutiny of counsel's performance must be highly deferential" and should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" Strickland, 466 U.S. at 689. "When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger." Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000).

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.

B. Ineffective Assistance of Counsel During the Penalty Phase

Brant alleges that trial 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.

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, 453 S.E.2d 824, 854 (N.C. 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 (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 HAC 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 (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.

6. Jury Waiver

After entering his guilty plea, Brant attempted to seat a penalty-phase jury on August 21, 2007, which was described as follows by trial counsel at the evidentiary hearing:

> We had a panel that was just—I mean, it was a debacle. It was just a debacle. We had jurors standing up. And I don't recall if I was questioning or Fraser was questioning, but when the issue came up and they found out that he had plead [sic] guilty and we were there just for the penalty phase, the overwhelming response to the point of almost, it looked like a riot was about to take place. These jurors were standing up saying why are we wasting our time here. He's guilty. Let's fry him. One would say that and four would follow behind, yeah, I agree. Yeah, I agree. Right. He's guilty. Let's fry him. And it was that type of thing. I mean, it just turned into a real fiasco altogether. Judge Fuente struck the entire panel.

After the jury panel was struck on August 21, 2007, trial counsel discussed with Brant the possibility of waving a jury recommendation at the penalty phase; at the time, Brant elected to proceed with another attempt to seat a penalty-phase jury from a different venire the next day. But by the following morning, Brant had changed his mind and decided to waive a jury recommendation. When Brant advised the trial court of his decision to waive a penalty-phase jury on August 22, 2007, the trial court conducted a thorough colloquy regarding the decision, during which Brant indicated that it was his decision alone, not his lawyers' decision, and that he was "absolutely sure" that he wanted to proceed without a jury. Brant now contends that trial counsel rendered deficient performance by either advising him to or failing to advise him not to waive a penalty-phase jury.

The evidence presented at the evidentiary hearing revealed 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. The postconviction court found the testimony of both attorneys credible and concluded that there was no deficient performance.

The postconviction court's findings are supported by competent, substantial evidence in the record, including the November 13, 2006, letter and the trial transcripts from August 21-22, 2007. Trial counsel did not perform deficiently by explaining all of Brant's options to him, including the positives and the negatives of those options, and then allowing Brant to make the decision on his own.

Under this claim, Brant also contends that counsel's performance fell below prevailing norms in: (1) "failing to develop rapport and trust with a client they knew suffered from depression"; (2) "failing to investigate and advise Brant of mitigation as set out above"; and (3) "failing to consult an expert on jury selection, having previously advised Brant to plead guilty." We reject these claims. Brant's assertion that there was no "rapport" or "trust" between Brant and his attorneys is refuted by the record. Brant told the trial court under oath during the plea colloquy that he was satisfied with the advice and representation he received from them both. The other two claims are without merit; counsel conducted a reasonable

mitigation investigation and did not perform deficiently in failing to consult with a jury selection expert.

C. Brady Violation

Brant next asserts that the postconviction court erred in denying his claim that the State withheld evidence that his half-brother, Garett Coleman, was a confidential informant ("CI") at the time of Brant's arrest, contrary to the mandates of Brady v. Maryland, 373 U.S. 83 (1963). In Brady, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In order to show that the evidence is material and establish that a Brady violation occurred, the defendant must demonstrate that there is a reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed. Strickler v. Greene, 527 U.S. 263, 280 (1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 289-90.

While Brant's charges were pending, Garett was interviewed by the State and listed as a witness. The State provided Garett's statements in discovery, and he was deposed by the defense. Garett did not appear to testify at the penalty

phase, but two of his sworn statements were introduced at the Spencer[4] hearing by stipulation of the parties. The State suggested that the statements rebutted mitigation evidence about Marvin Coleman's attitudes and behaviors. The trial court did not agree that the statements rebutted any mitigation evidence but did find that they corroborated evidence of Marvin's demeanor and considered them as mitigation evidence.

At the evidentiary hearing, Garett testified that after Brant unsuccessfully attempted to turn himself in on July 3, 2004, Garett saw some deputies from the Orange County Sheriff's Office at a gas station and advised them of the situation and Brant's location. He told them to call Agent Neil Clarke, with whom Garett worked as a CI, to verify his credibility. Agent Clarke testified that he met Garett in November or December 2005, and that Garett became a CI in January 2006. Sheriff's office records introduced through Agent Clarke corroborated his testimony that Garett first became a CI in 2006.

The postconviction court found Agent Clarke's testimony and the sheriff's office records, indicating that Garett did not become a CI until 2006, more credible than Garett's assertion that he was a CI in 2004. Thus, the postconviction court denied relief because Brant failed to establish that Garett was a CI at the time of

4. Spencer v. State, 615 So. 2d 688 (Fla. 1993).

Brant's arrest in July 2004. The court also concluded that even if Garett were a CI at the time he informed law enforcement of Brant's location in July 2004, he did so entirely of his own accord, there was no evidence that he was acting as a state agent at the time, and he did so because Brant wanted to turn himself in. Finally, even assuming that Garett was a CI in 2004 and provided information that led to Brant's arrest and the State withheld that information, the postconviction court concluded that Brant still would not be entitled to relief because such information was not material in that there was no reasonable probability that the result of the proceeding would have been different if the State had not withheld such information.

On appeal, Brant does not contest the postconviction court's finding that Garett was not a CI in 2004, nor does he explain how Garett's CI status would have been exculpatory, impeaching, or mitigating. Brant makes only the conclusory argument that Garett's CI status "was material as a mitigating factor under the Eighth Amendment and that the State's failure to disclose Garett's status as a CI violated Brant's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the Federal Constitution."

The postconviction court did not err in denying this claim. The testimony of Agent Clarke and the sheriff's office records provide competent, substantial evidence supporting the postconviction court's finding that Garett was not a CI in

July 2004. Further, Garett testified at the evidentiary hearing that he had conversations with Brant about being a CI prior to Brant's arrest, and that Brant advised him that it was not safe or a good idea to continue being a CI. "If the evidence in question was known to the defense, it cannot constitute Brady material." Pagan v. State, 29 So. 3d 938, 948 (Fla. 2009). Thus, even if Garett had been a CI in 2004, and even if that information would have been favorable and material, a Brady claim cannot stand because Brant knew of the evidence that he alleged was withheld.

III. PETITION FOR A WRIT OF HABEAS CORPUS

In his petition for a writ of habeas corpus, Brant asserts that appellate counsel was ineffective for failing to raise on appeal: (1) the argument that this Court's proportionality review fails to consider cases in which the defendant was convicted of murder and sexual battery where the State either did not seek death or where the jury recommended a life sentence, and this Court's proportionality review violates Brant's right to equal protection; and (2) that the trial court erred in denying Brant's motion to dismiss the kidnapping count.

A. Ineffective Assistance of Appellate Counsel for Failure to Challenge the Constitutionality of Our Proportionality Review

Brant argues that appellate counsel was ineffective in failing to argue on appeal that this Court's proportionality review fails to consider "first-degree murder/rape" cases in which defendants were convicted but spared the death

penalty—due to either the State's decision not to seek the death penalty or because the jury recommended a life sentence—and therefore, Brant's death sentence is random, arbitrary, and capricious in violation of the Eighth Amendment. This argument is without merit.

Proportionality review is a unique function of this Court's review in capital cases, and is done for the purpose of fostering uniformity in death-penalty law. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). It involves consideration of the totality of the circumstances of a case and a comparison of that case to other capital cases. Yacob v. State, 136 So. 3d 539, 546-47 (Fla. 2014); Snipes v. State, 733 So. 2d 1000, 1007 (Fla. 1999). It does not include a comparison of the circumstances of capital cases with those of noncapital cases. Indeed, we have specifically rejected the argument that our proportionality review is legally insufficient because we only consider cases in which a death sentence was imposed. See Hunter v. State, 8 So. 3d 1052, 1072-73 (Fla. 2008). Appellate counsel is not ineffective for failing to raise a meritless issue. Evans v. State, 995 So. 2d 933, 954 (Fla. 2008).

B. Ineffective Assistance of Appellate Counsel for Failure to Challenge Denial of Motion to Dismiss Kidnapping

Brant was charged in count three of the indictment with kidnapping by forcibly, secretly, or by threat, confining, abducting, or imprisoning the victim with the intent to inflict bodily harm or terrorize the victim, in violation of section 787.01(1)(a)3., Florida Statutes (2004). He filed a motion to dismiss count three

under Florida Rule of Criminal Procedure 3.190(c)(4), asserting that under Carron v. State, 414 So. 2d 288, 290 (Fla. 2d DCA 1982), approved, 427 So. 2d 192 (Fla. 1983), and Florida Standard Jury Instruction (Criminal) 9.1, as it existed from 1985 until 2014, see The Florida Bar re: Standard Jury Instructions Criminal Cases, 477 So. 2d 985, 997 (Fla. 1985), the State was required to prove that the confinement, abduction, imprisonment (a) must not be slight, inconsequential, or merely incidental to the felony; (b) must not be of the kind inherent in the nature of the felony; and (c) must have some significance independent of the felony in that it makes the felony substantially easier of commission or substantially lessens the risk of detention. The trial court denied the motion on the authority of our decision in Bedford v. State, 589 So. 2d 245, 251 (Fla. 1991). Brant now claims that appellate counsel was ineffective for failing to appeal the denial of his motion.

In Bedford, we held that the State is required to prove the three aforementioned elements when the kidnapping is charged as kidnapping with the intent to commit or facilitate the commission of another felony under subsection 787.01(1)(a)2., but not where the kidnapping is charged as kidnapping with the intent to inflict bodily harm upon or to terrorize under section 787.01(1)(a)3. 589 So. 2d at 251. Thus, a claim on appeal that the motion to dismiss was improperly denied would have been meritless, and appellate counsel was not ineffective for failing to raise a meritless claim. See Evans, 995 So. 2d at 954.

IV. HURST

While Brant's postconviction appeal was pending before this Court, the United States Supreme Court issued its decision in Hurst v. Florida, 136 S. Ct. 616, 619 (2016), in which it held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." Brant, who waived his right to a penalty-phase jury, requested leave to file supplemental briefing to address the impact of Hurst on his sentence, which we granted. We have previously held in a direct appeal that a defendant who has waived the right to a penalty-phase jury is not entitled to relief under Hurst. See Mullens v. State, 2016 WL 3348429, at *20 (Fla. June 16, 2016) (concluding that defendant who waived penalty-phase jury was not entitled to relief under Hurst because a defendant "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence"). A similar claim in postconviction proceedings is necessarily precluded. Accordingly, we reject Brant's Hurst claim.

V. CONCLUSION

For the reasons stated above, we affirm the postconviction court's order denying Brant's motion for postconviction relief and deny the petition for a writ of habeas corpus.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Two Cases:

An Appeal from the Circuit Court in and for Hillsborough County,
Deborah Michelle Sisco, Judge - Case No. 292004CF012631000AHC
And an Original Proceeding – Habeas Corpus

Marie-Louise Samuels Parmer of The Samuels Parmer Law Firm, P.A., Tampa, Florida,

for Appellant/Petitioner

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Christina Zuccaro, Assistant Attorney General, Tampa, Florida,

for Appellee/Respondent

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO.: 04-12631**

v.

CHARLES GROVER BRANT,
Defendant.
_____/

DIVISION: J/TR2

FINAL ORDER DENYING THIRD AMENDED MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH

THIS MATTER is before the Court on Defendant's Third Amended Motion to Vacate Judgment of Conviction and Sentence of Death, filed on August 23, 2013, pursuant to Florida Rule of Criminal Procedure 3.851. On May 25, 2007, Defendant pleaded guilty to first degree murder, sexual battery, kidnapping, grand theft motor vehicle, and burglary with assault/battery. On August 22, 2007, Defendant waived his right to a penalty phase jury advisory sentence and the trial court conducted a bench trial. On November 30, 2007, the trial court sentenced Defendant to death for first degree murder. Defendant's judgment and sentence of death were affirmed. *See Brant v. State*, 21 So. 3d 1276 (Fla. 2009).

Defendant filed his original 3.851 motion on February 9, 2011, and the State filed its response on April 11, 2011. On September 9, 2011, the Court entered an order granting an evidentiary hearing on certain claims, allowing Defendant leave to amend facially insufficient claims and reserving ruling. On October 13, 2011, Defendant filed an amended motion, and the State filed its response to Defendant's amended claims on November 3, 2011. On September 6, 2012, Defendant filed a second amended motion, and the State filed its answer on September 25, 2012. On August 23, 2013, Defendant filed his third amended motion, and the State relied on its September 25, 2012 response. During the 2 weeks of October 7, 2013 and October 14, 2013, as well as on November 8, 2013, the Court held evidentiary hearings on grounds 1, 2, 3, 4 and 7. The Court granted the parties' requests to file written closing arguments and, on December 3,

2013, Defendant filed his initial closing argument. The State filed its reply argument on December 18, 2013, and Defendant filed his reply argument on December 26, 2013. After considering the motions and responses, the court file and record, the testimony and evidence presented during the evidentiary hearings, as well as the arguments of counsel, the Court finds as follows.

In the instant motion, Defendant alleges ineffective assistance of counsel. Effective assistance of counsel does not mean that a defendant must be afforded errorless counsel or that future developments in law must be anticipated. *Meeks v. State*, 382 So. 2d 673 (Fla. 1980). In *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court provided the following standard for determining ineffective assistance of counsel:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
>
> . . . .
>
> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing the errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 686-687. To prove counsel performed deficiently, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-688. The Court found that "[j]udicial scrutiny of counsel's performance must be highly

deferential" and the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ..." *Id.* at 689. The *Strickland* court further noted that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* As to prejudice, "When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

When the defendant enters a guilty plea rather than proceeding to trial, the two-part test from *Strickland* still applies, however, the prejudice prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Specifically, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

CLAIM I

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 HIS FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHT UNDER THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION.

In claim 1A, Defendant alleges counsel performed deficiently by failing to investigate and consult with a jury expert and advise Mr. Brant of methods to address a juror's likely reaction to the sexual violence and murder in the case. Defendant asserts that counsel's advice to

enter a guilty plea because a jury would not want to hear facts of the crimes twice was "advice made in a vacuum" and constituted deficient performance based on an unreasonable investigation. Defendant contends counsel failed to establish a defense of the case or form a cohesive theory for the guilt phase and failed to engage in the necessary "legwork" by failing to do the following: meet with Defendant promptly; secure mental health experts to evaluate him and address issues relevant to the guilt phase while also consistent with the penalty phase, i.e., premeditation and sexual obsession; maintain ongoing meaningful contact with Defendant; consult with a jury expert to develop a cohesive theory for the guilt and penalty phases and identify potential juror issues regarding the facts of the case; develop and submit meaningful questions for voir dire and a written questionnaire prior to jury selection; consult with an expert in jury selection to understand how a jury can be presented with both a guilt and penalty phase fact pattern without holding that against defendant. Defendant claims a jury selection expert would have developed a juror profile, and explained how to best present the case to a jury and minimize the effect of the violence and sexual aspects of a crime to help jurors better understand Defendant. Defendant further claims counsel failed to maintain ongoing and meaningful communications, including refusing to take calls from family members and making disparaging comments to Defendant about the depravity of his crimes. Counsel failed to inform Defendant of methods available to present a cohesive theory for the guilt and penalty phase without alienating a jury. In closing argument, Defendant asserts counsel's advice was based on a deficient mitigation investigation and he would have not have pled guilty if he was aware of the mitigation available. Defendant claims the lack of advice and communication resulted in his uninformed decision to enter a plea with no assurances against the death sentence. Finally, Defendant asserts that counsel's deficient performance was prejudicial to the extent that there is a reasonable

probability that he would not have pled guilty and would have proceeded to trial but for counsel's deficient performance.

During the October 7, 2013 evidentiary hearing, Rick Terrana, Esquire, testified that he has been in private practice since 1991, primarily practices criminal defense and has tried between 15-25 capital cases. (*See* October 7, 2013 transcript, pp. 15-16). Mr. Terrana testified that he was primarily the guilt phase attorney, while Bob Fraser, Esquire, was second chair and responsible for penalty phase decisions. (*See* October 7, 2013 transcript, 15-16, 26-27, 34). Mr. Terrana testified that he has never advised a client to plead guilty and waive a penalty phase jury, and that he did not do so in this case. (*See* October 7, 2013 transcript, p. 18). Mr. Terrana testified that Defendant was adamant "from day one" about not proceeding with a jury trial in the guilt phase. (*See* October 7 transcript, 2013, p. 57). Mr. Terrana even requested that the State approve a plea in avoidance of the death penalty, but the State declined. (*See* October 7, 2013 transcript, pp. 57-58). Mr. Terrana explained that they did not have much to work with in terms of a theory of defense, so the strategy was to attack Defendant's confession, as follows:

> [MR. TERRANA]: We didn't have much of a theory. Therein lies the problem in this case. You know the facts of this case were horrific in that the manner of death and what transpired during immediately preceding her death were horrible. The problem was -- not the problem, the facts were such that the only witnesses to this murder or the only evidence really to speak of significance-wise was Mr. Brant's statement. His statement was this whole case. Without his statement they didn't have a case. But with his statement he was done. I have never – I never remember seeing or reading a client's statement that was so remorseful, so forthcoming as Mr. Brant was with law enforcement. And unfortunately, that worked to his disadvantage, of course, as it particularly does. So, you know, the strategy became attack the statement. And if I could get the statement thrown out then we were in good shape, without the statement we are done.

(*See* October 7, 2013 transcript, p. 19)

. . . .

> There were all kinds of discussions. This case was a tough case because, again, the facts of this case were so horrific and his statement was so damaging. We knocked our heads together forever just trying - - with him included, when I say "him" I'm talking about Charles included, trying to get some ideas of what to do here and so forth. You know, we came up with what we thought was the best strategy and that is to go full blown and attack his statement. And if we win great, if we don't we'll figure out something else.

(*See* October 7, 2013 transcript, pp. 52-53). His strategy to suppress the confession involved Defendant's methamphetamine use and how it affected him and his ability to give a voluntary statement. (*See* October 7, 2013 transcript, pp. 19-20). To that extent, he researched methamphetamines, sought input from a colleague (a former Assistant State Attorney), and also solicited the assistance of various experts, including a toxicologist and psychologists. (*See* October 7, 2013 transcript, pp. 20-26).

As to the decision to plead guilty, Mr. Terrana testified as follows:

> [POSTCONVICTION COUNSEL]: After the motion to suppress was denied, was there then conversation about having Mr. Brant plead guilty?
>
> [MR. TERRANA]: Apparently there were. You know, we met with Mr. Brant and talked about that, Fraser and I, and I don't know if we meet [sic] individually with him. He can probably tell you better than me. But apparently we talked about it at length. Ultimately, the decision was to enter a plea of guilty on the first phase and proceed to a jury trial on the second phase with the theory being that his confession, of course, would be played to a jury at length. And in our opinion, in my opinion, his confession was so damaging in its effect both emotionally and otherwise on the jury that we decided that once is better than twice for them to hear it. And just given all things, and again, these cases you can't look at any one thing in a vacuum, you have to look at everything and brainstorm, and what about this? What about this? If not this, what about that? When all those things were taken into account, all that strategizing done we made the decision that it would be in

> his best interest to plead guilty to the first phase and let a jury decide the penalty phase.

(*See* October 7, 2013 transcript, p. 28). A letter from Mr. Fraser to Defendant, dated November 13, 2006, memorializing a November 13, 2010 discussion between counsels and Defendant was entered into evidence as Defense Exhibit #10. (*See* October 7, 2013 transcript, pp. 29-30, Defense Exhibit #10). Mr. Terrana did not recall viewing the evidence in this case, and did not consider testing a clump of Defendant's hair or his clothing to substantiate Defendant's drug use. (*See* October 7, 2013 transcript, pp. 32-33). He explained that there was no doubt as to Defendant's use of crystal methamphetamines and the only issue was the effect such drug use may have had on him. (*See* October 7, 2013 transcript, p. 32). Mr. Terrana further testified that he has previously used and was aware of the benefits of a jury selection expert, but did not obtain one in this case due to the difficulties in procuring payment for such an expert. (*See* October 7, 2013 transcript, pp. 33-35).

On cross-examination, Mr. Terrana acknowledged the State could have proceeded to trial even if the motion to suppress had been successful because there was other circumstantial and forensic evidence tying Defendant to the crimes, including Defendant's DNA and the discovery of the victim's personal property in Defendant's garbage. (*See* October 7, 2013 transcript, p. 53). Mr. Terrana further agreed that Defendant's drug use could have been a factor in premeditated murder (albeit not a legal defense), but the State could have also proceeded on a theory of felony murder. (*See* October 7, 2013 transcript, p. 54). He further testified that in his experience there was no reasonable likelihood that a jury would have found Defendant not guilty of first degree murder or guilty of a lesser offense. (*See* October 7, 2013 transcript, p. 54). Mr. Terrana testified that his belief that the jury may be more kindly disposed to mitigation without a guilt phase in this case, was based on his years of experience in trying cases and handling capital

penalty phases, as well as "my style of doing things, and what I see jurors do, and what my experience and the facts tell me to do." (*See* October 7, 2013 transcript, p. 60). Mr. Terrana had no doubt that Defendant made a free, knowing, and voluntary decision to plead guilty and waive the penalty phase jury. (*See* October 7, 2013 transcript, p. 58).

Penalty phase counsel, Mr. Fraser, testified that he did not specifically advise Defendant to plead guilty to all charges in the indictment but he and Mr. Terrana had discussions with Defendant regarding all his options and Mr. Fraser wrote Defendant a letter outlining those options; Mr. Fraser agreed the letter fairly represented his thought processes and advice to Defendant. (*See* October 7, 2013 transcript, pp. 71-72; Defendant Exhibit #10). Other than this case, Mr. Fraser has not advised a death penalty defendant to plead guilty and proceed to the penalty phase, but his advice that they would be less likely to incur the jury's ire in this case if they pleaded guilty was based on his experience trying approximately 25 first degree murder cases. (*See* October 7, 2013 transcript, pp. 72-73). He did not conduct any research on the psychology and perception of juries or otherwise consult with a jury selection expert. (*See* October 7, 2013 transcript, pp. 73-74). He did not request individual voir dire or prepare a special voir dire questionnaire about the issues in this case, and testified that he did not recall his specific thoughts about questioning the jury and never had the opportunity to voir dire the jury. (*See* October 7, 2013 transcript, pp. 76-77).

A review of Defense Exhibit #10 reflects that it is a letter dated November 17, 2006, from Mr. Fraser to Defendant, confirming "the understandings reached on Monday, November 13, 2006 during a conference" between Defendant, Mr. Fraser and Mr. Terrana. (*See* Defense Exhibit #10). In the letter, Mr. Fraser states that they discussed Defendant's case and "the best approach to it," including the "benefits and detriments" of proceeding to a non-jury penalty

phase before Judge Fuente. (*See* Defense Exhibit #10). Mr. Fraser further states that they all agreed Defendant would plead guilty and they would proceed "to have a full blown penalty phase before the jury..." (*See* Defense Exhibit #10). Mr. Fraser explained that decision was based on the lack of doubt as to Defendant's guilt and as a demonstration of Defendant's remorse, as well as a way to avoid incurring the jury's ire if they were to "[contest] an uncontestable case." (*See* Defense Exhibit #10). Mr. Fraser also explained the negative aspects of pleading guilty, Defendant's right to testify, and the unavailability of a voluntary intoxication defense. (*See* Defense Exhibit #10).

During the evidentiary hearing, Toni Blake, a jury consultant and professor of psychology, was tendered as an expert in jury consultation, selection of juries in capital cases, and mitigation consultation in prevailing norms on mitigation presentation investigation. (*See* October 9, 2013 transcript, pp. 323, 326). She has been worked as a jury consultant in over 35 death penalty cases and over 100 murder trials, as well as 48 sexually violent predator commitment trials; she has also worked as a mitigation consultant in more than 35 death penalty cases; she is usually retained as both a jury and mitigation consultant. (*See* October 9, 2013 transcript, p. 325, 327). Ms. Blake testified that if an attorney told her that he had a death penalty client that wanted to plead guilty, she would advise the attorney about the guidelines, research in the area of guilty pleas and how that would affect a penalty phase jury, and she would have recommended that Defendant not enter a guilty plea in this case. (*See* October 9, 2013 transcript, p. 330). She explained that a juror needs time through both the guilt and penalty phases to get to know a defendant, and factors such exposure, similarities, proximity, and length of time could influence a juror's vote for life or death. (*See* October 9, 2013 transcript, pp. 332-33). Ms. Blake also disagreed with Mr. Fraser's and Mr. Terrana's advice that it would be better

if the jury did not hear disturbing facts of the case twice (during both guilty and penalty phase). (*See* October 9, 2013 transcript, pp. 333-34). Instead, Ms. Blake testified, the jury would be systematically desensitized by repeated exposure and be less shocked or emotionally impacted by such disturbing facts. (*See* October 9, 2013 transcript, pp. 333-34). She further explained that systematic desensitization occurs when a person is repeatedly exposed to the same thing, but if a person, i.e., a judge, is repeatedly exposed to different cases or scenarios, that person would not be systematically desensitized but would rank each case by severity, with the more recent ranking higher in severity; the research also reflects that it easier for a person who has already voted for death once to do so again. (*See* October 9, 2013 transcript, pp. 335-37). Ms. Blake also disagreed that the jury selection was a debacle, and instead viewed it as a good sign that they would seat a fair jury. (*See* October 9, 2013 transcript, p. 340).

Ms. Blake testified that a mitigation investigation begins with a thorough background investigation, i.e., gathering all medical and education records, investigating a defendant's biological family and/or the family that raised him going back as many generations as possible, and speaking with as many people in as many different places a defendant has lived. (*See* October 9, 2013 transcript, pp. 341-43).

Ms. Blake also testified about ABA guidelines and prevailing norms, which reflect that a guilty plea should be avoided and extra precautions should be taken when dealing with a depressed client. She also would have recommended that after the attempted jury selection, one of the attorneys in this case visit Defendant at the jail to discuss his options at length, not in a 15-minute conversation in the courtroom. (*See* October 9, 2013 transcript, p. 339). As for other things that defense counsel in this should have done differently, Ms. Blake's advice would have included the following: the attorneys should have moved for a juror questionnaire; she would

not have advised Defendant to plead guilty or waive the penalty phase; she would have recommended the attorneys retain a specialized expert in methamphetamine use and its effect on impulse control and sexual offenders as well as an expert in sexual offenders; she would have further investigated the neuropsychological aspects and the abnormalities in the PET scan, and presented the PET scan images; she would have recommended that prison adjustment evidence be presented. (*See* October 9, 2013 transcript, pp. 344-45, 348-49). She also found that the attorneys failed to establish a nexus between Defendant's background and how that affected his thought processes and lessened his moral culpability, and also failed to establish the genetic link or other risk factors that increased Defendant's risk for substance abuse and addiction. (*See* October 9, 2013 transcript, pp. 345-46, 351-52, 368-69).

Terence Lenamon, Esquire, a criminal defense attorney who practices almost exclusively in death penalty work, testified as an expert in prevailing norms in capital defense practice for the period of 2004 to 2007. (*See* October 8, 2013 transcript, pp. 247, 262). Mr. Lenamon relied on the American Bar Association (ABA) Guidelines for the appointment and performance of attorney in death penalty cases for 2003. (*See* October 8, 2013 transcript, p. 259). Mr. Lenamon testified the ABA guidelines state that attorneys should integrate their defense whenever possible and present a consistent theory that will flow from the guilt phase into the penalty phase. (*See* October 8, 2013 transcript, pp. 263-64). Additionally, the prevailing norms also call for front loading mitigation and aggravation, that is, putting forth the mitigation and worst aggravation during jury selection so that biased jurors can start eliminating themselves. (*See* October 8, 2013 transcript, pp. 265-67). In cases where there is overwhelming evidence of guilt, attorneys should use the guilt phase to set up the penalty phase. (*See* October 8, 2013 transcript, pp. 268-69).

Mr. Lenamon further testified that when multiple attorneys are appointed to a case, the prevailing norms indicate they should work as a team and not as separate entities. (*See* October 8, 2013 transcript, pp. 269-70. Prevailing norms also reflect that requests for public funds should be documented and set forth with specificity and support. (*See* October 8, 2013 transcript, pp. 278-80). Prevailing norms reflect that an attorney should not advise a defendant to enter a guilty plea as charged, without any benefit and, prior to doing so, an attorney must be able to advise the client completely and after thorough investigation of the case, possible defenses, the jury selection process, and advantages and disadvantages of entering a plea. (*See* October 8, 2013 transcript, pp. 286-89). Prevailing norms also discourage advising a defendant to plead guilty and waive a penalty phase jury. (*See* October 8, 2013 transcript, p. 291). When dealing with a depressed defendant, prevailing norms reflect that therapeutic services should be provided and someone from the defense team should provide should support so that the defendant can make rational choices. (*See* October 8, 2013 transcript, pp. 293-94). On cross examination, Mr. Lenamon acknowledged the ABA guidelines are guidelines and not requirements or rules. (*See* October 8, 2013 transcript, pp. 295, 299).

During the November 8, 2013 hearing, Defendant testified that he would not have pled guilty and waived the jury if he had known about all of the mitigation presented throughout the evidentiary hearings. (*See* November 8, 2013 transcript, p. 1713, attached). He further testified that during the plea colloquy and waiver of the penalty phase jury colloquy, he did what his attorneys told him. (*See* November 8, 2013 transcript, p. 1717). He also testified that he did not recall telling his attorneys that he wanted to plead guilty. (*See* November 8, 2013 transcript, p. 1718).

A review of the May 25, 2007 plea colloquy reflects the following exchange:

THE COURT: You've been charged by grand jury indictment, Case 04-12631 with a total of five offenses. Count 1 charges you - - may I see the indictment, please - - charges you with first degree murder. That is a capital crime which carries one of two possible penalties: Number one, life in prison without the possibility of parole; and the other is a sentence of death. There is no other possible sentence for that particular offense upon conviction.

. . . .

I'm told by your counsel, Mr. Fraser, Mr. Terrana, that at this time you wish to plead guilty to each and every one of those five counts; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And these are what we call open guilty pleas which means that as you plead guilty today, there is not agreement or understanding between you and the State as to what sentence I will impose when you come back for sentencing at a later date.

THE DEFENDANT: Yes.

THE COURT: You understand?

THE DEFENDANT: Yes.

THE COURT: With respect to Count 1, because the State has indicated that it is going to seek a death penalty upon conviction, you have a statutory right to have trial by jury with respect to the sentence to be imposed and a jury of 12 of your peers would be impaneled and the State would be entitled to present in evidence what we call aggravation. And you and your counsel would be entitled to present evidence, what we call mitigation.

And that jury of 12 persons would then render what we call an advisory sentence to which I would have to give great weight. And thereafter, I would be the one who would decide whether to impose a sentence of death or whether to impose a sentence of life as it pertains to Count 1 and Count 1 only. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: If you plead guilty today - - let me back up. You have an absolute constitutional right to plead not guilty to each and every one of these charges and have a trial by jury, jury of 12

persons, to decide whether you're guilty of any offenses charged. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: If this case were to proceed to jury trial, what would occur in this courtroom is that the State and your lawyers and this Court would impanel a jury of 12 of your peers to hear evidence in this case. And at that trial, the State would be required to present evidence to prove your guilt to the satisfaction of jury beyond a reasonable doubt. And at that trial you and your lawyers together would have the ability to confront and cross-examine the witnesses who testify against you. You have the right to summon witnesses to come into court to testify on your behalf, and you yourself would have the right to be a witness and testify on your own defense if you wished to do. [sic] So do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You also have a constitutional right to not testify if you do not wish to testify at your own trial. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: If you plead guilty today, you're going to give up your right to have a trial by jury in any of these, with respect to any of these counts. And you also are going to give up any right that might have to appeal except that your counsel tells me that your guilty plea with respect to the kidnapping count, Count 3, is a guilty plea wherein you're expressly reserving your right to appeal a prior ruling that I made denying a motion to dismiss kidnapping count filed by your counsel.

So that's the only right that you have to appeal with respect to your guilty pleas as to the guilt or innocence of these charges. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: If you plead guilty, you're going to give up your right to appeal all matters relating to your judgment including the issue of guilt or innocence; however you're not going to be giving up your right - - right to review this - - the judgment and sentence by collateral attack.

You understand that by pleading guilty as you've just done, you're going to give up each and every right that you have

associated with proceeding to trial, that is, you're going to [] give up your right to have a jury decide your guilt or innocence, give up your right to call witnesses. You're going to give up your right to require the State to prove you're guilty beyond a reasonable doubt. You understand that?

THE DEFENDANT: Yes.

THE COURT: You understand that when you plead guilty today, I'm going to ask the state for a factual basis. And after that, this Court would have opportunity and ability and the right to ask you questions about what you didn't do with respect to the crimes alleged. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, I would be required to give you - - tell you the terms of any plea agreement, but there is no plea agreement. The only thing that I understand is agreed to is that you're going to plead guilty, and obviously before I can impose a sentence with respect to Count 1, we're going to exercise your right to have a jury recommendation as to sentence to be imposed. So the jury would be impaneled at a later date, I presume the same date?

[THE STATE]: Yes, sir.

THE COURT: On the same date in August. That jury would come back with an advisory verdict. And if the jury comes back with a recommendation of life, under the statute, this Court would still have the discretion to sentence you to death, although that's highly unlikely under the status of the law today.

If the jury comes back with a recommendation of death, then this Court is - - would be charged with the responsibility to determine whether to impose the sentence of death or whether to impose a sentence life on Count 1. Do you understand that?

THE DEFENDANT: Yes, sir.

. . . .

THE COURT: All right. Then, Mr. Brant, I neglected to ask you a few things. First of all, are you satisfied with the advice and investigation and representation given to you by your counsel, Mr. Terrana, Mr. Fraser?

THE DEFENDANT: Yes, sir.

THE COURT: Is there anything that you feel that either of them should have done or should do and perhaps they haven't done with respect to investigating this case?

THE DEFENDANT: No, sir. They have done everything.

THE COURT: And I may have asked you this, but I'm not certain. At this very moment in time, are you under the influence of any medication whatsoever?

THE DEFENDANT: I'm taking Wellbutrin.

THE COURT: What is that for?

THE DEFENDANT: Depression.

THE COURT: When did you take it last?

THE DEFENDANT: This morning. I took it at 3:00.

THE COURT: You take that for depression?

THE DEFENDANT: Uh-huh.

THE COURT: And it's in your system now?

THE DEFENDANT: Yeah.

THE COURT: And does that affect your ability to communicate and discuss and understand anything that we've talked about today?

THE DEFENDANT: No, sir.

THE COURT: Mr. Terrana, Mr. Fraser, this morning, are each of you able to communicate adequately with Mr. Brant?

MR. TERRANA: Yes, sir.

MR. FRASER: Yes, sir.

THE COURT: And for the record, Mr. Brant appears to this Court to be very attentive and answering my questions very appropriately --

. . . .

THE COURT: Okay. Now, what I've been given with respect to [] your plea is simply the standard plea form that we use, and it's marked no contest. But as we discussed earlier, I'm not permitting that. I'm requiring that you plead guilty, and I'm requiring that you acknowledge your guilt. Are you pleading guilty and acknowledging your guilt with respect to the facts that the prosecutor's just alleged did you do those things?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand, again, that these are open pleas? That means that there's no agreement or assurance with respect to what sentence you're going to receive ultimately? That's your understanding?

THE DEFENDANT: Yes.

THE COURT: Has anybody, your lawyers or anybody in jail or any of your family members, has anybody suggested to you or promised you that any particular - - you would receive any particular sentence when this is all over?

THE DEFENDANT: No, sir.

THE COURT: Anything else from the State?

[THE STATE]: Yes, Your Honor. There has been an offer by the defense for - - to offer the defendant to plead guilty to all these counts for life in avoidance of death, and that was expressed by the defense in the packet. That offer pursuant to decision by the committee was rejected.

THE COURT: State rejects that?

[THE STATE]: Correct.

THE COURT: Okay. Anything else, Mr. Terrana?

[MR. TERRANA]: No, sir.

THE COURT: Mr. Fraser?

[MR. FRASER]: No, sir.

> THE COURT: Mr. Brant, do you have any questions whatsoever about anything that's happened here this morning?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Okay. I will find that there are sufficient facts, that the defendant has entered his plea knowingly and voluntarily on both counts, counsel with whom he is satisfied, there's sufficient factual basis and that his pleas are knowingly and intelligently entered and I'll accept the pleas.

(May 25, 2007 plea transcript, pp. 9-16, 30-31, 33-35).

The Court first notes that ABA guidelines are neither rules nor requirements. *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.). Secondly, the Court finds the testimony of Mr. Terrana and Mr. Fraser to be credible. Defendant and his trial counsels 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. The November 17, 2006 letter reflects that Defendant, Mr. Terrana and Mr. Fraser came to this decision after considering such factors as the lack of doubt as to Defendant's guilt, and that such a plea would demonstrate his remorse and lessen the likelihood of incurring the jury's ire by "contesting an uncontestable case." The Court further finds Mr. Terrana's testimony that Defendant did not wish to proceed to a jury trial "from day one" to be credible. Additionally, Defendant benefitted from his guilty plea where the trial court found in mitigation that Defendant "pled guilty to all crimes and did not require the State to prove the charges to a jury beyond a reasonable doubt" and gave that moderate weight. As to Defendant's argument that counsel's advice was based on an unreasonable mitigation investigation, as the Court will further address in claim 2 below, the Court finds counsels' mitigation investigation was not unreasonable.

Finally, as to the remaining allegations in claim 1A, the Court finds Defendant has failed to demonstrate that counsel performed deficiently by failing to meet with Defendant promptly or maintain ongoing and meaningful contact with Defendant. Although the decision to enter the plea was ultimately made by Defendant, the Court finds that in light of the facts of this case, counsels' advice was reasonable. Defendant has failed to show that counsel performed deficiently pursuant to *Strickland*.

Additionally, the Court finds Defendant has failed to establish prejudice. *See Hill v. Lockhart*, 474 U.S. at 59; *Grosvenor v. State*, 874 So. 2d 1176 (Fla. 2004) (holding that 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). The Court finds there is no reasonable probability that Defendant would have insisted on going to trial if counsel had consulted with or retained a jury selection expert to develop a cohesive theory of guilt for both phases and how present the case to a jury, identify potential juror issues, develop a juror questionnaire and questions for voir dire, and how to help jurors better understand Defendant.

As aforementioned, the Court finds Mr. Terrana's testimony that Defendant did not wish to proceed to a jury trial "from day one" to be credible; the Court also finds Defendant's testimony that he did not recall telling his attorneys that he wanted to plead guilty is not credible. Counsels sought to enter a plea in avoidance of the death penalty, but the State would not agree. The plea colloquy clearly reflects that Defendant was aware of all the rights he was giving up in pleading guilty as well as the penalty - death - that he faced, and that his plea was knowingly, voluntarily and intelligently entered. The Court is not convinced by Ms. Blake's testimony that having a jury hear the facts of this case in both a guilt and penalty phase would systematically

desensitize the jury, and nothing in her testimony would lead this Court to conclude that Defendant would have insisted on proceeding to trial if such a jury selection expert had been retained. Furthermore, the Court does not find Defendant's testimony to be credible that he would not have pleaded guilty, but would have proceeded to trial, if counsel had advised of him of all of the potential mitigation information. The Court will further address the additional mitigation presented during the evidentiary hearing under claim 2 below, but the Court also finds there is no reasonable probability Defendant would have insisted on going to trial if he had been aware of the additional mitigation evidence. **No relief is warranted as to claim 1A.**

In claim 1B,[1] Defendant asserts counsel was ineffective for failing to investigate the circumstances surrounding his arrest and to develop and present evidence that Garett Coleman (hereinafter "Garett"),[2] Defendant's half-brother, was a confidential informant (CI) for the Orange County Sheriff's Office (OCSO) at the time the instant offenses occurred. Defendant claims a Hillsborough County Sheriff's Office (HCSO) report vaguely reflected that law enforcement had "received information" as to Defendant's location, but that information was actually provided by Garett who was acting as a CI when he turned Defendant in and was directed by law enforcement to not disclose that information to anyone. Defendant asserts this information is relevant to a motion to suppress as Garett was directed to question or elicit information from Defendant about the crimes. Defendant contends that although Garett gave a sworn statement and was deposed, he never mentioned his status as a CI, and the State failed to provide or continued to hide this information, and counsel failed to discover it. Defendant

[1]The Court notes Defendant does not address this claim in closing arguments. It is not clear whether Defendant intended to abandon this claim but, in an abundance of caution, the Court will address claim 1B on its merits.

[2] Due to number of family witnesses with the same last names, the Court will refer to some of the witnesses by their first names.

asserts Garett's role as a state agent is material to the analysis of the voluntariness of Defendant's confession, including any statements he made in jail which were recorded and available to the prosecution. Defendant contends if he had known his own half-brother turned him in and questioned him while acting as a state agent and that this issue could have been raised during a motion to suppress or presented to the jury, then he would not have pled guilty but insisted on going to trial.

During the instant postconviction proceedings, Mr. Terrana testified that he did not know about Garett's CI status and he had no independent recollection as to how Defendant's location was discovered by law enforcement. (*See* October 7, 2013 transcript, pp. 46-48, 51). Mr. Fraser did not recall how law enforcement discovered Defendant's location when they arrested him and was not aware (in 2004-2007) of Garett Coleman's status as a CI. (*See* October 7, 2013 transcript, pp. 85-86, 134).

During the October 10, 2013 hearing, Garett testified that he worked as a CI with OCSO in 2004 and provided information regarding drug activity. (*See* October 10, 2013 transcript, p. 449). He worked with an agent known to him only as "Neil." (*See* October 10, 2013 transcript, pp. 449-50). Garett testified that on July 2, 2004, Defendant called and came to see him after the instant offenses. (*See* October 10, 2013 transcript, pp. 450-52). After spending the next day at the beach together, he and Defendant subsequently attempted to turn Defendant in at the Orange County Jail; however, they were advised that there was no warrant for Defendant so they returned to the home of their parents, Marvin and Crystal Coleman (hereinafter Marvin and Crystal).[3] (*See* October 10, 2013 transcript, pp. 456-60). As Garett drove home alone later that night, he pulled into a gas station where he saw some OCSO deputies. (*See* October 10, 2013 transcript, p. 461). Because his parents were elderly, his father was ill and Defendant was at

[3] Marvin and Crystal are actually Defendant's mother and step-father, and Garett's parents.

their home, Garett wanted to let the officers know that Defendant wanted to turn himself in peacefully. (*See* October 10, 2013 transcript, pp. 461-62). Garett approached the deputies and advised them of Defendant's situation and location, and told them to call "Neil" to verify his credibility. (*See* October 10, 2013 transcript, pp. 463-64). He believed they verified his information with Neil and he left. (*See* October 10, 2013 transcript, 463-64). He did not tell Defendant or his family that he was going to the police and he found out about Defendant's arrest the next morning when his mother told him. (*See* October 10, 2013 transcript, pp. 462, 465). On cross-examination, he testified that although he had Neil's cell phone number he did not call Neil about Defendant directly because he did not think he should burden Neil with personal issues or seek favors; he further acknowledged that on another occasion he may have asked officers to call Neil during a traffic stop. (*See* October 10, 2013 transcript, pp. 498-99).

Garett also testified that while he and Defendant were driving back from the beach that same day, Defendant's wife, Melissa Brant, called and he gave the phone to Defendant to speak with her; Garett also conceded he may have spoken to her father, James McKinney, but doesn't think he would have told him of Defendant's location. (*See* October 10, 2013 transcript, pp. 466-67). Garett further testified that he was still a CI during Defendant's trial and was told that as a CI he was not to disclose his CI status to anyone, including in court, and that was part of the reason why he did not appear to testify at Defendant's trial. (*See* October 10, 2013 transcript, p. 468). Garett did not have much contact with defense counsel and they did not explain to him the significance of his testimony or he would have appeared. (*See* October 10, 2013 transcript, p. 468).

During the October 10, 2013 evidentiary hearing, the defense also introduced a transcript of a recorded interview given by Garett to the State on January 10, 2012. (*See* Defense Exhibit

#39, attached). Garett essentially states the same information regarding his work as a CI in 2004, working with Neil and telling OCSO deputies about Defendant and his location. (*See* Defense Exhibit #39, pp. 9-17). However, Garett also concedes that he was himself a drug addict at the time, and he could be mistaken as to the dates when he was a CI and when he would have spoken to his brother about being a CI. (*See* Defense Exhibit #39, pp. 22-30, attached). He notes that he had a very serious drug addiction in the past and his memory is "only as good as it is." (*See* Defense Exhibit #39, p. 23, 26-27). Garett further states, "Dates, times, things like this I'm not guaranteeing [sic] on it. I wouldn't stake my life on it." (*See* Defense Exhibit #39, p. 23). Garett further claims he told Defendant he was a CI before the offenses occurred, but then agrees it's possible that conversation could have occurred after Defendant was arrested. (*See* Defense Exhibit #39, p. 24-25). Additionally, Garett states that he decided to approach the officers only because he knew Defendant wanted to turn himself in and in order to protect his elderly parents and their home. (*See* Defense Exhibit #39, pp. 11-13, 18). Nobody from law enforcement directed him to do anything, or speak with or question Defendant, and he was not compensated for any information he provided about Defendant. (*See* Defense Exhibit #39, pp. 18-19, 27-28). During the October 10, 2013 evidentiary hearing, he further testified that at the time he gave the January 10, 2012 statement, the interview was unexpected and he was suddenly approached by the State Attorney and investigator, and he actually believed they were members of the postconviction defense team even though they identified themselves as members of the State Attorney's office. (*See* October 10, 2013 transcript, pp. 472-74, 489-92).

During the October 9, 2013 hearing, Agent Neil Clarke, an agent with the Orange County Sheriff's Office Narcotics Division, testified that he met Garett in November or December 2005 during a consensual encounter. (*See* October 9, 2013 transcript, pp. 377, 379). Because Garett

indicated he had information about drug activity and Agent Clark wanted to move into the narcotics division, Agent Clark completed the CI documentation on Garett in January 2006. (*See* October 9, 2013 transcript, pp. 381-82). Garett was re-documented as a CI in 2007 and 2008. (*See* October 9, 2013 transcript, pp. 383-385). Agent Clarke further testified that Garett's CI number was NAR 06-12, and the "06" reflects the year the person became a documented CI. (*See* October 9, 2013 transcript, pp. 392-93). A CI retains the same number throughout his use as a CI and Garett retained the same CI number when he was re-documented in 2007 and 2008. (*See* October 9, 2013 transcript, pp. 392-94). Agent Clark also testified that a document identifying Garett's CI number as 05-12 was a "typo." (*See* October 9, 2013 transcript, pp. 396-97). Agent Clark testified that the OCSO records reflect Garett Coleman was a documented CI from January 2006 through June 2008. (*See* October 9, 2013 transcript, p. 385).

Additionally, Lieutenant Christi Esquinaldo, testified that she was employed with the HCSO and was the lead detective in this case. (*See* October 8, 2013 transcript, p. 401). On July 3, 2004, she was advised by Sergeant Burton that they had received information that Defendant was at his parents' house in Orlando. (*See* October 8, 2013 transcript, pp. 402-3). After reviewing a supplemental police report, it was her understanding that Detective Matera of HCSO was approached by Defendant's father-in-law, James McKinney, who told him that Garret asked him to have Melissa call Defendant at a given number, and once Defendant spoke with her, he would turn himself in. (*See* October 8, 2013 transcript, pp. 404, 410-13). She further believed that the address to Defendant's parents' house was obtained independent of any information from OCSO or Garett. (*See* October 8, 2013 transcript, pp. 412-13).

Lieutenant Frank Losat testified that in July 2004, he was employed with HCSO as a detective in the homicide division and assisted with the investigation in this case. (*See* October

8, 2013 transcript, pp. 415-16). Lt. Losat testified that he had no independent recollection of how he and Lt. Esquinaldo learned Defendant was located at his mother's house. (*See* October 8, 2013 transcript, pp. 417-18). On cross-examination, Lt. Losat testified that during a deposition taken by trial counsel, he stated that he had to conduct research to find out in which jurisdiction Crystal's house was located so he could contact the appropriate agency for assistance; Lt. Losat agreed it was correct to presume he had that address before making contact with Orlando law enforcement. (*See* October 8, 2013 transcript, pp. 422-23).

Major J.R. Burton testified that he was employed with HCSO as a sergeant in the homicide division during the investigation of this case, but he had no recollection as to how Defendant's location was obtained. Major Burton's case notes reflected the name "Mike" and an OCSO phone number, but Major Burton did not know when he spoke to Mike or whether Mike called him or whether he initiated the call to Mike. (*See* October 8, 2013 transcript, pp. 426-29).

The Court finds the testimony of Detective Clark and the OCSO records to be more credible and reliable than the testimony of Garett Coleman. Detective Clark's testimony that he did not meet Garett until late 2005 and Garett did not become a CI until 2006 is substantiated by OCSO records. Additionally, the Court finds credible the testimony of HCSO investigators that they learned of Defendant's location in Orlando through Garett's phone call to Defendant's father-in-law. Although it's possible that Garett may have contacted OCSO about Defendant's location, it appears to this Court that HCSO investigators learned of Defendant's location independent of Garett's tip to OCSO. The Court finds Defendant has failed to show Garett Coleman was a CI in July 2004. Although it is clear Garett was a CI at the time of the penalty phase hearing in 2007, Defendant has further failed to show how counsel was deficient in failing to discover this information when an HCSO report reflected they learned of Defendant's location

through Defendant's father-in-law, there was no indication that a CI was involved in this case, and Garett's CI status with OCSO was not disclosed to counsel by the State, Garett or even Defendant. Consequently, the Court finds Defendant has failed to show that counsel performed deficiently in failing to investigate the circumstances surrounding Defendant's arrest or Garett's status as a CI.

Furthermore, the Court finds Defendant has failed to demonstrate that he was prejudiced by counsel's failure to investigate the circumstances surrounding Defendant's arrest or discover Garett's status as a CI. The Court does not find credible Defendant's assertion in his motion that he would not have pleaded guilty but proceeded to trial if he had known of Garett's status as a CI. In *Grosvenor*, the court noted when determining whether there is a reasonable probability that the defendant would have insisted on going to trial, the court should consider the totality of the circumstances surrounding the plea, including whether a particular defense was likely to succeed at trial. *See Grosvenor*, 874 So. 2d at 1181-82. As noted above, the Court finds that Garett was not a CI at the time of Defendant's arrest in July 2004; therefore, Garett's lack of CI status in 2004 would not have had any effect on Defendant's motion to suppress. Additionally, even if Garett had been a CI in 2004 and tipped law enforcement off as to Defendant's location, there is no evidence that he was acting as a state agent where Garett has testified that he did so entirely of his own accord only because Defendant wanted to turn himself in and to protect his parents, he was not paid for any information provided and he was not directed to question Defendant. Garett's subsequent status as a CI from 2006 to 2008 would have had no bearing on the motion to suppress. The Court finds there is no reasonable probability that Defendant would have insisted on going to trial if counsel had investigated the circumstances surrounding his

arrest and Garett Coleman's CI status. **As Defendant has failed to meet either prong of *Strickland*, no relief is warranted on claim 1B.**

CLAIM 2

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.

In claim 2A, Defendant alleges counsel failed to conduct a reasonably competent mitigation investigation and failed to present mitigation evidence. Specifically, Defendant claims counsel failed to fully explain his background, personality, childhood, educational background, sexual history, family history of mental illness, drug abuse, alcoholism, and sexual violence, that Eddie Brant was not his biological father and how that background affected him and his conduct during the commission of the murders. Defendant asserts that counsel failed to utilize lay witness testimony to lay the foundation for a qualified expert, i.e., a clinical social worker or clinical forensic psychologist, and that failure led to the deficient presentation of a 'catalog of seemingly unrelated mitigation factors.' Defendant claims counsel failed to obtain an expert to explain why the testimony of defense witnesses was "relevant to an assessment of moral culpability because it directly affected and shaped [his] psychological and emotional development." Defendant claims counsel failed to obtain birth records, mental health records, probation records, divorce records, police reports and other records that would have corroborated the expert and lay witness testimony. Defendant alleges if counsel had presented expert testimony to explain how the family history of mental illness, addiction, sexual violence,

emotional neglect and abuse, and physical abuse affected his emotional and psychological development, there exists a reasonably probability that he would have received a life sentence. Defendant sets forth the testimonial, expert and documentary evidence that counsel should have provided and details them under the following categories: (1) neurological development risk factors (risk factor and events tending to establish brain damage); (2) family and parenting risk factors; and (3)community factors which contributed to Defendant's disturbed trajectory. Defendant asserts that if such evidence had been presented, there is reasonable probability of different result.

In claim 2B, Defendant alleges counsel performed deficiently in failing to investigate and present testimony about Defendant's ability to adapt to prison. Specifically, Defendant asserts counsel should have consulted with an expert in jail and prison risk factors to provide objective scientific evidence and testify that Defendant "was at low risk for violence in prison, likely to adjust well to incarceration and contribute to the community." Defendant asserts there is a reasonable probability of a different result if such evidence had been presented.

In claim 2C, Defendant alleges counsel failed to present objective and statistical analyses indicating Defendant met several significant risk factors for sexual homicide, including poor family attachment, neglect, instability of home structure, absent father, unsatisfactory relationships, lack of constructive role models, mother's conflicted feelings toward child, physical and psychological abuse, family sexual problems, sexual abuse and witnessing disturbing sex. Defendant asserts that if counsel retained an expert in sexual offenses, counsel would have been aware of the need to conduct test to check testosterone levels, pituitary gland function and other physical and paper-based tests and could have established that Defendant's strong sex drive was caused by biological/physiological factors and his sexual deviance was a

result of emotional and psychological factors which he could not control. Defendant claims that had such evidence been presented, along with evidence of brain damage, methamphetamine addiction, and psychological development, there is a reasonable probability that he would have received a life sentence.

In claim 2D, Defendant alleges counsel failed to adequately investigate and present evidence of Defendant's brain damage by failing to present PET scan images, and obtain MRI and additional neuropsychological testing. Defendant acknowledges that counsel consulted with a neuropsychologist, obtained a PET scan of Defendant, and obtained experts Dr. Wu and Dr. Wood to analyze those scans, but argues that counsel performed deficiently by failing to have those experts testify about the PET scan images or introduce those images into evidence even though the images demonstrated he suffered from brain damage. Defendant contends counsel's deficient performance resulted in the trial court finding only that Defendant had a problem with intellectual functioning, but not finding brain damage as a mitigating factor. Defendant claims if counsel had conducted a reasonable investigation, counsel could have established Defendant had brain damage or damage to the frontal lobe and other areas of his brain which substantially impaired his ability conform his conduct to the requirements of the law.

In claim 2E, Defendant claims counsel failed to consult with and present the testimony of a psychopharmacologist to explain the chronic and long term effects of methamphetamine and MDMA use on the brain, and to obtain objective scientific evidence to establish Defendant's use of methamphetamine at the time of the offense. Defendant acknowledges counsel presented testimony regarding Defendant's drug use and addiction and possible methamphetamine-induced psychosis, but argues that he failed to cross-examine and rebut evidence from State witnesses who diminished that testimony by suggesting Defendant was sober and coherent at the time of

the crime and thereafter. Defendant claims counsel should have tested his clothing worn at the time of the crime or his hair to establish the types of drugs he used and how long he had been using the drugs. A psychopharmacologist could have explained that Defendant may have appeared sober to law enforcement and lay people but still be suffering from side effects which are difficult for even trained experts to detect and could have testified about methamphetamine withdrawal and the effect it would have on him. Defendant also alleges that a psychopharmacologist could have explained effects of methamphetamine on the brain, especially in light of Defendant's brain damage, and how methamphetamines affect impulsivity and impulse-control. Defendant asserts counsel unreasonably relied on an expert who lacked sufficient knowledge of the effects of methamphetamine and MDMA use on the brain. Finally, Defendant alleges that if counsel had investigated and presentenced such mitigation, there is a reasonable probability that he would be sentenced to life.

In claim 2F, Defendant alleges counsel performed deficiently by failing to ensure that he received a reasonably competent mental health evaluation and retain reasonably qualified experts to determine the extent of his mental, emotional and psychological deficits. Defendant claims counsel also failed to retain an expert to assess the effects that methamphetamines and MDMA had on his brain and thought processes and how that would have established the statutory mental mitigators. Defendant claims counsel failed to retain an expert to assess his sexual dysfunction and how that dysfunction would have established the statutory mental mitigators, and again asserts that counsel failed to present expert testimony and evidence of the extent of his brain damage, including but not limited to an MRI, PET scan images and additional neuropsychological testing. Defendant further claims counsel failed to conduct a reasonably competent investigation of his biological, social and psychological history and failed to provide

his experts with relevant background information; if counsel had done so, they would have found testimonial and documentary evidence to corroborate the statutory and non-statutory mental mitigators and enabled the trial court to give greater weight to those mitigators.[4]

In claim 2G, Defendant asserts counsel was ineffective for failing to investigate and Garett's status as a CI who turned Defendant in to law enforcement. As in Claim 1A, Defendant asserts that Garett was CI for OCSO and he advised OCSO officers of Defendant's location, leading to his arrest and uncounseled confession. Defendant asserts Garett's CI status is "exculpatory and material to sentencing and punishment due to the fact that it was a member of his own family who turned him in to law enforcement and allowed his own half-brother to be subject to an uncounseled interrogation which was used to establish aggravating factors..." Defendant asserts Garett's CI status establishes "severe family dysfunction and illuminates [Defendant's] relationship with his family." Defendant further asserts Garett failed to appear for trial due to pressure and coercion related to his CI status, another factor that could have been relevant to mitigation.

Testimony and Evidence Presented During Postconviction Proceedings

Mr. Fraser, penalty phase counsel, did not specifically recall his theme of mitigation and recalled that he thought there was not very much weighty mitigation in this case (compared to his other death penalty cases), a thought which he probably conveyed to Defendant. (*See* October 7, 2013 transcript, p. 86, 121). Regarding his efforts to find out about Defendant's background, Mr. Fraser testified that he recalled meeting with Defendant, his ex-wife and his mother and that he may have spoken with Garett, but did not recall anyone else. (*See* October 7, 2013 transcript, p. 87). Mr. Fraser did not recall who Defendant's father was, and he did not have any contact

[4] Because many of the sub-claims overlap and much of the witness testimony involves multiple sub-claims, the Court will address the sub-claims in claim 2 together below.

with Eddie Brant or his family in Virginia or Ohio. (*See* October 7, 2013 transcript, pp. 87-88, 92). Mr. Fraser did not recall making a specific decision to not investigate Eddie Brant or Eddie's family, but recalled that Defendant had family in Florida and it took a lot of the mitigation team's time and effort to get them to open up and testify about the reality of how Defendant grew up. (*See* October 7, 2013 transcript, p. 89). He explained that in penalty phases it's common for family members to be hesitant to open about their history and penalty phase investigator, Toni Maloney, is excellent at wearing them down until they do. (*See* October 7, 2013 transcript, pp. 89-90). Mr. Fraser testified that if he was aware Eddie was Defendant's father, it was likely a situation where "too many cooks spoil the broth." (*See* October 7, 2013 transcript, p. 90). He only needed a certain number of mitigation witnesses and did not need to "parade [Defendant's] family tree through the penalty phase." (*See* October 7, 2013 transcript, p. 90). Mr. Fraser further agreed that the ABA guidelines regarding the need to investigate both sides of the family tree and find information from the time before a defendant's conception is ideal in theory, but noted there are also real "hoops" a defense team must jump through to get money from the JAC for such investigation; he testified that if they failed to investigate such history, it was because they focused on Defendant's local family instead. (*See* October 7, 2013 transcript, pp. 90-91). On cross-examination, Mr. Fraser recalled that Eddie left when Defendant was 7 weeks old and agreed that an investigation into his background would not have been very helpful in preparing for the penalty phase. (*See* October 7, 2013 transcript, p. 127).

Mr. Fraser did not recall how he specifically planned to address the sexual battery, but left it to the experts to discuss Defendant's rape fantasies. (*See* October 7, 2013 transcript, p. 93). Mr. Fraser did not seek a psychologist or psychiatrist who specialized in sexual offenses but

looked "for a psychiatrist and a psychologist who can test him and evaluate him and give us helpful opinions." (*See* October 7, 2013 transcript, pp. 93-94).

Mr. Fraser testified that he does not consider Defendant's methamphetamine use as a significant mitigating factor in this case because Defendant admitted that he took the drug for work purposes, not because of an addiction; Mr. Fraser also testified that he could not recall his thinking process as to Defendant' substance abuse at the time of the penalty phase. (*See* October 7, 2013 transcript, pp. 95-96, 107). He further testified that there was no dispute that Defendant regularly used methamphetamine. (*See* October 7, 2013 transcript, p. 129). Mr. Fraser also testified that he did not go to HCSO to view the evidence in this case, and did not have Defendant's hair or clothes tested to establish Defendant's methamphetamine use. (*See* October 7, 2013 transcript, pp. 106-7).

Mr. Fraser testified that he asked Ms. Maloney to contact 2 methamphetamine experts (Dr. Kadehjian and Dr. Piasecki) and a prison adjustment expert, and identified letters wherein he made those requests. (*See* October 7, 2013 transcript, pp. 97-98, 100-2, Defense Exhibits #9 and #11). He believes he spoke with one of the drug experts who was unable to appear as a witness. (*See* October 7, 2013 transcript, pp103-4). Mr. Fraser did not think Ms. Maloney contacted a prison adjustment expert and he did not know why. (*See* October 7, 2013 transcript, p. 104, 109). Although he obtained some of Defendant's jail records, Mr. Fraser was not sure if those records had been provided to his experts, Dr. Maher and Dr. McClain, for *Skipper* evidence purposes. (*See* October 7, 2013 transcript, pp. 109-10).

Mr. Fraser did not recall discussing the PET scan images with Dr. McClain, but testified, "I do remember discussing it with Dr. Maher, which is the reason I decided not to use it." (*See* October 7, 2013 transcript, p. 111). Mr. Fraser testified that he finds Dr. Maher to be a "very

competent expert" and believed Dr. Maher was competent to understand the PET scan and would testify that it was "good science that hadn't reached its fruition yet." (*See* October 7, 2013 transcript, p. 115). Mr. Fraser spoke with Dr. Maher around August 24, 2007 and then dictated a note to his file on August 27, 2007 about his decision not to present the PET scan images. (*See* October 7, 2013 transcript, pp. 111-12). Mr. Fraser testified that he had a phone conference with both Dr. Wu and Dr. Wood on August 24, 2007, but did not recall whether he ever viewed the PET scan images. (*See* October 7, 2013 transcript, pp. 113-14). During the preparation for the penalty phase, Mr. Fraser became aware that there was some disagreement as to the use of a PET scan in a forensic setting, and was concerned that the State's expert, Helen Mayburg, would be more credible than Dr. Wood and Dr. Wu. (*See* October 7, 2013 transcript, pp. 130, 137). Additionally, Ms. Maloney advised him that she had recently worked on another death penalty case where Dr. Wu appeared as an expert, and the jury had a difficult time understanding him; Mr. Fraser testified that he too had a difficult time understanding Dr. Wu, and Dr. Wood spoke so slowly that it was difficult to focus on what Dr. Wood was saying. (*See* October 7, 2013 transcript, pp.131, 141). Mr. Fraser testified he therefore made a strategic decision not to present the PET scan evidence through Dr. Wu and Dr. Wood and instead present it through Dr. Maher. (*See* October 7, 2013 transcript, p. 131). A memo from Mr. Fraser to his file, dated August 27, 2007, memorialized Mr. Fraser's decision not introduce the PET scan images or the testimony of Dr. Wood and Dr. Wu, and it was entered as Defense Exhibit #31. (*See* Defense Exhibit #31).

A review of Dr. Mayburg's deposition, entered as State's Exhibit #3, reflects that she reviewed materials including, but not limited to, the PET scan images and depositions of Dr. Wu and Dr. Wood. Dr. Mayburg found Defendant's PET scan was normal, and she did not find any identifiable abnormalities or "any finding that goes with any known psychiatric disorder." (*See*

State's Exhibit #3, pp. 7-10). She further testified that the generally accepted use for a PET scan is very limited and should not be used for diagnosis of psychiatric or psychological disorders or forensic purposes. (*See* State's Exhibit #3, pp. 10, 14-15).

Toni Maloney, a private investigator and capital case consultant, testified that she was retained for the mitigation investigation in this case. (*See* October 8, 2013 transcript, pp. 221-22). There were a couple of meetings with both Mr. Fraser and Mr. Terrana and she also had numerous meetings with Mr. Fraser and another investigator, Richard Bracewell. (*See* October 8, 2013 transcript, p. 223). She had a lot of the discovery, depositions, and police reports, and she spoke with Sherry, Crystal, Garett, Melissa, Gloria Milliner, the Lipmans, the Hardens, Steve Alvord, Pastor Jackson, Reverend Hess, Judy Sullivan, and Tom Rabeau. (*See* October 8, 2013 transcript, pp. 224-25). She noted that she is "not the best at documenting everything I do." (*See* October 8, 2013 transcript, p. 225). Ms. Maloney did not speak with Eddie Brant, who passed away shortly after she was retained, and she did not interview his widow or go out of state to interview any of Eddie's family members. (*See* October 8, 2013 transcript, p. 231).

Ms. Maloney acknowledged that she was asked to locate a prison risk and adjustment expert; she recalled speaking with James Aiken, but their conversation was not reflected in her file and she does not know why Mr. Aiken was not contacted or retained. (*See* October 8, 2013 transcript, pp. 232-33).

She recalled the failed jury selection and that she advised Mr. Fraser the panel needed to be stricken. (*See* October 8, 2013 transcript, pp. 233-34). She was aware of Defendant's depression and that he was taking medication for it. (*See* October 8, 2013 transcript, p. 234). After the attempted jury selection, Ms. Maloney was not asked to visit Defendant at the jail, and

was not a part of and did not have a clear memory of the after-court meeting between Defendant, Mr. Terrana and Mr. Fraser. (*See* October 8, 2013 transcript, pp. 234-35).

Around the same time as the instant case, Ms. Maloney worked on another death penalty case where the defense had retained and presented Dr. Wu, Dr. Wood and the PET scan evidence. (*See* October 8, 2013 transcript, pp. 235-36). She advised Mr. Fraser that she and the defense team in that case felt the jury was not receptive to Dr. Wu and the PET scan evidence; the jury appeared to have difficulty understanding him because of his accent and the content of his testimony. (*See* October 8, 2013 transcript, pp. 236-37).

Mr. Fraser asked her to contact Dr. Kadehjian and Dr. Piasecki, experts in methamphetamine, and did not ask her to contact any additional methamphetamine experts. (*See* October 8, 2013 transcript, pp. 238, 240). She spoke with Dr. Kadehjian, who declined to participate in this case because he did not do forensic work; she also contacted Dr. Piasecki but does not know why Dr. Piasecki was not retained in this case. (*See* October 8, 2013 transcript, pp. 238-42).

Ms. Maloney did not obtain records of Marvin's divorce from his first wife or Defendant's Tampa General Hospital records regarding Defendant's elevator accident and resulting head injury. (*See* October 8, 2013 transcript, p. 240).

Richard Bracewell, a self-employed private investigator, testified that he was retained as a defense investigator for the penalty phase team. (*See* October 8, 2013 transcript, pp. 148-49). He did not have any specific training in conducting penalty phase mitigation investigation. (*See* October 8, 2013 transcript, p. 149). He did not recall who he spoke with in this case. (*See* October 8, 2013 transcript, p. 150). He did not recall anything regarding Defendant's biological father except perhaps that Defendant's biological father had passed away, and he did not recall

speaking to anyone from Defendant's biological father's family in West Virginia or Ohio. (*See* October 8, 2013 transcript, p. 150). He also thought that Defendant's memory was "fogged" and, although he did not recall saying it, conceded that he may have expressed that Defendant had perhaps burned too many brain cells. (*See* October 8, 2013 transcript, p. 150). He did not have any training in identifying experts that would be helpful in a capital case or jury selection in a capital case, but he did sit in and assist with jury selection in this case. (*See* October 8, 2013 transcript, pp. 151-52). His invoice would have but did not reflect that he visited the jail after jury selection in this case. (*See* October 8, 2013 transcript, pp. 152-53).

Richard Walker testified that he worked for Bracewell Investigations from 2004 to 2005 and was asked to do review Mr. Fraser's file and look for potential mitigation in sentencing. (*See* October 8, 2013 transcript, pp. 160-61). He worked on Defendant's case from approximately December 2004 to July 2005. (*See* October 8, 2013 transcript, p. 166). Mr. Walker did not have any specific training or expertise in capital mitigation. (*See* October 8, 2013 transcript, p. 161).

Sherry Brant Coleman, Defendant's maternal half-sister, testified that she is 3 years older than Defendant, and her biological parents are Crystal Coleman and Eddie Brant. (*See* October 15, 2013 transcript, pp. 963-64). Sherry lived with her father for a short time until Crystal took her from Eddie under false pretenses and obtained legal custody of Sherry. (*See* October 15, 2013 transcript, pp. 965-69). Sherry was 8 years old when Crystal married Marvin, who cut off any further relationship between Sherry and Eddie Brant. (*See* October 15, 2013 transcript, pp. 971-72). She described Marvin as having "more than one personality," controlling, and verbally abusive to Crystal and Defendant. (*See* October 15, 2013 transcript, pp. 973-74). Defendant was also physically abused by the Colemans. (*See* October 15, 2013

transcript, p. 974). Sherry recalled an incident that occurred when they lived in Baltimore, where Marvin was drunk and pushed Crystal into a refrigerator, and Sherry and Defendant escaped the house through a window and Sherry called 911; Marvin was arrested. (*See* October 15, 2013 transcript, pp. 974-75). Sherry recalled a lot of fighting and yelling between Crystal and Marvin, but no other physical incidents. (*See* October 15, 2013 transcript, pp. 975-76). Marvin treated Defendant differently and he bore the brunt of Marvin's verbal and physical abuse. (*See* October 15, 2013 transcript, pp. 977-78). Defendant was bullied and beat up in school, and then Marvin would bully him at home. (*See* October 15, 2013 transcript, p. 978). Sherry testified that she was molested by Marvin, sometimes while Defendant was in the house, and there were incidents where Marvin would attack her by surprise. (*See* October 15, 2013 transcript, pp. 979-87). She finally told a family member and her grandmother about the sexual abuse, and Marvin stopped after he was confronted. (*See* October 15, 2013 transcript, pp. 987-89). Crystal told Sherry that she never left Marvin because he threatened to kill her and their family if she did. (*See* October 15, 2013 transcript, pp. 990-92). Sherry also testified that Defendant was a fun and gentle father to his sons. (*See* October 15, 2013 transcript, p. 994). Sherry was not aware of Defendant's drug problems prior to his arrest, but noticed that when she saw him in July 2004, he looked completely different from the previous time she saw him in Thanksgiving 2003; in July 2004, he was extremely thin, exhausted, had short dark hair and had been crying. (*See* October 15, 2013 transcript, p. 996). Sherry testified that she was aware of Garett's drug problems and, prior to Defendant's arrest in July 2004, Crystal told her that Garett was involved as a confidential informant. (*See* October 15, 2013 transcript, pp. 994-97). Sherry described the time that Defendant spent at their mother's house just before his arrest in this case; Crystal and Marvin, Sherry, Defendant, and Garett cried and prayed together, then Defendant, Garett and Sherry

attempted to surrender Defendant to law enforcement. (*See* October 15, 2013 transcript, pp. 998-1001). Although Sherry twice gave sworn statements to the State, in August 2004 and July 2006, she did not meet with defense counsel until about a week before the penalty phase when she met with Mr. Fraser and again a few minutes before she took the stand. (*See* October 15, 2013 transcript, pp. 1002-7). In the Fall 2012, postconviction counsel contacted her to take a DNA test and she provided a DNA sample in December 2012. (*See* October 15, 2013 transcript, pp. 1008-9). After receiving the results, she told Crystal, who was upset about the DNA testing and insisted that Eddie Brant was Defendant's father and the results were incorrect. (*See* October 15, 2013 transcript, pp. 1009-10, 1017). Several days later, Crystal told Sherry she had been raped and the rapist was Defendant's father. (*See* October 15, 2013 transcript, p. 1010). Sherry recalled that Defendant had once tried to contact Eddie, but he didn't really want anything to do with Defendant. (*See* October 15, 2013 transcript, pp. 1011, 1017. Sherry testified that she would have taken a DNA test if trial counsel had requested one. (*See* October 15, 2013 transcript, p. 1012).

On cross-examination, Sherry testified that she did not know if Defendant was present or witnessed any of Marvin's sexual abuse of her. (*See* October 15, 2013 transcript, pp. 1013-14). She recalled that Garett was travelling and working during Defendant's trial and wasn't exactly sure why he did not appear and testify. (*See* October 15, 2013 transcript, p. 1015). Defendant had a loving relationship with his grandmother, Delphia. (*See* October 15, 2013 transcript, p. 1015).

Crystal Coleman, Defendant's mother, testified that she initially retained Jerry Luxenburg, in this case and he gave her an article regarding crystal methamphetamine, which she in turn gave to Mr. Terrana. (*See* October 15, 2013 transcript, pp. 1021-22). After receiving a

subpoena from the State, Crystal said she tried to contact Mr. Terrana about the subpoena but was advised that he only spoke to clients and not family members (*See* October 15, 2013 transcript, p. 1023).

Crystal testified that she is the daughter of Delphia Cooper and Lawrence Crane. (*See* October 15, 2013 transcript, pp. 1023-24). Both Delphia and Lawrence drank alcohol almost every night or drank rubbing alcohol or aftershave if alcohol was not available. (*See* October 15, 2013 transcript, pp. 1005, 1024-25). Lawrence would disappear for weeks or months at a time, but when he was home he was drinking and beating Delphia. (*See* October 15, 2013 transcript, p. 1025). Crystal also recounted a time when Lawrence was drinking, shot her pet cat and buried it alive in front of her. (*See* October 15, 2013 transcript, p. 1026). The family moved around "all the time" until her paternal grandparents died and Lawrence inherited their property. (*See* October 15, 2013 transcript, pp. 1027, 1034-35). Crystal recalled that she was sleeping with her grandmother when she woke up one morning only to realize that her grandmother had passed away during the night. (*See* October 15, 2013 transcript, p. 1034). Crystal was about 9 years old when her grandparents passed away. (*See* October 15, 2013 transcript, p. 1032).

Neither Lawrence nor Delphia was home very much, and Crystal and her brother, Jerry, would have to eat raw vegetables they picked from the garden or fruit from trees. (*See* October 15, 2013 transcript, p. 1028). Crystal testified that Delphia became crippled when Lawrence, who had been drinking and was driving the family to Delphia's father's funeral, got into a car accident and Delphia broke her hip. (*See* October 15, 2013 transcript, p. 1028). Although Delphia was taken to the hospital, Lawrence took her out of the hospital before she could be treated for her broken hip. (*See* October 15, 2013 transcript, p. 1029-30). Consequently, Delphia could not walk and laid in bed or had to drag herself around. (*See* October 15, 2013

transcript, pp. 1030-31). Lawrence would leave for weeks at a time with no one taking care of Delphia, Crystal and Jerry, and Crystal and Jerry were not getting baths and were going to school dirty and hungry. (*See* October 15, 2013 transcript, p. 1031). At one point, some paternal relatives noticed their living conditions and took Crystal and Jerry to live with them because Delphia couldn't take care of them and Lawrence wouldn't. (*See* October 15, 2013 transcript, pp. 1036-37). Crystal and Jerry went to live with Aunt Hazel and it was the first time she was ever taken to the doctor or dentist. (*See* October 15, 2013 transcript, pp. 1037-38). Crystal felt Aunt Hazel loved Jerry more than her, and testified that she was never told she was loved during her childhood. (*See* October 15, 2013 transcript, pp. 1038-39). At one point while she was living with Aunt Hazel, Lawrence was drunk and tried to kill Delphia, who was still crippled and couldn't walk, by laying her out on the railroad tracks. (*See* October 15, 2013 transcript, pp. 1039-40). Aunt Hazel later helped Delphia get into a hospital and treated for her broken hip, and Crystal and Jerry were reunited with Delphia. (*See* October 15, 2013 transcript, p. 1040). For several years they moved around a lot, Lawrence was in and out of their lives, and at one point Delphia had him arrested after he beat her and Jerry. (*See* October 15, 2013 transcript, pp. 1041-47). Delphia eventually stopped drinking but started again, and was severely depressed and on medications. (*See* October 15, 2013 transcript, pp. 1079-81).

Crystal met Eddie Brant in school and, after graduation, she realized she was pregnant with Sherry; they later married out of a sense of responsibility. (*See* October 15, 2013 transcript, pp. 1048-51). She and Eddie eventually moved to Akron and lived in a duplex, where their neighbor subsequently raped Crystal. (*See* October 15, 2013 transcript, pp. 1055-57). She did not call the police or tell Eddie because she was ashamed and afraid nobody would believe her. (*See* October 15, 2013 transcript, p. 1057). She and Eddie did not have much of a relationship,

and he was always working and did not talk very much. (*See* October 15, 2013 transcript, p. 1059). She later realized she was pregnant with Defendant and was very sad and upset during the pregnancy; she quadrupled her smoking, started drinking coffee, cried all the time and wouldn't go outside. (*See* October 15, 2013 transcript, p. 1059). She eventually told her Aunt Jenny about the rape, and Aunt Jenny then told Eddie. (*See* October 15, 2013 transcript, p. 1060). Eddie asked if the child could be his, but Crystal did not think so because they used condoms; they never discussed it again. (*See* October 15, 2013 transcript, pp. 1061-62). When Defendant was born, Crystal could not bond with him and testified that she "felt nothing" except perhaps a sense of responsibility. (*See* October 15, 2013 transcript, p. 1062). About 8 weeks after Defendant's birth, Crystal had a nervous breakdown and went to a mental hospital where she received shock treatments. (*See* October 15, 2013 transcript, pp. 1063). While Crystal was hospitalized, Eddie and Aunt Jenny kept and took care of Sherry while Defendant was cared for by Eddie's parents. (*See* October 15, 2013 transcript, p. 1063). Crystal favored Sherry and Garett but found it difficult to love and bond with Defendant. (*See* October 15, 2013 transcript, pp. 1064-65). She essentially only felt responsible for providing housing and clothing, and sometimes, but not always, protected him from Marvin. (*See* October 15, 2013 transcript, pp. 1065-66).

Crystal testified that Marvin would come home drunk, accuse her of being unfaithful and held knives to her throat or do other things to try to "break" her so she would admit that she had done something wrong. (*See* October 15, 2013 transcript, pp. 1065-67). These episodes always ended in unwanted sex, but Crystal never refused him because she was afraid of him; Marvin had threatened many times to kill her and the children if she tried to leave him. (*See* October 15, 2013 transcript, p. 1067). Crystal recalled that she called the police after Marvin attacked her in

her kitchen, and also when he attacked her in Baltimore. (*See* October 15, 2013 transcript, pp. 1072-73).

Crystal explained that she testified in the penalty phase that Eddie Brant was Defendant's father because she did not want to admit the truth and didn't want Defendant or anyone to know the truth. (*See* October 15, 2013 transcript, p. 1068). She testified that she spoke with Mr. Terrana once about Defendant's case but he did not seem too interested to hear about her history. (*See* October 15, 2013 transcript, pp. 1069-70). She wrote a letter to Mr. Terrana in August 2005, and told him about her nervous breakdown, that Defendant had never bonded with anyone, and attached the article Mr. Luxenburg gave her about crystal methamphetamine; the letter was entered as Defense Exhibit# 21. (*See* October 15, 2013 transcript, pp. 1070-72). Crystal testified that she met with Mr. Fraser once for about 30 minutes, and he requested photos of Defendant but they did not talk about her life at all. (*See* October 15, 2013 transcript, p. 1074). She and Sherry met with Mr. Fraser a second time, and although he did not ask her about the photos again, Crystal testified that she only had 6 photos of Defendant while she had hundreds of Garett and Sherry. (*See* October 15, 2013 transcript, pp. 1074-75). Crystal also recalled several brief phone conversations with Toni Maloney but they were never about Crystal's life. She was not able to get ahold of Mr. Terrana and he would never call her back. (*See* October 15, 2013 transcript, p. 1076). Crystal stated that when she first met with postconviction counsel a few years ago, she still maintained that Eddie was Defendant's father, but after postconviction counsel confronted her with information from other family members and DNA test results, she agreed to submit a sample for DNA testing. (*See* October 15, 2013 transcript, pp. 1077-78). Crystal was upset with the postconviction investigator, Polly Mailhot, because Crystal didn't want anyone to know about her life and background. (*See* October 15, 2013 transcript, p. 178).

Prior to submitting the sample on January 29, 2013, she finally told counsel about Defendant's biological father. (*See* October 15, 2013 transcript, p. 1078). Crystal testified that if trial counsel had confronted her with the same information, she would have told them the truth. (*See* October 15, 2013 transcript, p. 1078).

Jerry Lee Crane, Crystal's older brother, testified he was a year older than Crystal, they were born in West Virginia, and their parents were Larry (Lawrence) and Delphia Crane. (*See* October 14, 2013 transcript, p. 721). The family was poor, lived in cheap housing, and moved around a lot, including 12 times when Jerry was in the 5th grade, because Lawrence drank a lot and wouldn't pay the rent. (*See* October 14, 2013 transcript, p. 722). Lawrence drank daily and drank anything with alcohol, even rubbing alcohol or shaving lotion, and Jerry spent a lot of his childhood in the bars with him; Delphia drank like Lawrence and was even hospitalized a couple of times after basically drinking herself into a coma. (*See* October 14, 2013 transcript, pp. 728-29). Lawrence's father also had an alcohol problem which became evident when Lawrence inherited his father's business and Jerry and Lawrence discovered hundreds of vodka bottles stuffed inside a hole in the wall of the building and scattered in the weeds of the property; Jerry did not get along with his grandfather, who he recalled chased him to hit or whip him. (*See* October 14, 2013 transcript, pp. 723-24). Lawrence's mother died the same day as his father, but she passed away in her sleep while Crystal was lying next to her. (*See* October 14, 2013 transcript, pp. 724-25. Neither Lawrence nor Delphia had time for their kids, and when Jerry or Crystal got hungry, their parents would give them money for a candy bar and a soda. (*See* October 14, 2013 transcript, pp. 729-30). Although Lawrence inherited his father's business, building and about $18,000, he ultimately lost everything due to his and Delphia's drinking. (*See* October 14, 2013 transcript, pp. 730-32).

When Jerry was 7 or 8 years old, Lawrence, who had been drinking, drove the family to the funeral for Delphia's father, and got into a car accident. (*See* October 14, 2013 transcript, pp. 726-27). Delphia broke her hip and was crippled as a result, and unable to walk well or get around for many years. (*See* October 14, 2013 transcript, pp. 727, 733, 738-39). Lawrence physically abused Delphia and they would get into violent physical arguments when drinking. (*See* October 14, 2013 transcript, pp. 732-33). Around the age of 11 or 12 years old, Lawrence left Jerry and Crystal with a relative, Aunt Hazel, who took very good care of them for a couple of years. (*See* October 14, 2013 transcript, pp. 734-36). At some point while Lawrence was incarcerated, Aunt Hazel helped Delphia divorce him, get on welfare, receive medical attention for her hip, and eventually find work. (*See* October 14, 2013 transcript, pp. 736-38).

Jerry knew Eddie Brant and described him as very quiet, laid back, gentle and kind, and "dumber than Hogan's Goat." (*See* October 14, 2013 transcript, p. 741). Although he's not exactly sure when, Jerry believes that after he got out of the military (around the age of 24), Aunt Jenny told him that Eddie was not Defendant's father. (*See* October 14, 2013 transcript, p. 743). Jerry only met Defendant once when Defendant was about 5 years old. (*See* October 14, 2013 transcript, pp. 744-45). Jerry did not find out about Defendant's arrest until several years later. (*See* October 14, 2013 transcript, p. 746). Nobody from the defense team contacted him. (*See* October 14, 2013 transcript, p. 747).

Sue Ann Berry testified that she knew Crystal and Eddie in high school. (*See* October 14, 2013 transcript, pp. 750, 752-53). Crystal did not tell her the identity of Defendant's father. (*See* October 14, 2013 transcript, p. 758). Crystal told Ms. Berry about Defendant's conviction and sentence after the fact and said it was important that she not tell anyone in West Virginia.

(*See* October 14, 2013 transcript, p. 758). Nobody from the defense team contacted her. (*See* October 14, 2013 transcript, p. 759).

Annice Crookshanks testified she is Eddie Brant's half-sister. (*See* October 14, 2013 transcript, p. 761). She recalled that when she was in her early teens Eddie called their mother and asked her to pick up Defendant; she later learned it was because Crystal was hospitalized in a mental institution for postpartum depression after Defendant's birth. (*See* October 14, 2013 transcript, pp. 770-71). Years later, maybe around the age of 17, she also learned that Eddie Brant was not Defendant's father but never found out who his father was. (*See* October 14, 2013 transcript, p. 772). Ms. Crookshanks stated that everyone knew Eddie was not Defendant's father but no one talked about it and testified that in her family, "things happened, you just didn't talk about them." (*See* October 14, 2013 transcript, p. 772). She never spoke to Eddie about Defendant not being his child. (*See* October 14, 2013 transcript, p. 772). Other than when Defendant was a baby, Annice did not have any contact with Defendant and she had no further contact with Crystal after she and Eddie divorced. (*See* October 14, 2013 transcript, pp. 772-74). She first learned of Defendant's conviction in 2012, and was never contacted by defense counsel. (*See* October 14, 2013 transcript, p. 775-76).

Fred Coleman, Marvin's older brother, testified that he lived in Cocoa, Florida for about 15 years, and would visit with Marvin and his family in Orlando every few months. (*See* October 14, 2013 transcript, pp. 777, 779-80). He testified that Marvin's family was not loving or tight-knit, and the kids were also always outside doing chores or with friends. (*See* October 14, 2013 transcript, pp. 780-81). Defendant appeared to be a quiet and reserved, meek boy and Fred was shocked when he learned of the charges. (*See* October 14, 2013 transcript, pp. 781, 783). He rarely saw Marvin and Defendant together, but they appeared to only tolerate each

other; he witnessed Marvin verbally abusing Defendant. (*See* October 14, 2013 transcript, pp. 781-82, 786). He was not close to Marvin, and knew that Marvin drank "some" and had seen Marvin smoke marijuana. (*See* October 14, 2013 transcript, pp. 785, 787-88). After Marvin's funeral, Crystal approached Fred and started to tell him that Marvin had sexually abused Sherry, but she was cut off by another of his brothers and they never spoke of it. (*See* October 14, 2013 transcript, pp. 782-7-84).

Bryan Coggins, testified that when he 16 or 17 years old, he met Defendant through a friend and Defendant became like a father figure to him. (*See* October 14, 2013 transcript, pp. 790- 91). They worked together, he spent time with Defendant's wife and children, and Defendant taught him how to surf and gave him his first surfboard. (*See* October 14, 2013 transcript, pp. 791). Defendant was a very loving father with his sons. (*See* October 14, 2013 transcript, pp. 792). Although Mr. Coggins and Defendant used drugs together, including crystal meth and ecstasy, Mr. Coggins stopped spending time with Defendant due to Defendant's excessive drug use. (*See* October 14, 2013 transcript, pp. 794, 796). Defendant was using a few grams of crystal meth on a daily basis. (*See* October 14, 2013 transcript, pp. 794-95). Shortly before the instant offenses, there was a time when Defendant "got a little wild, crazy" toward him. (*See* October 14, 2013 transcript, pp. 796-97). After Defendant was arrested, Mr. Coggins saw Defendant again at the jail where they were both inmates, and Defendant was crying, emotional and remorseful. (*See* October 14, 2013 transcript, pp. 799-800). Defendant later wrote him a supportive letter telling Mr. Coggins that he thought of him as a son and wanted him to stay on the right path. (*See* October 14, 2013 transcript, pp. 800-1). No one from the defense team contacted Mr. Coggins. (*See* October 14, 2013 transcript, p. 801).

Mary Kay Brant, Eddie Brant's widow, testified that they were married for 33 years and he died on March 18, 2005. (*See* October 14, 2013 transcript, p. 807). Before they were married, Eddie told her he was not Defendant's father and that his father may have been the man who lived next door to him and Crystal. (*See* October 14, 2013 transcript, pp. 817-18). Eddie also told her that after Defendant was born, Crystal had a nervous breakdown and went to Fallsview Mental Hospital. (*See* October 14, 2013 transcript, p. 815). It was during that time Jenny McCutcheon (Aunt Jenny) told Eddie that he was not Defendant's father, and Eddie both did not want to and could not take care of Defendant. (*See* October 14, 2013 transcript, pp. 818-19). While Crystal was hospitalized, Eddie and Aunt Jenny cared for Sherry, while Eddie called his mother to take Defendant. (*See* October 14, 2013 transcript, pp. 816-17, 819). After that, Eddie did not have very much contact with Defendant. (*See* October 14, 2013 transcript, pp. 823-24). Eddie never told Defendant or Sherry that he was not Defendant's father, and he thought Crystal should be the one to tell them. (*See* October 14, 2013 transcript, p. 824). Mrs. Brant did not find out Defendant was arrested until she was contacted by a CCRC investigator in June 2011 and, during a telephone conversation on August 3, 2011, she explained that Eddie was not Defendant's biological father. (*See* October 14, 2013 transcript, pp. 826-27; Defense Exhibit #35). Nobody from Defendant's trial team contacted her and she would have given them the same information. (*See* October 14, 2013 transcript, p. 827). Mrs. Brant has never met or spoken with Defendant. (*See* October 14, 2013 transcript, p. 829).

Gloria Milliner, a friend of Crystal's, testified that she was aware of the distance between Defendant and Crystal because Crystal would constantly comment on it. (*See* October 15, 2013 transcript, p. 836). Crystal told Mrs. Milliner that after Defendant was born she did not like him and he did not like her; she said he would cry all the time and kick her when she

changed his diapers. (*See* October 15, 2013 transcript, p. 836). Crystal told her she wasn't close to Defendant, didn't like him to be around and wished that she had never had him; Mrs. Milliner just thought that Crystal was partial to Garett. (*See* October 15, 2013 transcript, p. 837). Mrs. Milliner has known Crystal since 1988 when they worked together and they became best friends. (*See* October 15, 2013 transcript, p. 839). At time the time of her testimony during the penalty phase in 2007 Mrs. Milliner had been told by Crystal that Defendant's father was Eddie Brant, but about 3 weeks before her instant testimony, Crystal told her that Defendant was conceived when she was raped. (*See* October 15, 2013 transcript, pp. 838, 840).

Mrs. Milliner testified that she spoke to defense investigator Toni Maloney once by telephone phone for 10-15 minutes, but did not speak with Defendant's trial counsel. (*See* October 15, 2013 transcript, pp. 843-44). She described in more detail than she did at the penalty phase an incident when she saw Marvin slap Garett, who was an adult at the time, and when Marvin kicked Defendant, his wife and their infant son out of his home. (*See* October 15, 2013 transcript, pp. 845-848, 853). Mrs. Milliner did not witness any other abuse by Marvin to any members of the family, but was aware that he beat Crystal and mistreated Defendant. (*See* October 15, 2013 transcript, pp. 854, 858). Mrs. Milliner further testified that Crystal told her about her own family growing up; Crystal's parents never hugged her or told her they loved her, Crystal's father was an alcoholic and her mother was crippled; Crystal and her brother basically had to fend for themselves and they were very poor. (*See* October 15, 2013 transcript, pp. 849-50).

Nita Mezaros testified that she was married to Marvin from 1964-1969 and they had 2 children together. (*See* October 15, 2013 transcript, pp. 859, 866-67, 872). Marvin's parents both drank alcohol, and Marvin also started drinking heavily while he was in the military and

after his hand was damaged in a coal mining accident. (*See* October 15, 2013 transcript, pp. 861-62). After the accident Marvin became "insanely" jealous and accused her of cheating; he would also beat her. (*See* October 15, 2013 transcript, pp. 863-65, 867, 869). She recalled that at one point after they were separated and before they divorced, Marvin was in a mental institution and the psychiatrist told her that Marvin had "all kinds of mental problems." (*See* October 15, 2013 transcript, p. 870). After the divorce Marvin told her if he couldn't have the children all of the time, he didn't want them at all, and stopped seeing them. (*See* October 15, 2013 transcript, p. 872). When their son, Danny, was older, he visited Marvin, who made offensive comments to him; Danny also told her Marvin was still drinking heavily. (*See* October 15, 2013 transcript, p. 874). Their daughter also visited Marvin, and she told Ms. Mezaros that she saw Marvin beat Crystal and be verbally abusive to Defendant. (*See* October 15, 2013 transcript, pp. 874-76).

Dawn Arbogast Masters, the daughter of Nita Mezaros and Marvin, testified that she did not know Marvin was her father until she about 8 years old and finally met him when she was 15 years old. (*See* October 15, 2013 transcript, pp. 884, 888). Ms. Masters testified that during her first visit with Marvin, he offered her marijuana and she smoked with him. (*See* October 15, 2013 transcript, pp. 891-92). During the visit, she became very sick with mono, and Marvin offered her marijuana but did not take her to the hospital. After she ate some soup and put the bowl in the sink, she witnessed Marvin become irrationally upset over the bowl in the sink and physically assault Crystal. (*See* October 15, 2013 transcript, pp. 894-95). Although Ms. Masters had no contact with Defendant except for the time she met him during her visit with Marvin, she began to correspond with Defendant after his arrest and has since developed a close relationship with him. (*See* October 15, 2013 transcript, pp. 904-6). Nobody from Defendant's defense team ever contacted her. (*See* October 15, 2013 transcript, p. 905).

David Kaczynski, the brother of Theodore Kaczynski (aka the Unabomber), testified about his experience in having turned his brother in to law enforcement, working with the defense team regarding mitigation, and his experiences working to abolish the death penalty as well as with other family members who cooperate with law enforcement. (*See* October 15, 2013 transcript, pp. 908-30). One of the mitigation arguments that his brother's defense team wanted to present in mitigation was that a death sentence essentially punishes the families of people who cooperate with law enforcement, i.e., imposition of a death sentence could have a chilling on family members who might otherwise work with law enforcement. (*See* October 15, 2013 transcript, p. 917, 928).

Robert Coleman, Marvin's nephew, testified that he visited the family often around 1979-1980, when Defendant was around 14 years old. (*See* October 15, 2013 transcript, pp. 933-34, 937). He visited with Crystal's mother, Delphia, who was crippled and had an alcohol problem. (*See* October 15, 2013 transcript, p. 935-36). Robert saw Marvin drink a lot and smoke marijuana, and saw Marvin punch Defendant hard on the arm once. (*See* October 15, 2013 transcript, pp. 937-38). He always saw Defendant doing chores, i.e., cleaning the pool and yard work, noticed that neither Marvin nor Crystal spent much time with their kids, and the family did not appear that close. (*See* October 15, 2013 transcript, pp. 939-40). Although Robert had no contact with Defendant from 1983 to 2004, he now regularly corresponds with Defendant. (*See* October 15, 2013 transcript, pp. 941-42). He was not contacted by anyone on Defendant's defense team. (*See* October 15, 2013 transcript, p. 942).

Carol Coleman, Marvin's sister-in-law, testified that she was married to Marvin's older brother, Fred, and she is very close with Crystal. (*See* October 15, 2013 transcript, p. 946). Crystal told her that Marvin was mean, drank a lot and beat her. (*See* October 15, 2013

transcript, p. 950). She testified that Marvin was mean to Defendant but not the other children, and Marvin always had Defendant clean the boat, the car or the pool or mow the lawn. (*See* October 15, 2013 transcript, p. 950). She testified that neither Marvin nor Crystal spent a lot of time with the kids. (*See* October 15, 2013 transcript, p. 951). Carol recalled that Marvin would be out drinking and, a couple of times, she and Crystal would go out at night looking for him at the bars. (*See* October 15, 2013 transcript, pp. 952-53). Carol had very little contact with Defendant after he left home around the age of 18. (*See* October 15, 2013 transcript, p. 957). She was not contacted by anyone on Defendant's defense team. (*See* October 15, 2013 transcript, p. 954).

Darlene Sloan, Defendant's childhood neighbor, testified by video. (*See* October 16, 2013 transcript, p. 1100). All the neighborhood kids, including Defendant, ended up playing at Ms. Sloan's home so she knew Defendant in his elementary school years. (*See* October 16, 2013 transcript, p. 111). She was a teacher's aide at Hiawassee Elementary where she worked in the learning lab which was geared towards students who were behind in school; Defendant participated in this learning lab. (*See* October 16, 2013 transcript, pp. 1104-5). Defendant did what was expected of him and did not mind going there to improve his skills. (*See* October 16, 2013 transcript, p. 1106). Around 1999, Defendant visited Ms. Sloan and her husband and told them about them about his problems with drugs; they tried to be encouraging. (*See* October 16, 2013 transcript, pp. 1106-7). Nobody from Defendant's trial defense team contacted her. (*See* October 16, 2013 transcript, p. 1110).

Charles Crites testified that he and Defendant developed a friendship after meeting in an archery range around 1994. (*See* October 16, 2013 transcript, p. 1123. They became bow-hunting buddies and went bow hunting together several times over the years. (*See* October 16,

2013 transcript, p. 1123). During one of the hunting trips he noticed that Defendant was smoking marijuana and Defendant told him he had problems with drugs in the past. (*See* October 16, 2013 transcript, p. 1124). At some point before Defendant's arrest, he noticed that Defendant had started to sell a lot of his hunting gear and was looking gaunt. (*See* October 16, 2013 transcript, p. 1126). Defendant had told him that he had started using a drug that made him feel good and enhanced his sex life. (*See* October 16, 2013 transcript, p. 1126). A couple of weeks before Defendant's arrest, Mr. Crites saw Defendant laying tile flooring in a house, and Defendant appeared tired and gaunt. (*See* October 16, 2013 transcript, pp. 1129, 1132). Defendant told him he had been working day and night. (*See* October 16, 2013 transcript, p. 1129).

Meredith Carsella testified that she knew Defendant in high school and met him in the chess club. (*See* October 16, 2013 transcript, p. 1135). She didn't know him very well and he was very quiet, reserved and didn't volunteer much information. (*See* October 16, 2013 transcript, pp. 1135-38, 1140). Nobody from the defense team contacted her. (*See* October 16, 2013 transcript, p. 1140).

The Court adopts the summary of the postconviction testimony of **Terence Lenamon, Esquire**, set forth in ground 1A above. Additionally, Mr. Lenamon testified that prevailing norms reflect that, in addition to attorneys, a defense team should have a mitigation specialist and primary psychologist. (*See* October 8, 2013 transcript, pp. 270-71). A mitigation investigation should be multigenerational, starting even before a defendant's conception, to determine genetic predisposition to addiction and mental illness and to look at environmental factors; the investigation should look at both parents to get a complete picture. (*See* October 8, 2013 transcript, pp. 271-74). It's also important to conduct extensive family interviews and

collect records in order to find important information, provide that information to experts, and corroborate witness testimony. (*See* October 8, 2013 transcript, pp. 276-77). Prevailing norms indicate it is the attorney's responsibility to make sure all mitigation tasks are completed. (*See* October 8, 2013 transcript, p. 278).

Prevailing norms frown upon "generalists" (as opposed to specialized experts). (*See* October 8, 2013 transcript, p. 280). Attorneys should also set forth a persuasive narrative, and not a disjointed presentation. (*See* October 8, 2013 transcript, pp. 281). Mr. Lenamon further testified that ABA guidelines reflect that *Skipper* evidence should be presented because jurors consider future dangerousness of a defendant. (*See* October 8, 2013 transcript, pp. 283-85). Prevailing norms highly recommend jury consultants. (*See* October 8, 2013 transcript, pp. 286-87). Prevailing norms also discourage advising a defendant to plead guilty and waive a penalty phase jury. (*See* October 8, 2013 transcript, p. 291). Prevailing norms reflect that brain damage is a weighty mitigator which should be presented to the fact-finder with visual proof. (*See* October 8, 2013 transcript, p. 294). On cross examination, Mr. Lenamon acknowledged that whether Defendant was still able to present the same mitigation whether he proceeded to the penalty phase before a jury or a judge. (*See* October 8, 2013 transcript, pp. 303-4).

Wayne Hoffman, the associate lab director and quality manager for Cellmark Forensics, testified as an expert in DNA and relationship testing. (*See* October 16, 2013 transcript, pp. 1151-52, 1158). He was retained by postconviction counsel, who requested sibling relationship testing of Defendant and Sherry. (*See* October 16, 2013 transcript, p. 1159). He received a sample of Sherry's DNA as well as Defendant's DNA profile which was as developed by FDLE. (*See* October 16, 2013 transcript, pp. 1161-62). A subsequent DNA sample from Crystal was also submitted. (*See* October 16, 2013 transcript, p. 1166). The DNA testing reflected the

"halfsibship" index in this case was 6.78, which means that "[i]t's 6.78 times more likely that they're half siblings compared to the hypothesis that they're full siblings." (*See* October 16, 2013 transcript, pp. 1172-73). He further testified that they were able to calculate a corresponding percentage which indicates an 87% probability favoring half siblingship. (*See* October 16, 2013 transcript, pp. 1173-74, 1178). When Crystal's DNA was added to the testing, the aforementioned calculations decreased to 1.48 and 60%, respectively. (*See* October 16, 2013 transcript, pp. 1179-81). Without the father's DNA, the results do not exclude the possibility that Defendant and Sherry are full siblings. (*See* October 16, 2013 transcript, pp. 1181-83). The DNA reports were submitted as Defense Exhibit #36 and #37.

James E. Aiken, a consultant on jail and prison matters, was tendered as an expert in prison operations and classification of an inmate's adaptability to a prison setting. (*See* October 11, 2013 transcript, pp. 665, 679-80). Mr. Aiken reviewed materials provided by postconviction counsel, including the sentencing order and jail records, and also interviewed Defendant as well as correctional staff from the Hillsborough County Jail. (*See* October 11, 2013 transcript, 680-81, 687). He noted that it was particularly compelling that Defendant was a trustee in the Hillsborough County Jail even though he was charged with murder and a sexual offense. (*See* October 11, 2013 transcript, pp. 692-94). Mr. Aiken opined that Defendant "can adjust very well 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." (*See* October 11, 2013 transcript, p. 695). Mr. Aiken further testified that the Florida Department of Corrections could safely incarcerate Defendant if he had been sentenced to life in prison. (*See* October 11, 2013 transcript, pp. 695-96).

Jan Bates, employed with HCSO as a bureau commander of the classification of records bureau, testified that she worked in inmate programs between 2004-2007. (*See* October 9, 2013 transcript, pp. 434-35). She testified that Defendant was made a close supervision trustee in his pod, and his duties included cleaning and meal service. (*See* October 9, 2013 transcript, pp. 438-39). He was a trustee at 2 different times; the first time his trustee status ended following a verbal altercation with another inmate, and then he was subsequently made a trustee again. (*See* October 9, 2013 transcript, pp. 439-40).

Deputy Esteban Rodriguez testified that he worked as a pod deputy at the Hillsborough County Jail between 2003 and 2005. (*See* October 10, 2013 transcript, p. 504). Deputy Esteban reviewed records which reflected that Defendant was a trustee in his pod but Deputy Esteban did not recall Defendant because he tends to remember problem inmates, and Defendant did not give him any problems. (*See* October 10, 2013 transcript, p. 506). The records also reflected Defendant was involved in a minor verbal incident. (*See* October 10, 2013 transcript, p. 507).

Sergeant John Leboeuf was a hearing officer who handled inmate disciplinary issues at the Orient Road Jail, and was a hearing officer for the incidents involving Defendant. (*See* October 10, 2013 transcript, pp. 520-21). Defendant was found not guilty of fighting but found guilty of the conduct involving the verbal altercation; he lost visitation and canteen privileges as well as his trustee status for 30 days. (*See* October 10, 2013 transcript, pp. 522-23). Because it was a minor incident, he was not surprised that Defendant again became a trustee. (*See* October 10, 2013 transcript, pp. 523).

Brian Ritchie testified that he worked as a trustee in the same pod with Defendant at the Hillsborough County Jail. As trustees, they cleaned the pod and its floors at night while other inmates slept, and made breakfast for and served it to the other inmates. (*See* October 8, 2013

transcript, pp. 310, 314-15). Defendant was a good worker and a compliant, passive inmate. (*See* October 10, 2013 transcript, p. 310). Defendant appeared very remorseful and cried when he spoke to his family on the phone. (*See* October 10, 2013 transcript, p. 312). He recalled that Defendant had a couple of visits with his attorneys at the jail, but did not recall an exact amount. (*See* October 10, 2013 transcript, p. 312).

Dr. Joseph Chong Sang Wu, M.D., testified as an expert in brain imaging technology, specifically MRI's and PET scans as related to neuropsychiatric disorders and brain dysfunction. (*See* October 10, 2013 transcript, pp. 528, 533). He was contacted about Defendant's case in January 2007 by Toni Maloney and Dr. Frank Wood. (*See* October 10, 2013 transcript, pp. 533-34). Dr. Wu's understanding of his role was to provide a second opinion regarding the abnormalities in Defendant's PET scan. (*See* October 10, 2013 transcript, p. 536). Dr. Wood sent him Defendant's PET scan images, which he reviewed. (*See* October 10, 2013 transcript, p. 536.) He also received some police reports, Defendant's confession, and prison records, as well as a PowerPoint from Dr. Wood which included a time line, but no other psychological, neurological or neuropsychological assessments. (*See* October 10, 2013 transcript, p. 537). Dr. Wood's PowerPoint presentation was entered as Defense Exhibit #24. Dr. Wu recalled that he was scheduled to testify in Defendant's penalty phase on a Monday or Tuesday, but was contacted the previous Saturday or Sunday and advised that he would not be testifying. (*See* October 10, 2013 transcript, p. 541). Dr. Wu provided a sample PowerPoint presentation just to demonstrate what he could prepare for Defendant's case, and it was entered as Defense Exhibit #23. (*See* October 10, 2013 transcript, pp. 543-44). In reviewing his billing records, it did not appear to Dr. Wu that he ever showed or discussed the PET scan with Mr. Fraser, although Dr. Wu may have done that with Dr. Wood, Ms. Maloney and Dr. McClain. (*See* October 10, 2013

transcript, pp. 545-46, 587, 603-4). Dr. Wu summarized the sample PowerPoint presentation and what he would have been able to explain to a jury, which included generally but was not limited to: his qualifications; a discussion of the PET scan and how it differs from an MRI (brain function v. brain structure); a discussion of how PET scans work and how they are administered plus accompanying slides; sample diseased or abnormal PET scan slides; how PET scans are used; the relationship between PET scans and neuropsychological testing; literature and studies that support the use of PET scans in conjunction with neuropsychological testing in diagnosing brain injuries and abnormalities; a discussion of how the temporal and frontal cortex and other areas of the brain work to regulate impulses such as aggression and sexual impulses and how damage to those areas affect the ability of individuals to properly regulate those impulses; a discussion of how damage to the frontal lobe area is associated with more violent behavior; how persons with frontal lobe damage have poor judgment and are more likely to do things that are inappropriate or go against societal norms; how other factors in addition to prefrontal cortex damage affect an individual's likelihood to act out in a manner in which he or she will end up in the legal system, i.e., developmental background, abuse or neglect. (*See* October 10, 2013 transcript, pp. 547-85). Dr. Wu explained that PET scan is a corroborative tool not a standalone diagnostic tool. (*See* October 10, 2013 transcript, p. 560). Dr. Wu also testified that he could have prepared a similar PowerPoint presentation specific to Defendant's case, but counsel did not ask him to do so. (*See* October 10, 2013 transcript, p. 581).

As to Defendant's January 2007 PET scan images, Dr. Wu testified that the scan was abnormal with abnormalities in the frontal lobe region, cingulate or midline, and other parts of the brain including the occipital cortex. (*See* October 10, 2013 transcript, p. 586). He explained that the anterior cingulate is part of the circuitry in the brain which helps regulate violent,

aggressive behavior; it is the part of the frontal lobe involved in regulating cognitive and emotional function. (*See* October 10, 2013 transcript, pp. 589-91). This area of the brain can be damaged by toxic exposure, including exposure to lead and methamphetamines. (*See* October 10, 2013 transcript, p. 591). Dr. Wu testified that the occipital lobe is involved in the processing of visual information. (*See* October 10, 2013 transcript, p. 592). Damage to this area of the brain can make it more difficult for an individual to understand what he is seeing which could affect his behavior or judgment. (*See* October 10, 2013 transcript, p. 592).

In the instant case, Dr. Wu testified that he was provided with very little information and was not provided any information by the defense team that would indicate Defendant may have had head injuries or been exposed to lead through ingesting plaster as a child or banging his head as a child. (*See* October 10, 2013 transcript, p. 595). All of those are potential reasons for the brain abnormalities in Defendant's scan. (*See* October 10, 2013 transcript, p. 596). He also stated that sleep deprivation is known to depress frontal lobe activity thereby affecting brain function, decision making and impulsivity. (*See* October 10, 2013 transcript, pp. 596-97, 607-8). Dr. Wu acknowledged that even if he had been provided with information about Defendant's head injury or ingestion of plaster, he may not have been able to pinpoint the exact cause of the brain abnormality. (*See* October 10, 2013 transcript, pp. 598-99). Even though Dr. Wu could testify about the areas of the brain affected by abnormalities, he could not specify how the impairment affected Defendant's behavior at the time of the offenses. (*See* October 10, 2013 transcript, pp. 600, 602). Even though Defendant may have an impaired ability to regulate his impulses, he could still have the ability to plan other goal making behavior. (*See* October 10, 2013 transcript, p. 601). He acknowledged there is some debate in the medical community regarding the use of PET scans in a forensic setting. (*See* October 10, 2013 transcript, p. 603).

He opined that given Defendant's brain abnormalities as seen on the PET scan, the circumstances of his methamphetamine use and sleep deprivation, Defendant's "capacity to have a normally functioning frontal lobe would have been profoundly impaired, and would have significantly impaired his ability to conform his behavior to a reasonable degree of medical probability." (*See* October 10, 2013 transcript, pp. 608-9).

Frank Wood, Ph.D., a clinical neuropsychologist and forensic psychologist testified as an expert in neuropsychology and brain imaging. (*See* October 17, 2013, pp. 1218, 1224). He was retained in January 2007 to conduct a PET scan of Defendant, and he set up the behavioral protocol in effect during the scan, observed it and checked the data, and ultimately interpreted the scans; he opined the scan was validly conducted. (*See* October 17, 2013, pp. 1225-26). Dr. Wood found "striking abnormalities of low sugar consumption" in the entire left hemisphere and the frontal lobes. (*See* October 17, 2013, pp. 1229, 1237-1242). Prior to trial, Dr. Wood prepared a PowerPoint presentation for his testimony; it was entered into the instant proceedings as Defense Exhibit 61.[5] (*See* October 17, 2013, pp. 1229-30). The presentation included a timeline of major indicators, but it did not include any reference to Defendant ingesting plaster with lead-based paint or banging his head as a child, his work-related head injury or the details regarding his methamphetamine use; Dr. Wood testified that he was not aware of any of those factors but if he had known, he would have included them in the timeline. (*See* October 17, 2013, pp. 1231-34). Dr. Wood further described the slides in the presentation, and detailed what those slides indicated. (*See* October 17, 2013, pp. 1234-42). He explained that information comes through the thalamus, is analyzed in the middle and back part of the hemisphere (language is specifically analyzed in the left hemisphere), and decisions are made and behaviors programmed in the frontal lobe; approached behaviors are programmed in the left hemisphere

[5] Defense Exhibit #61 is a clearer but duplicate version of Defense Exhibit #24.

while withdrawal behaviors are programmed in the right hemisphere. (*See* October 17, 2013, pp. 1236-37). Additionally, he explained that the occipital frontal cortex (the bottom of the frontal lobes) receives sensory input from all 5 senses at the same time, and it is the part of the brain where decision are evaluated, and most of the brain energy in this area is devoted to stopping certain behavior; he noted that both sides were underactive but the left half was extremely underactive, suggesting "true problems, true disability in behavioral impulse control." (*See* October 17, 2013, p. 1240). On the right hemisphere on the sides of the frontal lobes and the base, there was an acceptable level of activity which suggests that "a degree of impulse control may be possible," but the left side reflects "extremely little activity suggesting that - - that self control and impulse control and decision-making would be seriously limited and impaired." (*See* October 17, 2013, pp. 1240-41). He further testified once decisions are made in the orbital frontal cortex, they are executed in the dorsolateral cortex, where the scan again indicated hypometabolism in the left side. (*See* October 17, 2013, p. 1241).

Dr. Wood recalled there was a phone conference scheduled with Mr. Fraser to discuss the PET scan results in detail, but the call was cancelled for a reason not known to him. (*See* October 17, 2013, pp. 1242-43). He was prepared to testify at trial in this case and had a plane ticket, but was subsequently notified that he would not be testifying. (*See* October 17, 2013, pp. 1243-45. If he had been called to testify, his testimony would have been the same but he would have added the risk factors of lead poisoning, head banging, the work head injury as well as the methamphetamine use to his timeline. (*See* October 17, 2013, p. 1245). On cross examination, Dr. Wood testified the PET scan did not isolate lead poisoning or methamphetamine as the cause for the abnormalities in the scan. (*See* October 17, 2013, pp. 1246-47). Dr. Wood explained that if he had been aware of the additional aforementioned risks factors, his testimony would have

been similar but not exactly the same because each factor adds a multiplicative increase in the probability of brain damage. (*See* October 17, 2013, pp. 1247-48). The additional factors of lead poisoning and head banging would have increased his certainty of the probability of brain damage from 90% to about 93% or 94%. (*See* October 17, 2013, pp. 1248-49). He further testified that that the degree of abnormality that he observed in the scans would impair Defendant's ability to make a plan and carry it out, but that he could think of a goal and carry it out. (*See* October 17, 2013, p. 1251). Dr. Wood agreed that his ultimate conclusion was that there was brain damage which impaired Defendant's ability to control his impulses. (*See* October 17, 2013, p. 1251).

Edward J. Barbieri, Ph.D., a forensic toxicologist, assistant laboratory director and toxicology technical leader for NMS Labs, testified as an expert in toxicology and pharmacology. (*See* October 16, 2013 transcript, pp. 1187, 1190-91). NMS Labs was requested to test the clump of Defendant's hair and asked to conduct a panel of testing which included drugs of abuse and therapeutic agents. (*See* October 16, 2013 transcript, pp. 1191-92). The testing results ultimately reflected 3 compounds present – amphetamine, methamphetamine and MDA – as well as some incidental findings such as nicotine. (*See* October 16, 2013 transcript, pp. 1201-2). The lab reports were entered as Defense Exhibit #30. (*See* October 16, 2013 transcript, p. 1195). Dr. Barbieri further testified that methamphetamine is a central nervous system stimulant that increases brain activity, and which may be characterized by increased stimulation, agitation, nervousness or high motor activity; when it leaves the body, a person goes into a depressive phase and may get lethargic or sleep for a while. (*See* October 16, 2013 transcript, pp. 1202-3. Dr. Barbieri testified that persons dependent on methamphetamine may take the drug for several days and not sleep, and then "crash" when then they stop taking it. (*See*

October 16, 2013 transcript, p. 1203). Other effects of methamphetamine in the chronic user include hallucinogenic activity in sight and hearing, hallucinations, aggressive behavior or irrational reactions; in very chronic users, there may also be paranoia and abnormal behavior due to the physical changes in the neurons in the brain. (*See* October 16, 2013 transcript, pp. 1203-4). He testified that MDA is also central nervous system stimulant like amphetamine and methamphetamine with similar properties but lasts longer than the other two. (*See* October 16, 2013 transcript, p. 1204). All 3 compounds found in Defendant's hair can be addicting. (*See* October 16, 2013 transcript, p. 1204). Testing for the presence of drugs could also have been completed on Defendant's clothes and the aforementioned testing was available in 2007. (*See* October 16, 2013 transcript, pp. 1205-6). On cross-examination, Dr. Barbieri testified that the testing could not distinguish between an acute or chronic user, when the drug were used in relation to when the hair was collected, or anything about the toxicological effects the person was experiencing prior to the collection of the hair. (*See* October 16, 2013 transcript, pp. 1206-7).

William Alexander Morton, Ph.D. testified as an expert in psychopharmacology and addiction. (*See* October 18, 2013 transcript, pp. 1520, 1527). Dr. Morton testified that there are several major issues related to methamphetamines, including impulsivity, psychosis and brain damage. (*See* October 18, 2013 transcript, pp. 1532-34). Some of the psychiatric symptoms associated with brain damage from methamphetamine use are instability and mood changes, impulsive and aggressive behavior, non-logical thinking and memory problems. (*See* October 18, 2013 transcript, p. 1535). Dr. Morton noted that in the penalty phase, the experts talked about methamphetamine like it was Motrin, not explaining why it is so addictive. (*See* October 18, 2013 transcript, p. 1539). Methamphetamine is addictive because it makes a person feel a

sense of euphoria and confidence, like a person can believe in himself, that he can get something done and feel good while doing it. (*See* October 18, 2013 transcript, p. 1539). Methamphetamine also makes a person tremendously energetic and heightens sexual activity and enjoyment. (*See* October 18, 2013 transcript, pp. 1539-40). Methamphetamine is a central nervous system stimulant which is extremely potent and stimulates nearly every nerve cell in the brain. (*See* October 18, 2013 transcript, p. 1542). It stimulates the release of dopamine, epinephrine (adrenalin), norepinephrine, and serotonin, and the simultaneous release and subsequent depletion of all those chemicals in the brain causes the damage and side effects. (*See* October 18, 2013 transcript, pp. 1542-43, 1553-54).

Dr. Morton further explained that MDA or MDMA (Ecstasy) is a "cousin" to methamphetamine, and it makes a person feel warm and accepted and feel good to be touched. (*See* October 18, 2013 transcript, pp. 1556, 1558-59). MDMA affects memory, thinking and mood, and causes instability and brain damage; when a person combines both methamphetamine and MDMA, there is a higher risk of brain damage. (*See* October 18, 2013 transcript, pp. 1559-61).

Dr. Morton prepared a timeline of Defendant's substance abuse, beginning with alcohol and marijuana in his teens and ending with the methamphetamines. (*See* October 18, 2013 transcript, pp. 1562-65). Dr. Morton determined that Defendant was addicted to MDMA and methamphetamines. (*See* October 18, 2013 transcript, p. 1566). Dr. Morton described 8 factors that cause addiction, including genetics, development, environment, stressors (losses), stressors (insults), personality, psychiatric symptoms and medications; he determined that Defendant had nearly all 8 factors present. (*See* October 18, 2013 transcript, pp. 1566-69; Defense Exhibit #62). Dr. Morton also opined that due to Defendant's methamphetamine use, the instant offense was

committed while Defendant was under the influence of an extreme emotional disturbance and his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was "[m]ore than substantially impaired." (*See* October 18, 2013 transcript, pp. 1574). He also opined that from a psychopharmacological point of view, the 3 main biological contributors in this case are Defendant's brain damage, abnormal sexual functioning, and methamphetamine use. (*See* October 18, 2013 transcript, pp. 1574-75).

Valerie McClain, Ph.D., a licensed psychologist who practices in the area of neuropsychology, testified that she was retained by trial counsel in this case to conduct a neuropsychological assessment of Defendant and address issues of competency and mitigation. (*See* October 8, 2013 transcript, pp. 168-69, 170). She worked primarily with Attorney Bob Fraser. (*See* October 8, 2013 transcript, p. 170). Mr. Fraser did not ask her to consider or testify about Defendant's sexual urges or rape fantasies; although she has some training in sexually violent crimes and sexual disorder, she does not consider that her specialty. (*See* October 8, 2013 transcript, pp. 170-71). Dr. McClain was aware of Defendant's drug addiction and extensive use of methamphetamine and was asked by Mr. Fraser to generally address that with respect to the actual offenses as well as Defendant's history. (*See* October 8, 2013 transcript, p. 171). Although she considers addiction and the effects of methamphetamine use as an area of expertise for her, she was not asked and did not testify about that at trial. (*See* October 8, 2013 transcript, p. 172). She testified that methamphetamine use can cause brain damage, and this was known among similar professionals in 2007. (*See* October 8, 2013 transcript, pp. 172-73). Defendant's mother told her of Defendant's history of exposure to lead-based paint through ingesting plaster and banging his head as a child, and both of those could cause brain damage or dysfunction. (*See* October 8, 2013 transcript, pp. 173-74). She was not provided with hospital

records regarding Defendant's work-related head injury. (*See* October 8, 2013 transcript, p. 174). She recalled that in her penalty phase testimony, she opined that Defendant suffered from a cognitive disorder, meaning there were very significant areas of impairment in his brain that would suggest memory or language problems or other that other areas had been affected by brain trauma. (*See* October 8, 2013 transcript, pp. 174-75). She was also aware of Defendant's history of depression and diagnosed him with depression. While working on this case, she spoke with Dr. Michael Maher, Defendant's mother, Crystal, Toni Maloney and had a discussion via computer with Dr. Wu. (*See* October 8, 2013 transcript, p. 176). She noted that Dr. Wu had an accent but was not difficult to understand. (*See* October 8, 2013 transcript, p. 177). During her computer session with Dr. Wu regarding Defendant's PET scan, she was able to view the images and the areas of the brain that showed some abnormal function; they discussed the decreased activity in Defendant's frontal lobe and how that might affect a person's functioning in terms of planning, judgment and impulse control. (*See* October 8, 2013 transcript, pp. 177-78).The PET scan was consistent with her findings and showed abnormal brain functioning. (*See* October 8, 2013 transcript, p. 178). She further testified that based on her neuropsychological assessment of Defendant, her findings suggested there was brain damage and she advised Mr. Fraser that a brain scan could pinpoint the areas of damage and clarify what was happening. (*See* October 8, 2013 transcript, p. 180). She testified that in her experience the use of PET scans in a forensic setting to corroborate brain damage is an accepted practice and, in her opinion, the PET scan images in conjunction with the testimony of the neurologist or neuropsychologist can help jurors understand the problem areas of the brain. (*See* October 8, 2013 transcript, p. 183). She was not consulted about whether the PET scan images would be entered at the trial, and did not know they were not until after the trial. (*See* October 8, 2013 transcript, pp. 184-85).

On cross-examination, Dr. McClain acknowledged that at trial she testified regarding Defendant's brain damage, his ability to conform his behavior to the requirements of law and that methamphetamine use would affect his ability to control his impulses and anger control issues. (*See* October 8, 2013 transcript, p. 186). She's aware there is a debate in the medical community about the use of PET scans in a forensic setting. (*See* October 8, 2013 transcript, p. 186). Dr. McClain further testified that poor impulse control and judgment would not preclude a person from being able to plan and carry out a plan to its conclusion. (*See* October 8, 2013 transcript, pp. 187-88). She acknowledged that other persons with brain damage are able to lead relatively normal lives without committing crimes. (*See* October 8, 2013 transcript, p. 188). Dr. McClain also testified that other factors, such as family support, drug use, sleep deprivation, history of abuse and depression, or toxicity, can interact with brain damage to affect judgment and impulse control. (*See* October 8, 2013 transcript, p. 190). She testified that persons who are "vulnerable psychologically would have more difficulty making appropriate decision based upon the level of stress in their life and variables going on whether it's family, financial, child abuse."

Michael Maher, M.D., a physician and psychiatrist licensed to practice medicine in Florida, testified that he was retained in the instant case and testified in the penalty phase; he was retained to evaluate Defendant for general issues of medical and psychiatric relevance as related to the charges against Defendant primarily for mitigation purposes as well as issues with competency and sanity. (*See* October 8, 2013 transcript, pp. 201-2). In preparation for his penalty phase testimony, Dr. Maher spoke with Defendant, his attorneys, and Melissa, and reviewed depositions of law enforcement officers, legal documents related to the charges, Dr. McClain's deposition, and materials from Dr. Wood and Dr. Wu regarding the PET scan. (*See* October 8, 2013 transcript, pp. 202-3). Dr. Maher was not specifically asked to do a bio-

psychosocial history of Defendant and counsel did not provide any background information regarding on Defendant's childhood. (*See* October 8, 2013 transcript, p. 204).

As to his training and experience related to methamphetamine use and abuse, Dr. Maher testified that he has general experience, knowledge and training regarding the use of various drugs, amphetamine use and abuse, and evaluating individuals with amphetamine dependency. (*See* October 8, 2013 transcript, p. 205). Dr. Maher advised Mr. Fraser about his general knowledge, but explained to him that he did not have any special credentials related to substance abuse, and had not researched the effect of amphetamines on the brain or treatment. (*See* October 8, 2013 transcript, p. 205). He advised Mr. Fraser that methamphetamine abuse and its effect on the brain were significant issues in this case, and indicated there are other experts with more experience and knowledge in that area. (*See* October 8, 2013 transcript, p. 205-6).

Dr. Maher had some general knowledge about the diagnosis and treatment of sex offenders, but does not specialize in that area. (*See* October 8, 2013 transcript, p. 207). He was only asked to testify about the sexual aspects of the crime in a "very limited and superficial way" and was asked to consider whether Defendant's amphetamine use and abuse was relevant to Defendant's rape fantasies and sex games with his wife. (*See* October 8, 2013 transcript, p. 207).

Dr. Maher suspected there were abnormalities in Defendant's brain function and believed that a PET scan would support his clinical findings. (*See* October 8, 2013 transcript, p. 208). Dr. Maher testified that he was surprised Mr. Fraser did not introduce the PET scan images, and denied telling Mr. Fraser that it was not a good idea to introduce them. (*See* October 8, 2013 transcript, pp. 210-11). Dr. Maher testified that he is not qualified to independently read a PET scan, but can "understand and interpret the findings that are pointed out by other experts." (*See*

October 8, 2013 transcript, p. 210). He reviewed the PET scan images, and advised Mr. Fraser that the PET scan supported his conclusion "that there were specific abnormalities that were relevant to the amphetamine dependence and the offense." (*See* October 8, 2013 transcript, p. 210). Mr. Fraser asked Dr. Maher to incorporate the PET scan findings in to his testimony. (*See* October 8, 2013 transcript, p. 210). Dr Maher testified that ingestion of lead (via plaster painted with lead-based paint), head banging and methamphetamine can potentially cause brain damage but he was not advised of any of those factors; such information would have assisted in corroborating a diagnosis of brain damage. (*See* October 8, 2013 transcript, pp. 211-13).

On cross-examination Dr. Maher agreed that he was able to testify in the penalty phase, regardless of the cause, that Defendant had brain damage in the area of his brain that affects his ability to control impulses and therefore Defendant's abilty to conform his conduct to the requirements of law was substantially impaired. (*See* October 8, 2013 transcript, pp. 214-15). He agreed that there was some controversy in the medical field regarding a PET scan as a forensic tool, specifically, as to where it can and how it should be used. (*See* October 8, 2013 transcript, pp. 216-17).

Jerry S. Luxenburg, Esquire, testified that he was retained by Defendant's mother, Crystal, on July 7, 2004 and represented Defendant for a day. (*See* October 7, 2013 transcript, pp. 6-7). Crystal advised him that Defendant used crystal meth and Ecstasy and had been a heavy drug user since the age of 14. (*See* October 7, 2013 transcript, p. 8). He interviewed Defendant at the Hillsborough County Jail for approximately an hour. (*See* October 7, 2013 transcript, p. 7). Because of the facts of the crime case and the drugs involved, he thought an expert should be brought in immediately and recommended that they retain Dr. Danziger, a forensic psychiatrist. (*See* October 7, 2013 transcript, pp. 8-10). He recalled that Crystal

retained Dr. Danziger, who met with Defendant at the jail; Mr. Luxenburg did not think there was a report and he did not have a copy of one in his file. (*See* October 7, 2013 transcript, p. 9). He recalled finding an article regarding crystal meth, which he sent to Defendant's mother. (*See* October 7, 2013 transcript, pp. 11-12). If he had continued in this case, he would have further investigated that drug use and its effect on Defendant's brain. (*See* October 7, 2013 transcript, p. 12). Mr. Luxemburg had no recollection of speaking to any attorneys in this case. (*See* October 7, 2013 transcript, p. 10). After his brief representation of Defendant concluded, he did not maintaining any further contact with the family and did not follow the case. (*See* October 7, 2013 transcript, p. 13).

During the October 11, 2013 hearing, **Heidi Hanlon**, a licensed mental health counsel, testified as an expert in the area of forensic sentencing evaluations, substance abuse counseling, investigation of mitigation in capital cases and mental health counseling. (*See* October 11, 2013 transcript, p. 621). Defendant was retained by postconviction counsel in July 2010 to conduct a biopsychosocial evaluation of Defendant particularly as to mental health and substance abuse, and to explore mitigation. (*See* October 11, 2013 transcript, p. 622). Ms. Hanlon interviewed Defendant, Crystal, Sherry, and Garett; Ms. Hanlon was also provided with the direct appeal opinion, the sentencing order, penalty phase transcripts, mental and school records, and copies of communications between Dr. Maher and the defense team. (*See* October 11, 2013 transcript, pp. 622-23). She explained that a biopsychosocial history is an evaluation that includes a person's family, marital, employment, school, mental health and substance abuse history. (*See* October 11, 2013 transcript, p. 618). It is important to conduct a family history in order to determine the genetic factors related to mental health and substance abuse, and it's also important to look at the environment in which a person grew up. (*See* October 11, 2013 transcript, p. 623). Research

shows that persons with family history of mental health or substance abuse issues are more likely to have those issues; for example, persons with first-degree relatives who are alcohol dependent are 3-4 times more likely to have that passed down than someone whose family does not have such history. (*See* October 11, 2013 transcript, pp. 636-37). Because Defendant had a family history of both, he was genetically predisposed to both substance abuse and mental health issues. (*See* October 11, 2013 transcript, p. 637).

Ms. Hanlon also created a genogram work tree, entered as Defense Exhibit #49, which reflects Defendant's family relationships as well as the mental health and substance abuse issues in the family. (*See* October 11, 2013 transcript, pp. 623, 627). Ms. Hanlon testified about Defendant's lack of relationship with Eddie Brant, the man he believed was his biological father and with whom he did not have a relationship after the age of 2 months, as well as Crystal's recent revelation that Defendant was actually conceived when she was raped by her neighbor. (*See* October 11, 2013 transcript, pp. 624-27). Crystal had a history of depression and, after Defendant was born, suffered from postpartum psychosis and received shock treatments; she is also a gambling addict and compulsive spender. (*See* October 11, 2013 transcript, pp. 628-630). Crystal also told her that she cared for Defendant but did not have loving feelings, and she believed he could sense that about her and therefore rejected her; Defendant would kick and scream and not allow her to change his diapers, and when he was older he would bang his head and scream. (*See* October 11, 2013 transcript, p. 640). She pushed Defendant away because she felt he didn't like her and she didn't like him. (*See* October 11, 2013 transcript, p. 640). Crystal's mother, Delphia, also had a history of depression and was prescribed Thorazine and Elavil and was hospitalized at some point for psychosis; she also had severe substance abuse issues with alcohol and marijuana. (*See* October 11, 2013 transcript, pp. 630-31, 638-39).

Delphia would drink the alcohol in the cups left over from party guests and also drank rubbing alcohol, and Defendant saw her smoking marijuana with Marvin and smoking marijuana from a "power hitter." (*See* October 11, 2013 transcript, pp. 638-39). Crystal's father, Lawrence, was also an alcoholic and was very abusive, at one point laying Delphia out on railroad tracks. (*See* October 11, 2013 transcript, pp. 631, 637-38). Defendant's stepfather, Marvin, also had an alcohol dependence and smoked marijuana; he had a bad temper when drinking and committed domestic violence against Crystal and Defendant. (*See* October 11, 2013 transcript, p. 631). Although Defendant is not related to Marvin, Marvin is included on the genogram because he was significant to Defendant's childhood environment, and the domestic violence was an environmental stressor. (*See* October 11, 2013 transcript, p. 632). Defendant's half-brother, Garett, who is the son of Crystal and Marvin, has bipolar disorder and substance abuse issues. (*See* October 11, 2013 transcript, p. 632). Although Defendant's biological father is unknown, it is likely that the father would have suffered some psychological problems such as a personality disorder. (*See* October 11, 2013 transcript, p. 640).

As to environmental factors that put Defendant at risk for substance abuse, Ms. Hanlon testified that Defendant was exposed to toxins in the womb when Crystal was bitten by a snake and given medication that blurred her vision, and made her restless, agitated and cry often. (*See* October 11, 2013 transcript, pp. 641-42). Defendant was also exposed to toxins as a child when he ingested plaster that could have contained lead paint, and ate fertilizer. (*See* October 11, 2013 transcript, p. 642). Defendant was picked on by other kids, had behavioral and attention problems in school and repeated the first grade. (*See* October 11, 2013 transcript, p. 644). The Coleman's did not encourage Defendant in school and he dropped out when he was asked by Marvin to move out of the house at the age of 17. (*See* October 11, 2013 transcript, p. 644).

Defendant was also verbally and physically abused and exposed to domestic violence by Marvin, who also abused Crystal and sexually abused Sherry. (*See* October 11, 2013 transcript, pp. 645, 647-48). Defendant was rejected by his other and the man he believed was his biological father, and was shuffled around between his grandmother and mother. (*See* October 11, 2013 transcript, pp. 645, 648-49, 652, 659). Other environmental risk factors included that Defendant grew up around alcohol dependence and substance abuse, he lived the surfing lifestyle and worked in industries, i.e., restaurant and construction/electrical, laden with substance abuse; while working with elevators he was first exposed to cocaine and methamphetamines. (*See* October 11, 2013 transcript, pp. 646-47). Grief is also an environmental risk factor and Defendant was particularly close to and very upset when Delphia passed away in his teens. (*See* October 11, 2013 transcript, p. 649, 659). Ms. Hanlon testified that rejection and abuse summed up Defendant's life and he really had no solid foundation. (*See* October 11, 2013 transcript, p. 650).

As part of her work in capital sentencing evaluations, she routinely advises attorneys on which types of experts may be helpful to the case and, in this case, she would have recommended a psychopharmacologist and a PET scan expert. (*See* October 11, 2013 transcript, pp. 633-34). A psychopharmacologist would have the information about the chemistry associated with crystal meth and could talk about Defendant's meth use and how it affected his brain, and a PET scan expert would have the information about how the substance damaged his brain. (*See* October 11, 2013 transcript, pp. 634-35).

Mark Cunningham, Ph.D., a clinical and forensic psychologist, testified as an expert in forensic capital sentencing evaluations and prison risk assessment. (*See* October 17, 2013 transcript, pp. 1254, 1256, 1269-70). He was retained by postconviction counsel to review the mitigation in this case and conduct a prison risk assessment. (*See* October 17, 2013 transcript, p.

1271). Dr. Cunningham interviewed Defendant, Crystal, Sherry, Garett, Mary Kay Brant, Anne Dowdy and Annice Crookshanks, and David Kaczynski. (*See* October 17, 2013 transcript, pp. 1281-82). He also reviewed 7 binders of materials, including: Defendant's educational, employment and mental health records; evaluations conducted by Dr. Maher, Dr. McClain and Dr. Gur; Crystal's mental health records; HCSO witness statements, arrest records and investigative notes; jail and prison records; and sworn statements, deposition and penalty phase transcripts as well as the sentencing order; and other articles, reports, and documents. (*See* October 17, 2013 transcript, pp. 1283-84).

Dr. Cunningham explained that the penalty phase focuses on a defendant's moral culpability, and a defendant's background and history is important so that the fact finder can understand the "raw materials and capabilities" of an individual, what shaped his perception of choices and diminished his control, and shaped the morality in his value system. (*See* October 17, 2013 transcript, pp. 1272-73). It is also important to explain to the fact finder the nexus between a defendant's background and negative outcomes, such as criminal behavior. (*See* October 17, 2013 transcript, pp. 1279-80). Dr. Cunningham prepared a PowerPoint presentation, which included a model demonstrating this relationship; the greater the impairing or damaging factors that are present, the steeper the angle of choice (i.e., choice is more steeply inclined toward a tragic outcome) and the lower the moral culpability. (*See* October 17, 2013 transcript, pp. 1277-79; Defense Exhibit #59).

Dr. Cunningham's evaluation focused on 4 areas: neuro-developmental factors, family and parenting, community and disturbed trajectory factors. (*See* October 17, 2013 transcript, pp. 1289). He essentially found the following 27 factors and/ or implications were not presented during the penalty phase:

1. Crystal smoked during her pregnancy with Defendant;

2. Crystal suffered from and was treated for a snake bite later in her pregnancy with Defendant;

3. Defendant's birth was complicated by breech presentation and emergency procedures;

4. Defendant engaged in severe head-banging in early childhood;

5. Defendant routinely ingested plaster, implicating lead poisoning, in early childhood;

6. Defendant exhibited symptoms of social spectrum disorder;

7. Defendant exhibited symptoms of ADHD in childhood;

8. Defendant exhibited learning disabilities in school;

9. MRI, PET scan and neuropsychological testing indicated brain abnormalities and dysfunction which affect thinking, emotional regulation and behavior;

10. Histories of neurological and neuropsychological dysfunction are over-represented among violent and sexually violent offenders;

11. Defendant was genetically predisposed to alcohol and drug abuse through his maternal family;

12. Defendant was genetically predisposed to psychological and personality disturbance through both his maternal and paternal family;

13. Methamphetamine dependence is clearly connected to heightened sexuality, aggressive reactivity, violence and homicide;

14. Defendant was conceived during the rape of his mother;

15. Crystal failed to bond with Defendant;

16. Defendant failed to form a secure attachment to Crystal;

17. Marvin's verbal abuse of Crystal was sexually accusing and demeaning in content;

18. Marvin raped Crystal almost nightly from 1973-1994;

19. Marvin's sexual attacks on Sherry took her by surprise;

20. Domestic violence, child abuse and child neglect are linked to violent offending;

21. Such family dysfunction as that experienced by Defendant has a nexus to aggressive sexuality and sexual homicides;

22. Marvin and Delphia's alcohol and drug abuse created substantial risk of psychological injury to Defendant;

23. Defendant's methamphetamine abuse was part of a national epidemic;

24. Defendant has been tormented by aggressive sexual fantasies since childhood;

25. Defendant had multiple risk factors for drug dependence in addition to self-medication;

26. Defendant was turned into law enforcement by own brother; and

27. Defendant is very likely to adjust to a life-without-parole sentence without serious violence.

Dr. Cunningham acknowledged that some the above factors were raised during the penalty phase, but found there was no explanation as to their implications or how those factors were linked to subsequent developmental problems, alcohol or drug dependence, or impulsive or criminal behavior. (*See* October 17, 2013 transcript, p. 1291).

Dr. Cunningham further explained that various studies have found a nexus between risk factors and sexual homicide, and between adverse developmental factors and criminal violence. Studies also identify the following protective factors that could reduce the likelihood of committing criminal violence: female gender, intelligence, positive social orientation, and resilient temperament, social bonding to positive role models, healthy beliefs and clear standards for behavior, i.e., non-violence and abstaining from drugs, and effective early interventions; but none of those were found in Defendant's history. (*See* October 18, 2013 transcript, pp. 1437-42).

Dr. Cunningham explained that outcome is related to the combination of risk and protective factors. (*See* October 18, 2013 transcript, pp. 1456-57). Essentially, persons who are "loaded up" with risk factors with very few protective factors are "disproportioned to choose badly."

(*See* October 18, 2013 transcript, pp. 1457). In Defendant's case, there was an abundance of risk factors, but very few protective factors; Defendant's choices were steeply inclined toward choosing criminal violence and therefore his moral culpability is lessened. (*See* October 18, 2013 transcript, pp. 1458). Dr. Cunningham further opined, that based on the "cumulative and synergistic action of the factors that affected [Defendant]," at the time of the offense Defendant was under the influence of an extreme emotional disturbance, and his capacity to appreciate the criminality of his conduct or conform his behavior to the requirement of law was substantially impaired. (*See* October 18, 2013 transcript, pp. 1460-63). Dr. Cunningham further explained Defendant was not "doomed to be a murderer" but that "he was set on a trajectory of significant personal and sexual and community maladjustment;" although the instant offenses could not be predicted with absolute certainty, "you could certainly have pointed with high likelihood that there was going to be . . . . there were going to be problems here." (*See* October 18, 2013 transcript, pp. 1506).

Dr. Cunningham also considered Defendant's risk for future violence, and explained that it is very significant mitigation evidence because studies show that jurors are concerned about a defendant's potential for future violence. (*See* October 18, 2013 transcript, pp. 1463-66). He opined that "there is very little likelihood [Defendant] would commit serious violence confined for life in the Florida Department of Corrections." (*See* October 18, 2013 transcript, p. 1468.

Ruben Gur, Ph.D., a neuropsychology professor at the University of Pennsylvania School of Medicine, testified as an expert in neuropsychology and imaging. (*See* November 8, 2013 transcript, pp. 1591-92, 1607). Dr. Gur was retained by postconviction counsel and found Defendant had previously received only minimal neuropsychological testing and recommended additional testing, which was done by Vidya Kamath, Ph.D., in May 2011. (*See* November 8,

2013 transcript, p. 1609). Dr. Gur reviewed the neuropsychological data in this case, including the neuropsychological battery conducted by Dr. McClain, the depositions of Dr. Wu and Dr. Mayberg, Defendant's school records, Defendant's Tampa General Hospital medical records, Crystal's trial testimony, Dr. Maher's trial testimony, the direct appeal opinion in this case, the sentencing order, the NMS Labs toxicology reports and Defendant's PET scan images. (*See* November 8, 2013 transcript, pp. 1609-10). Dr. Gur also interviewed Defendant in 2012 and conducted a computerized neurocognitive battery. (*See* November 8, 2013 transcript, pp. 1610-11). Dr. Gur discussed "basic brain science" as well as 3 technologies that study the brain: behavioral imaging, which shows how behaviors relate to regional brain function; magnetic resonance imaging (MRI), which obtains high resolution data of the brain structure; and a positron emission tomography (PET), which looks at brain activity. (*See* November 8, 2013 transcript, pp. 1612-44). In the most simplistic terms, the back of the brain perceives information, the middle of the brain processes information and the front of the brain acts; the various parts of the brain are interconnected and, although different parts of the brain control different aspects of a particular behavior, "the behavior itself will require cooperation of all these different brain regions." (*See* November 8, 2013 transcript, pp. 1623-24). When functioning properly, the frontal lobe both initiates action and stops it. (*See* November 8, 2013 transcript, p. 1634). Executive functions, i.e., ability to adjust behavior to context, monitor and direct behavior, planning, judgment, and inhibition of impulses, are coordinated in the frontal lobe. (*See* November 8, 2013 transcript, pp. 1631-32). Depending on the location and extent of damage, frontal lobe damage can result in disinhibition, irritability, emotional instability, poor planning, hypomania, risk-taking behavior, obsessive compulsive behavior, and motor difficulties. (*See* November 8, 2013 transcript, pp. 1635-38).

Dr. Gur testified regarding the MRI results and the specific areas of the brain that reflected low volume in the clinically significant or abnormal range, but conceded there was very little in the abnormal range. (*See* November 8, 2013 transcript, pp. 1660-63, 1694-95). Dr. Gur also testified that Defendant's PET scan images reflected very low activity in the hippocampus, amygdala, and left insula, as well as the left side dorsolateral and dorsomedial prefrontal and left superior regions of the frontal lobe, while other areas of the brain on the right side were hyperactive. (*See* November 8, 2013 transcript, pp. 1669-70). Essentially, the amygldala and other parts of the brain become more active but the less active fontal lobe is less able to inhibit the more aggressive responses of the amygdala and other areas of the brain. (*See* November 8, 2013 transcript, p. 1670). Dr. Gur also testified that Defendant's computerized neurocognitive battery results reflected Defendant's "accuracy is on average, but comes at the cost of reduced speed of processing." (*See* November 8, 2013 transcript, p. 1674). Dr. Gur acknowledged that the behavioral imaging he conducts is not generally accepted in the medical or neuropsychological community. (*See* November 8, 2013 transcript, pp. 1698).

Dr. Gur also identified the following risk factors which could have affected Defendant's brain development: Crystal's snakebite and treatment during her pregnancy with Defendant; Defendant's breech birth; Crystal's failure to bond with Defendant after his birth; Defendant's head banging as a toddler; Defendant's exposure to lead from plaster ingestion as a child; Marvin's abuse of Defendant; Defendant's exposure to trauma by Marvin's abuse of Crystal and Sherry; Defendant's concussion from an elevator accident; and Defendant's substance abuse issues. (*See* November 8, 2013 transcript, pp. 1675-81). Dr. Gur noted that methamphetamines are very toxic and can cause psychosis. (*See* November 8, 2013 transcript, pp. 1681-82). He

found Defendant had poor processing speed, poor executive, memory and social cognition performance and also microsmia. (*See* November 8, 2013 transcript, pp. 1683).

He reviewed Dr. Maher's trial testimony regarding brain damage and sensed that Dr. Maher was limited by his lack of background and training in brain and biology; Defendant really needed a neuropsychiatrist who could better understand brain systems and their function. (*See* November 8, 2013 transcript, pp. 1685-86). Dr. Gur opined that the deficits and abnormalities in Defendant's brain impaired or made it difficult for Defendant to conform his conduct to the requirements of law, and his use of methamphetamines would have exacerbated the inability of his brain to function properly. (*See* November 8, 2013 transcript, pp. 1687-88).

Mitigation Presented in the Penalty Phase and the Sentencing Order

Although Garett did not appear in court to testify during the penalty phase, the Court considered two sworn statements given by Garett on August 27, 2004 and July 19, 2006 to the State. (*See* State's Exhibits #1 and #2, attached). In the August 27, 2004 statement Garett states that his father (Marvin) was an alcoholic, very verbally and mentally abusive towards the family, treated Defendant differently and was physically abusive to Defendant. (*See* State's Exhibit #1, pp. 8-16, attached). Garett further stated that Defendant had substance abuse issues and was on crystal meth around the time of the offenses and when he met with Garett, Defendant attempted to turn himself into law enforcement, and Defendant was never known to be violent or have a criminal record. (*See* State's Exhibit #1 pp. 18-20, 23-24, 28, attached). In the July 19, 2006 statement, Garett stated that Defendant was addicted to and under the influence of crystal meth when Defendant visited him after the instant offenses, and Defendant had been awake for several days from using the drug. (*See* State's Exhibit #2, pp. 7-8 , 10-15, 17-18, attached).

During the August 23, 2007 hearing, Defendant's ex-wife, Melissa McKinney, testified that she met Defendant in Bible School in 1990, they were married in 1991 and had 2 sons. (*See* August 23, 2007 penalty phase transcript, pp. 135, 137, 139). She and Defendant separated 8 or 9 times during the marriage due to Defendant's drug use, which included marijuana and ecstasy. (*See* August 23, 2007 penalty phase transcript, pp. 188-89). She testified Defendant started to use crystal methamphetamine approximately 6 months before the murder and would use it frequently, and that he would go without sleep for 4 or 5 days, then "crash." (*See* August 23, 2007 penalty phase transcript, pp. 190-91). Around the fifth day, Defendant would be irritable and snappy. (*See* August 23, 2007 penalty phase transcript, pp. 192-93). She recalled that the week of the murder, she knew Defendant started using again because he had spent the rent money on the drug; that week he did not sleep and displayed the usual signs of his methamphetamine use. (*See* August 23, 2007 penalty phase transcript, pp. 192-94, 217). She also testified that Defendant was good with his hands and could build, do plumbing, electrical and tile work. (*See* August 23, 2007 penalty phase transcript, p. 194). Defendant became different after he started using crystal meth; she testified that it seemed like all he wanted was the drug, and he stopped caring about his family and work, and became obsessed with sex. (*See* August 23, 2007 penalty phase transcript, p. 197). Ms. McKinney testified that Defendant was actively involved with his children, i.e., taught and disciplined them, played video games and catch with them, and took them surfing and fishing. (*See* August 23, 2007 penalty phase transcript, pp. 197-200). Ms. McKinney also testified that ever since she had known Defendant, he'd had a difficult relationship with his stepfather, who was abusive. (*See* August 23, 2007 penalty phase transcript, pp. 184-85). Defendant could not have a relationship with his real father, and he wanted one with his stepfather; Defendant appeared sad or depressed over their

difficult relationship. (*See* August 23, 2007 penalty phase transcript, p. 185). During the October 8, 2007 hearing, Ms. McKinney further testified she brought their children to visit Defendant at the jail, and Defendant and his sons wrote letters to each other and Defendant was very supportive; she would continue to further encourage communication between them. (*See* October 8, 2007 transcript, pp. 3-6).

The Reverend John Hess III testified he was a teacher at Blue Ridge School of Prophets (Bible College) in Virginia while Defendant was a student. (*See* August 23, 2007 penalty phase transcript, p. 278). He was aware of Defendant's past drug use when he started at Bible College. (*See* August 23, 2007 penalty phase transcript, p. 281). He described Defendant as very likable and friendly. (*See* August 23, 2007 penalty phase transcript, p. 281). Defendant completed some electrical work at Rev. Hess's home and did it very well. (*See* August 23, 2007 penalty phase transcript, pp. 282-83). Defendant contacted Rev. Hess about re-applying for the school and mentioned that he'd been involved with drugs and wanted to straighten out his life. (*See* August 23, 2007 penalty phase transcript, p. 283).

James Harden testified that Defendant attended Bible College with his son and he invited Defendant to stay at his home. (*See* August 23, 2007 penalty phase transcript, pp. 289, 292). Defendant stayed at Mr. Harden's home for 3 months and was thoughtful and respectful. (*See* August 23, 2007 penalty phase transcript, pp. 292-93). Mr. Harden and his wife were shocked by the charges, and continued to support Defendant while he was in jail. (*See* August 23, 2007 penalty phase transcript, pp. 294-95).

Steve D. Alford testified that Defendant was his apprentice in construction in the late 1990's and worked with him in the elevator industry. (*See* August 23, 2007 penalty phase transcript, p. 304). He testified that Defendant is very smart about his mechanical abilities,

knows tools and elevator equipment, only needs to be shown how to do something once before he can do it himself, and can work without supervision. (*See* August 23, 2007 penalty phase transcript, p. 305). Defendant was a very good worker, and he did not know Defendant to have any problems with anyone or be violent in any way. (*See* August 23, 2007 penalty phase transcript, pp. 306-7).

Thomas Rabeau testified that he was a volunteer chaplain at the Hillsborough County Jail where he met Defendant. (*See* August 23, 2007 penalty phase transcript, pp. 331, 335). He met with Defendant once a week for 3 years (approximately 150 visits). (*See* August 23, 2007 penalty phase transcript, p. 335). Mr. Rabeau testified that Defendant showed remorse for the instant offenses. (*See* August 23, 2007 penalty phase transcript, pp. 336-38).

Dr. Valerie McClain was tendered as an expert in forensic neuropsychology. (*See* August 23, 2007 penalty phase transcript, p. 549). Dr. McClain evaluated Defendant in October 2005, and performed a clinical interview as well as various tests, including an IQ assessment, a personality test and neuropsychological testing. (*See* August 23, 2007 penalty phase transcript, pp. 550-551). She also reviewed Defendant's academic records and depositions of Defendant's brother and sister, and interviewed his mother. (*See* August 23, 2007 penalty phase transcript, pp. 550-52). The testing reflected that Defendant was in the low average range for intellectual functioning, with language skills in the borderline range; neuropsychological testing revealed problems in learning and memory as well as executive planning or organization skills and verbal fluency. (*See* August 23, 2007 penalty phase transcript, p. 551). Based on those results, she recommended a brain scan of Defendant, and after reviewing the deposition of Dr. Wu and Dr. Wood, the findings of the brain scan were consistent with the findings of the neuropsychological testing. (*See* August 23, 2007 penalty phase transcript, p. 552). Dr. McClain testified that

Defendant's academic records showed that he had a learning disorder and very low language skills. (*See* August 23, 2007 penalty phase transcript, pp. 553-54, 556-57. Dr. McClain diagnosed Defendant with polysubstance abuse, major depression recurrent and cognitive disorder not otherwise specified. (*See* August 23, 2007 penalty phase transcript, p. 555). She further opined that based on the deficits or problems in Defendant's brain functioning, his capacity to conform his conduct to the requirements of law was substantially impaired. (*See* August 23, 2007 penalty phase transcript, pp. 555-56). She testified that due to those deficits or problems in his brain functioning, Defendant has difficulties with impulse control and conforming his behavior to certain requirements. (*See* August 23, 2007 penalty phase transcript, p. 556). On cross-examination she also testified that Defendant had some difficulty with anger and was quick-tempered. (*See* August 23, 2007 penalty phase transcript, pp. 564-65). The use of methamphetamines would "crank" up such an anger problem or make it worse, thereby making a person more likely to act out, be impulsive or not be able to control such anger. (*See* August 23, 2007 penalty phase transcript, p. 576).

The State's expert, Dr. Donald Taylor, M.D., a forensic psychiatrist, testified that he evaluated Defendant on July 13, 2006 and August 14, 2007. He diagnosed Defendant as having a substance dependence disorder, a learning disorder and sexual sadism, a sexual disorder. (*See* August 23, 2007 penalty phase transcript, pp. 605-6). Dr. Taylor testified that due to the combination of his sexual sadism disorder as well as being under the influence of methamphetamines, Defendant was unable to conform his conduct to the requirements of law as it related to the sexual battery but not the homicide. (*See* August 23, 2007 penalty phase transcript, pp. 609-615, 621-25). He acknowledged, however, that as to the homicide Defendant was impaired by the methamphetamine during the entire episode and was still subject to the

same effects from the methamphetamines, sleep deprivation, intellectual limitations, and childhood factors. (*See* August 23, 2007 penalty phase transcript, pp. 617, 624-26). He also testified that Defendant's sexual disorder arises out of a genetic predisposition as well as his childhood environment, factors over which Defendant had no control. (*See* August 23, 2007 penalty phase transcript, pp. 618-19). Dr. Taylor further testified that specific factors in Defendant's childhood - including separation from his birth mother, not knowing his biological father, having a stepfather who abused alcohol and drugs and was who was verbally and physically abusive - are all factors that can contribute to a diagnosis of sexual sadism. (*See* August 23, 2007 penalty phase transcript, pp. 618-19).

Pastor Leon W. Jackson, Ms. McKinney's uncle by marriage, counseled Defendant and Ms. McKinney in 2003 while they were having problems in their marriage due to Defendant's drug use. (*See* August 24, 2007 penalty phase transcript, pp. 377-78). He found Defendant to be immature, insecure and emotionally incomplete. (*See* August 24, 2007 penalty phase transcript, pp. 381-82). He attributed that to Defendant having grown up in a very dysfunctional family and lacking a real father figure; Defendant told Pastor Jackson about his poor relationship with his father and Pastor Jackson observed a lack of substance in Crystal's interaction with her sons. (*See* August 24, 2007 penalty phase transcript, pp. 382-83). Pastor Jackson also thought Defendant acted more like a buddy than a parent to his sons. (*See* August 24, 2007 penalty phase transcript, pp. 383-84). He testified that if Defendant was sentenced to life, and with Defendant's affinity and knowledge of God and the bible, God could use Defendant to prevent others from going down his same path. (*See* August 24, 2007 penalty phase transcript, pp. 384-85).

Dr. Michael Maher, M.D., a physician and psychiatrist, testified that he spent approximately 8 hours conducting several interviews with Defendant in 2005. (*See* August 24, 2007 penalty phase transcript, pp. 393, 395). He reviewed legal documents, police reports, investigation reports, statements of family members and others who could provide information about Defendant's personal and medical background, spoke with Ms. McKinney by telephone, consulted with Dr. McClain and reviewed her report, reviewed the report and deposition of Dr. Taylor, and reviewed the depositions of Dr. Farzanigan, Dr. Wood and Dr. Wu. (*See* August 24, 2007 penalty phase transcript, pp. 395-96). Dr. Maher testified that he was familiar with methamphetamine use and abuse through medical school and continued training and experience. (*See* August 24, 2007 penalty phase transcript, pp. 396-97). He testified that Defendant fell into the category of users who initially use methamphetamine to work long and productive hours, but subsequently develop a methamphetamine dependence and then have periods of sharper and more dramatic dysfunction, deterioration and ultimately psychosis. (*See* August 24, 2007 penalty phase transcript, pp. 397-98). Dr. Maher testified that Defendant "had periods of psychosis associated with his methamphetamine use and those periods were a significant part of his experience at and around the time of the offense." (*See* August 24, 2007 penalty phase transcript, p. 399). He also described what Defendant would be experiencing during a period of methamphetamine-induced psychosis, including being highly energized, having racing thoughts and energized thought patterns, a pattern of irritability and behavioral fidgetiness, auditory hallucinations, tactile misperceptions and illusions. (*See* August 24, 2007 penalty phase transcript, pp. 399-400). Dr. Maher described the relationship between executive brain functions and impulse control, and testified that poor impulse control is a "substantial hallmark of methamphetamine abuse." (*See* August 24, 2007 penalty phase transcript, p. 402).

Dr. Maher testified that in forming his opinion, he relied on the 25-point verbal v. performance score difference in the testing conducted by Dr. McClain; Dr. Maher noted those testing results were statistically significant and indicative of abnormal brain functioning. (*See* August 24, 2007 penalty phase transcript, p. 403). Dr. Maher also relied on the deposition of Dr. Wood, who testified that he found 4 identifiable areas of the brain – in the frontal lobe and thalamus – that showed "abnormal patterns of glucose uptake on the PET scan." (*See* August 24, 2007 penalty phase transcript, p. 404). He further testified that those areas of the brain "are important for impulse control and executive functioning and are fundamental to reasoning, good judgment." (*See* August 24, 2007 penalty phase transcript, pp. 404-5). He testified that in Defendant's case the uptake of glucose was suppressed, which indicated those areas of the brains were less active. (*See* August 24, 2007 penalty phase transcript, p. 405). Dr. Maher further explained:

> And that is a good indication that those areas of the brain have less ability to affect the entire brain's working. So that means the human being's thought process and action, in this case, because those areas are critical to impulse control, judgment and decision making, it is an indication that there is in the brain substance itself a problem of some significance in impulse control and judgment in Mr. Brant's brain.

(*See* August 24, 2007 penalty phase transcript, p. 406). Dr. Maher acknowledged that the PET scan results could not be linked to a particular behavior but testified that the type of impulsive behavior exhibited by Defendant is consistent with the results of the underutilization of glucose in Defendant's PET scan. (*See* August 24, 2007 penalty phase transcript, pp. 410-11). Dr. Maher also clarified that that the PET scan reflected a brain abnormality and not necessarily brain damage as there was no clear indication that the abnormality was caused by damage or injury. (*See* August 24, 2007 penalty phase transcript, pp. 413-14).

Dr. Maher noted that Defendant had a history of problems dating back to childhood and that his relationship with his mother, grandmother, stepfather and wife all "showed significant patterns of pathology." (*See* August 24, 2007 penalty phase transcript, pp. 411-12). He testified that what began drug experimentation in adolescence "to escape his depressed and anxious state of mind," continued into self-medicating his depression and anxiety, and developed into an addicted lifestyle pattern of methamphetamine dependence. (*See* August 24, 2007 penalty phase transcript, p. 413). He further noted Defendant had a history of attention deficit disorder, which is a clinically relevant risk factor to "later-life drug dependency problems, depression problems, relationship problems, and impulse control problems." (*See* August 24, 2007 penalty phase transcript, pp. 414-15).

Dr. Maher's testified that his primary diagnosis of Defendant was methamphetamine dependence, severe, associated with psychotic episodes; he also diagnosed Defendant with sexual obsessive disorder and chronic depression. (*See* August 24, 2007 penalty phase transcript, p. 413). Dr. Maher opined that at the time of the offenses, as result of his mental disease or defect, Defendant's ability to conform his behavior to the requirements of law was substantially impaired. (*See* August 24, 2007 penalty phase transcript, p. 415). Dr. Maher also testified that Defendant wanted to be good person, father and husband, and was remorseful for his acts. (*See* August 24, 2007 penalty phase transcript, p. 435).

Gloria Milliner testified that she worked with Crystal, and has known Defendant since 1992. (*See* August 24, 2007 penalty phase transcript, pp. 461-62). Defendant and his wife lived with Ms. Milliner's daughter in Virginia for a few weeks after Marvin kicked them out of the house. (*See* August 24, 2007 penalty phase transcript, p. 463). Marvin was a very controlling person, had a bad temper, did drugs, and did not get along with Defendant. (*See* August 24,

2007 penalty phase transcript, pp. 466, 474-75). She believed that a stepfather doesn't feel the way a real father does about his kids, and that was very obvious with Marvin. (*See* August 24, 2007 penalty phase transcript, pp. 466, 474). Ms. Milliner recalled an incident where Marvin was arrested for beating Crystal and threatened to kill her and their family if she didn't bail him out. (*See* August 24, 2007 penalty phase transcript, p. 466). She testified that Defendant was "always a good kid" and he was a good father, helped others and was a very loving and caring person. (*See* August 24, 2007 penalty phase transcript, pp. 467-69, 475). She also noticed that Crystal appeared to favor Garett over Defendant. (*See* August 24, 2007 penalty phase transcript, pp. 470-71).

Crystal testified that she has 3 children: Sherry is the oldest and her father is Charles Edward Brant (Eddie Brant); Defendant is the next oldest and his father is Eddie Brant; and Garret is the youngest and his father is Marvin. (*See* August 24, 2007 penalty phase transcript, p. 477). Crystal testified that her mother suffered from and was treated for depression for 25 years, and her father was an alcoholic. (*See* August 24, 2007 penalty phase transcript, pp. 477-78). In terms of their parenting skills, she testified that "my father drank every day, beat my mother half to death every night; and no one took care of the children." (*See* August 24, 2007 penalty phase transcript, p. 478). She also said that her paternal grandmother suffered from depression and was hospitalized in a mental institution. (*See* August 24, 2007 penalty phase transcript, p. 478).

She testified that Defendant's father (Eddie Brant) was quiet and she did not get to know him very well; he was of low intelligence and had an IQ of 75 or 76. (*See* August 24, 2007 penalty phase transcript, p. 479). During her pregnancy with Defendant, she was bitten by a snake and took medication which she believed was the reason she cried day and night. (*See* August 24, 2007 penalty phase transcript, pp. 480). Defendant's birth was difficult as he was

stuck in the birth canal, and she "died twice." (*See* August 24, 2007 penalty phase transcript, p. 480). Crystal suffered from severe past partum depression after Defendant was born, and when he was approximately 6 weeks old, she saw a doctor, was given medication, was suicidal and placed in a mental hospital for 6-8 weeks where she received shock treatment. (*See* August 24, 2007 penalty phase transcript, pp. 481-82, 484). She has continued to take anti-depressants on and off for the past 45 years. (*See* August 24, 2007 penalty phase transcript, p. 484). While she was hospitalized and when Defendant was 7 or 8 weeks old, Eddie Brant left Crystal for "Aunt Jenny" and took Defendant and Sherry with him. (*See* August 24, 2007 penalty phase transcript, pp. 479, 482). Eddie Brant then sent Defendant to live with his parents (Defendant's paternal grandparents) in West Virginia while he and Aunt Jenny kept Sherry. (*See* August 24, 2007 penalty phase transcript, p. 482). Defendant remained with his grandparents for 6-8 weeks until Crystal was discharged and picked him up. (*See* August 24, 2007 penalty phase transcript, pp. 483, 485).

Crystal testified to the "animosity" in her relationship with Defendant; he didn't want her taking care of him, and she had a hard time feeding him and changing his diaper because he would kick her and "carry on." (*See* August 24, 2007 penalty phase transcript, p. 486). When Defendant started walking he would beat his head against the floor, made holes in the wall and ate the plaster; he also ate fertilizer. (*See* August 24, 2007 penalty phase transcript, pp. 486-87). Crystal worked and Defendant was cared for by an elderly neighbor; there were no other children with whom Defendant could socialize. (*See* August 24, 2007 penalty phase transcript, p. 490).

Crystal married Marvin when Defendant was 5 years old. (*See* August 24, 2007 penalty phase transcript, p. 489). She described life with Marvin as "horrible" and that, after several months of marriage, "it's like I married a monster." (*See* August 24, 2007 penalty phase

transcript, pp. 492-93). He started calling her names, didn't like Defendant and would spank him very hard and make him bleed. (*See* August 24, 2007 penalty phase transcript, p. 493). Marvin started drinking hard alcohol and chasing it with beer, and would "go crazy." (*See* August 24, 2007 penalty phase transcript, p. 494). Once, while they were living in Maryland, Marvin came home severely drunk and started hitting her and went after the children; she called the police. (*See* August 24, 2007 penalty phase transcript, pp. 494-95). After the family moved to Orlando, Florida, Marvin started drinking more and every night, and he would come home and mentally and physically torture her for several hours. (*See* August 24, 2007 penalty phase transcript, pp. 495-96). There was another incident in Florida where Marvin came home drunk and pushed her around, and Garett intervened; she called 911. (*See* August 24, 2007 penalty phase transcript, pp. 507-8). Marvin was very negative towards Defendant and constantly told him he was no good. (*See* August 24, 2007 penalty phase transcript, pp. 496). He was also physically violent towards Defendant and recalled a time he locked Defendant in the bedroom and beat him with a belt and his fists, and she recounted an incident when Marvin took Defendant out to the yard and beat him "unmercifully with his fists." (*See* August 24, 2007 penalty phase transcript, p. 512). Defendant showered attention on Garett, and taught him how to play ball and attended his games. (*See* August 24, 2007 penalty phase transcript, p. 497). Marvin only attended one of Defendant's football games but ridiculed him and ended up leaving after half an hour; Defendant was hurt and begged them to come to his games, but although Crystal tried, Marvin did not. (*See* August 24, 2007 penalty phase transcript, pp. 497-98). Defendant moved out when he was 17 years old. (*See* August 24, 2007 penalty phase transcript, p. 499). On cross-examination, she also testified that Marvin was less violent than her father, who would line them up along the gas heater and shoot at them just to see if he could hit them. (*See* August 24, 2007 penalty phase

transcript, p. 509). She also testified that Marvin had repeatedly threatened to kill her and had held guns to her head and razor blades to her throat. (*See* August 24, 2007 penalty phase transcript, p. 510).

Crystal also testified that she received and told Garett about his subpoena for Defendant's trial, but he was not present because he was up north looking for a job. (*See* August 24, 2007 penalty phase transcript, p. 489).

Defendant's sister, Sherry, testified that Marvin bullied Defendant and verbally and physically abused her mother, Crystal. (*See* August 24, 2007 penalty phase transcript, p. 514). When Defendant was around 8 years old, Marvin would verbally berate Defendant, i.e., tell him that he was never going to be anything or would end up in jail; Defendant was singled out for this verbal abuse and it continued for as long as she could remember. (*See* August 24, 2007 penalty phase transcript, pp. 515, 517). She testified that Marvin was an alcoholic, smoked pot, was not home very much and was not affectionate. (*See* August 24, 2007 penalty phase transcript, pp. 515-16, 518, 526). She did not recall personally witnessing any physical abuse of Defendant or her mother, but recalled the incident in Maryland where she went to the neighbor's house to call 911. (*See* August 24, 2007 penalty phase transcript, pp. 517-18). She testified that Marvin sexually molested her from the age of 13 to the age of 16. (*See* August 24, 2007 penalty phase transcript, pp. 520-21). Defendant and Marvin spoke before Marvin's death and had a reconciliation. (*See* August 24, 2007 penalty phase transcript, p. 523). Sherry also testified about going with Defendant's attempts to turn himself into law enforcement. (*See* August 24, 2007 penalty phase transcript, pp. 524-25). She testified that Garett was working then somewhere between Georgia and the Carolinas; Garret, who was in his early 30's has had a drug

problem - specifically, with crack - since he was 17 or 18 years old, and continued to battle the problem. (*See* August 24, 2007 penalty phase transcript, p. 525).

A review of the sentencing order reflects that the trial court found the existence of and gave great weight to the following 2 aggravators: the homicide was committed during the course of committing a sexual battery and the homicide was committed in a heinous, atrocious and cruel manner (HAC). (*See* sentencing order, pp. 36-37, attached). The Court further found that all factors offered in mitigation had been established. The Court considered and weighed the aggravators and mitigators as follows:

> On 1 July 2004 Defendant was and had been for many months, using unlawful substances, primarily methamphetamine. He went to the victim's home and entered with her consent, ostensibly for the purpose of taking photographs of some tile work he had done in her house when he and his wife lived in that home several months before. The best evidence of what he then did comes from his pre-arrest statements and admissions to Detectives Esquinaldo and Losat. The evidence is that he grabbed her and forcibly sexually assaulted her. He did not use a condom and he ejaculated. In the process he placed a sock in her mouth. He then choked her and left her on her bed, believing she was dead or not conscious. While he was then looking around the house, she regained consciousness and attempted to leave the house. He grabbed her and took her back to the bed and strangled and suffocated her using his hands, a plastic bag over her head, and ligatures – a stocking, an electrical cord, and a dog leash - around her neck. She was conscious for some period of time and was obviously aware she was going to die, but she did not die immediately. She "hiccupped" while he placed her body in the bath tub and opened the shower on her. The cause of death was strangulation and suffocation. She could have remained conscious for as little as seven to fourteen seconds, and possibly more. She endured being violently sexually assaulted, being strangled to a state of unconsciousness, then regained consciousness, then was strangled again, to her death. Defendant killed Ms. Radfar without conscience, and without pity. The homicide was extremely torturous to the victim. She must have experienced fear and terror knowing she was going to die. The homicide was heinous, was atrocious, and was cruel. The Court places great weight on the

conduct and manner of the sexual assault and the strangulation killing.

Defendant over the next several hours thereafter did things to conceal his crimes, including wiping areas to remove his finger prints, cleaning the room with cleansing materials, and taking her car from the area and abandoning it several blocks away. His conduct after the crimes however does not establish any facet of any aggravating circumstance.

Defendant in July, 2004 was 39 years of age, married, and had two sons. From the age of 5 until the age of 17 when he left his parents' home, his step father severely abused him emotionally, psychologically, and to a lesser extent, physically. He lived in that home with his step brother and sister. The step father also physically abused Defendant's mother and he sexually abused the sister. The step father was an alcoholic and an evil person to the children.

He later attended a bible school where he met his wife. He had been a religious person and wanted at one time to become a minister. He and his wife to be left the school, married, and had children. At some time during the marriage, Defendant began to abuse drugs, including marijuana, cocaine, and methamphetamine, and became dependent or addicted.

He is diagnosed with chemical dependence and has symptoms of attention deficit disorder. More significantly, he is diagnosed with having a sexual obsessive disorder, or sexual sadism. This led to the sex games or fantasies in which he engaged with his wife, which included "assaulting" her and having "rough sex," much like his conduct with the victim of the homicide.

His diagnosed drug dependence and depression and childhood experiences led mental health experts to opine that because of these factors, his capacity to appreciate the criminality of his conduct, or to his capacity to conform his conduct to the requirements of the law was substantially impaired. He has a diminished ability to control his impulses.

He came to be a good and reliable worker and competent craftsman, and supported his family. He was a good father and husband. He has a reputation for non-violence. Although Defendant has borderline verbal intelligence, he feels and has expressed genuine remorse for his actions. He attempted to turn himself into the police the day after he killed the victim, and he cooperated with detectives when they went to his mother's home to interview him, and he ultimately confessed to the crimes. He later pled guilty to the murder and other charges, which dispensed with requiring the State to prove his guilt to a jury, and he waived his right to a jury advisory sentence.

The above are significant aspects of the Defendant's background and character, on which the Court places importance and weight, as indicated below.

1. Charles G. Brant has no significant history of prior criminal activity.

   The Court accords this circumstance little weight

2. Defendant was emotionally, mentally and physically abused by his stepfather from age 5 to 17; he has diminished intellectual function; he has diminished impulse control due to drug dependency, and as 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.

   The Court accords these circumstances moderate weight

3. Defendant at the time of the crime was 39 years old and had led a crime-free life.

   The Court accords this circumstance little weight

4. Defendant is remorseful, and expressed his remorse when initially interviewed, and has expressed his remorse to other persons since his arrest.

   The Court accords this circumstance little weight

5. Defendant cooperated with law enforcement officers when approached at his mother's home. He voluntarily accompanied detectives, while not under arrest, to a station house for questioning. He admitted the crimes when questioned. He later pled guilty to all crimes and did not require the State to prove the charges to a jury beyond a reasonable doubt. He then waived his right to a jury penalty recommendation.

   The Court accords these circumstances moderate weight

6. Defendant has borderline verbal intelligence.

   The Court accords this circumstance little weight

7. Defendant has a family history of mental illness.

   The Court accords this circumstance little weight

8. Defendant is not a sociopath or a psychopath, and does not have an antisocial personality disorder.

   The Court accords this circumstance little weight

9. Defendant has diminished impulse control and is not able to make sound decisions because of methamphetamine abuse, and exhibits periods of psychosis.

   Defendant has recognized his drug dependence problems and has sought help.

   Defendant used methamphetamine before, during, and after the murder and other crimes.

   The Court accords these circumstances moderate weight

10. Defendant is diagnosed with chemical dependence, sexual obsessive disorder, and has symptoms of attention deficit disorder.

    The Court accords these circumstances moderate weight

11. Defendant is a good father. He encourages his sons to do well and expresses to them his interest in their welfare and how they are doing. His children, now ages 9 and 12, who he has not seen since 2004, responded favorably to him during the trial, and have written letter to him letters.

    The Court accords this circumstance little weight

12. Defendant is a good worker and craftsman.

    The Court accords this circumstance little weight

13. Defendant has a reputation of being a non-violent person.

    The Court accords this circumstance little weight

(*See* sentencing order, pp. 41-44, attached).

Findings

As to claim 2A, the Court first finds that much 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 Lawrence's alcoholism and mental and physical abuse of Delphia and the children, Delphia'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. *See Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007) ("[T]his Court has held that even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence.").

As to the evidence regarding Defendant's paternity and the circumstances surrounding his conception, the Court finds Defendant has failed to show that counsel performed deficiently in failing to discover this information. The Court notes that in this case Eddie passed away approximately 8 months after Defendant's arrest and Eddie essentially had no contact with Defendant after the age of 7 weeks. Although a few paternal family members may have been aware Eddie was not Defendant's biological father, it was clear that Crystal kept it a secret from everyone except Aunt Jenny and Eddie Brant. Neither Defendant, Sherry, Garett, or Ms. Milliner (Crystal's best friend) was aware of Defendant's paternity until postconviction proceedings. Crystal even testified under oath during the penalty phase that Eddie Brant was

Defendant's father. When finally confronted with DNA evidence, Crystal continued to insist Eddie was Defendant's father. Under such circumstances, counsel cannot be expected to verify paternity through other family members nor seek DNA testing to confirm parentage.

Although trial counsel did not introduce expert testimony explaining how Defendant's history/background affected his psychological and emotional development and, therefore, Defendant's moral culpability, the Court finds he has failed to establish prejudice. The Court first notes the trial court found in aggravation that the homicide was committed in the course of a sexual battery and HAC, an especially weighty aggravator. *See Butler v. State*, 100 So.3d 638, 667 (Fla. 2012) ("HAC is considered one of the weightiest aggravators in the statutory scheme."). The Court finds there is no reasonable probability the trial court would have imposed a life sentence.

As to claim 2B, the Court notes it is unclear why counsel did not present *Skipper* evidence. However, the Court finds counsel's failure to present *Skipper* evidence did not affect the outcome of the proceedings. Although there was no testimony or evidence presented at the penalty phase regarding Defendant's adaptability to prison, 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.

As to claim 2C, to the extent Defendant asserts that if counsel had retained an expert in sexual offenses, counsel would have been aware of the need to conduct tests to check testosterone levels, pituitary gland function and other physical and paper-based tests and could have established that Defendant's strong sex drive was caused by biological/physiological

factors, the Court finds Defendant has failed to show that counsel performed deficiently; Defendant did not present testimony or evidence of such physical tests or results.

To the extent Defendant alleges counsel failed to present objective and statistical analyses indicating Defendant met several significant risk factors for sexual homicide or that his sexual deviance was a result of emotional and psychological factors which he could not control, the Court finds Defendant has failed to establish prejudice. Even if counsel had presented testimony that Defendant had an increased risk for committing such an offense, the Court finds there is no reasonable probability such evidence would have affected the outcome of the proceedings. As mentioned in claim 2A above, the trial court was already aware of the existence of the facts underlying the risk factors and such testimony was cumulative. Additionally, Dr. Cunningham acknowledged that Defendant was not "doomed to be a murderer."

As to claim 2D, the Court finds the testimony of Mr. Fraser to be credible. Mr. Fraser considered introducing the PET scan evidence through the testimony of Dr. Wu and Dr. Wood, but made a strategic decision to bring in the PET scan evidence through the testimony of Dr. Maher. Mr. Fraser had concerns as to the presentation of Dr. Wu and Dr. Wood and was further concerned that the State's expert, Dr. Mayberg, would be more credible. Mr. Fraser also had concerns regarding the use of PET scans in a forensic setting, and the experts each acknowledged that this was an issue of some debate in the scientific community. Additionally, because neither Dr. Wu nor Dr. Wood testified at the hearing, the State did not call Dr. Mayberg to testify. The Court finds Mr. Fraser's strategic decision was reasonable, therefore, counsel has failed to show that counsel performed deficiently by not introducing the PET scan images or the testimony of Dr. Wu or Dr. Wood at the penalty phase, and instead presenting the PET scan evidence through Dr. Maher. *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.").

As to claim 2E, Mr. Terrana and Mr. Fraser testified that they did not seek drug testing of the Defendant's hair or clothing that was obtained as evidence in this case because there was no dispute that Defendant used methamphetamines; the only dispute was how such methamphetamine use affected him. The Court finds the testimony of Mr. Terrana and Mr. Fraser to be credible. The Court notes that all 3 penalty phase mental health experts, including the State's expert, diagnosed Defendant with substance abuse/dependence; Dr. Maher specifically diagnosed him with severe methamphetamine dependence, associated with psychotic episodes. Although Defendant's hair tested positive for amphetamine, methamphetamine and MDA, Dr. Barbieri testified that the testing could not distinguish between a chronic or acute user, when the drugs were taken or the toxicological effects experienced prior to the collection of the evidence. Additionally, Mr. 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. Although Dr. Maher testified that he told Mr. Fraser he had general knowledge and training regarding the effects of methamphetamine use and may have suggested that he consult with a specialist, Dr. Maher did not advise Mr. Fraser that he was unable or not competent to testify to such. The 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. The trial court found the following mitigators: Defendant had diminished impulse control due to his drug dependency; Defendant had diminished impulse control and was not able to make sound decisions because of his methamphetamine abuse; Defendant recognized his drug dependence

problems and sought help; Defendant used methamphetamine before, during and after the instant offenses; as a result of drug dependency, Defendant's capacity to conform his conduct to the requirements of law was substantially impaired. Consequently, the Court Defendant has failed to show that counsel performed deficiently under *Strickland*.

Additionally, the Court finds Defendant has failed to show that he was prejudiced by counsel's failure to obtain drug testing or retain a psychopharmacologist. As aforementioned, testing of the hair or clothing in evidence would not have indicated whether Defendant was a chronic or acute user, when he ingested the drugs, or what toxicological effects he experienced at the time of the offense or prior to the collection of the evidence. Furthermore, as mentioned previously, the sum and substance of Dr. Morton's testimony - that Defendant's methamphetamine use and abuse diminished his ability to control his impulses - was conveyed through Dr. Maher. The trial court found the following mitigators: Defendant had diminished impulse control due to his drug dependency; Defendant had diminished impulse control and was not able to make sound decisions because of his methamphetamine abuse; Defendant recognized his drug dependence problems and sought help; Defendant used methamphetamine before, during and after the instant offenses; as a result of drug dependency, Defendant's capacity to conform his conduct to the requirements of law was substantially impaired. The trial court gave those mitigators moderate weight. There is no reasonable probability the trial court would have imposed a life sentence had counsel tested the evidence for drugs or retained a psychopharmacologist.

In claim 2F, Defendant alleges counsel performed deficiently by failing to ensure that he received a reasonably competent mental health evaluation and retain reasonably qualified experts to determine the extent of his mental, emotional and psychological deficits. Defendant claims

counsel also failed to retain an expert to assess the effects that methamphetamines and MDMA had on his brain and thought processes and how that would have established the statutory mental mitigators. Defendant claims counsel failed to retain an expert to assess his sexual dysfunction and how that dysfunction would have established the statutory mental mitigators, and again asserts that counsel failed to present expert testimony and evidence of the extent of his brain damage, including but not limited to an MRI, PET scan images and additional neuropsychological testing. Defendant further claims counsel failed to conduct a reasonably competent investigation of his biological, social and psychological history and failed to provide his experts with relevant background information; if counsel had done so, they would have found testimonial and documentary evidence to corroborate the statutory and non-statutory mental mitigators and enabled the trial court to give greater weight to those mitigators.

The Court first finds Defendant has failed to demonstrate that counsel failed to ensure Defendant received a reasonably competent mental health evaluation. Counsel had Defendant evaluated by 2 mental health experts. Dr. McClain diagnosed Defendant with polysubstance abuse, major depression recurrent and cognitive disorder not otherwise specified; Dr. Maher diagnosed Defendant with methamphetamine dependence, severe, associated with psychotic episodes, sexual obsessive disorder and chronic depression. Defendant does not argue that their diagnoses were incorrect or otherwise lacking. As to Defendant's claim that counsel failed to obtain a biopsychosocial history of Defendant, as the Court discussed in claim 2A above, the testimony presented during postconviction proceedings was largely cumulative. As to his claim that counsel failed to retain an expert on methamphetamine use and the effect on Defendant's brain or an expert as to the extent of Defendant's brain damage, as the Court addressed in claim 2D and 2E above, counsel made reasonable a strategic decision in presenting PET scan evidence

and evidence regarding methamphetamine use and its effects through Dr. Maher. The trial court found numerous mitigators based on the mental health evaluations of Defendant's experts. The Court finds Defendant has failed to show that counsel performed deficiently or that the outcome of the proceedings would have been different as required under *Strickland*.

As to claim 2G, the Court adopts its summary of the postconviction testimony and evidence as set forth in claim 1B above. The Court finds the testimony of Detective Clark and the OCSO records to be more credible and reliable than the testimony of Garett Coleman. Detective Clark's testimony that he did not meet Garett until late 2005 and Garett did not become a CI until 2006 is substantiated by OCSO records. Additionally, the Court finds credible the testimony of HCSO investigators that they learned of Defendant's location in Orlando through Garett's phone call to Defendant's father-in-law. Although it's conceivable that Garett may have contacted OCSO about Defendant's location, HCSO investigators learned of Defendant's location independent of Garett's tip to OCSO. The Court finds Defendant has failed to show Garett Coleman was a CI in July 2004. Although it is clear Garett was a CI at the time of the penalty phase hearing in 2007, Defendant has further failed to show how counsel was deficient in failing to discover this information when an HCSO report reflected they learned of Defendant's location through Defendant's father-in-law, there was no indication that a CI was involved in this case, and Garett's CI status with OCSO was not disclosed to counsel by the State, Garett or even Defendant. Consequently, the Court finds Defendant has failed to show that counsel performed deficiently in failing to investigate the Garett's status as a CI.

Furthermore, the Court finds Defendant has failed to demonstrate that he was prejudiced by counsel's failure to investigate Garett's status as a CI. As the Court finds Garett was not a CI at the time of Defendant's arrest in July 2004, Garett's lack of CI status in 2004 would not have

served as a mitigating factor. Additionally, even if Garett had been a CI in 2004 and tipped law enforcement off as to Defendant's location, there is no evidence that he was acting as a CI or state agent where he did so entirely of his own accord to protect his parents and only because Defendant wanted to turn himself in, he was not paid for any information provided and he was not directed to question Defendant. Such information would not have served as mitigation or affected the outcome of the penalty phase where it is clear Defendant wanted to and had already attempted to turn himself in to law enforcement. Garett's subsequent status as a CI from 2006 to 2008 would have had no bearing on any mitigating factors at sentencing. The Court also finds Garett's testimony that his status as a CI was part of the reason that he did not appear for Defendant's trial is not credible. Both Crystal and Sherry testified at the penalty and/or postconviction proceedings that Garett was aware of the subpoena but he was travelling out-of-state- either working or looking for work. Even if his CI status was part of the reason he did not appear, it was clearly not the only reason and there is no indication whatsoever that he would have appeared but for his status as a CI. Therefore, Garett's failure to appear would also not have been a mitigating factor. **As Defendant has failed to meet either prong of *Strickland*, no relief is warranted on claim 2G.**

CLAIM 3

COUNSEL'S PERFORMANCE IN FAILING TO INVESTIGATE AND PREPARE FOR JURY SELECTION AND DEVELOP AND INFORM MR. BRANT OF MITIGATION IN THE PENALTY PHASE FELL BELOW PREVAILING PROFESSIONAL NORMS. 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.

In claim 3, Defendant alleges that counsel performed deficiently in the following 3 areas: (1) failing to move for a change of venue; (2) failing to investigate and advise Defendant of the mitigation described above; and (3) failing to conduct a jury selection expert to prepare for voir dire and reasonably communicate with Defendant about jury selection. Defendant further alleges counsel failed to do the following: develop a relationship of trust with Defendant, a client with an identified mental illness and depression; consult with an expert as to a change of venue, raise a change of venue with the trial court, or discuss that option with Defendant; consult a jury selection expert to develop written questions, form a cohesive jury selection strategy, or seek individual voir dire; meet with Defendant in jail after the first failed attempt at jury selection and explain options or strategies for the next jury selection; gain Defendant's confidence and assure him that a fair sentencing jury could be selected or, if not, that counsel could move for a change of venue. Defendant asserts that a jury selection expert would have explained and assisted counsel in presenting this case to a jury while minimizing the effect of the violence and sexual aspect of the crimes, developing a proper juror profile strategies for addressing jurors' contempt, identifying potential jurors who would be able to consider the mitigation evidence, and educating jurors as to the importance of the Defendant's right to a fair trial despite strong evidence of guilt.

Defendant argues counsel was aware of the extensive media surrounding this case, including multiple references to his confession, and counsel should have been aware that a jury could not be selected in Hillsborough County; however, counsel failed to move for a change of venue even after Defendant had filed his own motion for a change of venue which was denied because he was represented by counsel. Defendant further asserts there is a reasonable probability the trial court would have granted a motion for change of venue. Defendant contends he was faced with choosing between a bench trial or a biased jury.

Defendant contends counsels only advice was developed in a "vacuum" and consisted of "guesswork" that the trial court would not impose death. Defendant again asserts that counsel failed to fully develop and investigate the mitigation evidence and, therefore, failed to fully advise him of the available mitigation in this case. Therefore, Defendant claims his waiver of his right to a jury trial during the penalty phase was not knowing, intelligent or voluntary and, but for counsel's deficient performance, he would have exercised his right to a penalty phase jury. For the aforementioned reasons, Defendant asserts he would not have waived his right to a jury but for counsel's deficient performance.

The Court adopts the summary of the postconviction testimony and evidence of Mr. Terrana, Mr. Fraser, Mr. Lenamon and Ms. Blake as set forth in claim 1 above. Additionally, the Court notes Mr. Fraser agreed the jury selection was a debacle and very disheartening, and after that attempt to seat a jury, he and Mr. Terrana met with Defendant in court. (*See* October 7, 2013 transcript, p. 79). Mr. Fraser did not recall what was said during that meeting. (*See* October 7, 2013 transcript, p. 79). As to Defendant's decision to go nonjury, Mr. Fraser testified as follows:

> [MR. FRASER]: I never told him he should go nonjury, if that is the question. I was talking to him in court after court adjourned. He decided at that point that he wanted a jury trial. Those were our marching orders when we left court that night.

(*See* October 7, 2013 transcript, p. 81).

> . . . .
>
> [POSTCONVICTION COUNSEL]: And so the next morning when Mr. Brant comes to court how long is that conversation with Mr. Brant? And who is involved in that conversation prior to your telling Judge Fuente that Mr. Brant is going to go nonjury?
>
> [MR. FRASER]: I don't recall. He just announced it. We didn't have a discussion. He just announced he wanted to go nonjury.

(*See* October 7, 2013 transcript, p. 82).

Mr. Terrana did not recall the theory or any discussions regarding how to address Defendant's guilty plea with the jury, but believed the first step would have been death qualifying the jury. (*See* October 7, 2013 transcript, p. 34). Mr. Terrana called the jury selection a debacle but noted that the panel was stricken. (*See* October 7, 2013 transcript, p. 37). He agreed part of the jurors' frustration was related to Defendant's guilty plea, but also due to the nature of the offense and facts of the case. (*See* October 7, 2013 transcript, p. 37). Mr. Terrana had no independent recollection of the meeting after jury selection, only that sometime after that meeting and the next morning, a decision was made to go nonjury as announced by Mr. Fraser on the record. (*See* October 7, 2013 transcript, pp. 38-39). He also testified that he was not concerned about going nonjury before Judge Fuente, as follows:

> [POSTCONVICTION COUNSEL]: Did you or Mr. Fraser research whether Judge Fuente had conducted any nonjury penalty phases previously?
>
> [MR. TERRANA]: I know I didn't. I wasn't concerned about that. I have known Judge Fuente for 20 years, 25 years. Judge Fuente is the judge who taught me how to try murder cases. I tried a number of death penalty cases with him. I know what his intellectual abilities are. And that's all I needed to know. I knew that we had the best judge one could ever have hoped for in terms following the law and recognizing mitigators and aggravators, weighing them properly, and making a right decision based on those. So that was a no brainer for me.
>
> I didn't need to research him. I've known him for 25 years -- well, I didn't know him for 25 years at the time, probably 20, or 19 at the time. But, in any event, what I'm telling you about Judge Fuente saying is he's hands down.
>
> [POSTCONVICTION COUNSEL]: A good part of the decision was based on your knowledge of Judge Fuente and your belief that he would listen and follow the law.
>
> [MR. TERRANA]: Correct.

(*See* October 7, 2013 transcript, pp. 39-40). Mr. Terrana testified he did not and did not think Mr. Fraser advised Defendant to waive the jury; they laid out his options and Defendant chose to go nonjury. (*See* October 7, 2013 transcript, pp. 41-43).

A review of the August 22, 2007 transcript reflects the following exchange occurred regarding Defendant's decision and waiver of a penalty phase jury:

> THE COURT: We're here on the matter of the second phase, penalty phase, for Charles Brant.
>
> Mr. Fraser, have and Mr. Terrana and Mr. Brant decided what you want to do?
>
> MR. FRASER: Mr. Brant has changed his mind since yesterday, and he's elected to go nonjury before the Court.

(*See* August 22, 2007 trial transcript, p. 2).

> . . . .
>
> THE COURT: Let's be sure. Mr. Brant, as you know, you pled guilty to these various offenses. And as you saw in the last two days the efforts that everybody went through to try to seat a jury of 12 people to hear evidence in aggravation that the State would present and evidence in mitigation that your lawyers would present.
>
> And as I know, your lawyers have told you under the law, what would happen is those 12 jurors after they hear that evidence would get some instructions from [] me. Then they'd go back to deliberate then they would come back with some recommendation.
>
> If it turns out that recommendation were life imprisonment, although the statute says that I would still have the legal right to impose a death sentence, as a practical matter under the current status of the law, as decided by the Supreme Court, it's highly unlikely that I could or would do that.
>
> Let me just the ask the State, are you in a position to state whether if the jury recommended life, you would ask the Court to impose notwithstanding?
>
> MR. HARB: That's highly questionable, Judge, given the status of the law on that issue.
>
> THE COURT: So as a practical matter, if that jury recommended life rather than death, I mean, it's highly, highly remote that this

Court would or could impose a death sentence. And it's highly likely that if I were to do so, that that sentence would be reversed on appeal if I impose the death sentences.

But if we do impanel a jury, as you heard me say many times yesterday to the panel, if they gave -- if they came back with a recommendation of death, then it would fall upon me to really reweigh and reconsider all the evidence; that is, the aggravation and mitigation.

And one of the factors I'd have to consider is their recommendation that is the jury's recommendation. And the law provides that I would have to give that great weight. And of course, I would. And then it would be up to me to impose either a sentences of death or sentences of life in prison without possibility of parole and under either of those scenarios if you were to receive a death sentence, obviously that would be directly appealable to the Supreme Court, even though you pled guilty.

Now, your lawyers I know told you, and the statute provides that at this stage of the proceedings, if you want it, I must impose a jury to hear all what I just described. But it's up to you and up to you alone. You have an absolute statutory right to weigh the - - a jury recommendation on this question and have the evidence presented to one person, myself. And I would do that entire waiving -- I'm sorry -- weighing, and then I would be the one to decide; and there would be no jury recommendation one way or the other. Your lawyers tell me that last night your feeling was that you wanted a jury, but just this morning I think now you've told them you've changed your mind and you want to do it without a jury. Can you tell me in your own words what it is you want to do, how you want to proceed from this point forward?

THE DEFENDANT: I want your recommendation.

THE COURT: I'm sorry?

THE DEFENDANT: I just -- I don't want a jury.

THE COURT: You do not want a jury? You're absolutely certain of that?

THE DEFENDANT: Yes.

. . . .

THE COURT: Okay. Mr. Brant -- and I'll ask you and your counsel. Counsel, during the course of your preparation for this phase is there any reason or any evidence that might suggest that

Mr. Brant currently suffers from any mental condition or anything like that?

MR. FRASER: I was interrupted but –

MR. HARB: I'm sorry.

MR. FRASER: The question is there any -- do I have any to doubt that he's capable and competent to make this decision? No, I don't have any doubt that I can articulate.

THE COURT: He's been examined by, I presume, psychologists.

MR. FRASER: Dr. Maher, Dr. McClain, Dr. Wu. Although Dr. Wu and Dr. Wood basically dealt with the PET scan, Dr. Maher and Dr. McClain would have found him competent to proceed. And I haven't seen any dramatic or even subtle change in his mental state all the times I visited him. So as far as I know, he's perfectly competent to make this decision, Judge.

THE COURT: Mr. Brant right now, sir, are you under medication? Are you being treated for anything -- with any medication at the jail?

THE DEFENDANT: No.

THE COURT: Nothing whatsoever?

THE DEFENDANT: Well, I'm taking Hydra(phonetic spelling), I think it is.

THE COURT: Taking what? I'm sorry.

THE DEFENDANT: I think it's Hydra.

THE COURT: What is that for?

THE DEFENDANT: I have a urinary infection. And I take Zantac for heartburn.

THE COURT: In your past history, have you been treated for mental illnesses by any psychologist or psychiatrist?

THE DEFENDANT: No, sir. Well, at the jail. Does that count?

THE COURT: Were you treated at the jail?

THE DEFENDANT: For depression, antidepressants.

THE COURT: When was the last time you took antidepressants?

THE DEFENDANT: About two months ago I stopped taking them.

THE COURT: Any prior criminal history, Mr. Harb?

MR. HARB: Mr. Brant? No, sir. No convictions.

THE COURT: So you've never been adjudicated incompetent for any criminal matters because you have no prior criminal matters; is that correct?

THE DEFENDANT: Uh-huh.

THE COURT: And right now at this very moment are you under the influence of anything, any medication, any alcohol, any drugs of any sort?

THE DEFENDANT: No, sir.

THE COURT: And you understand that you know this choice is yours and yours alone. It's certainly not up to your lawyers or up to me or up to the prosecutor. This choice of having a jury hear this evidence and then making recommendation of waiving a jury and letting me hear it all and having me make my own decision, that's your decision, your decision alone. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: But you know, once you've waived it and once we begin, I don't think that there's any provision in the law which would allow you to say, I changed my mind; I want to have a jury here. So once we start, that's the way we're going to proceed. Do you understand that? Do you have any questions at all about anything from the prosecutor, from me, from your lawyers or anybody about anything?

THE DEFENDANT: No, sir.

THE COURT: You're absolutely certain this is what you want to do?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And you understand that this is going to be a little bit out of focus, so-to-speak? In other words, we may hear, this afternoon or tomorrow, we may hear some aggravation -- evidence in aggravation? We may then hear some mitigation evidence and then later on hear more aggravation. So it will be a little bit interrupted.

But after all is said and done, what I'll do is I'll have the court reporter transcribe everything. We'll have an opportunity for the lawyers on both sides to make arguments and submit any legal memorandum that they wish and then it will be incumbent upon me to make a decision, which I'll do in writing and announce it sometime in the future. Any questions at all about the procedure?

THE DEFENDANT: No, sir.

THE COURT: Has anybody prior to today suggested to you that because of what their experiences might have been before this particular judge, Judge Fuente, that Judge Fuente is lenient or harsh or easy or hard in any respect? Are you making this decision because of your attitudes or feelings towards this judge as opposed to other judges?

THE DEFENDANT: I've seen you in the past three years.

THE COURT: I'm sorry?

THE DEFENDANT: I've seen you for the past three years, and you're pretty tough.

THE COURT: Do you think that that means I would not impose a death sentences?

THE DEFENDANT: No.

THE COURT: You understand that I could and I would if required by law? You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that I have before, I've done this before, I have imposed a death sentence before?

THE DEFENDANT: Yes.

> THE COURT: Okay. I guess - - show, Santo, on the docket that we had a colloquy with the defendant and he has waived his right to trial by jury for penalty phase.

(August 22, 2007 transcript, pp. 5-8, 10-15).

The Court finds the testimony of both Mr. Terrana and Mr. Fraser to be credible, and that neither Mr. Terrana nor Mr. Fraser advised Defendant to waive the penalty phase jury. As the letter indicates, counsel had discussions with Defendant explaining his various options. It was decided that they would proceed to a full-blown penalty phase before a jury. After the panel was stricken and Mr. Terrana and Mr. Fraser met with Defendant, counsel believed that they were still going to proceed with a jury in the penalty phase but, by the next morning, Defendant made the decision to waive the penalty phase jury and have the trial court alone determine his sentence. The Court finds Defendant has failed to show how counsel performed deficiently pursuant to *Strickland*.

Although the exact standard for prejudice in such a case is unclear, Defendant argues that the Court should apply the standard set forth in *Hill v. Lockhart*, 474 U.S. 52 (1985), wherein the Court held that in order to satisfy the prejudice prong of *Strickland* when a defendant has pleaded guilty, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Assuming arguendo that such a standard is appropriate, the Court finds the Defendant has failed to establish prejudice. The detailed colloquy regarding Defendant's waiver of a penalty phase jury reflects that Defendant was aware of all the rights he was giving up in waiving a jury recommendation as well as the penalty that he faced; Defendant specifically advised Judge Fuente that he wanted Judge Fuente alone to decide his sentence. His decision to waive the penalty phase jury was knowing, intelligent and voluntary. The Court, therefore, finds there is no reasonable probability

that Defendant would have insisted on proceeding with a penalty phase jury if counsel had developed rapport with Defendant (who suffered from depression), moved for a change of venue, retained a jury selection expert, or advised Defendant of all of the potential mitigation evidence presented during the postconviction proceedings. The Court further notes that Defendant also has failed to demonstrate that the outcome of the proceedings would have been different had he proceeded to a penalty phase before a jury. **No relief is warranted as to claim 3.**

CLAIM 4

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.

During the October 16, 2013 evidentiary hearing, Defendant orally withdrew claim 4. (*See* October 16, 2013 transcript, pp. 1141-45). Consequently, the Court does not further address claim 4 herein.

CLAIM 5

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. BRANT OF A FUNDAMENTALLY FAIR TRIAL

GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

In claim 5, Defendant alleges he did not receive a fundamentally fair trial due to the cumulative effect of the errors in the guilt and penalty phases which, "when considered as a whole, virtually dictated a sentence of death."

As the Court has herein denied each of Defendant's claims, the Court further finds relief is not warranted on claim 5. *See Parker v. State*, 904 So. 2d 370, 380 (Fla. 2005) "[W]here the individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error also necessarily fails."); *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003) ("[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail.").

CLAIM 6

MR. BRANT'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS HE MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

In claim 6, Defendant acknowledges this issue is not yet ripe for review as a death warrant has not been signed, however, he asserts it is necessarily raised to preserve it for federal review. Defendant argues that this 8th Amendment rights will be violated as he may be incompetent at the time of his execution. Defendant argues that he suffers from brain damage and mental illness and, his already fragile mental condition could only deteriorate under his current conditions of incarceration.

In its response, the State argues that Florida Rules of Criminal Procedure bar an incompetency claim until the death warrant has been signed. Furthermore, the State contends that

Defendant has not alleged any facts in support of this claim and that it should be summarily denied because it is not ripe for consideration.

As both parties note, a death warrant has not yet been signed in this matter. **As such, this issue is not ripe and relief is not warranted as to claim 6.** *See Gamble v. State*, 877 So. 2d 706, 720 (Fla. 2004) ("[A] claim of competency to be executed is not ripe for review until the governor signs a death warrant."); *Griffin v. State*, 866 So. 2d 1, 22-23 (Fla. 2003) (finding trial court properly denied claim regarding defendant's sanity for execution because the issue was not ripe where death warrant had not been signed); *see also Hunter v. State*, 817 So. 2d 786, 798-99 (Fla. 2002) (finding meritless defendant's claim that he may be incompetent at the time of his execution); *Hall v. Moore*, 792 So. 2d 447, 450 (Fla. 2001) (agreeing defendant's claim regarding competency at the time of execution was premature and finding the claim to be without merit).

CLAIM 7

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

Defendant asserts the State withheld evidence material to Defendant's guilty and sentencing in violation of *Brady v. Maryland*, 373 U.S. 87 (1963). Specifically, Defendant asserts the State withheld evidence that Defendant's half-brother, Garett Coleman, was a CI for OCSO during the time of the instant offenses and when he turned Defendant into OCSO. Defendant avers that Garett's CI status was relevant and material to establish the voluntariness of Defendant's confession as well as mitigating factors in sentencing. Defendant asserts Garett was a CI when he contacted the OCSO to inform them of Defendant's whereabouts which resulted in

Defendant's middle-of-the-night arrest and uncounseled lengthy interrogation by law enforcement (wherein Defendant made statements which were then used to support the aggravating factors). Defendant further asserts the information was relevant to establish a level of family dysfunction relevant and material to mitigating factors in sentencing. Defendant asserts Garelt was a listed witness who gave a sworn statement, but his status as a CI was never revealed to Defendant.[6]

The State has a duty to evaluate evidence and disclose all evidence that is either material to guilt or to punishment of the defendant. *See Brady v. Maryland*, 373 U.S. 83, 85 (1963). In order to show that a *Brady* violation has occurred, a defendant must demonstrate (1) that exculpatory or impeaching favorable evidence (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. *See Strickler v. Greene*, 527 U.S. 263, 281–82(1999). To meet the materiality prong, the defendant must demonstrate 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' *Strickler*, 527 U.S. at 280 (quoting *U.S. v. Bagley*, 473 U.S. 667, 682 (1985)). "As with prejudice under *Strickland*, materiality under *Brady* requires a probability sufficient to undermine confidence in the outcome." *Duest v. State*, 12 So. 3d 734, 744 (Fla. 2009).

As to claim 7, the Court adopts its summary of the postconviction testimony and evidence as set forth in claim 1B above. As the Court found in claim 1B, the Court finds the testimony of Detective Clark and the OCSO records to be more credible and reliable than the

[6] In its closing argument, the State argues that *Brady* does not apply when a defendant pleads guilty. However, the Court notes that in *Farr v. State*, 124 So. 3d 766 (Fla. 2012), the Florida Supreme Court took note of the cases cited in the State's closing argument, but proceeded by assuming arguendo that a defendant is not precluded from raising a *Brady* violation after pleading guilty and addressed the claim on its merits. Consequently, in an aabundance of caution, the Court will address this *Brady* claim on its merits.

testimony of Garett. Detective Clark's testimony that Defendant did not meet Garett until late 2005 and he became a CI in 2006 is substantiated by the OCSO records. Additionally, the Court finds credible the testimony of HCSO investigators that they learned of Defendant's location in Orlando through Garett's phone call to Defendant's father-in-law. Although it is conceivable that Garett may have contacted OCSO about Defendant's location, HCSO investigators learned of Defendant's location independent of Garett's tip to OCSO. The Court finds Defendant has failed to show Garett was a CI in July 2004. As the Court finds Garett was not a CI at the time of Defendant's arrest in July 2004, Garett's lack of CI status in 2004 was neither exculpatory nor impeaching favorable evidence, and was immaterial to and would not have had any effect on Defendant's motion to suppress or served as a mitigating factor. Additionally, even if Garett had been a CI in 2004 and tipped law enforcement off as to Defendant's location, there is no evidence that he was acting as a state agent where he did so entirely of his own accord only because Defendant wanted to turn himself in and to protect his elderly parents, and Garett was not paid for any information provided and was not directed to question Defendant. Even if he was a CI who purportedly told officers about Defendant's location, such information would not have served as mitigation or affected the outcome of the penalty phase where it is clear Defendant wanted to and had already attempted to turn himself into law enforcement. Garett's subsequent status as a CI from 2006 to 2008 would have had no bearing on Defendant's motion to suppress or any mitigating factors at sentencing. As Defendant has failed to show Garett's CI status was favorable evidence (either mitigating or impeaching) or material, the Court finds Defendant has failed to establish that a Brady violation occurred. **No relief is warranted on claim 7.**

It is therefore **ORDERED** that Defendant's Third Amended Motion to Vacate Judgment of Conviction and Sentence of Death is hereby **DENIED**.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this 5th day of February, 2014.

MICHELLE D. SISCO
Circuit Judge

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of this order has been furnished to Mary-Louise Samuels Parmer, Esquire, Capital Collateral Regional Counsel – Middle, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619, by regular U.S. mail; Katherine Blanco, Esquire, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Ronald Gale, Esquire, Office of the State Attorney, 419 N. Pierce St., Tampa, FL 33602, by inter-office mail, on this 5th day of ~~January~~, 2014.

~~Sandi Hecksher, Judicial Assistant~~
DEPUTY CLERK

CIRCUIT COURT * CLERK * HILLSBOROUGH COUNTY

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO.: 04-12631**

v.

CHARLES GROVER BRANT, **DIVISION: J/TR2**
Defendant.
_____/

ORDER DENYING MOTION FOR REHEARING

THIS MATTER is before the Court on Defendant's Motion for Rehearing, filed on February 20, 2014, pursuant to Florida Rule of Criminal Procedure 3.851(f)(7). The State did not file a response. After considering, the motion, court file and record, the Court finds as follows.

On February 5, 2014, this Court entered its Final Order Denying Third Amended Motion to Vacate Judgment of Conviction and Sentence of Death, wherein the Court denied Defendant's rule 3.851 motion for postconviction relief. In the instant motion, Defendant asserts that in its order, the Court "overlooked and misapprehended facts and law necessary to a just decision in the matter..." Specifically, Defendant asserts the Court misunderstood the role of the ABA guidelines and failed to recognize that they provide guidance as to minimal standards of attorney performance. Defendant further asserts the Court misunderstood the testimony at the evidentiary hearing and his argument regarding his paternity. Defendant asserts he did not argue counsel should have verified his paternity or conducted DNA testing, but that counsel had a minimal obligation to investigate and contact Defendant's father or paternal relatives; had counsel done so, he could have discovered Defendant's paternity in a 10-minute phone call to Eddie Brant's widow. Defendant requests that the Court grant his motion and find that he was prejudiced by counsel's deficient performance.

The Court is well aware that the ABA guidelines provide guidance as to reasonable standards of attorney performance in capital cases. In *Mendoza v. State*, 87 So. 3d 644 (Fla. 2011), the Florida Supreme Court noted,

> The ABA Guidelines are not a set of rules constitutionally mandated under the Sixth Amendment and that govern the Court's *Strickland* analysis. Rather, the ABA Guidelines provide guidance, and have evolved over time as has this Court's own jurisprudence. To hold otherwise would effectively revoke the presumption that trial counsel's actions, based upon strategic decisions, are reasonable, as well as eviscerate "prevailing" from "professional norms" to the extent those norms have advanced over time.

See Mendoza, 87 So. 3d at 653 (footnote omitted). In noting in its final order that "ABA guidelines are neither rules nor requirements," the Court was not implying that those guidelines could simply be ignored, but only that failure to meet those standards of performance did not automatically require a finding of ineffective assistance of counsel.

To the extent that Defendant believes the Court misinterpreted his claim regarding the failure to investigate his paternity, the Court finds as follows.[1] As the Court noted in its final order, Eddie Brant passed away 8 months after Defendant's arrest and virtually had no contact with Defendant after the age of 7 weeks. Defendant's mother, Crystal Coleman, identified Eddie Brant as Defendant's father and did not disclose Defendant's paternity or the circumstances surrounding his conception to her children, including Defendant, or to counsel. Crystal Coleman even testified under oath during the penalty phase that Eddie Brant was Defendant's father. Trial counsel, Robert Frasier, had no reason to believe Eddie Brant was not Defendant's biological father. Additionally, Mr. Frasier testified at the evidentiary hearing that Defendant had immediate family members, including his mother and siblings, who resided locally. He further agreed on cross-examination that investigating Eddie Brant would not have been very helpful in

[1] The Court adopts and incorporates the recitation of testimony and evidence as set forth in its February 5, 2014 order.

the preparation of his penalty phase as Eddie left when Defendant was 7 weeks old. Mr. Frasier did not specifically recall making a decision to not investigate Eddie Brant, but testified that if the defense did not investigate Eddie Brant, it was because the defense focused instead on those local family members. Under these circumstances, the Court finds counsel's failure to investigate Eddie Brant or Defendant's paternal family while focusing on Defendant's local family and other witnesses instead, was reasonable. Defendant has failed to demonstrate that counsel performed deficiently. *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.").

Additionally, Defendant has failed to demonstrate that he was prejudiced by counsel's alleged deficient performance. As this Court noted in its final order, the trial court found as aggravating circumstances that the homicide was committed during the course of committing a sexual battery and the homicide was especially heinous, atrocious and cruel. Specifically, in considering and weighing the aggravating and mitigating circumstances, the trial court found, in part,

> The evidence is that he grabbed her and forcibly sexually assaulted her. He did not use a condom and he ejaculated. In the process he placed a sock in her mouth. He then choked her and left her on her bed, believing she was dead or not conscious. While he was then looking around the house, she regained consciousness and attempted to leave the house. He grabbed her and took her back to the bed and strangled and suffocated her using his hands, a plastic bag over her head, and ligatures – a stocking, an electrical cord, and a dog leash - around her neck. She was conscious for some period of time and was obviously aware she was going to die, but she did not die immediately. She "hiccupped" while he placed her body in the bath tub and opened the shower on her. The cause of death was strangulation and suffocation. She endured being violently sexually assaulted, being strangled to a state of

> unconsciousness, then regained consciousness, then was strangled again, to her death. Defendant killed Ms. Radfar without conscience, and without pity. The homicide was extremely torturous to the victim. She must have experienced fear and terror knowing she was going to die. The homicide was heinous, was atrocious, and was cruel. The Court places great weight on the conduct and manner of the sexual assault and the strangulation killing.

(*See* sentencing order, pp. 38-39). The Court finds that even if the evidence of Defendant's paternity and all the mitigation evidence presented during the instant postconviction proceedings had been presented at trial, there is no reasonable probability that Defendant would have received a life sentence. No relief is warranted on Defendant's motion for rehearing.

It is therefore **ORDERED** that Defendant's Motion for Rehearing is hereby **DENIED**.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this 11th day of March, 2014.

MICHELLE D. SISCO
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to Mary-Louise Samuels Parmer, Esquire, Capital Collateral Regional Counsel – Middle, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619, by regular U.S. mail; Katherine Blanco, Esquire, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; Ronald Gale, Esquire, Office of the State Attorney, 419 N. Pierce St., Tampa, FL 33602, by inter-office mail, on this 11th day of March, 2014.

Deputy Clerk