IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC95153; SC00-405

OLEN CLAY GORBY,
Appellant,

v.

STATE OF FLORIDA,
MICHAEL W. MOORE,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

Mr. Gorby has established that confidence in the outcome of both the guilt phase and penalty phase is undermined due to his trial counsel's ineffective assistance and the State's violation of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). The State's misconduct, combined with counsel's failure to conduct a reasonable background investigation, his failure to consult with experts regarding mitigation, and his failure to present the testimony of those experts during the penalty phase, completely deprived the judge and the jury of an accurate picture of Olen Gorby. The State attempts to prop up trial counsel's deficient performance by hypothesizing various explanations and excuses for counsel's omissions. But in the final analysis, it is clear that the lack of mitigating evidence presented at Mr. Gorby's trial was the result of counsel's slipshod, last-minute investigation and his failure to ask the mental health experts to evaluate Mr. Gorby for purposes of establishing mitigation. But for counsel's ineffectiveness and the State's misconduct, there is a reasonable probability that Mr. Gorby would not have been sentenced to death.

ARGUMENT I

THE OUTCOME OF MR. GORBY'S PENALTY PHASE IS UNRELIABLE DUE TO TRIAL COUNSEL'S UNREASONABLE FAILURE TO PREPARE AND PRESENT ABUNDANT MITIGATING EVIDENCE; THE SENTENCERS WERE DEPRIVED OF INFORMATION WHICH WOULD HAVE PERSUADED THEM TO SENTENCE MR. GORBY TO LIFE IMPRISONMENT.

A. Counsel had no strategic reason for not presenting evidence of Mr. Gorby's mental deficiencies.

At the post-conviction evidentiary hearing, **three of the four mental health experts who testified agreed that both statutory mitigators pertaining to mental health applied in Mr. Gorby's case.**[1] But at Mr. Gorby's penalty phase in 1991, not a single mental health expert ever took the stand to discuss the statutory mitigating factors and to explain to the jury how and why they applied.

The State grasps for a strategic reason to explain why trial counsel failed to call any mental health experts during the penalty phase. But the reality is that **counsel simply never asked either defense expert to evaluate Mr. Gorby for purposes of establishing statutory mitigation.** (PCR. 1134, 1192, 1193). In fact, counsel deliberately restricted the scope of the experts' duties--not for any strategic reason, but simply to curry favor with the State: "[Y]ou're paying [expert witnesses] and paying them by the hour probably and

[1]The fourth expert, Dr. Harry McClaren, did not dispute that the statutory mitigating factors applied; rather, he stated that he had "no opinion" on the subject. (PCR. 1331).

since the State watches how I spend my money...I take the liberty of focusing or directing the witness." (PCR. 1001). For the same reason, counsel also withheld information from the experts. (PCR. 1012). For example, he never informed either Dr. Goff or Dr. Warriner that Mr. Gorby had begun consuming alcohol at the age of eight. (PCR. 1002). He never provided Dr. McClaren's raw data (from psychological testing) to Dr. Warriner, though Warriner had requested it. (PCR. 1139). He never showed Dr. Goff's report to Dr. Warriner. (PCR. 1107-08). He never related any details of Mr. Gorby's childhood to either defense expert apart from the car accident which occurred when Mr. Gorby was four. (PCR. 999). And, though he did eventually forward the reports prepared by Drs. Annis and McClaren to Dr. Warriner, he did so only after Dr. Warriner had already evaluated Mr. Gorby. (PCR. 1106, 1138).

The justification given by trial counsel for not calling Dr. Goff at the penalty phase is that Goff's testimony would have been "a duplication of what he already said" at the guilt phase. (PCR. 1006). But had counsel bothered to ask Dr. Goff to evaluate Mr. Gorby for purposes of establishing mitigation, Dr. Goff would have had much more to say at the penalty phase. He would have testified that Mr. Gorby was acting under an extreme mental or emotional disturbance at the time of the offense, and that Mr. Gorby's capacity to conform his conduct to the requirements of the law was

substantially impaired. (PCR. 1195-96). He would have elaborated on his guilt phase testimony concerning Mr. Gorby's brain damage and, armed with the additional information gathered by collateral counsel (which corroborated his 1991 findings), he would have been able to explain to the jury how Mr. Gorby's mental abnormalities contributed to his behavior at the time of the offense. In short, Dr. Goff would have given strong, effective testimony supportive of statutory mitigation, yet trial counsel--through sheer ignorance--never asked him to do so.

Though the State suggests that trial counsel had a tactical motive for not calling Dr. Goff at the penalty phase, the State overlooks objective evidence to the contrary: **Counsel did not know what Dr. Goff's testimony regarding mitigation would have been, because he never asked Dr. Goff to consider mitigation in his evaluation of Mr. Gorby.** (PCR. 1192). **Counsel's failure to call Dr. Goff at the penalty phase therefore cannot be a tactical decision,** for no tactical motive can be ascribed to omissions based on lack of knowledge, see Nero v. Blackburn, 597 F. 2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare. Kimmelman v. Morrison, 477, U.S. 365 (1986).

Notwithstanding the established fact that counsel's failure to call Dr. Goff was grounded in ignorance, the State defends the omission with the unsupported hypothesis that counsel's closing

argument relied upon Goff's earlier guilt phase testimony as a basis for finding mitigating circumstances. (Answer Brief of Appellee at 46). Yet counsel's own words belie the State's contention. He told the jury in closing argument, "I understand that you did not accept [Dr. Goff's testimony] as a defense and so I hesitate to talk about it because **I don't know what value it has if anything.**" (R. 1817) (emphasis added). Counsel did not know **whether** Dr. Goff's conclusions would be valuable in mitigation **because he never asked Dr. Goff about it!** Dr. Goff testified post-conviction that had trial counsel consulted him on the issue of mitigation, he would have advised counsel that his conclusions more strongly supported the statutory mitigating circumstances than the guilt phase theory. (PCR. 1194). Counsel's omitted "consultation, thorough-going investigation and preparation were vitally important." Powell v. Alabama, 287 U.S. 45, 56 (1932). Without knowing the relative strengths and weaknesses of the psychiatric evidence, he could not, and in fact did not, make a reasoned--much less "reasonable"--decision. By his own words--"I don't know what value it has if anything"--trial counsel did not know the mitigating value of Dr. Goff's conclusions.

Counsel's failure to call Dr. Warriner as a witness also lacks a reasoned justification. As above, the State's contention that Dr. Warriner advised trial counsel that he would not be a good witness,

(Answer Brief of Appellee at 43), is contradicted by Dr. Warriner's testimony that he did not recall such a conversation. (PCR. 1146). In any case, after reviewing background material on Mr. Gorby provided by collateral counsel, Dr. Warriner testified that if he had reviewed this material in 1991 he would have advised trial counsel "to have either me or some other psychologist review the information that I have today and to present themselves on call at least for the sentencing phase." (PCR. 1159).

An alternative theory advanced by the State for counsel's failure to call Dr. Warriner is that Warriner's testimony would have "diminish[ed] the testimony of Dr. Goff." (Answer Brief of Appellee at 43). However, nowhere in the Answer Brief does the State explain how Dr. Warriner's findings--which *corroborated* those of Dr. Goff--could conceivably have diminished Goff's testimony. The State seems to rest its argument on the absurd proposition that two mutually reinforcing expert opinions would somehow have been worse than one. Far from diminishing Dr. Goff's testimony, Dr. Warriner's testimony would have complemented and strengthened it. Warriner believed that Mr. Gorby was brain-damaged, (PCR. 1107), and that he committed the crime in a state of extreme mental disturbance. (PCR. 1135). At the evidentiary hearing, Dr. Warriner testified emphatically that both statutory mitigating factors pertaining to mental health applied. (PCR. 1135-36). He also stated his opinion that the crime was

committed quickly and impulsively, with no intent to torture the victim; this testimony would have been valuable at the penalty phase for defeating the "heinousness" aggravator. (PCR. 1159). Thus counsel's purported strategic reason for not calling Dr. Warriner is nonsense: Dr. Warriner's testimony could only have bolstered Dr. Goff's testimony, not diminished it.

Lastly, the State argues that it would have been futile for trial counsel to call Dr. Warriner because the prosecutor would have called Dr. McClaren to counter his testimony. (Answer Brief of Appellee at 48). The State overlooks the fact that Dr. McClaren's findings actually corroborate--not contradict--Dr. Warriner's conclusions. Dr. McClaren's 1991 report noted that Mr. Gorby's performance on the MMPI was "consistent with an individual reporting significant psychopathology," and referred to organic brain damage and substance abuse. (Def. Ex. 17 at tab 24). At the evidentiary hearing Dr. McClaren also acknowledged that the facts of the crime are consistent with a rage killing, and that it is possible Mr. Gorby suffers from episodic discontrol syndrome. (PCR. 1337-38, 1343). All of these observations are *consistent* with those reported by Dr. Warriner. In fact, Dr. Warriner himself testified at the evidentiary hearing that "Dr. Annis and Dr. McClarin's (sic) and Dr. Goff's view of [Mr. Gorby]...varies very little from mine." (PCR. 1121). Thus the State's argument that Dr. Warriner's testimony would have been

somehow negated by Dr. McClaren's testimony is wholly without factual support and logical force.

Trial counsel's failure to call Dr. Warriner was not a strategic decision, but an omission lacking any reasonable justification. Despite all the possible explanations offered by the State for counsel's failure to call Dr. Warriner, **nothing changes the fact that counsel never asked Dr. Warriner about mitigation in the first place.** (PCR. 1134). **Counsel therefore could not have made an informed judgment about whether or not to present Warriner's testimony at the penalty phase.** See Lockett v. Anderson, 2000 WL 1520594, 15 (5th Cir. 2000) (Strickland standard requires informed strategic choices); U.S. v. Drones, 218 F. 3d 496, 500 (5th Cir. 2000) (Strickland does not require courts to defer to decisions which are "uninformed by an adequate investigation into the controlling facts and law.").

B. Counsel failed to conduct a reasonable investigation of Mr. Gorby's background in preparation for the penalty phase.

Trial counsel had an "obligation to conduct a thorough investigation of the defendant's background." Williams v. Taylor, 120 S. Ct. 1495, 1515 (2000); id. 120 S. Ct. at 1524 (O'Connor, J., concurring) (finding deficient performance in "counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and unique personal circumstances"). But Mr.

Gorby's lawyer failed to fulfill this basic obligation. He testified that he needed "[a]nother six months and an investigator" to investigate the case "the way it should have been done." (PCR. 1062-63).

Testimony from the evidentiary hearing enables this Court "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time," as Strickland requires. Strickland v. Washington, 466 U.S. at 689. Counsel's testimony establishes that, contrary to "prevailing professional norms," id. at 690, counsel's preparation of Mr. Gorby's case suffered from the fact that his attorney was preoccupied with concerns unrelated to Mr. Gorby's defense. For instance, counsel's choices about which experts to hire were guided by concern for his own reputation: "If I get the reputation of squandering county resources in one instance I may not be able to get an expert I really need in another. So I have to weigh that in there too." (PCR. 1368). Counsel also allowed the demands of his busy practice and fee-paying clients to influence his exercise of judgment regarding Mr. Gorby's case. He testified, "I had other cases and other clients to answer to. So I can't devote forty hours a week to a case like this that I'm appointed on." (PCR. 983). But rather than asking that co-counsel be appointed to assist him, counsel persisted in handling the case by himself, knowing he lacked the time and resources to do

so effectively. This situation represented a conflict of interest. See, Comment to Fla. R. Prof. Conduct 4 - 1.7 (a lawyer's own interests should not be permitted to have an adverse effect on representation of a client).

Although investigative assistance was available, trial counsel unreasonably failed to secure the services of an investigator after the court-appointed investigator, Lee Norton, informed counsel that she could not assist him. Norton wrote Mr. Gorby's attorney in April 1991 advising him that the complexity of the case would require "upwards of 200 hours" of investigation. (Def. Ex. 16). She warned counsel, "The tremendous needs of the case, combined with my backlog of clients make it impossible for me to complete the necessary work before Fall of this year." (Def. Ex. 16). But counsel did not seek another investigator, and Mr. Gorby's case proceeded to trial in June 1991 with little investigation having been performed. At the evidentiary hearing, counsel held Norton responsible: "[S]he couldn't devote the attention to this case that I would have liked her to...[S]he was spread too thin, and she had several other trials...and she just couldn't devote any time to Mr. Gorby." (PCR. 985-86).

Mr. Gorby's lawyer would not devote much time to him, either, and consequently a full penalty phase investigation was never undertaken. Not surprisingly, trial counsel failed to call a single

mental health expert at the penalty phase. **Not a single mental health expert even evaluated Mr. Gorby for purposes of addressing mitigation.** If not for trial counsel's ineffectiveness, the appointed defense experts would have established the applicability of the two statutory mental health mitigating factors, and the State's expert would not have contradicted them.

Counsel testified, "I had hoped to be able to develop much more information, or witnesses I should say, for the penalty phase." (PCR. 987). The meager evidence presented on Mr. Gorby's behalf was not the result of any conscious choice by counsel, but rather the consequence of counsel's inexperience and his unreasonable decision to "devote[ ] most of [his] effort towards preparation for the guilt phase" at the expense of penalty phase preparation. (PCR. 982).

The lack of mitigation presented at Mr. Gorby's penalty phase was preceded by a lack of investigation into Mr. Gorby's background. Counsel didn't even begin to interview family members until two weeks before the trial, (PCR. 988), and even then his contact with the family was superficial and destined to yield little information. Counsel admitted that he was "dependent upon" Mr. Gorby's mother to assist him in interviewing family members and gathering mitigation. (PCR. 1010). Though the State lauds counsel's efforts, it was clearly unreasonable for counsel to rely on family members to do his

job for him. And Mr. Gorby's mother was especially unsuited for this task given that many members of the Gorby family identified her as a cause of the family's dysfunctionalism.

Moreover, counsel failed to follow standard interviewing techniques when he met with family members. Rather than meeting with each family member individually, counsel hastily gathered all of Mr. Gorby's relatives together in one room for a group interview. One of Mr. Gorby's sisters described the interview: "[Trial counsel] asked me a few questions. And that was about it. It was a very short session. I couldn't say too much because my mother was, the whole family was sitting there, so you just don't say too much in front of them." (Def. Ex. 23 at 19). This setting prevented frank discussion of sensitive issues (i.e. childhood physical abuse, sexual abuse, and alcoholism) which would have been important for purposes of psychological evaluation as well as for serving as non-statutory mitigation. As capital defense expert Tim Warner testified, group interviews of family members are impractical because "you may have an abuser sitting in the same room with an abused person and that information never comes to light." (PCR. 1226). Dr. Warriner added that it is "standard practice" to conduct individual interviews because people "are influenced by the presence of other people to shade or change or admit testimony or to exaggerate testimony depending on family members or friends or acquaintances who are

present in the investigatory room." (PCR. 1157-58). Had trial counsel taken the basic step of consulting Dr. Warriner on the penalty phase investigation, this damaging omission would never have occurred. Failing to consult an available expert on such an issue is unreasonable. See, Ake v. Oklahoma, 470 U.S. 68 (1985) (discussing the importance of expert assistance as an essential tool for mounting a defense).

In post-conviction, relatives of Mr. Gorby--after being interviewed separately--testified to the abusiveness and alcoholism prevalent in the family; to the family's extreme poverty; to Wanda Garrison's[2] practice of having sexual intercourse with various men while her children slept in the same bed; and to Mr. Gorby's poor health and problematic behavior as a child. All of this information would have been uncovered had Mr. Gorby's attorney followed basic principles of interrogation and conducted a thorough investigation of Mr. Gorby's background.

Counsel's hurried approach to investigating Mr. Gorby's background also led him to overlook or dismiss additional sources of information. For example, counsel spoke with Mr. Gorby's father by phone only once, and perfunctorily decided that he would not be helpful or cooperative. (PCR. 1032). In fact, Mr. Gorby's father *was* willing to provide help, but his hearing impairment made it

[2]Mr. Gorby's mother.

difficult for him to communicate by phone. (Def. Ex. 24 at 48, 54). Because trial counsel did not take the time to meet with Mr. Gorby's father in person or to otherwise accommodate his hearing impairment, counsel never learned what Mr. Gorby's father had to say. It is therefore specious to argue that counsel made a tactical decision not to call Mr. Gorby's father as a witness, since the notion of a "tactical decision" presupposes that counsel has gathered all relevant evidence, weighed the options, and made an informed choice between them. The standard set forth in Strickland v. Washington "demands more than the mere decision of a strategic choice by counsel. **It requires 'informed strategic choices.'"** Lockett v. Anderson, 2000 WL 1520594, 15 (5th Cir. 2000) (emphasis added).

Furthermore, even if counsel made a decision that Mr. Gorby's father would be a poor witness, that still would not explain counsel's failure to interview him and convey any information he obtained to the mental health experts. At the evidentiary hearing, Dr. Goff testified that information provided by Mr. Gorby's father (to collateral counsel) was especially helpful because it illuminated Mr. Gorby's behavior both before and after his head injury and described an early attempt at mental health intervention. (PCR. 1206-08). Yet this information went undisclosed at the time of Mr. Gorby's trial, for no reason other than trial counsel's hasty and cursory investigation of Mr. Gorby's background.

C. Counsel failed to present extensive evidence constituting nonstatutory mitigation.

As a result of counsel's unreasonable investigation of Mr. Gorby's background, he came to the penalty phase armed only with some lay witness testimony intended to "humanize" Mr. Gorby and a handful of platitudes concerning the morality of the death penalty. (PCR. 1000). Mr. Gorby's sisters spoke briefly about Mr. Gorby being a caring individual, but gave no hint as to the path that the jury could have thought led him to take another man's life. Mr. Gorby's mother offered testimony amounting to a plea for mercy, but gave little insight into the sad history that culminated in her son's trial for capital murder.

What the jury never heard--what they needed to hear--was some explanation, some assurance that the crime for which they were to sentence Olen Gorby was not the product of cold-blooded evil, but rather the tragic outcome of a lifetime of deprivation and abuse and violence, ignited in a sudden conflagration of rage. The witnesses and records that would have supplied this explanation were available to trial counsel, yet through inexperience or ineptitude he unreasonably failed to present this mitigating evidence.

At the evidentiary hearing, collateral counsel presented the evidence that the jury never heard. While fully discussed in the Initial Brief, nonstatutory mitigation established at the hearing included:

1. **Extreme neglect and abandonment as a child**: Mr. Gorby's mother regarded her children as a nuisance and a distraction from her life of carousing in bars and taking up with various men. (See Def. Ex. 21). Mr. Gorby's father, employed at a steel mill ninety miles from the family's hometown, worked six days a week and was rarely home. (Def. Ex. 24). For much of their childhood, Mr. Gorby and his siblings were completely unsupervised, literally wandering the streets of the impoverished West Virginia town where the family lived. (Def. Ex. 23 at 10; Def. Ex. 21). When Mr. Gorby's mother did spend time with her children, it was often to bring them to bars. (Def. Ex. 21; Def. Ex. 24 at 16-17).

2. **Being left in the care of adults who were severe alcoholics**: The Gorby household was characterized by misery, poverty, constant fighting, and lack of affection. The balm which soothed the family's suffering and made it at least seem bearable was alcohol. As Mr. Gorby's sister stated simply, "Everybody in my family drank." (PCR. 1082). Alcoholism was a family tradition on the maternal side of the family, (Def. Ex. 21), and the aunts, uncles, and cousins who were regular visitors to (or sometimes occupants of) the Gorby household kept that tradition alive and well. In addition to Mr. Gorby's mother, Aunt Mildred Stottlemire, Uncle Clifford Haines, Cousin Geraldine, and Mr. Gorby's stepmother Angie were all heavy

drinkers with violent natures that were especially fierce when disinhibited by alcohol.

3. **Extreme poverty**: Littleton, West Virginia, where Mr. Gorby was raised, is located in the heart of Appalachia, one of the most chronically poor regions in the United States. (See Def. Ex. 18). Littleton's only grade school was shut down, and there was no hospital. (R. 1765). Proper medical care was almost unheard of: Mrs. Gorby never saw a doctor during her pregnancies, (Def. Ex. 24 at 20), and when Mr. Gorby was struck by a car at the age of four, his mother merely had a neighbor bandage the wound on his head. (Def. Ex. 21).

Littleton was poor even by the standards of West Virginia[3], and the Gorby family was poor even by the standards of Littleton. When Mr. Gorby was less than a year old, his father lost his job hauling mine props. (Def. Ex. 25 at 5). Economic conditions were so bad in Littleton that his father moved to a town ninety miles away in order to find work at a steel mill, where he worked six days a week. (Def. Ex. 24 at 4-5). Mr. Gorby's mother and their four children remained in Littleton.

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[3]Even after years of social welfare programs, West Virginia's poverty rate in 1988 was a staggering 22.3 percent. (Def. Ex. 18 at 55).

4. **Exposure in utero to alcohol**: Mr. Gorby's mother drank heavily throughout each of her pregnancies, including her pregnancy with Olen Gorby. (Def. Ex. 24 at 19-20).

5. **Alcohol abuse**: As a child, Mr. Gorby would accompany his mother to bars or to the local VFW hangout, where his mother spent four or five nights per week. (Def. Ex. 24 at 19-20). Mr. Gorby's mother began giving him alcohol when he was eight years old, and by his twelfth birthday he had become an alcoholic, (Def. Ex. 21), thus beginning his lifelong struggle with alcoholism. Dr. Goff reported that Mr. Gorby's alcohol abuse was so severe that Mr. Gorby suffered alcoholic blackouts, and noted that "a number of the acts which [Mr. Gorby] committed previously were committed under the influence of alcoholic beverages." (Def. Ex. 17 at tab 26).

6. **Substance abuse**: In addition to his alcohol dependency, Mr. Gorby has in the past been a user of LSD, (Def. Ex. 17 at tab 24), amphetamines (Def. Ex. 17 at tab 22 and tab 23), and marijuana (Def. Ex. 17 at tab 23).

7. **Exposure to caregivers who were unstable, mentally ill, or cruel**: At various times Mr. Gorby and his siblings were left in the care of Mildred Stottlemire, an aunt who was suicidal and eventually hospitalized for mental illness. (Def. Ex. 23 at 24; Def. Ex. 21). Three of Mrs. Stottlemire's brothers committed suicide. (Def. Ex. 25). Sometimes the children were looked after by Clifford

Haines, a mentally retarded uncle who was known for having a mean streak, and who had attempted to sexually molest Mr. Gorby's sister. (PCR. 1082). Relatives suspected him of having also molested Olen Gorby. (Def. Ex. 23 at 13; Def. Ex. 19). Another adult who sometimes watched the children was a hard-drinking and temperamental cousin named Geraldine, who once dragged Mr. Gorby's young sister over a scorching furnace. (PCR. 1089).

8. **Exposure to aggression, violence, and physical abuse**: Violence was a part of life in the Gorby house. When Mr. Gorby's mother wasn't ignoring her children, she beat them. (Def. Ex. 23 at 6-7). Mr. Gorby's father was equally abusive; one of Mr. Gorby's sisters testified that he beat her with a stick. (PCR. 1086-87). Besides beating their children, Mr. Gorby's parents also took out their aggression on each other, sometimes resorting to baseball bats and even a shotgun. (Def. Ex. 24 at 9-10).

9. **Verbal and emotional abuse**: Mr. Gorby's parents showed no affection toward their children. (PCR. 1088-89; Def. Ex. 23). The house was filled with yelling and fighting, (Def. Ex. 24), and birthdays and holidays went uncelebrated. (PCR. 1088). Mr. Gorby's mother referred to her children as "little sons of bitches." (Def. Ex. 24 at 22).

10. **Prior psychiatric treatment**: As a young boy, Mr. Gorby was examined and treated by a psychiatrist for a behavior disorder, for

which he was prescribed Librium. (Def. Ex. 17 at tab 20). The psychiatrist's report describes conditions of neglect and physical abuse in the Gorby home, and notes Mrs. Gorby's strong opposition to her son receiving further psychiatric treatment. (Def. Ex. 17 at tab 20).

11. **Evidence of a hereditary mental disorder**: Mental illness is prevalent in Mr. Gorby's family. (Def. Ex. 21). A maternal aunt, several uncles, and two cousins all displayed symptoms of mental illness, and at least one relative was committed to an institution. Additionally, the psychiatrist who treated Mr. Gorby for a childhood behavior disorder reported that Mr. Gorby's mother believed her son's disorder was genetic. (Def. Ex. 17 at tab 20).

12. **Exposure as a young child to inappropriate sexual behavior**: Mr. Gorby's mother often brought home men she met in local bars and had sexual intercourse with them in front of the children. (PCR. 1166, 1177-78).

13. **Possible sexual molestation and/or rape as a child**: Family members suspected that Mr. Gorby was molested by Clifford Haines, an uncle who was mentally retarded. (Def. Ex. 19). Haines had once tried to sexually assault Mr. Gorby's sister. (PCR. 1082). It was also believed that Mr. Gorby was molested by one of the

various men with whom his mother had extramarital affairs. (Def. Ex. 20).[4]

14. **Brain damage**: Organic brain damage was suspected by Drs. Annis, McClaren, and Warriner, and confirmed by neuropsychological tests conducted by Dr. Goff. (Def. Ex. 17 at tab 24, 25, and 26). Dr. Crown also concurred in the diagnosis of brain damage. (PCR. 1437-38).

Despite the State's argument that all of the preceding evidence is cumulative, (Answer Brief of Appellee at 38), **almost none of it was presented to the jury.** (Def. Ex. 32). In fact, only a few nonstatutory mitigating factors were identified by the trial court, and these were apparently given little weight.[5] (R. 2621-29).

D. Conclusion

In attempting to weigh the aggravating and mitigating factors, the judge and the jury relied on an incomplete and inaccurate account of Mr. Gorby's troubled life. They saw a man from a poor but fairly unremarkable background who they believed had committed an

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[4]Evidence that Mr. Gorby was sexually abused as a child is especially salient given the indications that the murder involved a homosexual encounter. (See, e.g., R. 1302).

[5]Those mitigating factors were: 1) The defendant's love for and love by his family; 2) Car accident at age four; 3) Childhood poverty; 4) Failed marriage; 5) Sisters were shot by police. The trial court also considered evidence of Mr. Gorby's mental state as nonstatutory mitigation, having rejected a finding that any statutory mitigating factors applied. (R. 2621-2629).

inexplicable act of violence. While testimony that this man's family loved him may have been touching, it said nothing about *why* he committed that act. It said nothing about the configuration of abuse and alcoholism and mental dysfunction that contributed to Mr. Gorby's behavior. It gave the jury no reason to suppose that the crime could have been impelled by anything other than sheer malice. In short, the scant evidence presented on Mr. Gorby's behalf did virtually nothing to erode the State's theory that Olen Gorby was merely an evil man who had done an evil thing.

The evidence presented at the post-conviction hearing comprises the rest of the story. In contrast with the fragmentary, incomplete view of Mr. Gorby that was presented at trial, the abundant evidence adduced at the hearing formed a complete account of Mr. Gorby's background and character. As Dr. Warriner described it, "[I]t is like instead of reading every third chapter in a book you get to read the whole book." (PCR. 1119).

A reasonable penalty phase investigation would have uncovered the raw material for that book. Information readily available from relatives, neighbors, and medical records would have formed the basis for the array of mitigating factors enumerated in the preceding pages. Beyond just "humanizing" Mr. Gorby, this information would have enlightened the jury and the trial court as to the combination of heredity and misfortune that shaped Olen Gorby. Most importantly,

it would have led them to an understanding of how a battered, neglected, terrified child with a near-lifelong history of brain damage, alcoholism, and privation grew into a malformed adult who had known only violence his whole life, and--in accordance with sad but well-established principles of psychology--ended up reenacting that history of violence on another human being.

It was not mercy that the jury and trial court lacked; it was understanding. Had trial counsel been diligent in preparing for Mr. Gorby's penalty phase, he could have presented the evidence that would have provided that understanding. **Counsel could have presented evidence of at least *fourteen* nonstatutory mitigating factors, coupled with testimony from Dr. Goff and Dr. Warriner that both statutory mitigating factors relating to mental health applied.** Such overwhelming mitigation would have been impossible to ignore.

With an awareness of the circumstances that contributed to Mr. Gorby's actions, there is a reasonable probability that the jury would have concluded that a sentence of death was not justified in this case. "Defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. GORBY'S CLAIMS THAT THE STATE VIOLATED BRADY V. MARYLAND AND/OR GIGLIO V. UNITED STATES.

A. Robert Jackson

The State opened its case against Mr. Gorby with the testimony of Robert Jackson, a convicted felon who was himself suspected of involvement in the victim's death. The State used Jackson's testimony to place Mr. Gorby in Panama City at the time of the murder, to establish his opportunity to commit the murder, and to show that Mr. Gorby was checking out of his room at the Rescue Mission on the evening the murder occurred. (R. 538-39, 552-54).

Unknown to trial counsel, Jackson's testimony was not unconditional. While being held in the Calhoun County Jail during Mr. Gorby's trial, Jackson wrote a letter to the assistant state attorney in Bay County. (Def. Ex. 4). The letter was not disclosed to the defense. Although the State dismisses this letter as containing "no relevant information which [the jury] needed in order to assess [Jackson's] credibility or bias," (Answer Brief of Appellee at 53), in fact the letter contains several significant details. Jackson's letter indicates that (1) he had a close relationship with law enforcement in an adjoining county through which he (2) received uniquely special privileges as a trustee such as getting legal advice from the sheriff himself; (3) that he was an unwilling participant in

the State's case against Mr. Gorby (and at worst he was a professional jailhouse witness); and (4) that whether he would prove to be a wanted or "unwanted" witness for the State turned on whether or not jailers in Bay County would provide him with the same preferential treatment he received in Calhoun County. (Def. Ex. 4).

In denying Mr. Gorby relief on his claim that the State's suppression of Jackson's letter constituted a Brady violation, the lower court not only misconstrued the basis of Mr. Gorby's claim, but also misapplied the principles set forth in Brady and its progeny. First, the court found that "[t]he defendant alleges that Mr. Jackson surreptitiously tried to make a deal with the State not to alter his testimony if certain 'conditions' were met." (R. 676). Proceeding from this mistaken premise, the court then found that the requests made by Jackson in his letter "are not extraordinary and do not evidence that a deal was made." Id. Because Mr. Gorby did not prove the existence of a "deal" between Jackson and the State, then, the court reasoned that Mr. Gorby had failed to prove that a Brady violation had occurred. The lower court's characterization of Mr. Gorby's claim, and the legal conclusions it reached based on that characterization, are both flawed.

Mr. Gorby made no allegations one way or the other concerning a deal which may have existed between Jackson and the State.[6] Rather, Mr. Gorby's claim was that the information contained in Jackson's letter constituted impeachment evidence which would have cast considerable doubt upon Jackson's credibility and his motives for assisting the State. Jackson's threats and demands "would have fueld a withering cross examination," Kyles v. Whitley, 514 U.S. 419, 443 (1995), that would have undermined confidence in an essential premise of the State's case, i.e., that Mr. Gorby had the opportunity to commit the crime and that he fled the area afterward. It is thus irrelevant and unnecessary to prove that a deal existed in order for Mr. Gorby to prevail on his Brady claim. Brady holds that the suppression of evidence "favorable to an accused" violates due process where the evidence is material to either guilt or to punishment, "irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). Both

> "[i]mpeachment evidence...as well as exculpatory evidence, fall[ ] within the Brady rule." U.S. v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150, 154 (1972).

In recognizing that impeachment evidence is encompassed by Brady, the

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[6]The full extent of Jackson's relationship with the State and the existence of any deal could not be determined because counsel were unable to locate Robert Jackson at the time of the evidentiary hearing.

U.S. Supreme Court cited to its own precedent in Napue v. Illinois, 360 U.S. 264, 269 (1959), wherein it stated:

> The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon **such subtle factors as the possible interest of the witness in testifying falsely** that a defendant's life or liberty may depend.

(emphasis added). There is no mention in either Brady or its progeny that a defendant must prove that a deal existed between a witness and the State in order to establish that a Brady violation occurred. Furthermore, Brady does *not* require either that the witness "surreptitiously" acted in a way that provided impeachment evidence or that what the witness sought as a condition of providing "wanted" testimony was "extraordinary." "Such argument...confuses the weight of the evidence with its favorable tendency, and even if accepted would work against the State, not for it." Kyles, 514 U.S. at 451.

In effect, the lower court held that Jackson's letter was not favorable to the Defense within the meaning of Brady because Jackson openly expressed the tenuousness of his testimony and because the conditions he set on its being what the State wanted were not "extraordinary."[7] However, a witness can be impeached for making his

[7]Although the question of whether Jackson's demands were "ordinary" or "extraordinary" is irrelevant under Brady, it bears mentioning that even if Jackson's demands were found to be ordinary, such a finding would actually be unfavorable to the State. Showing

testimony contingent on *anything*; the point is that there was a contingency from the witness's point of view. The jury could have easily inferred from the information contained in Jackson's letter that Jackson's "truthfulness and reliability" as a witness was highly suspect. Napue v. Illinois, 360 U.S. 264, 269 (1959).

B. The lower court erred in refusing to consider the sworn affidavit of Jerry Wyche (Def. Profferred Ex. 37) in which Wyche recanted his trial testimony against Olen Gorby.

At trial, the State presented the testimony of Jerry Wyche, an inmate who shared a cell pod with Mr. Gorby during his detention at the Bay County Jail. (R. 1300-1302). Wyche testified that Mr. Gorby confessed to having "beat a dude down with a hammer," and that Mr. Gorby told him that he "didn't like homosexuals." (R. 1302).

Wyche's testimony was false. In 1998, Wyche provided a sworn affidavit recanting his trial testimony. (Def. Profferred Ex. 37). In his affidavit, Wyche swore that his testimony "was a lie. I learned what to say against Gorby from others talking about it, not because Olen [Gorby] ever said anything to me about it." Id. According to Wyche, he agreed to testify against Mr. Gorby in exchange for a contact visit with his girlfriend arranged by the assistant state attorney. Id.

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that jailers and prosecutors "ordinarily" accorded trustee status and dispensed personal advice from the sheriff to "wanted" jailhouse witnesses would have made law enforcement look even more conniving than Jackson's letter suggests.

Mr. Gorby alleged in his 3.850 motion that the State's actions in procuring Wyche's testimony along with its failure to disclose those actions to the defense violated Brady v. Maryland and Giglio v. United States. (PCR. 350-51). Mr. Gorby attempted to call Wyche as a witness at the evidentiary hearing, but he failed to appear despite having been served with a subpoena and arrangements having been made for his transportation.[8] (PCR. 1347-50). At this time, counsel moved to introduce Wyche's affidavit pursuant to Fla. R. Evid. 90.804. (PCR. 1349-50, 1402-05).

The lower court refused to admit the affidavit, however, ruling that counsel had not established Wyche's unavailability. (PCR. 1406). The court advised counsel to "call upon the assistance of the court" by asking that a capias be issued to secure Wyche's attendance. (PCR. 1405). In the court's view, issuance of a capias was a necessary predicate for a showing of Wyche's unavailability. (PCR. 1406). Counsel stated their willingness to do "[a]nything the court wants to do to compel [Wyche's] attendance," and duly requested that a capias be issued for Jerry Wyche. (PCR. 1405-10). The court issued the capias on July 16, 1998. Id.

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[8]Wyche later informed collateral counsel that the assistant state attorney had communicated through Wyche's daughter that he would be arrested if he appeared at the evidentiary hearing. (PCR. 1347). The assistant state attorney acknowledged having spoken with a woman at Wyche's home, but denied threatening to have Wyche arrested. (PCR. 1348-49).

On October 9, 1998, at the close of the evidence, Mr. Gorby's counsel informed the court that the capias had still not been served on Wyche and that neither the State nor the defense was able to locate him. (PCR. 1518-20). Counsel for Mr. Gorby again moved to admit Wyche's affidavit, and again the court refused. (PCR. 1520). Despite counsel's having done everything the court asked in order to secure Wyche's attendance, the court ruled that there had been no showing of Wyche's unavailability. (PCR. 1520).

Eventually Wyche was taken into custody,[9] and collateral counsel promptly filed a Combined Motion to Reopen Evidentiary Hearing and for Protective Order. (PCR. 771-73). Wyche was brought before the court on February 15, 1999, but before he took the witness stand, the assistant state attorney urged the court to appoint a public defender for Wyche. (PCR. 1530-33). The court did so, and, after conferring with the public defender, Wyche promptly invoked his Fifth Amendment rights. (PCR. 1537).

By invoking his Fifth Amendment rights and refusing to testify, Wyche became unavailable as a witness. Fla. R. Evid. 90.804 (1) (b) (declarant is unavailable if he "[p]ersists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so"). Accordingly, his affidavit was

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[9]Wyche was also facing charges relating to delinquency in child support payments.

properly admissible as a statement against interest. Fla. R. Evid. 90.804 (2) (b). By refusing to consider the information contained in Wyche's affidavit, the lower court omitted a crucial piece of evidence necessary to a cumulative analysis of Mr. Gorby's claims. Kyles, 514 U.S. at 436.

The lower court's refusal to admit Wyche's affidavit amounts to nothing less than a denial of due process. The only witness to testify at trial that Mr. Gorby confessed to the murder has now recanted his testimony, yet Mr. Gorby has been prevented from introducing evidence of that recantation by the court's erroneous and arbitrary ruling that Wyche's affidavit is inadmissible. Counsel for Mr. Gorby used every legal means to obtain Wyche's presence at the evidentiary hearing, even going so far as to have a capias issued for Wyche's arrest. When Wyche was finally brought before the court, prepared to reveal the truth about his participation in Mr. Gorby's trial, his testimony was averted only by the last-minute intervention of the assistant state attorney, who intimated that he would charge Wyche with perjury if Wyche dared to take the stand. Wyche, following the advice of the public defender who was appointed him at the State's urging, invoked the Fifth Amendment and refused to testify despite the fact that he was under subpoena and being held on a contempt charge from his failure to appear at the evidentiary hearing. Under these circumstances, there is no question that Wyche

was unavailable within the meaning of Fla. R. Evid. 90.804, and the court's refusal to enter his sworn affidavit was not only contrary to Florida law, but also contrary to principles of fundamental fairness.

CONCLUSION

For the foregoing reasons, and those stated in Mr. Gorby's Initial Brief and Petition for Writ of Habeas Corpus, the judgments of conviction and sentence of death should be vacated and the case remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **REPLY BRIEF OF APPELLANT** has been furnished by United States Mail, first-class postage prepaid, to Stephen R. White, Assistant Attorney General, Capital Appeals, Office of the Attorney General, the Capitol, Tallahassee, FL, 32399-1050, on December ___, 2000.

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