IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

KHADAFY MULLENS,

Appellee.
_____/

CASE NO. SC19-1587
L.T. No. 08-CF-18029
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT/CROSS-APPELLEE

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PRELIMINARY STATEMENT

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STATEMENT OF THE CASE AND FACTS

A. Trial and Sentencing

On direct appeal, this Court provided the following summary of facts:

> The Central Food Mart in St. Petersburg was a convenience store equipped with a visible, but inoperative videocassette recording device (VCR), as well as at least seven other concealed devices that recorded and captured the events that occurred in the store on the evening of August 17, 2008. Spencer Peeples and Mullens entered the store on that evening and initiated a robbery of Uddin, the clerk who was working in the store that evening. Peeples brandished a gun and together with Mullens, demanded money from the cash register. At one point, Peeples tucked his hand into his shirt to prevent his fingerprints from being left on the register. While the three men stood behind the counter as Uddin opened the register, Hayworth entered the store and stood quietly at the counter.
>
> After Peeples and Mullens removed cash from the register, they asked Uddin about the inoperative VCR equipment. Peeples removed the equipment and handed it to Mullens, who placed it in a plastic bag. Peeples returned to the counter, filled another plastic bag with lottery tickets, and handed a small box to Hayworth across the counter at Hayworth's request. Hayworth left the counter to approach the door, but did not exit the store. Peeples and Mullens dragged Uddin from the counter to the entrance of the store and at gunpoint demanded the keys to Uddin's car, but Uddin refused. The three men returned to the counter where Peeples took a green carton of Newport cigarettes and handed it to Mullens, who placed it in a plastic bag. As Peeples continued to demand the keys from Uddin, Mullens walked around the store and spoke to Hayworth before returning to the store entrance. Peeples eventually obtained the keys from Uddin, handed the gun to Mullens, and indicated that he would return shortly with Uddin's car before he exited.

Mullens stood in front of the door and alternatively looked outside the door and back at the counter at Uddin. When Mullens opened the door and leaned outside, Uddin reached for a telephone and dialed a number. Mullens saw the movement and ran toward him with the gun pointed at Uddin. Mullens pushed Uddin back toward the phone and struggled with Uddin before shooting Uddin once in the head.

Mullens then walked away from the counter and grabbed the arm of Hayworth, who had remained in the store but was not standing in front of the door or blocking Mullens's exit. Mullens pushed Hayworth to the floor and shot him in the head as well. As Mullens exited the store, he placed the gun in his pocket. Barton then opened the door of the store, but balked as Mullens attempted to pull him into the store. Barton and Mullens struggled and Mullens fired several shots at Barton. Barton eventually fell to the ground and crawled away, at which point Mullens abandoned Barton and picked up the bag full of lottery tickets before he exited the store.

After reviewing footage from the operative surveillance equipment, officers issued a "Be On The Lookout" notice with a description of Peeples, Mullens, and Uddin's stolen car. Peeples was arrested driving Uddin's car in the early morning of August 18, and he gave a voluntary statement to officers. Officers also recovered from Uddin's car a cylinder from a revolver and a pack of Newport cigarettes. In his statement, Peeples indicated that he only intended to commit a robbery, not murder. Peeples also consented to a search of his apartment, from which officers recovered the lottery tickets, VCR equipment, and clothing that matched that worn by both of the assailants in the video recordings. Detectives Rodney Tower and Brian Taylor later saw Mullens in an alley and arrested him because they recognized him from the surveillance footage. When Mullens was arrested, officers searched him and found lottery tickets with serial numbers that matched those taken from the store.

On September 4, 2008, a grand jury indicted Mullens

and Peeples on two counts of first-degree murder and one count of attempted first-degree murder, although the joint indictments were eventually severed. Between July and September 2011, a hearing was conducted to determine whether Mullens was competent to proceed. Dr. Jill Poorman testified that in her opinion, Mullens was competent to proceed, although Dr. Scot Machlus offered an opinion to the contrary. Dr. Peter Bursten, a psychologist, opined that while Mullens suffered from antisocial personality disorder he did not display any symptoms consistent with an Axis I disorder. Bursten also offered an opinion that Mullens was malingering. However, Dr. Machlus testified that in his opinion it would be difficult for someone of Mullens's intelligence level and behavioral patterns to malinger. The trial court orally found that Mullens was competent to proceed. On April 29, 2013, Mullens pleaded guilty to the first-degree murders of Uddin and Hayworth and the attempted first-degree murder of Barton. During the penalty phase, he waived the right to present evidence to a jury, [FN1] and aggravating and mitigating evidence was received by the trial court.

> [FN1] The State objected to Mullens's waiver of a penalty phase jury. The trial court conducted a colloquy of Mullens and accepted the waiver.

During the testimony of Detective Tower, the State introduced video recordings and still photographs obtained from the surveillance cameras. Defense counsel objected that the State could not establish a sufficient foundation for this evidence to be admitted through Tower, who did not immediately respond to the crime scene and did not know how the footage was downloaded into an accessible format. Law enforcement personnel from the City of St. Petersburg were initially unable to access the surveillance footage. Tower contacted Robert Dematti of Able Solutions, who assisted law enforcement personnel in retrieving and accessing the surveillance footage. The court admitted the material into evidence over the objections of defense counsel.

The State also presented testimony from Detective Taylor, who interviewed eyewitnesses and supervised

the search of Peeples's apartment. One witness, Russell Watson, informed Taylor that an individual, later identified as Peeples, had approached him earlier that day, indicated that Peeples was armed, and invited him to participate in the robbery of the Central Food Mart. Watson declined, but observed Peeples enter the convenience store later that day. Another witness informed Taylor that she watched a driver in Uddin's gray Toyota Camry, which had been parked in front of the store that day, drive away from the store, make a U-turn, and return to the store. Officer Willard Smith also testified that the serial numbers of the lottery tickets found in Mullens's possession matched those registered to the Central Food Mart. Dr. Jon Thogmartin, the medical examiner, also testified that the cause of death for both Uddin and Hayworth was a gunshot wound to the head, and that while Uddin lost consciousness immediately, there was a possibility that Hayworth did not. The State did not present testimony from Dematti, who assisted law enforcement with the surveillance footage, or Barton, the surviving witness.

After the State concluded the presentation of penalty-phase evidence, Mullens presented various witnesses in mitigation. Ali Sultan, another local convenience store owner, testified that he knew Peeples had a reputation for violence and intimidation. He stated that he and Peeples were involved in an ongoing dispute, and on the day of the crimes, Peeples had first come to Sultan's store, looking for Sultan, but Sultan was not there at the time. Sultan also testified that while he did not know Mullens well, he was a known local drug addict who seemed "simple" to Sultan.

Several family members and friends of Mullens also testified with respect to Mullens's childhood and character. During much of Mullens's childhood, Mohammad Ibrahim, his father, was incarcerated, leaving Cassandra Washington, his mother, to care for several children while she completed her education. Cassandra often relied on her oldest child, Shandra, to supervise the children while she worked or attended school. Relatives described Mullens's childhood home

as cluttered, decrepit, and lacking food to feed the family. At one point, Cassandra and her family were evicted.

When Ibrahim was released from prison, he offered little support to Mullens, Cassandra, or the rest of the family. He verbally and physically abused Cassandra in front of the children, and when Mullens observed this, he removed his younger sister Kendra from the room. Ibrahim abused drugs and stole food stamps, the household television, and a Mickey Mouse watch from Shandra to purchase drugs. Additionally, he taught both Shandra and Mullens to shoplift when they were children.

During one of the periods of Ibrahim's incarceration, Cassandra married Levi McClendon, who also had problems with substance abuse. Cassandra testified that McClendon was tougher on Mullens than the rest of the children. Sharon Mullens, the sister of Ibrahim and aunt of Mullens, testified that she did not like the interactions between Mullens and McClendon.

Family members and friends described Mullens as a happy, outgoing, and loving child who was easily manipulated and influenced, especially by his older brother, Wesley. Wesley once directed Mullens to break into a neighbor's garage and steal bicycles. Mullens also cared for his younger sister Kendra and always attempted to make sure that Kendra would not go hungry, even if it required that he steal food for her. Kenneth Mullens, the uncle of Mullens, testified that Mullens was fiercely protective of his family and recounted an incident in which Mullens physically attacked someone who had threatened his cousin during a football game. Kenneth considered taking in Mullens to live with his family, but his wife feared that Mullens would negatively influence their own children.

Mullens was described as an immature child, but when he grew older, he underwent wild mood swings and began to act inappropriately. As a teenager, he asked his mother, who worked at a family planning center, to speak to his girlfriend about birth control so that she would agree to have sex with him. When he was

fifteen, his mother eventually told Mullens that he could no longer live in her home, and he was arrested and incarcerated in an adult facility shortly thereafter. After he was released from prison at the age of sixteen, his demeanor upon his return to Cassandra's home was markedly different. Mullens became angry, hostile, and paranoid. It was difficult to maintain a conversation with him, due to his rapid and discordant speech. Neighbors approached Cassandra, asking her to force him to leave the neighborhood, and she contemplated poisoning her son, "to put him out of his misery."

In addition to behavioral problems, evidence was presented regarding Mullens's substance abuse. Sultan testified that Mullens was one of the local addicts. Cassandra testified that after Mullens was released from prison in 2007 and returned to her home, he used marijuana, and she suspected that he also used cocaine. Michael Wonka, Mullens's roommate at the time of his arrest, testified that they regularly consumed drugs together. Mullens also told Dr. Machlus that he began using drugs when he was eleven years old and began drinking at thirteen, although Dr. Machlus admitted that such reports were not necessarily reliable. [FN2]

> [FN2] Dr. Machlus noted that it would be unusual for an individual to begin using cocaine at age eleven, alcohol at thirteen, inhalants at thirteen or fourteen, and marijuana at fifteen, as Mullens reported.

Mullens also presented evidence regarding his mental health. According to testimony from Cassandra Washington, several relatives in her family suffered from mental illness, including diagnoses of schizophrenia, depression, and alcoholism. Ibrahim testified that he suffered from bipolar disorder and post-traumatic stress disorder (PTSD). Dr. Machlus testified that given this family history, Mullens had a genetic predisposition toward certain mental illnesses, which was exacerbated by his own substance abuse. While Mullens was incarcerated in 2007, prior to the murders, he was diagnosed with bipolar I disorder and schizophrenia, Axis I disorders, as well

as avoidant personality disorder and independent personality disorders, Axis II disorders. When Dr. Machlus first attempted to evaluate his competency, Mullens acted inappropriately, but after he received medication, Dr. Machlus noted that he became more focused and cooperative. Family members also noted that it became easier to maintain conversations with him. Dr. Machlus opined that Mullens (1) committed the murders while under an extreme emotional or mental disturbance, and (2) acted under the duress of Peeples during the robbery.

Mullens presented evidence of two other proposed mitigating circumstances. Dr. Machlus testified that Mullens informed him that he had been sexually abused by McClendon when he was a child and on eight occasions during a prior incarceration. Both Cassandra and Ibrahim also testified that Mullens exhibited paranoia regarding sexual abuse after he was released from prison. Ibrahim also testified that he named Mullens after Muammar Gaddafi, whom he respected for opposing the administration of President Reagan.

The trial court issued its sentencing order on August 23, 2013. It found the existence of three aggravating circumstances with respect to each murder: (1) Mullens had been convicted of prior violent felonies under section 921.141(5)(b), Florida Statutes (including a prior conviction for aggravated battery, the contemporaneous murders of Uddin and Hayworth, and the attempted murder of Barton); (2) the capital felonies were committed during the course of a robbery, section 921.141(5)(d), which merged with pecuniary gain, section 921.141(5)(f); and (3) the capital felonies were committed for the purpose of avoiding lawful arrest, section 921.141(5)(e). The court assigned great weight to each aggravating circumstance.

The court found that two statutory mitigating circumstances applied. First, the court concluded that the capital felony was committed while Mullens was under the influence of an extreme mental or emotional disturbance, section 921.141(6)(b), and assigned it moderate weight. The court noted that while Mullens had been diagnosed with bipolar disorder, personality

disorder (not otherwise specified), and polysubstance abuse, there was no evidence of Mullens's precise mental state during the murders because Dr. Machlus did not ask Mullens about his mental state at that time. The court also found that Mullens's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired, section 921.141(6)(f), and assigned it moderate weight. This circumstance was based on the evidence presented by members of his family that detailed his difficult childhood, mental health, history of substance abuse, and the lack of protective factors that might otherwise insulate someone from the negative consequences of such a childhood.

Regarding nonstatutory mitigation, the court explained that of the thirty-one circumstances that Mullens presented as mitigation, sixteen had been addressed as statutory mitigation and would not be reconsidered as nonstatutory mitigation. [FN3] The court consolidated the remaining factors into nine nonstatutory mitigating circumstances: (1) Mullens was sexually abused as a child and while in prison (not proven and given no weight); (2) his mental illness can be successfully treated (some weight); (3) he is immature, impulsive, and easily manipulated (little weight); (4) he acted under the domination and control of Peeples (some weight); (5) he has a low IQ and poor academic achievement scores (little weight); (6) he accepted responsibility for his crimes (little weight); (7) his family and friends love and support him (little weight); (8) he was "too far gone to be helped" at ten years old (not proven and given no weight); and (9) he was named after Muammar Gaddafi (not mitigating and given no weight).

> [FN3] These sixteen factors include Mullens's: (1) genetic predisposition to psychological disorders; (2) genetic predisposition to substance dependency; (3) exposure to parental conflict; (4) exposure to and victim of child abuse and neglect; (5) poor parental attachment; (6) exposure to family drug and alcohol abuse; (7) exposure to family criminal behavior; (8) abuse at the hands of his older brother; (9)

> residential instability; (10) impoverished childhood; (11) poor academic performance; (12) incarceration as a juvenile in an adult facility; (13) diagnosis of bipolar disorder; (14) diagnosis of polysubstance abuse; (15) diagnosis of a personality disorder; and (16) being taught to commit crimes when he was five years old by his father.
>
> Upon review of the weight assigned to all of the established aggravating and mitigating circumstances, the court sentenced Mullens to death for the murders of both Uddin and Hayworth, and life imprisonment for the attempted murder of Barton.

As part of the mitigation investigation and presentation, Mullens's defense team hired clinical and forensic psychologist Dr. Scot Machlus in 2010. Defense counsel, Jill Menadier, introduced Dr. Machlus's CV and his February 2013 forensic report into evidence at the penalty phase hearing. (DAR:V9/1323-24; V12/2135). Dr. Machlus testified that he interviewed Mullens at least twelve times over a three-year period. (DAR:V10/1325). In late 2011, Dr. Malchus administered intelligence, achievement, and personality tests. (DAR:V10/1429). Dr. Machlus explained that he needed to split the testing up among days because Mullens would become distracted. (DAR:V10/1429). He acknowledged that the test is ordinarily completed in one sitting or within a certain timeframe. (DAR: V10/1430). In Dr. Machlus's opinion, splitting the testing up, even the IQ testing, rendered an accurate result. (DAR:V10/1429).

According to his February 2013 report, Dr. Machlus also interviewed Mullens's mother, father, sister, and aunt. (DAR:V9/1325; V13/2163). Mullens told Dr. Malchlus that his brother abused him when they were children. Mullens stated that his brother would hit him with objects, throw things at him, and beat him on a regular basis. (DAR: V9/1373) Mullens also told Dr. Machlus that he was sexually abused by his stepfather and while in prison. (DAR:V10/1401).

Further, Dr. Machlus testified that Mullens's IQ was below average and that Mullens had a history of poor academic achievement. (DAR:V9/1374-75). And, although Dr. Machlus did not diagnose Mullens with Post-Traumatic Stress Disorder, he did testify that teens who are incarcerated in adult prisons, as Mullens had been, show signs of Post-Traumatic Stress Disorder and associated anxiety. (DAR:V9/1375-76). Dr. Machlus never affirmatively testified that Mullens did not have Post-Traumatic Stress Disorder.

Dr. Machlus diagnosed Mullens with Bipolar I Disorder, Personality Disorder (NOS), and Polysubstance Abuse. (DAR:V9/1328). Dr. Malchus explained that symptoms of bipolar mania include elevated, expansive, or irritable mood, which explains Mullens's seemingly inappropriate laughing. Alternatively, Mullens can be angry and aggressive with fellow

inmates and prison staff. At times Mullens speech is circumstantial and tangential and he appears to have racing thoughts. (DAR:V9/1332). Dr. Machlus testified that Mullens also suffered from Paranoid Personality Disorder and had indicators of Borderline Personality Disorder. He exhibited distrust and suspicion of others. He also was impulsive with paranoid ideations. (DAR:V9/1344-45).

Dr. Machlus also considered Mullens's excessive masturbatory behavior a sign of mania. (DAR:V9/1331-33). The Department of Corrections and Pinellas County Jail records that Dr. Malchus reviewed reflect that Mullens regularly masturbated regardless of where he was or who was around. (DAR:V9/3841, 3845-47). For example, Mullens masturbated in front of visitors, in front of doctors, standing in the middle of his cell, in front of female nurses, in the day room, in front of social workers, and in the pod. (PCR/3845-47; DAR:V12/1755-76, 1779-80, 1782-85, 1790; V13/1794, 1797, 1800, 1823, 1856, 1870, 1909). He continued this behavior even though he suffered negative consequences including disciplinary reports, loss of privileges, and problems with other inmates. (DAR:V9/1333; V13/2163-91).

Defense counsel presented evidence at the penalty phase that Mullens came home from prison "a different person." His mother testified Mullens went to prison when he was 16, and when

he returned he was angry and paranoid. (DAR:V7/1139). Mullens was so belligerent and confrontational that the neighbors drew up a petition asking Mullens's mother to make him leave. (DAR:V7/1141). Mullens went to prison a second time and when he returned he was taking medications, which helped with his behavior. (DAR:V7/1143). Eventually, Mullens resumed his old ways and began drinking and using drugs again becoming angry and challenging like he was before going to prison. (DAR:V7/1146). After his arrest on the instant charges he was medicated in jail and his behavior improved. (DAR:V7/1148).

Shandra Washington, Mullens's older sister, testified that when Mullens returned from prison the first time, he wasn't himself; when he returned from prison the second time, he was like a different person. He would talk to himself and his hygiene was terrible. (DAR:V8/1257-58). In the year or two prior to his sentencing, Mullens's mental condition had improved and his thinking seemed to be clearer (DAR:V8/1261). Similarly, Atari Russ, a childhood friend, testified that when Mullens returned from prison, he was "completely different," and seemed paranoid. (DAR:V8/1238-39).

Additionally, defense counsel presented evidence of Mullens's intellectual and cognitive deficits at the penalty phase. Mullens's mother testified that Mullens was an impulsive

child who did not think of the consequences of his actions. (DAR:V8/1124). He was always seeking the approval of others. (DAR:V8/1123). She also testified that Mullens was gullible and other children would take advantage of him. (DAR: V8/1127).

Likewise, Mullens's uncle, Kenneth Mullens, testified at the penalty phase that Mullens always lacked maturity, even as an adult. (DAR:V8/1195). When he was a child, Mullens did not read on the same level as Kenneth's children and his vocabulary was limited. He did not seem to understand the thread of stories. He could tell Mullens was "different." (DAR:V8/1189). Kenneth's son, James, testified that Mullens was easily manipulated. James also testified that Mullens was academically behind other kids his age. (DAR:V8/1206). James recalled that Mullens was an extremely emotional child who would cry even when gently criticized. (DAR:V8/1202). Mullen's aunt, Sharon Mullens, and his childhood friend, Atari Russ, also testified that Mullens was gullible and easily influenced as a child. (DAR:V8/1222, 1230).

Among other things, defense counsel argued in the sentencing memorandum that Mullens has intellectual deficits. (DAR:V10/1574). In the sentencing order, the court found that Mullens established the mitigators that he is immature,

impulsive, and easily manipulated and that he has a low IQ and poor academic achievement scores. (DAR:V15/2284-2326).

Postconviction Motion to Vacate Judgment and Sentence

Mullens filed a Motion to Vacate Judgment and Sentence on December 18, 2017, and an Amended Motion to Vacate Judgment and Sentence on May 15, 2018. (PCR/94, 119). Mullens raised nine claims, only one of which is at issue in this appeal – counsel alleged penalty-phase ineffective assistance of counsel. In claim 3 Mullens alleged that his trial attorneys were ineffective at the penalty phase due to their failure to uncover and present all available mitigation. Specifically, Mullens alleged that counsel failed to introduce a cohesive mitigation narrative and did not present evidence of diminished capacity, Post-Traumatic Stress Disorder, childhood sexual and physical abuse, and assaults in prison. Mullens also claimed counsel failed to ensure an adequate and competent mental health evaluation, neuropsychological testing, brain scans, and failed to investigate evidence of brain damage and dysfunction. Further, Mullens asserted counsel mismanaged an "incompetent" expert -- Dr. Machlus.

Postconviction Hearing Testimony and Evidence

On the day of Mullens's arrest, in August 2008, Senior Assistant Public Defender Dudley Clapp, and Assistant Public

Defender Jill Menadier, visited Mullens in the Pinellas County Jail. (PCR/2739, 2747, 2755). Mr. Clapp, at that point in time, had been an assistant public defender for over 30 years. (PCR/2728). During his decades-long career, Mr. Clapp tried over 90 felony trials and handled dozens of death penalty cases. He was actively involved in publishing the Office of the Public Defender's death penalty manual, which includes motions, instructions, and ideas regarding representing capital defendants. (PCR/2730). He also was a member of the Office of the Public Defenders "Cap Team" -- an informal group of capital public defenders who discussed cases, strategy, and tactics. (PCR/2733). Mr. Clapp testified that the overriding goal in a capital case is to save the client's life. (PCR/2734).

Mr. Clapp met with Mullens no less than once a week. (PCR/2743). Mr. Clapp believed that there was something wrong with Mullens from a "mental point of view," which made representing him challenging. (PCR/2737, 2744, 2747). The biggest factual challenge in defending Mullens was the good-quality video of the robbery, murders, and attempted murder. (PCR/2737). Undeterred by the video, Mr. Clapp hoped that further factual development, specifically about what happened before Mullens and Spencer Peeples entered the store and after

they left, would weaken the State's case. (PCR/2736, 2746, 2764).

Mr. Clapp was primarily responsible for the guilt phase of any potential trial and Ms. Menadier focused on the penalty phase. (PCR/2735). Immediately after the first meeting with Mr. Mullens, Ms. Menadier requested Mullens's school and medical records. (PCR/2755, 4029-40). Within two weeks of Mullens's arrest, Mr. Clapp and Ms. Menadier had obtained many but not all of Mullens's juvenile records and evaluations. (PCR/2756). A little more than two weeks after their first meeting, Mr. Clapp had obtained and reviewed Mullens's mental health records from Gulfcoast Mental Health Center. (PCR/2758). Less than three weeks later, Mr. Clapp had received and reviewed Mullens's mental health records from Suncoast Center for Community Mental Health. (PCR/2758).

In early December 2008, approximately 4 months after Mullens's arrest, Mr. Clapp hired neuropsychologist Dr. Michael Gamache to conduct a records review and evaluation of Mullens. (PCR/2740, 4037). One factor in hiring Dr. Gamache specifically was to "take him off the board" for the State. (PCR/2740). Mr. Clapp's experience taught him that assistant public defenders and assistant state attorneys "tend to go through cycles of favorite psychiatrists and psychologists." The State often hired

Dr. Gamache. Dr. Gamache became unavailable to the State once retained by Mr. Clapp. (PCR/2740).

On March 12, 2009, Mr. Clapp had a telephone conference with Dr. Gamache. Dr. Gamache advised that the low IQ score noted in Mullens's Department of Corrections records was invalid because of Mullens's failure to cooperate. (PCR/2761, 4039). Dr. Gamache suggested explosive behavior may be a sign of frontal lobe damage, but Mullens did not report to Dr. Gamache any head injuries, which is consistent with the records the defense team eventually compiled. (PCR/2761, 4039). Dr. Gamache advised that Mullens appeared to suffer from mental health problems for which there was no effective treatment in prison, but Mullens's lack of cooperation complicated matters. (PCR/2762, 4039; DAR:V12/1895-97). Mr. Clapp's notes of the phone call state that Mullens's lack of cooperation "could hurt" any attempt to assert his mental health problems could not be effectively treated in prison. (PCR/4039-State's 30).

Mr. Clapp could not recall if Dr. Gamache recommended a PET scan or MRI. (PCR/2759). Whether Mr. Clapp would have followed through such a recommendation if it were made would have depended on, among other things, the State's position regarding the death penalty. (PCR/2759). In Mr. Clapp's professional opinion, it was not a matter of whether Mullens had mental

health problems, it was a matter of how and when to raise them. (PCR/2762). The decision of how, when, and whether to raise a defendant's mental health issues is a strategic one made on a case-by-case basis. (PCR/2762).

Mr. Clapp testified that juries are "notoriously unimpressed with mental health type of defenses," which is a consideration in the decision to hire experts. (PCR/2757). Additionally, the timing of hiring experts is a strategic decision and, according to Mr. Clapp, delay can sometimes be used to "jam the State." (PCR/2780). In this case, Mr. Clapp testified that he wanted a better understanding of all the facts before involving multiple experts. Except for January 2010, during which time he was in treatment for his admitted alcoholism, Mr. Clapp continued to actively work on Mullens's case until he left the Office of the Public Defender in August 2010. (PCR/2767, 2769).

Ms. Menadier, like Mr. Clapp, was an experienced attorney and assistant public defender and criminal trial lawyer when she became involved in Mullens's case. She began her career as an assistant state attorney in Miami and subsequently worked for the Office of the Attorney General Statewide Prosecutor's Office. (PCR/1419). In 1994 she began working as an assistant public defender in the Thirteenth Judicial Circuit, but since

1999 has worked in the Sixth Judicial Circuit Office of the Public Defender. (PCR/1419). Ms. Menadier is "death qualified" and has tried six to ten death penalty cases through verdict and sentencing. In addition, she has tried countless non-capital murder trials. (PCR/1420). Ms. Menadier keeps up-to-date on representing capital defendants by attending various seminars such as "Life over Death," and "Life in the Balance," capital voir dire training, and other miscellaneous death penalty seminars. (PCR/1420). It is her practice to "get every single piece of paper that mentions [her] client from any place." (PCR/1521).

In September 2010, after Mr. Clapp left the Office of the Public Defender, Ron Eide took over as lead counsel. (PCR/1736). Mr. Eide knew Mr. Clapp to be a good attorney who was once Chief Assistant Public Defender, and who unfortunately developed an alcohol addiction. (PCR/1752, 1753). Mr. Eide did not believe that Mr. Clapp was ever impaired by alcohol while at work. (PCR/1755).

When Mr. Eide retired, Mike Hayes came on the case and Ms. Menadier became lead counsel. (PCR/1428). Allison Miller also became involved in Mullens's case because she was an "up and coming" assistant public defender who showed an interest in death penalty cases. (PCR/1425-26). Ms. Menadier focused on

preparing for a potential penalty phase, but she was involved in all aspects of the defense. (PCR/1429). The strategy for guilt phase was to "humanize" Mullens and show that Peeples planned and directed the robbery that resulted in the murders and attempted murder. The defense team also planned on presenting Mullens's mental health issues as mitigation. (PCR/1455).

Ms. Menadier testified that she found it difficult to communicate with Mullens when he was unmedicated. After Mullens began taking his psychiatric medication, though, he appeared stable and it was easier to communicate with him. (PCR/1446, 1449). His behavior also improved, and he was no longer getting in trouble in the jail. (PCR/1455). Ms. Menadier testified that when Mullens was on his medication he was engaged and could respond to the information that his attorneys were providing. (PCR/1446). That said, Mullens would rap nonsensically when Ms. Menadier tried to discuss legal strategy with him. (PCR/1446). Ms. Menadier did not notice Mullens exhibiting any medication side effects such as slurred speech. (PCR/1449).

Through her professional experience and attendance at death penalty seminars, Ms. Menadier has some knowledge regarding intellectual disability. (PCR/1450). She noted some indicators that Mullens may be intellectually disabled. According to Dr. Machlus's pretrial testing, which was conducted in late 2011,

Mullens has an IQ of 83, which is low average. (PCR/1514, 3837). Dr. Machlus also stated that a case could be made that Mullens had average intellectual functioning. Mullens had no significant deficits in knowledge and did not have a learning disability. (PCR/1519, 3524).

Per the December 2011 Structured Interview of Reported Symptoms, (SIRS-2), which experts consider the "gold standard" for determining if a person is malingering, Mullens was "definitely feigning." (PCR/1519). Dr. Machlus administered a SIRS-2 about a year later and Mullens did not have any scores in the "definite" or "probable" feigning ranges. His other scores were indeterminate. (PCR/3841). As a result, "overall response style [was] not possible." (PCR/3841).

Ms. Menadier knows the difference between a neuropsychologist and a psychologist and often consults with either or both in preparing mitigation. (PCR/1456-57). According to Ms. Menadier's postconviction testimony, for the three years Dr. Machlus was on the defense team and despite numerous reports written by Dr. Machlus, his testimony at the competency hearing, and her introduction of his CV and testimony at the penalty phase, she was under the impression that Dr. Machlus was a neuropsychologist. (PCR/1456, 1470-71).

Ms. Menadier wrote in the notes of her January 11, 2013, conversation with Dr. Machlus that Dr. Machlus saw nothing indicating neuropsychological problems "in the testing he has done" and that Mullens had no history of head injury or developmental disorders. (PCR/3062-63). Ms. Menadier testified at the postconviction evidentiary hearing that based on her notes she "*probably* thought that (Dr. Machlus) had done some neuropscyh testing." (PCR/1500)(emphasis added). Ms. Menandier presented Dr. Machlus's May 13, 2013, penalty phase testimony, including introducing his CV and February 4, 2013, report. (DAR:V9/1323-24). Nonetheless, she testified at the evidentiary hearing that she has "since learned" that Dr. Machlus is a psychologist. (PCR/1471).

Tiffany Cunningham is the mitigation specialist who worked on Mullens's case. Her first summary report was provided in October 2011. (PCR/2992; 2991-3005). Ms. Cunningham documented several previous alleged head injuries. (PCR/1312). Mullens's sisters reported incidents in which Mullens's brother, Wesley Washington, would beat him when they were children. (PCR/1312). Ms. Cunningham interviewed Wesley Washington and he denied abusing Mullens. Mr. Washington stated that he hit his brother on occasion, but never hit him in the head. Mr. Washington had no information about whether Mullens suffered head injuries as a

child. (PCR/3012). The remaining information about alleged head injuries came solely from Mullens. (PCR/1312).

Ms. Cunningham met with Mullens's now-deceased mother, Cassandra, at least four or five times, and with Mullen's father two or three times. (PCR/1300) Ms. Cunningham testified that it was difficult to get information from Cassandra. Ms. Cunningham believed that Cassandra was "not willing to fall on her sword." (PCR/1301).

Ms. Cunningham suspected Mullens had neurological issues and possible intellectual disability. (PCR/1368). In October 2011, she included those suspicions in a report to Mullens's attorneys and suggested follow up, including a "brain mapping." (PCR/1369). Ms. Cunningham also suggested that Mullens be evaluated by a neuropsychologist. In November 2011, she emailed Dr. Machlus the contact information for two neuropsychologists. (PCR/1381, 1391, 3036). Ms. Cunningham also suspected Mullens had sensory integration issues, and Post-Traumatic Stress Disorder. (1370). Dr. Machlus did not share her opinion that Mullens suffered from Post-Traumatic Stress Disorder. (PCR/1399-1400).

On October 3, 2011, around the same time Dr. Machlus was administering intelligence and achievement testing of Mullens and Ms. Cunningham provided her first report, Ms. Menadier had a

telephone call with neuropsychologist Dr. Gamache, which she documented in the file. (PCR/1465; 3050-51). Dr. Gamache did a forensic evaluation of Mullens on September 26, 2011. (PCR/3049). Ms. Menadier noted that Dr. Gamache stated that Mr. Mullens *possibly* has a "frontal lobe dysfunction/disorder." There is no indication that Dr. Gamache suggested a brain scan or additional neuropsychological testing. (PCR/1465). While Ms. Menadier did not document any recommendation from Dr. Gamache regarding brain scans, she did note that Dr. Gamache suspected Mullens had a personality disorder that caused his "outrageous behavior" including threatening "to put a cap in" his mother. (PCR/1510; 3050-51).

Ms. Menadier testified that she did not forward Ms. Cunningham's summary report, which documented Mullens's alleged head injuries and contained Ms. Cunningham's opinions and impressions, to Dr. Machlus. (PCR/1497). Ms. Menadier would have preferred that Ms. Cunningham put her opinions and impressions in a separate document to avoid potential discovery issues. (PCR/1468). Ms. Cunningham's report introduced at the evidentiary hearing include critical marginalia, presumably written by Ms. Menandier or another attorney member of the defense team, including a note that the report contains "too many rhetorical ?s and too little info.". (PCR/3006-27).

Mullens's attorneys requested medical records from Edward White Hospital to confirm the alleged "clothesline" incident that was the basis for one of the alleged head injuries reported by Mullens to Ms. Cunningham. (PCR/1507) Those records, if they ever existed, were purged and unavailable. (PCR/1507; 3515). Additionally, Bayfront Medical Center had no records related to any alleged head injury Mullens suffered. (PCR/1508; 3512). Likewise, Manatee Memorial Hospital had no records related to Mullens. (PCR/1508; 3509).

Mullens reported the "clothesline" incident and subsequent trip to the Edward White Hospital emergency room where butterfly tape was applied to his neck, during a January 1998 Juvenile Justice Behavioral Evaluation. Other than the butterfly tape, no further treatment was given or necessary according to Mullens. During that same evaluation, Mullens also reported that he was knocked unconscious briefly during a fight, but he did not require medical treatment. He stated he had no residual effects from the incidents. During that same evaluation Mullens was given the Kaufman Brief Intelligence Test. He scored in the 45th percentile in relation to his peers. (PCR/1523-25; 3548-52).

Contained in Mullens's Suncoast Center for Community Mental Health records is an "HIV and STD Risk Factor Assessment." In it, Mullens denied prior surgeries and denied having ever been

"forced or coerced into having sexual relations." He also denied any previous diagnosis or treatment for a head injury or headache. (PCR/1527; 3553-56). This form was filled out two months before the robbery, murders, and attempted murder.

In Mullens's Social Security Administration Records from 2008, only months before the crimes, Dr. Thomas Conger concluded that Mullens suffered from Affective Disorder, Personality Disorder (Antisocial Personality), and Substance Abuse Addiction Disorder. Dr. Conger concluded that there was no indication of mental impairment and Mullens was capable of independent living. (PCR/1577, 1579; 3748-49). Among the possible diagnoses for Dr. Conger to consider were "Mental Retardation" or "Organic Mental Disorders," but neither was found. (PCR/1577; 3692).

During an October 21, 2010, meeting Mr. Eide informed Mullens that the doctor (it is unclear which doctor as Mullens had been evaluated for competency and by defense-retained experts) thought Mullens was not trying during testing. Mullens stated, "go ahead and give me the death penalty for this pussy ass shit." (PCR/1538; 3758).

Mr. Eide was the Chief Assistant Public Defender in 2010 when he joined Mullens's defense team. (PCR/1721, 1725). During his 35-year tenure at the Office of the Public Defender he was the office's representative in the Statewide Public Defender's

Office Death Penalty Steering Committee, which is composed of all 20 Florida judicial circuits. (PCR/1722). The committee was primarily responsible for putting together the program for the "Life Over Death" seminar. (PCR/1722). He was involved in more than 100 death penalty cases during his career as an assistant public defender, not all of which would go to verdict or penalty phase. (PCR/1722). Mr. Eide estimated that he handled 12 to 15 death penalty trials. (PCR/1722). He attended the informal "Cap Team" meetings to discuss the pending death penalty cases in the office. (PCR/1724).

In capital cases, Mr. Eide might have had a psychiatrist or psychologist evaluate the defendant early on. (PCR/1734). But, in Mr. Eide's experience, not all mental health or intellectual problems are relevant to mitigation or sentencing in a death case. (PCR/1734).

When Mr. Eide joined Mullens's defense team in September of 2010, the case was set for trial in November of that year. In Mr. Eide's opinion the case was not ready for trial and, moreover, he was not ready to try it. (PCR/1738). Mr. Eide met with Mullens soon after he joined the defense team. In Mr. Eide's opinion, Mullens showed signs of limited understanding and inappropriate behavior during their first meeting. (PCR/1740).

Mr. Eide recollected that Mr. Clapp had hired Dr. Gamache early on to evaluate Mullens. (PRC/1741). In Mr. Eide's opinion, Mullens was a bit of an "enigma." He acted childlike, did not appear to be following conversations, or would behave inappropriately. (PCR/1746). For example, when Mr. Eide was reviewing with Mullens the still photographs taken from the video recording, Mullens smiled and asked, "Does that look like me?" (PCR/1746-47). Mullens understood the seriousness of the charges and the potential consequences, which is why Mr. Eide thought the question and the smiling were inappropriate. (PCR/1747). In Mr. Eide's opinion, he needed to immediately explore Mullens's competency. (PCR/1741). To that end, Mr. Eide needed a doctor who was "good and fast." (PCR/1743). Dr. Machlus was able to see Mullens within days of being retained. He called Mr. Eide after this first visit with Mullens and told Mr. Eide that Mullens began masturbating during the interview. (PCR/1747).

Mr. Eide understood that Dr. Machlus was not a neuropsychologist, but Mr. Eide was looking for an opinion on competency not brain damage. (PCR/1746). Mr. Eide also had Mullens evaluated by a Dr. Jones, who Mr. Eide recalled was either a psychologist or a psychiatrist, in November 2010. (PCR/1766). Dr. Jones informed Mr. Eide that Mullens was "angry

and antisocial and that he was noncompliant." Ultimately, Dr. Jones was unable to give an opinion as to Mullens's competency. (PCR/1766; 3757).

During his career, Mr. Eide represented defendants who could not carry on a conversation because of their mental impairments or disorders. That was not the case with Mullens. (PCR/1751). That said, Mullens, in Mr. Eide's opinion, "was not right." (PCR/1751). Mr. Eide recalled that Mullens was a substance abuser, which may have contributed to his inappropriate behaviors. (PCR/1751). According to Mr. Eide's file memorandum, Mullens seemed to be "playing games" with his attorney and the doctors and was possibly malingering mental illness. (PCR/1769; 3758).

Mr. Eide documented his observations of Dr. Machlus's February 18, 2011, competency evaluation of Mullens. (PCR/1770; 3759). Mullens was sullen and noncommunicative. It was obvious that Mullens intentionally would not respond to Dr. Machlus's questions regarding the roles of various people in the court system. (PCR/3759).

Mr. Eide testified that there were no viable defenses that did not have to do with Mullens's mental state at the time of the crime. (PCR/1755). The video was of good quality and watching it was "almost like being there . . . in realtime when

the crime was committed." (PCR/1755). Nonetheless, had Mullens insisted on going to trial, his defense team would have obliged and would have unreluctantly presented a defense on his behalf. (PCR/1757).

Assistant Public Defenders Michael Hayes and Allison Miller joined the defense team in 2011. Mr. Hayes first met Mullens at Mullens's 2011 competency hearing. Mr. Hayes did not think Mullens was competent and he maintained this concern throughout his representation of him, despite judicial findings to the contrary. (PCR/1781). Mr. Hayes also thought Mullens had obvious mental health issues. He did not recall suspecting intellectual disability, but he would not be surprised if that were the case. (PCR/1782).

As far as guilt phase preparation, the strategy was to humanize Mullens and present Peeples as the more culpable participant. (PCR/1787). Factually, the video was a significant challenge. (PCR/1787). The evidence of guilt was overwhelming. The defense team expected not only a guilty verdict, but a death recommendation. A penalty phase jury waiver was a better strategy because the judge would not have to override a jury recommendation to impose a life sentence. (PCR/1791). Before recommending that Mullens waive a penalty phase jury, the defense team investigated the judge's sentencing history and

discussed the case with other attorneys in the Public Defender's Office. (PCR/1791). They also discussed the possibility of a guilty plea and a penalty-phase jury waiver with the elected Public Defender. (PCR/1809).

Allison Miller was not death qualified when she joined Mullens's defense team. She was interested in handling death penalty cases and the office was encouraging some of the newer attorneys to become involved in death penalty cases because the death qualified attorneys were reaching retirement age. (PCR/1638). She did not have any specific responsibilities regarding trial preparations. (PCR/1631). Although some in the office viewed Mullens's case as "hopeless" Ms. Miller recalled Ms. Menadier saying something to the effect of there is "no such thing as a case without mitigation. Everyone has a story." (PCR/1639).

Ms. Miller had continuing concerns about Mullens's competency despite a judicial determination that Mullens was competent to proceed. (PCR/1636). Mullens appeared to be gullible and easily manipulated. Ms. Miller believed he was being advised by other inmates to request certain materials or defenses. (PCR/1660). Ms. Miller recalled being shocked that Mullens's IQ was higher than Spencer Peeples's IQ. (PCR/1667).

At the time, though, she was not familiar with the indicators of intellectual disability. (PCR/1663).

Ms. Miller, Ms. Menadier, and Mr. Hayes worked collaboratively. They all thought that the best strategy for saving Mullens's life was to have him plead guilty and waive a penalty-phase jury. (PCR/1642-43).

Mullens's uncle, Kenneth Mullens, testified at the evidentiary hearing that as a child Mullens was affectionate and "loved hard." He was slower academically than his contemporaries and had trouble understanding social interactions. Mullens longed to "fit in" and other children took advantage of this. (PCR/1607). James Mullens, Kenneth's son and Mullens's cousin, also testified. He recalled that as a child and teen Mullens "understood things differently." (PCR/1618-19). He recalled the incident where Mullens beat up a neighborhood bully because the boy punched James during a street football game. (PCR/1619). Mullens and his sibling did not read on the same level as James and his siblings did. (PCR/1617). Mullens was easily manipulated and he did not understand sarcasm. (PCR/1620). Mullens understood the basic rules of games, but sometimes would need repeated instruction. (PCR/1624).

Tony Rosa was a childhood friend of Mullens who testified at the evidentiary hearing. Mr. Rosa recalled that he and

Mullens would play tackle football on the pavement with no protective gear. (PCR/1709). He recalled Mullens falling out of a tree and he assumed that Mullens hit his head. (PCR/1708). Mr. Rosa did not recall any behavior "out of the ordinary." (PCR/1709). Mr. Rosa and the other older boys "could make the younger kids" do what the older boys wanted. (PCR/1710). Because they were not in the same grade, Mr. Rosa does not know if Mullens struggled in school. (PCR/1710). He did recall that Mullens's house was never clean and that there were rumors that family members used illegal drugs. (PCR/1712).

Mullens's father, Mohammad Ibrahim, testified that Mullens's now-deceased mother drank alcohol and smoked cigarettes when she was pregnant with Mullens. (PCR/2075). Mr. Ibrahim did not live with Mullens and his family from the time Mullens was 5 years old to 15 years old because Mr. Ibrahim was incarcerated. (PCR/2077).

Katherine Adikes was Mullens's third grade teacher. She remembered Mullens had trouble regulating his mood and did not understand social cues. (PCR/2052, 2057). He performed below grade level academically, but she could not recall whether Mullens had an IEP (Individualized Education Program.) (PCR/2054, 2056). Mullens was in the dropout prevention program, which targeted children at risk based on several factors

including poor attendance, poor academics, trouble at home, and lack of support. (PCR/2057).

Expert Testimony

Mullens presented the testimony of Dr. Joseph Wu. Dr. Wu refers to himself as a "neuropsychiatrist", but he is licensed as a psychiatrist. (PCR/1947). Likewise, he is not a radiologist or a neurologist. He is self-taught in image interpretation. (PCR/1947). In the mid-1980s, Dr. Wu participated in a two-year unaccredited fellowship involving PET and MRI imaging. (PCR/1948). He has never sat for a board exam in neuropsychiatry, radiology, nuclear medicine, or image interpretation. (PCR/1948). Dr. Wu relied solely on statistical quantitative analysis for his impressions regarding the diffusion tensor imaging and the MRI. (PCR/2000). According to Dr. Wu's statistical analysis, Mullens has the "small brain" of a person will Fetal Alcohol Spectrum Disorder.

Dr. Lawrence Holder has been board certified in radiology since 1974 and in nuclear medicine since 1975. (PCR/2519). Dr. Holder started his medical career at Johns Hopkins Hospital in Baltimore Maryland. Prior to moving to Florida, Dr. Holder was the Head of Nuclear Medicine at the University of Maryland Hospital. Subsequently, he was a Professor of Radiology at the University of Florida Health, Jacksonville. He still practices

at UF Health, Jacksonville and is a Courtesy Professor of Radiology there. Ninety percent of his practice involves seeing patients and teaching. (PCR/2521).

Dr. Holder has interpreted thousands of PET scan images, mostly in a hospital or other clinical setting (PCR/2541). He is occasionally called upon to blindly interpret scans to determine if a new drug or treatment is effective in reducing the size of tumors and the like. (PCR/2541). Dr. Holder is also trained and experienced in interpreting MRI images. He studied with a colleague who conducted the original clinical research regarding the use of MRI technology. (PCR/2540).

Radiologists "interrogate the image" and do not read into their interpretation clinical information, such as the patient's symptomology, etc. (PCR/2584). Similarly, Dr. Holder testified that imaging should be considered only if it will answer the "clinical question." (PCR/2578). A broad and vague statement like "rule out brain injury" is not an acceptable indication for imaging. (PCR/2578).

According to Dr. Holder, the PET/CT images of Mullens's brain are completely normal, as are the MRI images. (PCR/1240, 1219, 1266, 1337-38). Contrary to Dr. Wu's testimony that Mullens has the "small brain" of a person with Fetal Alcohol Spectrum Disorder, Dr. Holder testified that Mullens's brain

fills the entire head cavity and is normal size and volume. (PCR/2569, 2617). There is “lots of brain tissue.” (PCR/2569). The hemispheres of the brain are relatively equal. Neither side appear shrunken compared to the other. (PCR/2569). The frontal lobes of Mullens’s brain show no atrophy and are closely opposed – meaning there is no significant space between them. (PCR/2572). Mullens’s thalami and basal ganglia show no signs of atrophy. (PCR/2572). His cerebellum is showing more metabolic activity relative to the middle, but it is within normal limits. (PCR/2574, 2580). Mullens’s temporal lobes show normal variations as well. (PCR/2576). Also contrary to Dr. Wu’s conclusion, Mullens’s orbital frontal cortex and neocortex are normal. (PCR/2581, 2600).

Dr. Wu testified quantitative volumetrics showed that only eight people on Earth would have a corpus collosum as small as Mullens’s. (PCR/1901). Similarly, Dr. Wu testified that only one in four billion people would have an anterior corpus collosum as small as Mullens and five in 100 trillion people would have a mid-corpus collosum value as low as Mullens. (PCR/1941, 1916). Dr. Holder testified that if that statement were accurate the images should show that more than half of Mullens’s corpus collosum is missing. The images did not show an anatomically small corpus collosum. (PCR/2650). In fact, the anatomy of

Mullens's brain does not show any of the significant decreases that Dr. Wu testified about. The scans show a normal brain. (PCR/1918-22).

Dr. Holder testified that quantum volumetrics does not take the place of visual examination of the image. (PCR/2646). It should not be used as a stand-alone analysis. (PCR/2646). Dr. Holder's expert opinion, as a board-certified radiologist and a board-certified nuclear physician, with decades of clinical and academic experience, is that the MRI and PET/CT scan images of Mullens's brain are completely normal. (PCR/2667).

Defense expert psychiatrist, Dr. Michael Maher, relied on Dr. Wu's conclusion that Mullens has a "dramatically small and underdeveloped corpus collosum" to support his own conclusion that Mullens suffers from Fetal Alcohol Spectrum Disorder, which causes Mullens's impulsivity, inappropriate sexual behaviors, and rule-breaking. (PCR/2117, 2125-26). According to Dr. Maher, a small corpus collosum is the "smoking gun" of Fetal Alcohol Spectrum Disorder. (PCR/2117). Likewise, based on, among other things, Dr. Wu's interpretation of Mullens's brain scans Dr. Maher discounted a diagnosis of personality disorder in favor of a diagnosis of brain damage to explain Mullens's antisocial behaviors. (PCR/2165).

In addition to his document review, Dr. Maher met with Mullens three times for a total of six hours from October 2017 to January 2019. (PCR/2098). Dr. Maher criticized Dr. Malchus for "not being aware" that Mullens suffered from Fetal Alcohol Spectrum Disorder. (PCR/2132). Dr. Maher is of the opinion that Mullens also suffers from PTSD due to his traumatic upbringing and sexual abuse. (PCR/2139). Mullens initially did not want to tell Dr. Maher about the sexual abuse, but eventually discussed it with him. (PCR/2140). Dr. Maher thought it significant that according to Dr. Ouaou's notes, Mullens made a motion simulating masturbation while discussing being sexually abused by his stepfather. (PCR/2144). Dr. Maher opined that Mullens's behavior while speaking of the sexual abuse indicated that Mullens was experiencing a "real and genuine memory." (PCR/2145).

Dr. Maher acknowledged that Mullens had previously admitted to exaggerating or faking symptoms and that jail and prison records note that he did so for secondary gain. (PCR/2209-12).

Dr. Robert Ouaou[1] is a neuropsychologist hired by postconviction counsel to evaluate Mullens. Like Dr. Maher, Dr. Ouaou testified that the symptoms of brain damage are sometimes

[1] The majority of Dr. Ouaou's testimony dealt with intellectual disability, which is not an issue on appeal except to the extent the postconviction court considered it in finding counsel ineffective.

confused with psychological or personality disorders. (PCR/2289). According to Dr. Ouaou, brain damage is diagnosed through a combination of a medical evaluation, neurocognitive testing, and brain imaging. (PCR/2264).

Dr. Ouaou does not read brain scan images himself; instead he relies on a radiologist's interpretation of the brain imaging. (PCR/2264). In this case, he relied on Dr. Wu's report (Dr. Wu is not a radiologist) to confirm his opinion that Mullens has brain damage. (PCR/2280-81). Dr. Ouaou accepted Dr. Wu's conclusion that Mullens has damage to the part of his brain that controls impulses and reasoning. (PCR/2294). According to Dr. Ouaou, and relying in part on Dr. Wu's reports, Mullens's impulsive, reckless, and irresponsible behavior is a result of brain damage, rather than a personality disorder. (PCR/2292, 2294).

Furthermore, Dr. Ouaou noted that fetal alcohol exposure is the main cause of nongenetic intellectual disability. (PCR/2297). Dr. Ouaou testified that he suspected that Mullens's cognitive testing deficits were related to brain damage and that the damage occurred during brain development. (PCR/2296). Dr. Ouaou used Mullens's family members postconviction interview statements and Dr. Wu's discredited testing/opinion to "confirm" his suspicion that Mullens was exposed to alcohol in utero and

had suffered brain damage that caused his intellectual disability. (PCR/2296, 2297).

According to Dr. Ouaou's postconviction WAIS-IV testing, Mullens has an IQ of 73. To determine Mullens's developmental-period adaptive functioning, Dr. Ouaou used an adaptive behavior diagnostic scale, which is a structured interview given to people who knew Mullens during the developmental period. In this case, the responses came from Mullens's mother and uncle and the interviews were conducted after Mullens was sentenced to death. (PCR/2344, 2489). According to his mother's and his uncle's responses, Mullens's adaptive functioning was in the first percentile. (PCR/2344). Dr. Ouaou could not quantify how much of a role the structured interview played in his final opinion, but he did rely on it. (PCR/2488). The assessment results from Mullens's mother and uncle are inconsistent with Dr. Ouaou's opinion that Mullens suffers from mild intellectual disability. (PCR/2488). Dr. Ouaou admitted that Mullens's mother and uncle had an incentive to report that Mullens had severe adaptive functioning deficits – that being the fact Mullens is on death row. (PCR/2489).

According to Dr. Ouaou, the ten-point difference between the IQ score Mullens achieved on the postconviction, post-death

sentence WAIS-IV and the 82[2] full-scale IQ score he achieved on the pretrial WAIS-IV can be explained by the fact that Dr. Machlus, by necessity, administered the test over multiple days. (PCR/1002). Dr. Ouaou posited that taking the test over several days allowed Mullens to "rest" resulting in an artificially inflated score. (PCR/2331). Nowhere in the WAIS testing manual, though, does it state that giving the test over multiple days invalidates the score. (PCR/2437, 2445-48). Dr. Ouaou's admitted that it is his opinion that breaking the testing up results in an invalid score. (PCR/2445).

Dr. Ouaou testified that Mullens's pretrial Woodcock-Johnson score is valid and accurate. (PCR/2432). The Woodcock-Johnson Achievement Test is used to assess cognitive-based academic achievement. (PCR/2449, 2407). The Woodcock-Johnson scores were all in the 6th to 9th grade level except for oral language, which tested out at a 4th grade level. (PCR/2434). Dr. Ouaou agreed that the achievement scores are consistent with Mullens's school records and previous screening test scores. (PCR/2474). Likewise, there is congruency among Mullens's pretrial WAIS-IV score of 82, his Woodcock-Johnson score, and his school grades. (PCR/2474). Dr. Ouaou agreed that individuals

[2] The pretrial IQ test had a scoring error that yielded an IQ of 83. Rescoring yielded and IQ of 82. (PCR/2435).

can intentionally perform below their capability on testing, but they cannot perform any better than their capability. (PCR/2426).

Postconviction Court's Order

The postconviction court issued an order denying in part and granting in part Mullens's motion for postconviction relief finding that counsel was ineffective in the investigation and presentation of mitigation. The court vacated Mullens's death sentence and ordered a new penalty phase.

The postconviction court found that trial counsel's performance was deficient because the only expert that counsel presented at the penalty phase was Dr. Machlus. According to the postconviction court, Dr. Machlus "failed to adequately convey the mitigation factor that Mr. Mullens was sexually abused." The postconviction court also stated that Dr. Machlus "apparently ignored the assessments and suggestions of the mitigation specialist." The court stated that counsel was deficient because they "should have consulted and used" a neuropsychologist rather than relying on Dr. Machlus – a psychologist. (PCR/2929).

The postconviction court acknowledged that trial counsel presented at the penalty phase evidence that Mullens was sexually abused via testimony from family members and Dr. Machlus. The court relied on Dr. Maher's evidentiary hearing

testimony that Mullens “detailed the sexual abuse incidents” to Dr. Maher and that Dr. Maher, unlike Dr. Machlus, did not find Mullens to be malingering. (PCR/2930). The court also observed that Dr. Ouaou did not find Mullens to be malingering. The court stated that Dr. Maher believed Mullens had PTSD as a result of the sexual abuse and that the reports of the sexual abuse are likely true because of Mullen’s hesitancy to talk about it and his “primitive, programmed, repetitive motor activity of masturbation while describing the sexual abuse to Dr. Ouaou.” The court concluded that “with these two experts, a medical doctor and a neuropsychologist, it is likely the sentencer would have found this mitigation factor (sexual abuse) to have existed.” (PCR/2937)(parenthetical added).

The postconviction court found counsel was deficient for not notifying the sentencing court about the implication of how Dr. Machlus conducted the WAIS. The court also faulted counsel for not presenting any evidence of Mullens’s adaptive deficits even though Mullens’s pretrial IQ score was 83. (PCR/2931).

The court’s order notes that during the penalty phase counsel presented evidence that Cassandra Mullens abused alcohol and drugs during Mullens’s infancy and childhood, but there was no testimony that Cassandra drank while pregnant with Mullens. The court further noted that it is unclear who had knowledge of

Cassandra's alleged drinking during her pregnancy with Mullens. Nonetheless, because of the well-known fact that Cassandra drank during Mullens's youth, the court found that "fetal alcohol consumption and the apparent presence of its effects on Mr. Mullens should have been further explored and developed for purposes of the initial penalty phase." (PCR/2938).

The "apparent effects" of fetal alcohol consumption on Mullens, as described in the postconviction court's order, include impulsivity, school failure, mood disorders, and rule breaking. (PCR/2938). The court also noted Dr. Maher believed that Mullens has a small corpus collosum, which indicated to him (Dr. Maher) the presence of fetal alcohol disorder.

The postconviction court also credited Dr. Maher's opinion that Mullens has chronic traumatic encephalitis. Dr. Maher based this opinion on "some documented and reported history of head injury" and Mullens's emotional instability, and inappropriate sexual behavior. (PCR/2930). Dr. Maher and Dr. Ouaou disagreed with Mullens's previous diagnosis of Antisocial Personality Disorder. (PCR/2930).

With regard to the brain scan testimony, the court found Dr. Holder's testimony to be more persuasive than that of Dr. Wu. In fact, the court determined that Dr. Wu "exceeded the scope of his expertise in making conclusions from the QV and DTI

testing . . .” (PCR/2936). Although the court was not persuaded by the brain scan testimony, the court did not think the testimony was dispositive to the court’s conclusion that counsel was deficient. (PCR/2936).

In its order, the postconviction court stated:

> Having heard testimony and received evidence from counsel in this case and from additional experts, the Court finds that counsel’s investigation and presentation of mental health and background mitigation fell below objective standards of reasonableness. The communication amongst the attorneys, the mitigation specialist, and Dr. Malchus was poor to the detriment of Mr. Mullens’ penalty phase. Ms. Cunningham continually pointed to evidence of numerous head traumas, indicators of PTSD, and indicators of fetal alcohol disorder. Further, she continually indicated possible brain damage or at least the necessity of neuropsychological testing, and noted indicators of intellectual disability. This information was either not shared with Dr. Machlus or Dr. Machlus disregarded it despite apparent signs that other medical experts easily picked up on and to which counsel testified they were familiar with. Counsel testified at the evidentiary hearing that they were aware of these mental heath issues and observed some indicators themselves yet apparently blindly followed Dr. Machlus’ conclusions. The Court is not persuaded by the brain scan testimony and evidence presented at the hearing. However, the Court finds the testimony and evidence regarding a diagnosis of PTSD and FASD for Mr. Mullens, and the testimony and evidence regarding Mr. Mullen’s possible intellectual disability to be credible and compelling to a mitigation presentation and, all were overlooked at the penalty phase.
>
> In addition to finding that counsel was deficient, the Court finds that counsel’s deficient performance prejudiced Mr. Mullens. Had a more cohesive presentation of Mr. Mullens’ mitigation

> evidence been presented, had the sentencer received evidence regarding Mr. Mullens diagnosis of PTSD and FASD and the implications of such a diagnosis, as well as received evidence as to Mr. Mullens' possible intellectual disability, the Court find that a reasonable probability exists that the sentencer would have found that the balance of the aggravating and mitigating factors did not warrant death.

(PCR/2943).

SUMMARY OF THE ARGUMENT

In order to find counsel rendered ineffective assistance at a capital penalty phase, a defendant must show both that counsel performed outside the wide range of professionally competent assistance, and that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different.

Trial counsel is not deficient because the defendant is able to find postconviction mental health experts that reach different and more favorable conclusions than the mental health experts consulted by trial counsel. Yet, the record in this case shows that is exactly what Mullens presented at the evidentiary hearing, different and more favorable expert opinions based on the same factual information.

Additionally, the postconviction court failed to conduct an objective, context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time. Instead, the court determined counsel’s penalty-phase performance was deficient, because the mitigation could have been better presented. To the extent the postconviction court made factual findings, those findings are not supported by competent

substantial evidence. This Court should reverse the granting of a new penalty phase and Mullens's death sentence should remain undisturbed.

Finally, the postconviction court did not conduct a prejudice analysis except to say, essentially, that "absent deficient performance the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." The postconviction court did not consider the weighty aggravating factors, which include a contemporaneous murder, contemporaneous attempted murder, the murder was committed avoid arrest (as to Hayworth), and a prior violent felony of aggravated battery.

ARGUMENT

Ineffective Assistance of Counsel

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984) promulgated a two-pronged test to determine whether counsel's assistance was so defective as to require a reversal of a verdict or sentence. Strickland, 466 U.S. at 687. First, the defendant must show counsel's performance was deficient. This showing of deficiency requires the criminal defendant to establish that his counsel made errors so serious that the defendant was deprived of "counsel" as contemplated by the Sixth Amendment. Second, the defendant must show counsel's errors resulted in prejudice.

As to the performance prong, "the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." Bobby v. Van Hook, 558 U.S. 4 (2009). In assessing the reasonableness of counsel's performance, courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689 (quotation marks omitted). The defendant carries the burden to overcome that presumption. See Strickland, 466 U.S. at 689.

The appropriate test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. That requires a "substantial," not just "conceivable," likelihood of a different result. Harrington v. Richter, 563 U.S. 86, 112 (2011). Once again, "Strickland places the burden on the defendant . . . to show a 'reasonable probability' that the result would have been different." Wong v. Belmontes, 558 U.S. 15 (2009) quoting Strickland, 466 U.S. at 694.

Similarly, as to claims of ineffective assistance of counsel at a capital penalty phase, a defendant must show "both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different." Occhicone v. State, 768 So. 2d 1037, 1049 (Fla. 2000) (citations omitted); Strickland, 466 U.S. at 694 (the defendant must prove that the sentencer would have weighed the aggravating and mitigating

factors and found that the circumstances did not warrant the death penalty).

With regard to both guilt phase and penalty phase allegations of ineffective assistance of counsel "[w]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001); Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003).

With respect to the investigation and presentation of mitigation evidence, the United States Supreme Court observed in Wiggins v. Smith, 539 U.S. 510 (2013), 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." Wiggins, 539 U.S. at 533. Also, counsel's failure to present cumulative evidence does not constitute deficient performance. Hall v. State, 212 So. 3d 1001, 1018 (Fla. 2017).

Standard of Review

Because both prongs of the Strickland test present mixed questions of law and fact, in reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim, this Court employs a mixed standard of review, deferring to the postconviction court's factual findings only if

they are supported by competent, substantial evidence, and reviewing the postconviction court's application of the law to the facts de novo. Mungin v. State, 932 So. 2d 986, 998 (Fla. 2006). "Even under de novo review, the standard for judging counsel's representation is a most deferential one." Harrington v. Richter, 562 U.S. 86, 105 (2011). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Id. quoting Strickland, 466 U.S. at 690, 104 S. Ct. 2052.

ISSUE I

TRIAL COUNSEL'S REPRESENTATION FELL WITHIN THE WIDE RANGE OF REASONABLE PROFESSIONAL ASSISTANCE AND THE POSTCONVICTION COURT FAILED TO CONSIDER THE EVIDENCE FROM THE PERSPECTIVE OF COUNSEL AT THE TIME THE DECISIONS WERE MADE; FURTHER, MULLENS FAILED TO PROVE THAT THE OFFERED MITIGATION WOULD ALTER THE BALANCE OF AGGRAVATING FACTORS AND MITIGATING CIRCUMSTANCES SUCH THAT A DEATH SENTENCE WOULD NOT BE WARRANTED.

Trial Counsel's Mitigation Investigation and Presentation was not Objectively Unreasonable

It is an attorney's duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence, but it is not necessary to run down every possible lead. Hall v. State, 212 So. 3d 1001, 1026–27 (Fla. 2017). In determining whether counsel's investigation was reasonable under prevailing professional norms, courts are to conduct "an objective, context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." Lebron v. State, 135 So. 3d 1040, 1062 (Fla. 2014) citing Wiggins v. Smith, 539 U.S. 510, 522–23 (2003). Every effort must be made to eliminate the "distorting effects of hindsight." Strickland, 466 U.S. at 689.

In determining whether counsel's penalty phase performance was deficient, the court should "not inquire whether mitigation could have been better presented, but whether the defendant has demonstrated both deficient performance and prejudice." Knight

v. State, 211 So. 3d 1, 10 (Fla. 2016) citing Brown v. State, 846 So.2d 1114, 1121 (Fla. 2003).

Counsel's performance cannot be deemed deficient merely because counsel failed to discover potential mitigation despite "extensive questioning, mental health testing, and investigation." Hall, 212 So. 3d at 1026–27. Counsel cannot be found ineffective for relying on psychiatric evaluations even if they are less than complete. See State v. Sireci, 502 So. 2d 1221, 1223 (Fla. 1987). A new sentencing hearing may be required only where the pretrial psychiatric examination is so "grossly insufficient that [it] ignore[s] clear indications of either mental retardation or organic brain damage." Id. at 1224 citing Mason v. State, 489 So. 2d 734 (Fla. 1986).

Additionally, this Court has established that defense counsel is entitled to rely on evaluations conducted by qualified mental health experts even if, in retrospect, other experts questions the evaluation's thoroughness. Johnson v. State, 135 So. 3d 1002, 1030 (Fla. 2014) quoting Reese v. State, 14 So. 3d 913, 918 (Fla. 2009) (quoting Darling v. State, 966 So. 2d 366, 377 (Fla. 2007)); see also Stewart v. State, 37 So. 3d 243, 252–53 (Fla. 2010) ("[T]rial counsel's reliance on his retained experts is not proven unreasonable simply because

another expert . . . questions the thoroughness of the prior evaluations.").

Furthermore, "trial counsel is not deficient because the defendant is able to find postconviction mental health experts that reach different and more favorable conclusions than the mental health experts consulted by trial counsel." Asay v. State, 769 So. 2d 974, 986 (Fla. 2000); See also Knight, 211 So. 3d at 10. Similarly, the fact that trial counsel's mitigation argument was unsuccessful does not lead to the conclusion that counsel was ineffective or that the defendant suffered prejudice. See Dufour v. State, 905 So. 2d 42, 58 (Fla. 2005) ("Simply presenting the testimony of experts during the evidentiary hearing that are inconsistent with the mental health opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief.").

Mitigation Investigation and Presentation

Here, the postconviction court failed to evaluate trial counsel's mitigation investigation in context and from counsel's perspective at the time. In fact, the court did not evaluate counsel's investigation at all. In other words, the court did not consider what counsel's investigation actually consisted of and whether or not that investigation was objectively reasonable under the circumstances.

This is not a case where counsel failed to investigate mental health issues or other mitigation in the face of clear evidence of their existence. See Wiggins v. Smith, 539 U.S. 510 (2003) (stating, "the scope of (counsels') investigation was . . . unreasonable in light of what counsel actually discovered" in the records reviewed). Likewise, there is no evidence that counsel ignored information readily available and that the prosecution planned to use to support aggravation. See Rompilla v. Beard, 545 U.S. 374 (2005) (counsel's performance was objectively unreasonable when counsel failed to examine the file of a prior conviction after the prosecution informed counsel of its intent to use information in the file). This is not a case where counsel failed to speak to relevant family members or friends of the defendant or unreasonably delayed doing so. See Williams v. Taylor, 529 U.S. 362, 395 (2000) ("The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before the trial.") Instead, postconviction counsel presented essentially the same facts through different witnesses who expressed different opinions than those expressed at the penalty phase. None of which leads to the conclusion that Mullens was deprived of counsel as contemplated in the Sixth Amendment or that he was prejudiced as a result.

Starting almost immediately, defense counsel obtained available medical records, school records, mental health records, and jail records. Counsel sought any and all documentation related to Mullens's mental health or possible head injuries. (PCR/2758; 4029-40). Defense counsel or the mitigation specialist interviewed Mullens, his family members, and friends. (PCR/2991-3005). The mitigation specialist contacted and interviewed available teachers who were willing to speak with her. Counsel hired and consulted with relevant experts including a neuropsychologist and a psychiatrist. (PCR/2740, 3553-56, 3692, 3748-49).

Within weeks of his arrest, Mullens's counsel had obtained most, if not all, of Mullen's juvenile records and evaluations. Also, early in their representation counsel gathered Mullens's mental health records from Gulfcoast Mental Health Center and Suncoast Center for Community Mental Health. As the investigation progressed, counsel obtained Mullens's available school records. Likewise, counsel obtained Mullen's Social Security Administration records and incarceration records. (PCR/2756, 2758, 4029-40).

In October 2011, the mitigation specialist reported that Mullens possibly suffered head injuries as a child. Mullens's his attorneys obtained or attempted to obtain Mullen's medical

records to substantiate such claims. For example, Edward White Hospital had no records related to Mullens's alleged head injury as a result of being "clotheslined" when he was nine because, even assuming the records existed, records that old had been purged. (PCR/1507, 3515). Counsel also sought records from Bayfront Medical Center and Manatee Memorial Hospital. (PCR/3509, 3512). Neither hospital had any record of treating Mullens for a head injury or any other ailments.

The defense team retained neuropsychologist Dr. Michael Gamache as early as December 2009, four months after Mullens was arrested, for a records review and evaluation. (PCR/2740, 4037). Dr. Gamache informed the defense team that Mullens's Department of Corrections records indicate Mullens's failure to cooperate and that the low IQ scores therein are invalid. (PCR/2761, 4039).

Consultation with Dr. Gamache continued to at least October 2011 when Ms. Menadier conferred with Dr. Gamache on the telephone. Dr. Gamache had conducted a forensic evaluation of Mullens in September 2011 (PCR/1465, 2050-51). The notes of Ms. Menandier's conversation with Dr. Gamache indicate that Dr. Gamache thought it possible that Mullens had a frontal lobe dysfunction. The notes do not reflect that Dr. Gamache recommended a brain scan or additional neuropsychological

testing. Ms. Menandier testified that had it been recommended to her she would have followed through with neuropsychological testing. (PCR/1458). Although Dr. Gamache thought it *possible* that Mullens had frontal lobe dysfunction he was much clearer in his opinion that Mullens had a personality disorder that caused his "outrageous behavior." (PCR/3050-51). The conclusion that Mullens had a personality disorder was reached by other mental health professionals who evaluated Mullens over the years. Previous diagnoses include Antisocial Personality Disorder, Intermittent Explosive Disorder, Borderline Personality Disorder, and Malingering. (DR 3845-48).

Additionally, as part of the mitigation investigation the defense, through Ms. Cunningham, reached out to Mullens's teachers. Ms. Cunningham spoke to Mullen's middle school math teacher, James Moore, who professed that he is "staunchly against the death penalty." (PCR/3121). Another teacher, Tracy Clayton, told Ms. Cunningham that she did not want to get involved. (PCR/3020).

Mr. Moore told Ms. Cunningham that Mullens "had a chip on his shoulder" and was "always hostile." (PCR/3021). Mullens's mother was unreceptive to the school's attempts to address Mullens's behavior with her. Mr. Moore did not recall ever seeing any documents in Mullens's school records that indicated

Mullens had a disability, like autism. He concluded his interview with Ms. Cunningham by stating that Mullens "knew well how to manipulate the system" and was always "able to talk himself out of everything." (PCR/3121).

Retention of and Consultation with Experts

Attorney Menandier testified that when Dr. Machlus informed her on their January 2011 phone call that he did not detect any neuropsychological problems in the testing he had conducted she *probably* thought Dr. Malchus was a neuropsychologist. (PCR/1500, 3062-63). By the time of this phone call, Dr. Machlus had been involved with Mullens's case for approximately one year. Dr. Malchus never represented himself to be a neuropsychologist and provided written reports to defense counsel that clearly identify him as a clinical and forensic psychologist.

Additionally, even accepting that Ms. Menandier may have thought that Dr. Machlus was a neuropsychologist during the January 2011 phone call, it is unlikely that she remained under that misperception for the next two-plus years, including when she presented his CV, testimony, and February 2013 report at the penalty phase. (DAR:V9/1323, V13/2135). Ms. Menandier is a criminal trial attorney who at the time of Mullens's sentencing had almost 20 years of criminal trial experience. (PCR/1419). She was and is death qualified and tried six death penalty cases

to verdict and sentence prior to representing Mullens. (PCR/1420). She attends numerous professional seminars dealing with capital litigation. (PCR/1420). She testified that she knew and understood the difference between a psychologist and a neuropsychologist. It is difficult to believe that she never realized that Dr. Machlus was a clinical and forensic psychologist, not a neuropsychologist. (PCR/1456-57).

Even assuming for the sake of argument Ms. Menandier remained ignorant of Dr. Machlus's qualifications, she consulted with a neuropsychologist, Dr. Gamache. There is no evidence that Dr. Gamache recommended brain scans. In fact, the evidence established that Dr. Gamache was more concerned about the existence of personality disorder causing Mullens's outrageous behavior, including threatening to shoot his mother. (PCR/1510, 3050-51).

Part of the postconviction court's rationale for finding counsel's performance deficient vis-à-vis neuropsychological testing and brain scans comes from information provided in the mitigation specialist's report. According to the postconviction court, Ms. Cunningham's report details Mullens's head injuries. (PCR/2940). The referenced report was submitted to defense counsel in October of 2011, the same month that Ms. Menandier conferred with Dr. Gamache. Also, in mid-October 2011, Ms.

Cunningham received a response from Bayfront Medical Center that they had no record of treating Mullens in the last ten years and that records older than that had been purged. (PCR/3512). Likewise, Edward White Hospital had no records of treating Mullens nor did Manatee Memorial Hospital. (PCR/3506, 3515). Mullens was incarcerated in the Department of Corrections from 2000-2001 and again from 2002-2007. The was no evidence presented at the evidentiary hearing that the Department of Corrections documented Mullens having any head injuries, history of head injuries, or evidence or brain damage.

The postconviction court also seems to have accepted as true the information contained in Ms. Cunningham's August 2012 "fact sheet." (PCR/3034-35). The postconviction court stated that the "fact sheet" "condensed the most serious and pertinent information about Mr. Mullens and his case." The court observed that the "fact sheet" "noted multiple head injuries plus neurological issues, and severe trauma and active psychosis." According to the postconviction court, the "fact sheet" "specified a low IQ score in elementary school and a history of having an extremely poor short-term memory and possible brain damage." (PCR/2940).

What the court failed to recognize is that these "facts" came from reports from Mullens and his family. For example, the

"fact sheet" notes that Mullens's "parents and/or sisters report" that Mullens was beaten by his brother, that he came home from prison "a different person" and would scream and cry when they tried to wake him from sleep, and that he had a "low IQ score when he was tested in elementary school and a history of an extremely poor short-term memory, possibly even brain damage." (PCR/3035).

There is no evidence to support most of these "facts." Despite defense counsel's investigation, there are no medical records that support that Mullens suffered brain damage as a child. According to Dr. Holder's expert opinion, Mullens brain shows no evidence of any damage or abnormality. Likewise, Mullen's school records, which defense counsel obtained, do not support the assertion that Mullens was "tested" in elementary school and had a low IQ. (PCR/3055-59). Even so, as will be discussed in more detail, defense counsel had Mullens's IQ tested and did present evidence at the penalty phase that Mullens had a low IQ. Counsel did not ignore Ms. Cunningham's report. Instead, counsel investigated the allegations of head injury and low IQ scores and found no evidence to support either allegation.

In addition to knowing that there was no documented history of Mullens having any head injuries, counsel knew that Mullens

had a history of malingering and feigning. They also knew that Mullens had been previously diagnosed with Factitious Disorder, Antisocial Personality Disorder, Intermittent Explosive Disorder, and Borderline Personality Disorder. (PCR/3841-43). Two different experts had informed the defense that Mullens did not report any history of head injury to them. One expert, neuropsychologist Dr. Gamache, reported that Mullens more likely had a personality disorder that caused his outrageous behavior. Further, Mullens did not report head injuries during the various evaluations that the defense had acquired and reviewed. It is not objectively unreasonable for counsel to rely on this information in deciding not to pursue neuropsychological testing and/or brain imaging. As evidenced by Dr. Holder's postconviction testimony, brain imaging would have proved that Mullens's brain is completely normal.

Even if Ms. Menandier relied solely on Dr. Machlus's opinion regarding the need, or lack thereof, for neuropsychological testing, Mullens did not establish that her performance was deficient as a result. There was no evidence presented at the evidentiary hearing that Dr. Machlus was not a qualified mental health expert or that it is objectively unreasonable for counsel to have relied on Dr. Machlus's opinion. Mullens did not prove that a reasonable trial attorney

should have known to not rely on the conclusions offered by the mental health experts who evaluated him prior to trial. Thus, he did not prove that counsels' performance was deficient in this regard.

Additionally, the postconviction court's conclusion that communication among the attorneys, the mitigation specialist, and the experts was poor does not rise to the level of deficient performance or prejudice. Objectively reasonable performance, not perfection, is required of counsel. Waters v. Thomas, 46 F.3d 1506, 1518 (11th Cir. 1995) "Nor is the test whether the best criminal defense attorneys might have done more. Instead, the test is whether some reasonable attorney could have acted, in the circumstances, as [defense counsel]-whether what they did was within the 'wide range of reasonable professional assistance,'" Id. citing Strickland, 466 U.S. at 689; White v. Singletary, 972 F.2d 1218, 1220 (11th Cir.1992). Even assuming, without conceding, that counsel's communication with experts and the mitigation specialist could have been better, poor communication does not come close to meeting the standard for deficient performance or prejudice.

Sexual abuse

Defense counsel presented, as a non-statutory mitigator, that Mullens was sexually abused as a child and while in prison.

In assessing that proposed mitigator, the sentencing order states:

> The defendant alleges that he was sexually abused as a child by his step-father and that he was also later sexually abused while incarcerated in prison. However, no competent evidence was presented during the penalty phase hearing to substantial these claims. Accordingly, the Court finds that this non-statutory mitigator has not been proven and therefore accords it no weight.

(DAR:V11/1604).

This Court agreed that there was no competent substantial evidence to support the allegation that Mullens was sexually abused. This Court noted that a sentencing court "may even reject uncontroverted expert opinion testimony regarding proposed mitigating evidence if that opinion is unsupported by the record." Mullens v. State, 197 So. 3d 16, 34 (Fla. 2016). The only evidence presented to support the allegation that Mullens was sexually abused was the testimony of Dr. Machlus and the speculation of family members. Dr. Machlus admitted on cross examination that Mullens never reported the alleged sexual abuse to other mental health experts, specifically during Mullens's competency evaluations. Id.

The conclusion that there was no competent substantial evidence to support the allegations of sexual abuse was true when the sentencing court stated it, when this Court affirmed

the sentencing court's finding, and is still true now. There is no *evidence* to support the allegation of sexual abuse, let alone competent and substantial evidence.

In reversing course, the postconviction court stated, "at the evidentiary hearing, Dr. Maher testified that Mr. Mullens detailed the sexual abuse incidents and did not find Mr. Mullens to be malingering. Likewise, Dr. Ouaou performed a multitude of tests with Mr. Mullens and found him not to be malingering. Had counsel consulted with these two experts, a medical doctor and a neuropsychologist, it is likely the sentencer would have found this mitigation factor to have existed." (PCR/2930).

The postconviction court also stated in its order that Dr. Maher believed the allegations of sexual assault to be true because of Mullens's hesitance and humiliation while speaking about it and "in light of Mr. Mullens' primitive, programmed, repetitive motor activity of masturbation while describing the sexual abuse to Dr. Ouaou." (PCR/2937).

The postconviction court's order does not explain how trial counsel's penalty phase presentation of the allegations of sexual abuse was objectively unreasonable. Trial counsel presented the testimony of Dr. Machlus as well as family members to support the allegations. Mullens did not testify about the alleged abuse during the penalty phase. During the

postconviction presentation there was no additional evidence presented to support the allegations. None of the lay witnesses even mentioned the alleged sexual abuse. The information regarding the allegations come from the same sources that Dr. Machlus considered in testifying that Mullens was sexually abused. The only thing presented was a difference of opinion among experts regarding Mullens's malingering, (Dr. Machlus testified that Mullens "may have been malingering." Mullens, 197 So. 2d at 34), and the significance of Mullens's excessive masturbatory behavior.

Notably, other mental health providers found that Mullens was malingering. Mullens's incarceration records are replete with the diagnosis of either Malingering or Factitious Disorder. (DAR: V9/1338-39, V12/1861, 1863, 1865, 1867, 1873, 1875, 1879-81, 1883-84, 1886, 1888, 1912, 1924, 1929, 1931, 1935-38, 1949; V13/2176-79). And, as noted earlier, experts found Mullens was malingering during his competency evaluations. Mullens, 197 So. 2d at 34. Regardless, a difference of opinion among experts –- particularly among pretrial and postconviction experts -- does not render counsel's performance deficient.

Dr. Maher testified that Mullens's act of masturbating while speaking about the alleged sexual abuse was an indication of the truthfulness of the allegation. (PCR/2144-45). Dr.

Machlus, on the other hand, opined that Mullens's excessive masturbation was a sign of mania and supported his diagnosis of Bipolar I Disorder. (DAR:V9/1332). Notably, Mullens did not masturbate only while speaking of the alleged sexual abuse. Instead, as noted earlier, Mullens masturbated during jail visits, in front of prison and jail personnel, standing in the middle of his cell, in the pod, and in front of other inmates. Initially, Mullens reported to Ms. Cunningham that "voices" made him expose himself to other people. He also told Ms. Cunningham that he exposes himself when he gets frustrated, such as when the commissary is out of something he wants. (PCR/2994).

Again, a difference of opinion regarding the cause of Mullens's behavior does not support a finding the counsel was deficient. Moreover, there is no competent and substantial evidence to support the conclusion that the allegations of sexual abuse are any more true now than they were during the penalty phase. Instead, it is a classic example of postconviction counsel finding an expert that reached a different and more favorable conclusion based on the same evidence.

Intellectual Functioning and Testing

Appellant addresses the postconviction court's findings with regard to the evidence of intellectual functioning only to

the extent that it bears on the postconviction court's conclusion the counsel was ineffective. The lower court deferred a decision on whether Mullens is, in fact, intellectually disabled.

The postconviction court's conclusion regarding the impact of how the pretrial IQ test was administered is not supported by competent substantial evidence and, instead, is based on a mere difference of expert opinions. Defense counsel and the mitigation specialist suspected that Mullens might be intellectually disabled. As a result, Dr. Machlus administered an IQ test. (DAR:V13/2135). Dr. Machlus testified at the penalty phase hearing that he had to break up the testing over multiple days because Mullens would become distracted and could not complete the tests. (DAR:V10/1429). Dr. Machlus testified that this is not how the test is ordinarily administered, but, in his opinion, it yielded an accurate result in Mullens's case. (DAR:V10/1429-32). The postconviction court's assertion that "it was learned" at the evidentiary hearing that Dr. Machlus administered the IQ test over several meetings is incorrect. (PCR/2931). The sentencing court was aware of how Dr. Machlus administered the test.[3]

[3] The postconviction court's parenthetical that Dr. Machlus administered the test "notwithstanding the DSM-IV's instruction

At the postconviction hearing, Dr. Ouaou was of a different opinion than Dr. Machlus about the impact administering the test over a number of days would have on the accuracy of the results. He testified that breaking up the testing over a number of days allowed Mullens to rest, thereby, artificially increasing his score. (PCR/2331). He admitted, though, that the WAIS testing manual, while encouraging that the testing be done in one sitting or within a day, does not state that giving the test over multiple days invalidates the score. (PCR/2435, 2445-48). Dr. Ouau also admitted that Mullens's pretrial IQ score of 82 is consistent with Mullen's achievement tests and his school grades. (PCR/2474). Finally, Dr. Ouaou acknowledged that a person can always do worse on an IQ test than their intellectual capabilities would allow, but they cannot do better than their intellectual capabilities would allow. (PCR/2426).

The postconviction court's order accepts Dr. Ouaou's opinion that the pretrial IQ testing is invalid because Dr. Machlus broke up the testing among various days. (PCR/2931). The postconviction court failed to consider that Dr. Machlus testified at the penalty phase hearing that he broke up the

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to perform the test in one sitting" is also factually incorrect. Dr. Ouaou testified regarding the instructions in the WAIS manual, not the DSM-IV. Also, the WAIS manual does not mandate that the test be performed in "one sitting."

testing and he explained why. He also opined that the IQ score of 83 was valid. Certainly, Dr. Ouaou is of the opinion that testing over various days makes the score invalid. The WAIS manual does not say as much, though, and Dr. Machlus disagrees.

Furthermore, the postconviction court overlooked that Mullens has a history of a lack of cooperation with IQ testing. In fact, Dr. Gamache, also a neuropsychologist, informed defense counsel that the *low* IQ score noted in Mullen's incarceration records was invalid because of Mullens's failure to cooperate during testing. (PCR/2761, 4039) Additionally, Mullens's pretrial IQ score is consistent with his achievement scores and his school grades. (PCR/2747). It is also consistent with previous observations that Mullens may have Borderline Intellectual Functioning. (PCR/3842-43). If anything, there is competent substantial evidence to support a finding that the pretrial score is accurate and the postconviction score is invalid.

Adaptive Functioning Deficits

In finding counsels' performance deficient, the postconviction court criticized defense counsels' penalty-phase presentation because there "was simply no presentation as to Mr. Mullens' adaptive deficits . . . let alone whether they occurred prior to the age of 18." (PCR/2932).

Pursuant to § 921.137(1), Fla. Stat. the terms "intellectually disabled" or "intellectual disability":

> means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

The mean IQ test score is 100. The standard deviation on an IQ test is approximately 15 points, therefore, two standard deviations is approximately 30 points. "Thus a test taker who performs 'two or more standard deviations from the mean' will score approximately 30 points below the mean on an IQ test, i.e., a score of approximately 70 points." Hall v. Florida, 572 U.S. 701, 711 (2014).

At the time Mullens was sentenced,[4] the Florida Supreme Court had interpreted the statute to include a strict cut off IQ score of 70. Cherry v. State, 959 So. 2d 702, 712 (Fla. 2007),

[4] The penalty phase hearing was conducted on May 13, 2013, and Mullens was sentenced on August 23, 2013.

abrogated by Hall v. Florida, 572 U.S. 701 (2014). Defendants who had an IQ more than 70 could not meet the first prong of the test and evidence of adaptive functioning deficits was, therefore, irrelevant for purposes of determining intellectual disability. In Hall, the United States Supreme Court held that "that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." Hall, 572 U.S. 701, 723 (2014). The standard error of measurement for an IQ score is approximately five points. Id. at 720.

Defense counsel had Mullens's IQ tested in 2011 and the test showed Mullens had an IQ of 83 (or accepting there was a scoring error 82). Even accounting for the standard error of measurement, the IQ test established that Mullens does not have an IQ two standard deviations below the mean. As a result, presentation of evidence of "adaptive functioning," as that term is defined by the statute and understood in the medical community, was not required and likely would not have been admissible.

Had counsel offered expert testimony regarding "adaptive functioning deficits" at the penalty phase it would have been met with an objection. In addition to Mullens not having an IQ

two standard deviations below the mean, counsel did not notify the State or the court that evidence of intellectual disability was going to be offered. Pursuant to § 921.137, Fla. Stat., "A defendant charged with a capital felony who intends to raise intellectual disability as a bar to the death sentence must give notice of such intention in accordance with the rules of court governing notices of intent to offer expert testimony regarding mental health mitigation during the penalty phase of a capital trial." See also Fla. R. Crim. P. 3.203(b).

Even so, defense counsel presented evidence of Mullens's intellectual and cognitive deficits at the penalty phase and argued as much in the sentencing memorandum. (DAR:V15/1571, 1577). In the sentencing order, the court found that Mullens established the mitigators that he is immature, impulsive, and easily manipulated, and that he has a low IQ and poor academic achievement scores. (DAR:V15/1591-1609).

The postconviction court was also critical of Dr. Machlus's methods for assessing Mullens's intellectual functioning. The postconviction court asserted that Dr. Machlus, in addition to reviewing school records, spoke to four of Mullens's family members "seemingly only briefly" while Dr. Ouaou interviewed "several" family members, friends, and a teacher of Mullens to

reach his conclusions regarding Mullens's adaptive functioning. (PCR/2931).

The record reflects that Dr. Malchus reviewed mental health records, and reviewed Mullens's school records. (DAR 3382-84). All told, Dr. Machlus reviewed 3,500 documents related to Mullens. (DAR:V10/1481). He interviewed Mullens's father twice for a total of 2 hours and 5 minutes. He also interviewed Mullens mother twice for a total of 2 hours and 40 minutes. He spoke to Sharon Washington, Mullens's aunt, and Shandra Mullens, Mullens's sister, for about 30 minutes each. (PCR/3832-34). Defense counsel, through Ms. Cunningham, reached out to Mullens's teachers who either did not want to cooperate or who had negative things to say about Mullens. (PCR/3020-21).

Dr. Ouaou did not quantify how long he spoke to Mullens's family members, he testified that he spent "several hours" doing so. (PCR/2344). The only family members Dr. Ouaou interviewed were Mullens's mother, and his uncle Kenneth Mullens. Both of them completed a standard assessment of adaptive functioning, which Dr. Ouaou admitted yielded a result inconsistent with his own opinion that Mullens had mild intellectual disability. Dr. Ouaou also admitted that because Mullens had been sentenced to death Mullens's mother and uncle had a strong motivation to exaggerate Mullens's deficiencies. (PCR/2489).

Dr. Ouoau spoke to Tony Rosa, a childhood friend of Mullens, who Dr. Machlus did not interview. Mr. Rosa testified at the evidentiary hearing. Mr. Rosa's testimony was relatively unremarkable. Mr. Rosa testified that Mullens acted younger than his age, did not fit in with the older kids, but was not any more easily influenced by the older boys than the other boys Mullen's age in the neighborhood. (PCR/1710). Mr. Rosa was not in the same grade as Mullens and could offer no information about Mullens's academic abilities. (PCR/1710). In sum, Mr. Rosa testified that Mullens childhood abilities were "nothing out of the ordinary." (PCR/1709). At the penalty phase, defense counsel presented the testimony of Mullens's childhood friend, Atari Russ, who testified in more detail about Mullen's behavior and gullibility as a child and young adult. (DAR:V8/1230-31, 1234-35).

Mullens's third-grade teacher, Ms. Adikes, also testified at the evidentiary hearing. While Ms. Adikes certainly, and probably sincerely, wished that she had helped Mullens more, her testimony added no new information that was not contained in the school records defense counsel had collected or that others had testified to at the penalty phase hearing. (PCR/2052-57). As mentioned previously, the teachers the mitigation specialist

could interview either did not want to get involved or had negative things to say about Mullens. (PCR/3020-21).

Interestingly, in addressing Mullens's adaptive functioning, the postconviction court observed that Mullens "could not drive a car, hold down a job, write a check, manage a bank account, or cook a full meal." (PCR/2931). What the court failed to acknowledge is that Mullens was in prison at the age of 16 and was released when he was 17. He returned to prison a year later and was not released until 2007, when he was 24 years old. A year later he committed the robbery, murders, and attempted murder in this case and he has been incarcerated since.[5] Obviously, learning to drive, holding down a job, writing a check, managing a bank account, and cooking a full meal are not necessary life functions for an incarcerated individual.

Brain Injury, FASD, PTSD, CTE

The postconviction court did not find the brain scan evidence to be dispositive. That said, the court also found that Dr. Wu exceeded the scope of his expertise in drawing conclusions about brain damage from the quantative volumetrics and the diffusion tensor imaging scans. (PCR/2936).

A finding that Dr. Wu exceeded his expertise in relying on the QV and DTI to form his opinion that Mullens has brain damage

[5] http://www.dc.state.fl.us/offendersearch.

undermines both Dr. Maher and Dr. Ouaou's opinions of Mullens's mental disorders and intellect. Both Dr. Maher and Dr. Ouaou relied on Dr. Wu's report to support their conclusions regarding Fetal Alcohol Spectrum Disorder, Chronic Traumatic Encephalopathy, and to some extent Post-Traumatic Stress Disorder, and Intellectual Disability.

Dr. Ouaou testified that brain damage is diagnosed through a combination of a medical evaluation, neurocognitive testing, and brain imaging. (PCR/2264). Dr. Ouaou relies on a radiologist's interpretation of the brain imaging as he has no experience in reading PET/CT or MRI. (PCR/2264). In this case, he relied on Dr. Wu's report to confirm his opinion that Mullens has brain damage. Dr. Wu is a psychiatrist, not a radiologist. (PCR/2280-81). Dr. Ouaou accepted Dr. Wu's report's conclusion that Mullens has damage to the part of his brain that controls impulses and reasoning. (PCR/2294). According to Dr. Ouaou, and relying in part on Dr. Wu's reports, Mullens's impulsive, reckless, and irresponsible behavior is a result of brain damage, rather than a personality disorder. (PCR/2292, 2294).

Furthermore, Dr. Ouaou noted that fetal alcohol exposure is the main cause of nongenetic intellectual disability. (PCR/2297). Dr. Ouaou testified that he suspected that Mullens's cognitive testing deficits were related to brain damage and that

the damage occurred during brain development and as a result of Mullens's mother's alleged drinking while pregnant with him. (PCR/2296). Dr. Ouaou used Mullens's family members' postconviction interview statements and Dr. Wu's discredited testing/opinion to "confirm" his suspicion that Mullens was exposed to alcohol in utero and had suffered brain damage that caused his intellectual disability. (PCR/2296, 2297).

Likewise, Dr. Maher relied on Dr. Wu's conclusion that Mullens has a "dramatically small and underdeveloped corpus collosum" to support his own conclusion that Mullens suffers from Fetal Alcohol Spectrum Disorder and frontal lobe damage that causes Mullens's impulsivity, inappropriate sexual behaviors, and rule breaking. (PCR/2117, 2125-26). According to Dr. Maher, a small corpus collosum is the "smoking gun" of Fetal Alcohol Spectrum Disorder. (PCR/2117). Based on Dr. Wu's interpretation of Mullens's brain scans, among other things, Dr. Maher discounted a diagnosis of personality disorder in favor of a diagnosis of brain damage to explain Mullens's antisocial behaviors. (PCR/2165). Interestingly, Dr. Machlus also disagreed with the previous diagnosis of Antisocial Personality Disorder. In his opinion, while Mullens exhibited some of the criteria, it was usually during a manic episode, which would be at odds with an Antisocial Personality Disorder diagnosis. He, like Dr. Maher

and Dr. Ouaou, also questioned whether Mullens lacked remorse. (DAR:V10/1446-47, 1471).

In addition, the postconviction court credited Dr. Maher's opinion that Mullens's "pattern of disorganization, the pattern of emotional instability, the inappropriate sexual behavior and urges" is a result of CTE. In supporting this conclusion, Dr. Maher, and the postconviction court, relied on Mullens's alleged history of "multiple head injuries, fighting with people, and some documented and reported history of head injury. . ." (PCR/2939).

Again, there is no documentation of a history of head injuries other than reports to counsel and the mitigation specialist by Mullens and his family members. Defense counsel was aware of Mullens's family's allegation that Mullens's brother abused him when they were children. Defense counsel obtained Mullens's medical records, incarceration records, mental health records, and other relevant documents. There simply is no documented "history of head injuries" in any of the records defense counsel obtained. There is one juvenile detention report where Mullens claims that he was in a fight where he was knocked unconscious, but he claimed he did not receive and treatment and sustained no lasting effects. (PCR/3548-52). Defense counsel cannot be faulted for failing to

present a theory of mitigation that is completely lacking in any evidentiary support.

To the extent counsel could have presented the testimony of family members regarding the alleged abuse of Mullens by his brother the decision not to is not objectively unreasonable considering the lack of independent documentation of any resulting brain injury. Further, Ms. Cunningham interviewed Mullens's brother, Wesley Washington, and he denied abusing Mullens. He stated that he hit his brother on occasion, but never hit him in the head. Mr. Washington had no information about whether Mullens suffered head injuries as a child. (PCR/3012). Presumably, in addition to pointing out the lack of independent documentation of head injuries the State would have introduced Mr. Washington's testimony that he never hit Mullens in the head to counter the testimony of Mullens's sisters. At it a minimum, it was reasonable for counsel to assume so. Also, defense counsel presented Dr. Machlus's testimony that Mullens was abused by his brother and that this abuse was one of the many adverse risk factors Mullens faced in his life. (DAR:V9/1373).

Significantly, Dr. Holder, a radiologist, testified that the scans of Mullens's brain are completely normal. (PCR/1918-22). Dr. Wu's testimony that QV and DTI show a small corpus

collusum and other brain deficiencies was discredited and not accepted by the postconviction court. (PCR/2936). Dr. Maher's and Dr. Ouaou's opinion that Mullens's behavior was better explained by brain damage than a personality or psychological disorder is not supported by the objective evidence that Mullens's brain is normal.

With regard to Fetal Alcohol Disorder, the postconviction court acknowledged that it is "unclear" who on the defense team knew about Cassandra Mullens's alleged drinking during her pregnancy with Mullens. Ms. Cunningham admitted that she was not informed about Cassandra's alleged drinking during pregnancy. There is no information in her reports that anyone told her that Mullens's mother drank while pregnant with him. Likewise, there is no indication in Dr. Machlus's reports that Mullens's mother drank while pregnant. The attorney notes do not include any information about Mullens's mother drinking while pregnant.

Ms. Menandier testified at the postconviction hearing that certain family members mentioned Cassandra's drinking to her, but she did not document that information anywhere. Interestingly, Cassandra Mullens was alive and well when the penalty phase was conducted. She testified at the penalty phase. It is not unreasonable to assume that she would not have testified that she drank while pregnant with Mullens – either

because it is not true or because she did not want to “fall on her sword” as Ms. Cunningham put it. Either way, counsel cannot be faulted for failing to put on evidence of alleged fetal alcohol consumption when the persons most likely to know whether that was true either would not admit it or would contradict it.

Regardless, the postconviction court improperly concluded that counsel was deficient because “the well-known fact of the mother’s heavy drinking during Mr. Mullens’ youth and the psychiatric conditions Mr. Mullens’ exhibited . . . should have suggested to counsel, the mitigation specialist, and Dr. Machlus to explore the possibility of the mother’s drinking during the pregnancy and the effects on Mr. Mullens resulting from his mother’s consumption of alcohol while pregnant. Fetal alcohol consumption and the apparent presence of its effects in Mr. Mullens should have been further explored and developed for purposes of the initial penalty phase.” (PCR/2938).

The court does not explain how counsels’ performance was objectively unreasonable in light of the information they had at the time. The “effects” of supposed fetal alcohol consumption on Mullens are also consistent with Dr. Machlus’s diagnosis of Bipolar Disorder. Additionally, the supposed “effects” of fetal alcohol consumption are consistent with Mullens’s long-standing

diagnosis of Bipolar Disorder, Antisocial Personality Disorder, and Intermittent Explosive Disorder.

Lack of Prejudice

Even if one could agree that counsels' performance was deficient with regard to mitigation investigation and presentation, Mullens failed to prove he was prejudiced as a result. The aggravating factors in this case include a prior violent felony including a prior aggravated battery conviction and the contemporaneous murder and attempted murder. The prior violent felony conviction aggravator is one of the "most weighty" in Florida's sentencing scheme. Bevel v. State, 983 So. 2d 505, 524 (Fla. 2008) citing Sireci v. Moore, 825 So.2d 882, 887 (Fla. 2002). Accordingly, the sentencing court afforded great weight to the prior violent felony aggravator. Additionally, the murders were committed during the course of a robbery, and, as to Hayworth, the murder was committed to avoid arrest. Foster v. State, 778 So. 2d 906, 921 (Fla. 2000) (noting the seriousness of the avoid arrest aggravator). The sentencing court afforded these aggravators great weight.

As correctly noted in the sentencing order, as they were robbing his store, Mullens and his codefendant, Peeples, repeatedly harassed Uddin into giving them the keys to his car. (DAR:V15/1592). While Peeples left the store to retrieve the

car, Mullens stayed in the store holding at gun point both Uddin and Hayworth. When it appeared to Uddin that Mullens had left the store, Uddin picked up the phone. Seeing this, Mullens aggressively approached Uddin who was behind the counter. (DAR:V15/1593). Mullens threatened Uddin with the gun as Uddin cowered and pleaded for his life. Ignoring the pleas, Mullens shot Uddin in the head. He then turned his attention to Hayworth who was not offering any resistance or blocking Mullens's exit. Mullens grabbed Hayworth by his arm, twisted him around, and shot him in the head.

After murdering Uddin and Hayworth, Mullens attempted to leave the store. Just then, Barton was entering the store unaware of what just transpired. Mullens grabbed Barton by the arm and pulled him into the store. Mullens fought with Barton. As they struggled, the cylinder fell out of the revolver. Mullens had the presence of mind to pick up the cylinder, reassembled the revolver, and fire several shots at Barton. (DAR:V15/1593). One of the shots hit Barton in the face. Fortunately, Barton survived. Mullens fled the store with a bag of stolen merchandise and got into Uddin's car with Peeples and the two drove off.

Relying primarily on Dr. Machlus's penalty phase testimony, the sentencing court afforded moderate weight to the statutory

mitigation that the murders were committed while Mullens was under the influence of extreme mental or emotional disturbance, and that Mullens's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired. (DAR:V15/1599-60).

The court found the defendant was under the domination and control of the co-defendant, Peeples, and assigned the mitigator some weight. (DAR:V15/1605-06). The court also found and gave little weight to the non-statutory mitigator that Mullens is immature, easily influenced, and manipulated. (DAR:V15/1605). The court found and afforded little weight to the non-statutory mitigator that Mullens has a low IQ and poor academic achievement scores. (DAR:V15/1606). Likewise, the court gave little weight to the established non-statutory mitigating factor that Mullens took responsibility for his crimes and has supportive family and friends. (DAR:V15/1606-07).

The extent of the postconviction court's prejudice analysis is the conclusory statement that "had a more cohesive presentation of Mr. Mullens' mitigation evidence been presented, and the sentencer received evidence regarding Mr. Mullens' diagnosis of PTSD and FASD and the implications of such diagnoses, was well as received evidence as to Mr. Mullens' possible intellectual disability, the Court finds that a

reasonable probability exists that the sentencer would have found the balance of the aggravating and mitigating factors did not warrant death." (PCR/2943).

The sentencing court *did* receive evidence of Mullens's possible intellectual disability. The sentencing court found that Mullens established that he had a low IQ and gave the circumstance little weight.

None of the records that the defense team collected indicate that Mullens was ever previously diagnosed with PTSD or FASD. The postconviction "diagnoses" of PTSD and FASD are not based on any fact or circumstance that defense counsel failed to uncover. The diagnoses are based on a difference of expert opinions. How these postconviction diagnoses could have been presented at the penalty phase is unclear. Even assuming it were appropriate to conclude that the postconviction experts' diagnoses are accurate, the postconviction court does not say how these diagnoses mitigate murdering two individuals and attempting to murder a third or how any such mitigation would outweigh the strong aggravating factors in this case.

These alleged mitigating circumstances do not outweigh the aggravation in this case. Mullens ruthlessly murdered two people during a robbery. He almost murdered a third. The video does not support a conclusion that Mullens acted "impulsively."

Additionally, the robbery and murders were committed approximately one year after Mullens was released from prison after serving a sentence for aggravated battery. There is no reasonable basis to conclude that the weighing of the mitigation and aggravation would have resulted in a sentence other than death. The postconviction court's conclusion to the contrary is simply second-guessing. This Court should reverse the order granting a new penalty phase.

CONCLUSION

In conclusion, Appellant/Cross-Appellee, the State of Florida, respectfully requests that this Honorable Court reverse the decision of the court below granting Mullens a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 25th day of February, 2020, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Julie Morley, Jami Chalgren, Assistants CCRC-M, Law Office of Capital Collateral Regional Counsel - Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, **morley@ccmr.state.fl.us**,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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