**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC01-734**

**VICTOR TONY JONES,**

**Appellant,**

**vs.**

**THE STATE OF FLORIDA,**

**Appellee.**

**ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION**

# BRIEF OF APPELLEE

**ROBERT A. BUTTERWORTH**
**Attorney General**
**Tallahassee, Florida**

**SANDRA S. JAGGARD**
**Assistant Attorney General**
**Florida Bar No. 0012068**
**Office of the Attorney General**
**Rivergate Plaza -- Suite 950**
**444 Brickell Avenue**
**Miami, Florida 33131**

**PH. (305) 377-5441**
**FAX (305) 377-5654**

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## STATEMENT OF THE CASE AND FACTS

Defendant was charged, in an indictment filed on January 11, 1991, in the Eleventh Judicial Circuit of Florida in and for Miami-Dade County, Florida, case number F90-50143, with committing: (1) the first degree murder of Matilda Nestor, (2) the first degree murder of Jacob Nestor, (3) the armed robbery of Matilda Nestor, (4) the armed robbery of Jacob Nestor, and (5) the possession of a firearm by a convicted felony. (DAR. 13-16)[1] The crimes were alleged to have been committed on December 19, 1990. *Id.*

After the trial court granted Defendant's motion to sever the charge of possession of a firearm by a convicted felony, the matter proceeded to trial on the remaining counts on January 26, 1996. (DAT. 932) The jury found Defendant guilty as charged on the four remaining counts, and the trial court adjudicated Defendant guilt in accordance with the verdicts. (DAR. 319-22, 323) After a penalty phase proceeding, the jury recommended a sentence of death for the murder of Mrs. Nestor by a vote of 10 to 2, and recommended a sentence of death unanimously for the murder of Mr. Nestor. (DAR. 353-54) The trial court followed the

[1] The symbols "DAR" and "DAT" will refer to the record on appeal and transcript of proceedings from Defendant's direct appeal, Florida Supreme Court Case No. 81,482, respectively. The parties will be referred to as they stood in the lower court.

jury's recommendations and imposed death sentences for both murders. (DAR. 325-27) The trial court also sentenced Defendant to life imprisonment for each of the robbery counts and ordered that all of the sentence be served consecutively. *Id.*

Defendant appealed his convictions and sentences to this Court, raising 5 issues:

> 1) the trial court erred by denying his motion for judgment of acquittal on the two armed robbery counts; 2) the trial court erred by failing to instruct the jury that if it found both the aggravating factor of "during the course of a robbery" and the aggravating factor of "for pecuniary gain" that it had to consider the two factors as one; 3) the trial court erroneously rejected Jones' mental or emotional disturbance at the time of the offense as a statutory mitigating factor and failed to properly instruct the jury on the factor; 4) a new sentencing proceeding is required because the mental health experts who testified failed to bring the possibility that Jones suffered from fetal alcohol syndrome/fetal alcohol effect to the court's attention and because the court refused to consider Jones' abandonment by his mother as a mitigating circumstance; and 5) the trial court erred by failing to grant Jones' motion for mistrial based upon various alleged improper comments made by the prosecutor during penalty phase closing argument.

*Jones v. State*, 652 So. 2d 346, 359 (Fla. 1995).

The Court affirmed Defendant's convictions and sentences on January 12, 1995. *Jones v. State*, 652 So. 2d 346 (Fla. 1995). In doing so, this Court found the following facts:

> According to the evidence presented at the trial, on December 19, 1990, the bodies of sixty-six-year-old Matilda Nestor and sixty-seven-year-old Jacob Nestor were discovered in their place of business. Mr.

Nestor's body was found in the main office. He had been stabbed once in the chest. An empty holster was found on Mr. Nestor's waistband. Mrs. Nestor's body was discovered in the bathroom. She had been stabbed once in the back. The Nestors' new employee, Victor Tony Jones, was found slumped over on the couch in the main office not far from Mr. Nestor's body. The butt of a .22 caliber automatic pistol was protruding from under Jones' arm.

According to the evidence, December 19 was Jones' second day of work for the Nestors. It appears that as Mrs. Nestor was entering the bathroom in the rear of the building Jones came up behind her and stabbed her once in the back. As Mr. Nestor came toward the bathroom from the main office, Jones stabbed him once in the chest. The medical examiner testified that Mrs. Nestor died as result of a stab wound to the base of her neck which severed the aorta that carries blood and oxygen to the brain and Mr. Nestor died as a result of the stab wound to his chest which entered his heart.

There was evidence that after being stabbed, Mr. Nestor retreated into the office, where he pulled the knife from his chest, attempted to call for help, drew his .22 caliber automatic pistol and shot five times, striking Jones once in the forehead. No money or valuables were found on either victim or in Mrs. Nestor's purse which was found on the couch in the main office next to the defendant. The evidence also was consistent with Mr. Nestor's body having been rolled over after he collapsed so that personal property could be removed from his pockets.

After the couple was murdered, Jones was locked inside the building where he remained until police knocked down the door after being called to the scene by a neighbor. Money, keys, cigarette lighters and a small change purse that was later identified as belonging to Mrs. Nestor were found in Jones' front pocket. The Nestors' wallets were later found in the defendant's pants pockets. It was not immediately apparent to the police that Jones had been shot. However, after Jones was handcuffed and escorted from the building, he complained of a headache. When an

> officer noticed blood on Jones' forehead, and asked what happened, Jones responded, "The old man shot me." Rescue workers were called and Jones was taken to the hospital. While in the intensive care unit, Jones told a nurse that he had to leave because he had "killed those people." When asked why, Jones told the nurse, "They owed me money and I had to kill them."
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> * * * *
>
> As to each murder, the court found in aggravation: 1) Jones was under a sentence of imprisonment at the time of the murder, 2) Jones was convicted of a prior violent felony, 3) the murder was committed during the course of a robbery, and 4) the murder was committed for pecuniary gain, which the court merged with the "during the course of a robbery" aggravating factor. Although Jones presented evidence that he had been abandoned at an early age by his mother and that he suffered from extreme emotional or mental disturbance throughout his life, the court found nothing in mitigation.

*Id.* at 348-49. Defendant then sought certiorari review in the United States Supreme Court, which was denied on October 2, 1995. *Jones v. Florida*, 516 U.S. 875 (1995).

On March 24, 1997, Defendant filed a shell motion for post conviction relief. (R. 38-71)[2] After various stays granted by this Court and numerous public records hearings, Defendant files an amended motion for post conviction relief on March 9, 1999. (R. 92-202) This motion was unverified and accompanied by a motion to determine competency pursuant to *Carter v. State*, 706 So. 2d 873 (Fla. 1997). (SR. 131-34) In accordance with *Carter*,

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[2] The symbols “R” and “SR” will referred to the record on appeal and supplemental record on appeal in the instant appeal, respectively.

the post conviction court ordered Defendant evaluated by two experts, who both found Defendant competent. (SR. 147-56, ?) After an evidentiary hearing at which both doctors testified, the post conviction court found Defendant competent. (SR. ?)

On October 8, 1999, Defendant filed his second amended motion for post conviction relief, raising 22 claims:

> I.
> [DEFENDANT] IS BEING DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION BY THE LACK OF FUNDING AVAILABLE TO FULLY INVESTIGATE AND PREPARE HIS POST CONVICTION PLEADINGS, UNDERSTAFFING, AND THE UNPRECEDENTED WORKLAOD ON PRESENT COUNSEL AND STAFF, IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND IN VIOLATION OF SPALDING V. DUGGER.
>
> II.
> [DEFENDANT] IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISION OF THE FLORIDA CONSTITUTION, BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT. [DEFENDANT] CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND HAS BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.
>
> III.
> [DEFENDANT'S] CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE CUMULATIVELY EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, NEWLY DISCOVERED EVIDENCE, AND/OR IMPROPER RULINGS OF THE TRIAL COURT, IN VIOLATION OF [DEFENDANT'S] RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

IV.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE NAD PREPARE MITIGATING EVIDENCE, FAILED TO PROVIDE THE MENTAL HEALTH EXPERTS WITH THIS MITIGATION, AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE.

V.

TRIAL COUNSEL WAS BURDENED BY AN ACTUAL CONFLICT OF INTEREST ADVERSELY AFFECTING COUNSEL'S REPRESENTATION, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND THE CORRESPONDING PROVISION OF THE FLORIDA CONSTITUTION.

VI.

[DEFENDANT'S] RIGHT TO DUE PROCESS WAS DENIED WHEN HE WAS CONVICTED DESPITE BEING INCOMPETENT, AND TRIAL COUNSEL FAILED TO REQUEST A COMPETENCY EVALUATION IN THE FACE OF BONA FIDE SUBSTANTIAL GROUNDS TO BELIEVE [DEFENDANT] WAS INCOMPETENT, IN VIOLATION OF HIS RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

VII.

[DEFENDANT] WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE PROSECUTOR'S ARGUMENTS AT GUILT/INNOCENCE AND PENALTY PHASES PRESENTED IMPRESSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. TO THE EXTENT THAT DEFENSE COUNSEL FAILED TO RAISE PROPER OBJECTIONS, IT WAS DEFICIENT PERFORMANCE WHICH DENIED [DEFENDANT] EFFECTIVE ASSISTANCE OF COUNSEL.

VIII.

[DEFENDANT'S] CONVICTIONS ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AS ESTABLISHED BY NEWLY DISCOVERED EVIDENCE.

IX.

[DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE THAT WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED FALSE AND/OR MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING OF THE EVIDENCE.

X.

[DEFENDANT'S] SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO [DEFENDANT] TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING [DEFENDANT]. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THESE ERRORS.

XI.

[DEFENDANT'S] SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR BECAUSE THE JURY RECEIVED INADEQUATE GUIDANCE CONCERNING THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED. FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THESE ERRORS.

XII.

[DEFENDANT'S] DEATH SENTENCE IS FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS DUE TO THE STATE'S INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENTS UPON NON-STATUTORY AGGRAVATING FACTORS. DEFENSE COUNSEL'S FAILURE TO OBJECT OR ARGUE EFFECTIVELY CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

XIII.

[DEFENDANT'S] SENTENCING JURY WAS MISLED BY COMMENTS, QUESTIONS, AND INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF

RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF EIGHTH AND FOURTEENTH AMENDMENTS TO UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY OBJECTING.

XIV.

[DEFENDANT] IS DENIED HIS FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POST-CONVICTION REMEDIES BECAUSE THE RULES PROHIBITING [DEFENDANT'S] LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

XV.

[DEFENDANT] IS INNOCENT OF FIRST DEGREE MURDER AND INNOCENT OF THE DEATH PENALTY. [DEFENDANT] WAS THEREFORE CONVICTED AND SENTENCED TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XVI.

[DEFENDANT] IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT.

XVII.

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AS APPLIED IN THIS CASE, BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

XVIII.

THE JURY AND JUDGE WERE PROVIDED WITH AND RELIED UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN SENTENCING [DEFENDANT] TO DEATH, IN VIOLATION OF JOHNSON V. MISSISSIPPI, 108 S. CT. 1981 (1988), AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

XIX.

[DEFENDANT'S] DEATH SENTENCE ID PREDICATED UPON AN AUTOMATIC AGGRAVATING CIRCUMSTANCE, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL

RENDERED INEFFECTIVE ASSISTANCE IN THIS REGARD.

XX.

[DEFENDANT] IS INSANE TO BE EXECUTED.

XXI.

JUROR MISCONDUCT IN THE GUILT AND PENALTY PHASES OF [DEFENDANT'S] TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISION OF THE FLORIDA CONSTITUTION.

XXII.

[DEFENDANT'S] TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, FOURTEENTH AMENDMENTS.

(R. 203-314) In the public records claims, Defendant did not name any agency that had not disclosed public records. (R. 213-15) He merely stated that he was "renew[ing] his requests for the records the disclosure of which had been previously denied by the Court in various ruling either sustaining objections pursuant to Rule 3.852 or following an *in camera* inspection." *Id.*

After the State had filed its response and Defendant had filed a reply, the post conviction court conducted a *Huff* hearing. (R. 315-64) On March 20, 2000, the post conviction court entered an order granting Defendant an evidentiary hearing on "Claim III-Voluntary Intoxication;" "Claim IV-Mental Health and Family History Mitigation;" and "Claim VI-Competency Prior

to Trial." (R. 365) The evidentiary hearing was held on July 18, 2000 through July 26, 2000. (R. 380)

At the evidentiary hearing, Art Koch, Defendant's trial counsel, testified that he had been practicing law for 30 years. (R. 470-71) In this matter, Juan Sastre was assigned as an investigator to assist Koch. (R. 474-75) Mr. Sastre would do the tasks that Koch assigned to him. (R. 475-76) Some of the tasks that Koch would have assigned to Mr. Sastre would have been interviewing penalty phase witnesses and obtaining documentation. (R. 476-77) Marlene Schwartz, a social worker, was also assigned to assist Koch. (R. 482) One of the things Ms. Schwartz would have done was to interview family members. (R. 483) Ms. Schwartz provided Koch with notes that she had taken. (R. 484) Koch considered hiring a mitigation specialist named Lee Norton but eventually decided not to do so. (R. 494-98)

Because Defendant had been shot in the head and spent time in the hospital, Koch received assistance from a number of mental health professionals, including Dr. Hyman Eisenstein, a neuropsychologist, Dr. Steven Sevsush, a neurologist, Dr. Brad Fisher, Dr. Merry Haber and Dr. Jethro Toomer. (R. 485-86) Koch wanted Dr. Eisenstein to test and evaluate Defendant to determine the effects of the gunshot, the effects of the medication Defendant was taking, whether any mitigation could be

presented and whether Defendant was competent. (R. 486-87) Dr. Sevsush was also asked to evaluate Defendant's competence. (R. 487) Koch did not specifically recall why he had asked Dr. Fisher and Dr. Haber to evaluate Defendant other than to investigate his mental health. (R. 498-99) Koch asked Dr. Toomer to work on this matter because he felt that Dr. Toomer would be able to establish a better rapport with Defendant, as they were both African-American. (R. 499-500)

Koch decided what background materials to which expert based on the type of expert and the experts request for documentation. (R. 500-01) If an expert had requested information, Koch would have provided the information if it was available. (R. 501) Koch recalled trying to get records of Defendant's prior incarcerations. (R. 501) He sought these records to evaluate Defendant's behavior in prison and to look for evidence of mental health treatment. (R. 501-02) Koch did not recall if he had been aware that Defendant had been admitted to Jackson Memorial Hospital for psychiatric treatment. (R. 502-03) However, he stated that if Dr. Toomer testify to such a hospitalization, he would have been provided that information to Dr. Toomer and would have had documentation about it. (R. 503) Koch did see a reference to a 60 to 90 day stay in that hospital's psychiatric ward in Ms. Schwartz's notes. (R. 504)

Koch was sure that he would have obtained the records of this hospitalization because it was his standard practice but did not specifically recall having seen the records. (R. 510-11)

Koch stated that in most cases he would send a letter to the experts with materials he provided them. (R. 512) Letters from counsel's file indicated that he had sent Ms. Schwartz's notes and Defendant's prison records to Drs. Toomer and Haber. (R. 512-13) These records were provided to assist in their evaluations of Defendant. (R. 513-14) Koch also stated that he would provide information, which was not contained in documentation, to the experts orally. (R. 540)

Koch did not recall what information he may have had regarding Defendant's alleged intoxication. (R. 514) On viewing Dr. Hearns' toxicology report, Koch stated that it indicated that Defendant had a trace amount of cocaine in his system. (R. 514-15) Koch stated that Ms. Schwartz's notes had an indication that at the time of an offense, Defendant had reported using cocaine and alcohol. (R. 515-18) However, above this note was the words "armed robbery," and Koch could not be sure if this note referred to the time at which Defendant had committed one of his prior offenses or to the commission of this crime. (R. 515-18)

Koch did not believe that he presented any evidence of

intoxication in this case. (R. 519) However, Koch was aware that intoxication and substance abuse could be presented as mitigation. (R. 519-20) Koch did not recall if he provided any information about these areas to the experts. (R. 520-21) However, Koch indicated that in his experience intoxication, particularly on illegal drugs, was dangerous evidence because juries tend to view such evidence negatively. (R. 521) In this case, Koch did not consider presenting such evidence because Defendant told Koch he was not intoxicated. (R. 521) Koch did not attempt to corroborate Defendant's statements because Defendant had killed the two people who were with him in the hours before the murder and because jurors tend to consider such evidence aggravating, not mitigating. (R. 522) However, Koch would have provided any information he had on intoxication to the experts. (R. 522-23)

Koch did not recall if either doctor had ever directly stated that Defendant was competent. (R. 488) However, Koch did receive indications that Defendant was competent and believed that Defendant was competent based on his dealings with Defendant. (R. 488) Koch stated that because he was not a doctor, he asked the experts to evaluate Defendant and make recommendations regarding additional work that needed to be done. (R. 489) He specifically recalled that Dr. Sevsush had

been surprised by the fact that Defendant had a small amount of neuropsychological damage. (R. 489) Had any of the doctors expressed the opinion that Defendant was incompetent to Koch, he would have requested a competency hearing. (R. 489) Koch's notes reflected that Dr. Sevsush had told Koch that Defendant was competent. (R. 493-94)

Koch interviewed Defendant during the course of his representation several times in an attempt to develop mitigation. (R. 524-27) During these interviews, Defendant provided the names of Carl Leon Miller, a cousin, Pamela Mills, his sister, and Laura Long, who raised Defendant. (R. 524-27) Defendant indicated that he was beaten by Long's son Lawrence, who was more than 10 years older than him, and that Miller and Mills were also beaten. (R. 425-27) Koch did not know if he had spoken to Mills and did not believe that he had spoken to Miller. (R. 533)

Koch also interviewed Ms. Long, who seemed upset with Defendant. (R. 528-30) Koch indicated that Ms. Long was reluctant to be involved but promised to be at trial. (R. 528-30) Ms. Long came across as educated, straight-laced and emotionally cold. (R. 528-30) She stated that she did not know why Defendant had turned to a life of crime, described his upbringing as idyllic and indicated that Defendant had left her

care around the age of 14. (R. 528-30) Koch did not think Ms. Long would be a great witness, but he had no others, so he presented her testimony to humanize Defendant. (R. 530) Koch stated that he felt hampered in preparing family mitigation because he and his staff did not have sufficient time to develop a rapport with the family. (R. 531-33)

Koch also interviewed Greg Whitney, Defendant's childhood best friend. (R. 537-39) Whitney had indicated that he and Defendant parted company when Defendant was 14 and that drugs had a large impact on Defendant's live. (R. 537-39) Koch made a strategic decision not to call Whitney because he was concerned that the jury might draw an unfavorable comparison between Defendant and Whitney. (R. 537-39) Whitney had a similar upbringing to Defendant, committed juvenile offenses like Defendant but had outgrown his problems and become a law abiding citizen. (R. 537-39) Koch acknowledged that Whitney could have corroborated that Defendant had a substance abuse problem. However, that problem was already well documented. (R. 539-40)

Koch stated that he decided to have his co-counsel Rosa Rodriguez present the penalty phase closing argument between the guilt and penalty phases. (R. 534-35) This decision was made because of the feeling Koch had gotten from the jury during the guilt phase. (R. 534-35) Koch stated that he had planned for

Defendant to testify at the guilt phase but that Defendant did not do so which caused him to have very little to argue in the guilt phase closing and to lose his rapport with the jury. (R. 534-35)

On cross, Koch stated that he had been handling capital cases for 4 years when he represented Defendant and that Defendant was not his first capital trial. (R. 543-44) In fact, he had already represented at least one defendant who had been sentenced to death. (R. 556-57)

Prior to trial, Koch had met with Defendant 30 to 40 times. (R. 545) He was able to say whether the file purported to be his file from the time of trial was complete and he had not reviewed the file. (R. 545-49) Instead, he had only reviewed the portion of the file that Defendant's present counsel had showed him. (R. 545-49) He did not recall why he had made the choices he made and had no notes to refresh his recollection. (R. 545-49)

Koch admitted that he represented Defendant for the three years this matter was pending before trial. (R. 549-50) He had requested numerous continuances, and they were always granted. (R. 550) He admitted that he was ready for trial when it commenced. (R. 551) He acknowledged that Ms. Schwartz had been assigned to assist him at least a year prior to trial. (R. 560-62)

Koch admitted that in addition to the 5 mental health experts he named in direct, he also had Dr. Frank Lefler appointed to assist him. (R. 553-54) He admitted that he had chosen the experts he did because he was familiar with their work or they had been recommended to him. (R. 563-65) He admitted that he had spoke to each expert both before and after he had them assigned to the case. (R. 565) He admitted that he had provided Dr. Lefler with information to contact Whitney, Long and Vera Edwards, one of Defendant's teachers. (R. 565-66) He had also informed Dr. Lefler about the 3 drug abuse programs to which Defendant had been sent and that Defendant had not participated in any of them. (R. 566) He admitted that he would have reviewed Dr. Lefler's bill before it was submitted and that the bill showed that Dr. Lefler had spend 5 hours with Defendant. (R. 567)

He stated that he had Sastre obtain Defendant's school and prison records and that he would have had Sastre try to obtain his hospital records. (R. 555) Sastre would also have attempted to locate Defendant's family members. (R. 555-56)

Koch stated that he frequently asked his experts to confer with one another to share information. (R. 567) He admitted letters to Drs. Lefler and Eisenstein encouraging them to contact each other would be consistent with his normal practice.

(R. 567) Koch admitted that in May and June 1992, he had sent, and made available, to Dr. Toomer background materials including school records, prison records, notes of witness interviews, notes of interviews with Defendant, and contact information for Defendant's family and friends. (R. 568-70) Koch admitted that his penalty phase preparation had begun well before the guilt phase began. (R. 570-71) However, Koch stated that the decision regarding what penalty phase evidence to present may have been made shortly before the penalty phase. (R. 571-72)

Koch stated that Dr. Lefler had retired before the time of trial and that the retirement was the reason why he was not a witness. (R. 572) He asserted that he was dissatisfied with Dr. Haber's work and that he therefore decided not to have her continue on this case. (R. 572) Koch stated that it was possible that he might have contacted Dr. Fisher to explore the possibility of an insanity defense. (R. 573) Koch stated that he probably would have relied more heavily on Dr. Eisenstein because he had worked with him on a number of cases and respected him. (R. 574) He admitted that his decision regarding which experts to call would have been made based on the quality of the experts work and ability to testify. (R. 624-25)

Koch stated that he originally believed that competency would be an issue because of Defendant's injury and medication.

(R. 574) However, as he dealt with Defendant, Koch realized that Defendant was competent. (R. 574-75) Koch recognized that Defendant knew who everyone was and what role each participant played and that Defendant was able to communicate with Koch regarding his past. (R. 575-76) After the guilty verdict, competency again became an issue. (R. 574) Koch stated that if any of the experts had indicated that Defendant was not competent and had a reason for doing so, Koch would have raised the issue with the court. (R. 584)

In preparation of mitigation, Koch received information from Defendant, had Ms. Schwartz speak to Defendant and had Defendant evaluated by six mental health professionals. (R. 575-80) Based on the information he received, Koch made decisions about what information to present. (R. 580-82) He would have tried to investigate Defendant's allegation that he was abused as a child and would have tried to locate his family members, including Pamela Mills and Carl Leon Miller. (R. 581-82) In fact, Koch's file reflected attempts to contact Defendant's sister Valerie. (R. 582-83) Koch recalled being in contact with Defendant's aunt Laura Long and his grandmother Beatrice Brown. (R. 583) Koch admitted that he was aware of the claimed psychiatric admission to JMH and would normally have sent someone to get records from the hospital. (R. 586-87) However, he claimed to have no memory

of what he did in this case. (R. 587)

Koch stated that he probably would have asked Defendant if he had been intoxicated at the time of the crime. (R. 587) Had Defendant admitted that he had committed the crime while intoxicated, he would have pursued the issue vigorously. (R. 588) However, Defendant asserted that he had not committed the crimes here, and the issue was therefore not as important to Koch. (R. 588) He stated that he would not have told the jury that Defendant was innocent but that if he was not, he was intoxicated. (R. 589)

Koch acknowledged that Ms. Long always responded to his calls, was interviewed by the mental health experts, came to trial and testified. (R. 590-91) He stated that when he described her as reluctant, he meant that she was embarrassed by what Defendant had done and no longer wished to associate with Defendant. (R. 591) As such, he did not feel that Ms. Long was candid with him and idealized Defendant's upbringing. (R. 591-93) However, he did not know that what she had told him was not, in fact, true. (R. 592) Koch stated that there was a conflict between Defendant's claim that he was beaten and Ms. Long's statement that he was not. (R. 593-94) However, Koch felt that he did not have the resources to discover which version was true and admitted that he still did not know what the truth was. (R.

593-95) He did acknowledge that the claimed beatings were in connection with Defendant's misbehavior. (R. 593-95)

Koch stated that he might have asked Greg Whitney about Defendant's home life. (R. 597-98) However, he did not recall whether Mr. Whitney had indicated how much contact he had with Defendant's home. (R. 597) Had Mr. Whitney stated that Defendant was abused as a child, Koch would have noted it. (R. 597)

Koch reiterated that he would have attempted to locate each individual whose name had been provided to him. (R. 602) However, he did not remember which people could be found and what was discussed with those that were located. (R. 603-04) He stated that he would not have looked only for the witnesses about whom he had an address. (R. 613-14) He would have looked for every witness. (R. 613-14) He admitted that he never found anyone other than Defendant who stated that he was beaten. (R. 604-05)

With regard to intoxication as a mitigator, Koch stated that he had spoken to people who had served on juries and that they had indicated that they generally do not consider intoxication mitigating. (R. 616) As a result of this experience, Koch tried to avoid presenting it. (R. 616) He stated that having an expert attempt to explain why it should be considered mitigating is generally unavailing. (R. 617) Koch stated that his decision

about this area was not a baseless personal opinion. (R. 620) Instead, his opinion was based on 22 years of experience, including 14 years of experience trying capital cases, and his research into jury studies on the issue. (R. 620) He stated that his decision not to present intoxication was largely influenced by Defendant's assertion of innocence. (R. 621-22) However, had any of the experts reported that Defendant was intoxicated, Koch would have reconsidered his decision. (R. 623-24)

Dr. Fisher testified that he was contacted by Koch to evaluate Defendant. (R. 631-35) As a result, he met with Defendant twice. (R. 635) During these meetings, Dr. Fisher had Defendant do a sentence completion test, a house-tree-person test and begin completing a personal history checklist. (R. 636) Dr. Fisher did a preliminary evaluation of Defendant but never received any records regarding him. (R. 637) Dr. Fisher did not recall what type of evaluation he was asked to conduct regarding Defendant. (R. 638) He was not called or listed as a witness at the time of trial and did not recall having discussed why with Koch. (R. 639) However, he did have a note regarding reports of dizziness and "NGRI" in his file. (R. 639)

Dr. Fisher stated that he had been contacted about Defendant again by post conviction counsel. (R. 639-40) As a result, he had seen Defendant about 6-10 weeks before the hearing for a

couple of hours. (R. 640-41) Defendant's present counsel had provided Dr. Fisher with testimony and depositions from Drs. Toomer, Miller, Mutter, Eisenstein, and Herrera, school records, prison records , medical records, affidavits from family and friends of Defendant, Ms. Schwartz's notes and information concerning Defendant's cousin Lawrence. (R. 641-47) Additionally, two days before testifying, Dr. Fisher had met with Defendant's sisters Valerie and Pamela, his cousin Leon, his brother Michael and his Aunt Bea. (R. 647) Based on this information, Dr. Fisher opined that Defendant's family background was mitigating and that his abuse of drugs and alcohol from a young age was mitigating. (R. 648-49) Dr. Fisher also saw some indication of neurological problems. (R. 649) However, he could not state whether these alleged problems predated the crime and head injury associated with it. (R. 649-50) Dr. Fisher also opined that Defendant qualified for both statutory mental mitigators. (R. 650-53) Dr. Fisher stated that his opinions on the statutory mitigation was based on his interviews with family members and Defendant and his opinion that Defendant was abusing drugs at the time. (R. 650-53) Dr. Fisher also opined that Defendant was intoxicated at the time of the crime. (R. 653)

Dr. Fisher stated that the report of Defendant's

hospitalization in 1975 was important to him. (R. 655) He stated that the document showed an admitting diagnosis of chronic schizophrenia and a discharge diagnosis of unsocialized aggressive reaction to adulthood. (R. 655) He stated that it showed that Defendant had been in the hospital for a drug overdose in December 1974 for 3 to 4 months and had stayed 39 days during this stay. (R. 656) He felt that the admitting diagnosis and length of stay were particularly relevant. (R. 656-57) He also opined that the notation in Ms. Schwartz's note that read "OFFENSE Cocaine 1/4 bag (shot cocaine) Drank, bottle (fifth)" was particularly relevant. (R. 657-58) He felt that this corroborated the information from his interviews with the family members. (R. 658-59)

Dr. Fisher stated that the family interviews were some of the most important information that he had in forming his opinion. (R. 658-59) He stated that he had spent five hours with the family at a home in the poor area of Liberty City. (R. 680) He stated that Defendant's brother Michael could not sit still, was drooling, had to be given drugs to continue the interview and finally got to the point where he left and did not return. (R. 680-81) He stated that he asked each family member about the amount of time they had lived with Defendant, Defendant's drug use, their mother and life with Ms. Long. (R. 681-86) Dr. Fisher

described the home as very small with a large number of people living in it. (R. 686-87)

Dr. Fisher stated that Defendant grew up around the pervasive use of drugs and alcohol. (R. 705-06) He stated that this background would cause mental problems and would be independently mitigating. (R. 706) He stated that he had relied upon the toxicology report in reaching his conclusions about Defendant. (R. 706-07)

On cross, Dr. Fisher admitted that he did not always get called to testify in cases in which he was asked to do evaluations. (R. 713-16) Dr. Fisher admitted that his notes indicated that he was probably contacted to render an opinion on whether Defendant was not guilty by reason of insanity (NGRI). (R. 717) He acknowledged that he had not found Defendant to be insane or incompetent. (R. 717-18) Dr. Fisher admitted that he would have spoken to Koch about the scope of the examination that Koch was requesting but that he was unable to recall why at this time. (R. 718-19) Dr. Fisher stated that he did not remember if he knew that Defendant had been seen by a number of other mental health professionals. (R. 719-20)

Dr. Fisher claimed that Defendant’s present counsel never asked him to look at any specific area of mitigation. (R. 728-29) He stated that instead he was looking for anything that

might be mitigating. (R. 729-32) Dr. Fisher claimed that Defendant had asserted that he had problems with his memory. (R. 733-35)

Dr. Fisher reiterated that he had relied on the toxicology report and stated that it indicated that Defendant had cocaine in his system. (R. 736-37) However, he admitted that he did not know when the blood was drawn in relation to the crime, what drugs the test was designed to detect, what amount of drugs were indicated and what te results meant in terms of when any drugs had been taken or what effect that amount of drugs would have had on Defendant. (R. 737)

In terms of family background, the only information provided by Defendant was that his cousin had beaten him. (R. 738) Dr. Fisher claimed not to have questioned Defendant extensively about this subject. (R. 738-39) He claimed that he did not ask more questions because Defendant was not forthcoming and because he assumed Defendant would stop talking to him if he pushed. (R. 739)

Dr. Fisher admitted that he had never met with Ms. Long. (R. 743) He claimed that he wanted to talk to her but that he allowed counsel to dictate whom he met and when he met with them. (R. 742-44) He admitted that the people who he met were inclined to provide information that might help Defendant. (R.

744-45)

Dr. Fisher admitted that he had not seen a complete listing of Defendant's criminal history. (R. 745) However, he was aware that Defendant had been incarcerated on numerous occasions. (R. 745) He acknowledged that Defendant had been sent to numerous drug treatment facilities but had never attended the treatment. (R. 748) He admitted that Defendant had been incarcerated as a juvenile on at least 4 occasions. (R. 748)

Dr. Fisher stated that the 1975 hospital report was not something he relied upon heavily. (R. 746) He stated that he attached significance to the admitting diagnosis. (R. 746) However, he acknowledged that the discharge diagnosis was a common diagnosis given to a juvenile who ran away, did drugs and disobeyed authority. (R. 747) He admitted that Defendant was not treated for schizophrenia during that hospitalization and had never been treated for that alleged condition. (R. 747-48) He acknowledged that he did not know the source of the notation of the alleged hospitalization for the alleged overdose. (R. 749) He stated that he had noticed that no hospital records had been produced to substantiate this claim. (R. 750) However, he claimed not to have asked for records on this alleged admission. (R. 750-51) Instead, he asserted that he had only asked Defendant about what Koch had said about this alleged

hospitalization. (R. 750)

On redirect, Dr. Fisher stated that he did not ask more questions of Defendant about his family because the issue was covered in Dr. Toomer's testimony, Ms. Schwartz's notes and the affidavits from the family. (R. 754)

Dr. Fisher stated that he relied upon Defendant's history of substance abuse in determining that Defendant was intoxicated at the time of the crime. (R. 756-57) He also relied upon the interviews with the family members. (R. 758) The family members related information concerning Defendant's history of substance abuse and their contact with Defendant until the day before the crime. (R. 762-63)

Juan Sastre, an investigator from the Public Defender's Office, testified that he was assigned as investigator on this case. (R. 764-66) Mr. Sastre would have become involved in Defendant's case upon Defendant's arrest. (R. 767) Mr. Sastre received assignments on the case from Edith Georgi and Koch. (R. 769) His tasks would be given to him in writing, and he would respond in writing. (R. 769-70) In addition to requests to Mr. Sastre, Koch would obtain records by having a secretary send a letter for them. (R. 770) Mr. Sastre knew Ms. Schwartz as a social worker in his office and stated that she would be responsible for interviewing family members and obtaining

background history. (R. 771)

Mr. Sastre stated that locating witnesses for whom the attorney had no address would have been part of his job. (R. 772) One way to locate such a witness would be to search public records. (R. 772-73) Mr. Sastre would probably not have talked to a witness without Koch's knowledge and would have reported any conversation he had with any witness. (R. 773-74) Mr. Sastre did not recall traveling outside of Florida on this case. (R. 774) Mr. Sastre admitted that some witnesses cannot be located. (R. 781)

Mr. Sastre stated that he had destroyed his copies of the work requests during this case. (R. 779) Mr. Sastre did not know if Koch had placed his copies of the requests in the office's file. (R. 779) Mr. Sastre had no independent recollection of the work he had done in this case. (R. 780) He had not reviewed the file and did not know if all of the requests that he had received on this case were there. (R. 780)

Mr. Sastre admitted that one request that was in the file concerned an attempt to contact Defendant's sister Valerie. (R. 782-84) An investigator did attempt to find Valerie and have her contact Koch. (R. 782-84)

Dr. Eisenstein, a neuropsychologist, testified that he evaluated Defendant prior to trial. (R. 786-89) At that time,

Koch had asked Dr. Eisenstein to determine what damage had been caused by Defendant's injury and to determine if any mitigation existed. (R. 789-90) Koch provided the records of Defendant's hospitalization for the gunshot wound and police reports. (R. 790) Dr. Eisenstein testified at the midtrial competency hearing and at the *Spencer* hearing. (R. 791-93) Dr. Eisenstein had seen Defendant numerous times before he testified and had conducted two complete evaluation of Defendant before testifying. (R. 793-94) He had also spoke to Ms. Long. (R. 796-97)

For the post conviction proceedings, Dr. Eisenstein evaluated Defendant again. (R. 793) He again tested Defendant's IQ and interviewed Defendant. (R. 793) Dr. Eisenstein received more background information in connection with this new evaluation, including affidavits from family members and Ms. Schwartz's notes. (R. 794-96) In preparation for the hearing, Dr. Eisenstein had spoken to family members other than Ms. Long and had spoke to Ms. Long again during the hearing. (R. 797) He felt that speaking to these people was helpful in forming an opinion. (R. 797) He also relied upon the 1975 hospital records and the toxicology report. (R. 802-03)

Dr. Eisenstein stated that these records permitted him to give a opinion regarding whether Defendant had mental problems before the crime. (R. 803-04) He now opined that Defendant

qualified for both statutory mental mitigators. (R. 804-05) He also asserted that Defendant was intoxicated at the time of the offense. (R. 805)

Dr. Eisenstein stated that the 1975 hospital records were important because of the length of time Defendant was hospitalized and the fact that the admitting diagnosis was schizophrenia. (R. 806-10) He also found the indications in the report that Defendant had been abusing drugs significant. (R. 810-11) He also found the claim that Defendant had been previous hospitalized for a drug overdose significant. (R. 812)

Dr. Eisenstein stated that he was always of the opinion that Defendant was not competent. (R. 818-19, 858-60) However, Dr. Eisenstein was not sure if he provided that opinion to Koch pretrial. (R. 819-21) Dr. Eisenstein stated that he did not believe that Defendant could communicate relevant facts to his attorney, manifest appropriate courtroom behavior and testify relevantly. (R. 832-33) He stated that the reason why a competency hearing was held after the guilt phase was that Defendant had been angry and verbally abusive to Koch and Dr. Eisenstein during an interview in the jail. (R. 834) He asserted that he was afraid Defendant might physically attack them, and the interview was terminated. (R. 834)

Dr. Eisenstein stated that he relied on the notation about

the consumption of intoxicants in Ms. Schwartz's notes in determining that Defendant was intoxicated. (R. 836-38) He also relied upon his interviews with family members. (R. 838) The family members he spoke to concerning substance abuse history and intoxication were Ms. Long, Valerie, Michael, Leon and Pamela (R. 839-42) He stated that Valerie was not with Defendant at the time of the crime. (R. 840-41)

With regard to Defendant's upbringing, Dr. Eisenstein questioned Ms. Long about why Defendant had been sent to live with her and how the family functioned while they were living together. (R. 842-44) He also inquired about Ms. Long's son and his relationship with Defendant's sister Pamela. (R. 845-46) He also questioned the type of discipline that Ms. Long used with the children. (R. 846-47) He observed the nice neighborhood in which Ms. Long lived. (R. 843-44) He found Ms. Long to be distant with a bland affect. (R. 847)

According to Dr. Eisenstein, Pamela claimed that her mother was an alcoholic. (R. 851) Ms. Long's son Lawrence would beat Defendant for misbehavior. (R. 851) Defendant ran away several times by the age of 6 or 7. (R. 851) Pamela and Defendant would drink. (R. 851) They did not attend school regularly and went to be with their mother when Defendant was 11 or 12. (R. 851-52) She characterized Defendant as a loner, who would cry and

internalize his emotions. (R. 852)

According to Dr. Eisenstein, Leon claimed that Ms. Long was too strict with the children and required that they go to church. (R. 852-53) He asserted that Defendant and he drank and did drugs together when Defendant was 14. (R. 853) Leon averred that Lawrence whipped Defendant with a belt on Ms. Long's orders for misbehavior. (R. 853) He claimed that Defendant had overdosed when he was 13 or 14 and was hospitalized at JMH. (R. 853) He asserted that Defendant was first arrested around the age of 15 or 16. (R. 853) He claimed that Defendant had been working for him doing landscaping shortly before the murders and that Defendant was abusing cocaine and heroin at the time. (R. 853) Leon asserted that Defendant was having violent outbursts and that the family had considered sending Defendant to Georgia before the crime. (R. 853-54) Leon reported that he had seen Defendant after his arrest while they were both incarcerated. (R. 854)

Dr. Eisenstein claimed that the family interviews were extremely important in determining Defendant's alleged problems. (R. 855-56) He asserted that the background information allowed him to assert that Defendant had a neuropsychological impairment before he was shot. (R. 856-58)

On cross, Dr. Eisenstein admitted that he was aware of what

was at issue in a capital proceeding and what was necessary to conduct a complete evaluation. (R. 862) Before trial, he had numerous discussions with Koch. (R. 862) He knew Defendant was being evaluated by other mental health professionals, including Drs. Lefler, Haber, Sevsush and Toomer. (R. 863-64) Dr. Eisenstein had spoken to Dr. Lefler. (R. 864-65)

Dr. Eisenstein admitted that he had testified at the midtrial competency hearing that Defendant would be unable to demonstrate appropriate courtroom behavior. (R. 873) He averred that his opinion was correct even after it was pointed out to him that Defendant had done so. (R. 873-74) He based this testimony on the interaction with Defendant after the guilty verdict. (R. 874) He admitted that it was natural that a person would be upset with his attorney under these circumstances but claimed that Defendant's reaction was exaggerated. (R. 874)

Dr. Eisenstein claimed that he had wanted to speak to Defendant's family prior to trial but that the only family member made available to him was Ms. Long. (R. 876-77) He had no idea where the other family members were or if they would have been available at that time. (R. 877-78, 920-21) Defendant did provide information to Dr. Eisenstein. (R. 879)

Dr. Eisenstein admitted that Defendant had stated that he was an average student. (R. 879) The school records Dr.

Eisenstein had indicated that Defendant had passed first and second grade and had attended school regularly at that time. (R. 880-81) The records from one grading period from ninth grade indicated failing grades, but Dr. Eisenstein could not say whether Defendant was attending school regularly at that point. (R. 881-83) However, the records from the seventh grade indicated that Defendant had made B's and C's with the exception of art. (R. 882) The records again shows C's in eighth grade. (R. 882)

Dr. Eisenstein stated that he had relied on a notation from the 1975 hospital record regarding Defendant's intellectual functioning. (R. 884-85) However, he admitted that he did not know where this notation came from and that it was contradicted by a finding of average intelligence by the person who evaluated Defendant in the hospital. (R. 884-85) He insisted that the records showed that Defendant was mentally ill even though the doctor who discharged Defendant from the hospital found that Defendant was not and recommended that Defendant be placed in a facility merely to address his tendency to run away and commit crimes. (R. 886-87) He admitted that Defendant was not schizophrenic. (R. 887-88) He insisted that Defendant had to be mentally ill because of the length of time that Defendant spent in the hospital. (R. 888) However, he acknowledged that he was

unaware of whether Defendant had been kept in the hospital for that length of time because another placement for him could not be found. (R. 888-89)

He admitted that he had never seen hospital records concerning the alleged 3 month stay for the alleged overdose. (R. 889-90) He acknowledged that Leon had told him that Defendant was at JMH. (R. 884) He stated that he had attempted to get these records but that no such records could be found. (R. 890) He admitted that it was possible that Defendant's family had lied about the alleged hospitalization for the alleged overdose. (R. 890)

He stated that the toxicology report would show whether a drug was in a person's system. (R. 891) He stated that he did not know if it gave any indication of when a drug was consumed. (R. 891) He admitted that he did not know what drugs the tests were designed to detect, when the blood was drawn and what the results indicated. (R. 891-92) Despite this lack of knowledge, Dr. Eisenstein insisted that the toxicology report was part of the information he relied upon. (R. 892)

Dr. Eisenstein stated that he was relying upon what Leon told him even though he did not know if Leon was being truthful. (R. 892-93) He acknowledged that Leon was allegedly intoxicated at the time he alleged observed Defendant's use of intoxicants.

(R. 893) He admitted that Leon's information concerned a 1 to 2 week period before the crime. (R. 894) However, Dr. Eisenstein did not know when the crime was committed. (R. 894) As such, he did not know how much time elapsed between when Leon last saw Defendant using drugs and when the crime was committed. (R. 894) Instead, Dr. Eisenstein was merely relying on Leon's statement that Defendant had been heavily consuming cocaine and heroin in the weeks before the murder. (R. 894-95)

Dr. Eisenstein admitted that he had given Defendant the MMPI twice and that Defendant's score on the F scale was extremely elevated both times. (R. 901-02) He acknowledged that this scale had been designed to detect malingering but refused to admit that Defendant was malingering. (R. 901-03) Instead, his opinion was that the high F scale meant that Defendant was crying out for help. (R. 902-03)

Dr. Eisenstein claimed that he had waited to the middle of the hearing to interview Ms. Long again because it could not have been arranged earlier. (R. 903-04) He admitted that he had not tried to call her. (R. 904) He stated that Ms. Schwartz's notes about her conversation with Ms. Long were difficult to read because the handwriting was poor. (R. 904) He had not attempted to contact any of the other experts about their conversations with Ms. Long. (R. 904-05) He made no attempt to

determine if Ms. Long had given consistent information. (R. 905) He did admit that Ms. Long's version of Defendant's upbringing at the time of trial was inconsistent with his present version and that the first version was consistent with what Defendant had related to him at the time of trial. (R. 905-06)

Dr. Eisenstein admitted that Defendant had claimed to have been in New York from the ages of 11 to 13. (R. 907) However, the school records indicated that he was living in Miami between the ages of 12 and 14. (R. 907-08) As such, Dr. Eisenstein had to admit that he did not know how long Defendant lived with his mother. (R. 908) He claimed that it did not matter if he had accurate information about where Defendant was living. (R. 908-09)

Dr. Eisenstein acknowledged that Defendant had not claimed to have had as bad an upbringing as his family members now claimed. (R. 910-11) He claimed that this was because of Defendant's personality type. (R. 911) He admitted that it was possible that the family members were lying or exaggerating. (R. 912-13) However, he claimed that lying or exaggerating would not affect his opinion. (R. 913) He insisted that it was possible for Defendant's family life to have been as bad as claimed without anyone noticing or saying anything. (R. 913-14)

Dr. Eisenstein insisted on answering questions regarding

Defendant's intellectual function with his IQ score. (R. 916-18) However, he admitted that Defendant read and wrote well and that he enjoyed doing so. (R. 914-19) When pushed, Dr. Eisenstein stated that Defendant was able to communicate but had deficits in his ability to abstract and had damage to his frontal lobe because of the gunshot wound. (R. 918)

Dr. Eisenstein insisted that the fact that Defendant had not lived with Ms. Long for 20 years before he committed these murders did not change his opinion. (R. 925-26) He claimed that even if each piece of information he had been provided regarding Defendant's upbringing was incorrect, his opinion would be the same. (R. 921-25, 927-30) He stated that even if Defendant had led a productive and law abiding life for a period of time, Defendant was still unable to conform his conduct to the requirements of the law and was under extreme emotional distress at those times. (R. 925-26)

Pamela Mills, Defendant's older sister who was born on November 10, 1957, testified that she had not seen Defendant for 20 years before the evidentiary hearing. (R. 944-46, 949) Ms. Mills stated that she and Defendant had 3 brothers Lionel, Frank and Michael and one sister Valerie. (R. 947) According to Ms. Mills, Valerie lived with their grandmother Beatrice Brown. (R. 948) Their mother died in 1982. (R. 948-49) Ms. Mills had no

recollection of ever living with her mother. (R. 949) Instead, Ms. Mills, Defendant and their cousin Leon lived with Ms. Long and her family. (R. 949-50)

Ms. Mills stated that Ms. Long treated Defendant, Leon and her as stepchildren and thought the world of her own son Lawrence. (R. 951) She claimed that they were beaten daily. (R. 951-52) She stated that Lawrence "took advantage of [her] sexually" a few times when she was 6 or 7. (R. 952) She stated that she became pregnant by Lawrence and had a child around the age of 10. (R. 952) Shortly after her son Virgil was born, Ms. Mills moved to New York to live with her mother, Valerie and Michael. (R. 953)

She claimed that Defendant joined the family in New York when he was 11. (R. 953-54) She stated that her mother did not supervise the children because she was drunk. (R. 954) She stated that the children would also drink. (R. 954) However, she did not drink when she lived with Ms. Long. (R. 954) She stated that she never saw Leon drink or use drugs when he lived with Ms. Long. (R. 956-57)

She also used drugs when she lived with her mother. (R. 954-55) She stated that she had a substance abuse problem until she entered rehab in 1989. (R. 955, 966) After leave rehab in New York, she was in a halfway house for 9 months. (R. 955) She

presently lives by herself in New York and is trying to stay off drugs. (R. 956) In 1992, Ms. Mills was diagnosed with AIDS. (R. 956)

She stated that she, Defendant and Leon were beaten for failing to behave as Ms. Long wanted. (R. 957) She stated that the beatings would leave bruises and welts on their bodies. (R. 959) She claimed that she and Defendant were slow learners and that Ms. Long made them do extra school work. (R. 959)

She stated that she was not contacted by Koch or any investigators prior to trial. (R. 960) She averred that she would have come and testified had she been contacted. (R. 960)

On cross, Ms. Mills admitted that she was not in touch with her family from 1990 until 1997 or 1998. (R. 961-62) She acknowledged that she did not know how to contact her family and did not even remember their names during this time. (R. 962) She had no idea that Defendant had been arrested and convicted, and no one in the family knew where she was. (R. 962-63) Ms. Mills owned no real property, did not have a car and did not have a driver’s license. (R. 963) From 1986 to 1989, Ms. Mills lived on the street and had never provided a forwarding address to the post office. (R. 963, 967) Beginning in 1989, Ms. Mills spent 42 days in rehab, 9 months in a halfway house, a couple of months living with a sponsor, 6 months in a recovery house and then

moved into her own apartment. (R. 967-69)

Ms. Mills was never arrested in New York. (R. 970) She did have a social security number and did receive public assistance. (R. 970-71) When she had her own apartment, she did have utilities and a phone in her name. (R. 972)

Carl Leon Miller, Defendant's cousin, testified that he lived with Defendant, Valerie, Pamela and Lawrence at Ms. Long's home. (R. 974-75) Leon admitted that he had an extensive criminal history beginning at the age of 17 and had been incarcerated. (R. 975-76) His first arrest was for shooting Ms. Long because she had cut his hair. (R. 976-77) Leon stated that Defendant was the first child to go to live with Ms. Long and that he came to live there when Defendant was about 6 and Leon was 10 or 11. (R. 977) He stated that Pamela and Valerie joined the household later but did not remain in the house for very long. (R. 977-78)

Leon stated that about a year to a year and a half after he came to live with Ms. Long, Lawrence moved into the home. (R. 978) He claimed that he did not like Lawrence because Lawrence would beat the children with a belt. (R. 979) Leon stated that Lawrence acted as the enforcer for Ms. Long and would beat Defendant. (R. 983)

Leon stated that he left Ms. Long's home at 17 because he

did not care to behave in the manner which Ms. Long expected. (R. 979-80) Leon then stated that he lived in Ms. Long's house for 12 years. (R. 980) When the lower court pointed out that Leon could not have lived there 12 years if he came to live there at 10 or 11 and left at 17, Leon stated that he probably had the wrong ages. (R. 980)

Leon claimed that Ms. Long lived with his uncle, then with a Sgt. Hunt and finally with Rev. Long. (R. 981-82) Leon asserted that Sgt. Hunt moved out after he was threatened by family members for beating Leon and Defendant. (R. 982) He stated that Rev. Long did not beat them. (R. 982)

Leon stated that Pamela probably lived in the house for "some years" but he could not be sure how long. (R. 983) He stated that Pamela was the first to leave and went to New York. (R. 983) Valerie left and went to live with their grandmother in Miami. (R. 984) According to Leon, Defendant left when he was 12 to 13. (R. 984)

Leon claimed that he began using drugs around the age of 13 or 14. (R. 984) He asserted that he used all kinds of drugs. (R. 984) Leon stated that Defendant used drugs with him and that he gave drugs to Defendant. (R. 985) Leon stated that he began selling drugs at 15 and that Lawrence sold drugs as well. (R. 985)

Leon saw Lawrence chasing Pamela and putting his hands on her in a sexual way. (R. 986-87) While living in the house, Pamela became pregnant. (R. 987) Leon believed that Lawrence was the father. (R. 987)

Leon last saw Defendant in December 1990. (R. 987-88) They were at Aunt Beatrice's home smoking crack and drink with Michael and Valerie. (R. 988) He thought that it was the day before the murder but did not remember what time of day. (R. 988-89) He denied having seen Defendant since that time. (R. 989)

Leon stated that he lived at Beatrice Brown's home from 1990 to 1992. (R. 990) He admitted that in 1991, he spent a year in jail. (R. 990) He stated that he did not speak to Defendant's attorneys or investigators during this time. (R. 991) He claimed not to know that Defendant had been arrested for murder but later admitted that he had learned from family members before trial. (R. 991)

On cross, Leon denied having introduced Defendant to drugs. (R. 993) He did not know how old Defendant was when he started using drug with him. (R. 994)

He stated that on the day when he was at Ms. Brown's home using drugs, Defendant was injecting drugs. (R. 995) He claimed that when Defendant came home from prison, he lived at Ms.

Brown's home. (R. 995-96) During the weeks between when Defendant came home and committed this crime, Leon claimed to have seen Defendant injecting drugs. (R. 995-96) Leon asserted that he was smoking crack and drinking to the point of intoxication when he saw this. (R. 997)

Leon admitted that he had seen Defendant when Leon was in jail in 1991. (R. 998) He claimed that he did not know why Defendant was incarcerated although he did think that Defendant had been charged with murder. (R. 998-99) He admitted that he was allegedly living with Defendant at the time, that he knew Defendant had not come home, that he had seen a report on the crime on television and that the family was talking about it. (R. 1000) He acknowledged that he did know that Defendant had been charged with these crimes. (R. 1000-01) However, he claimed not to know that Ms. Brown and Ms. Long were speaking to Defendant's attorneys. (R. 1001)

He stated that he did not know because he was too busy doing his "own thing" to focus on what was happening around him. (R. 1001-02) He admitted that he was in no condition to testify at the time of trial because of his drug problem but claimed that he would have cleaned himself up to testify. (R. 1002) He claimed to have a good memory but could not remember when he had been arrested or why. (R. 1002-03) He claimed to have had too

many arrests and not to have a good memory for dates. (R. 1003-04)

He later claimed to have lived in Louisiana and Texas in 1991. (R. 1005) He then stated that he only lived in Louisiana and Texas for a couple of weeks. (R. 1007-08) He stated that at some time, he saw Defendant overdose on pills. (R. 1005-06) He stated that Defendant was taken by ambulance to JMH for treatment of the overdose. (R. 1006-07)

Dr. Merry Haber, a psychologist, testified that she was asked to evaluate Defendant pretrial. (R. 1009-10) At the time, Dr. Haber was told about the crime and Defendant's injury. (R. 1011) Dr. Haber was provided with Ms. Schwartz's notes and Defendant's prison records. (R. 1012) The letters from Koch indicated that information that she was provided although she did not remember being given contact information for siblings that was reflected in the letters. (R. 1012-13)

On January 20, 1992, Dr. Haber conducted a screening evaluation and asked about Defendant history, including family background, criminal history, education history and substance abuse history. (R. 1013-14) During this interview, Defendant was responsive to questions. (R. 1014) He claimed to have been in a car accident that did not result in his hospitalization that caused him to have headaches and dizziness thereafter. (R. 1015)

He related that he had been placed in JMH for evaluation after stealing a gun from someone. (R. 1015) He relied an extensive history of drug abuse beginning at age 12 or 13. (R. 1015-17) He stated that he had overdosed on quaaludes and valium at the age of 16. (R. 1016) Dr. Haber asserted that Defendant had track marks on his arm from injecting cocaine at the time of her interview. (R. 1017) He told Dr. Haber that he had lived with his mother as a young child and went to live with Ms. Long at age 6 and remained there for 6 years. (R. 1018) He stated that he ran away from home as a teenager and eventually went to New York for 3 years. (R. 1018) He provided the names of his sister Valerie and cousin Leon. (R. 1018) Dr. Haber stated that after speaking to Defendant, she spoke to the medical staff at the jail who allegedly stated that Defendant showed signs of being in drug withdrawal. (R. 1019)

In February 1992, Dr. Haber met with Defendant aunt, grandmother and school teacher. (R. 1020) Ms. Long told Dr. Haber that Defendant lived with her from infancy until he was 12 or 14. (R. 1021) She stated that Leon joined the household later and that she always had a paid babysitter for the boys. (R. 1021-22) She stated that Defendant was a good child and accompanied her to church until the age of 12. (R. 1021-23) When Defendant was between 12 and 14, he came home one day and was

not himself. (R. 1022) Ms. Long called the police, who stated that Defendant was sniffing transmission fluid. (R. 1022) Defendant then began skipping school and running away. (R. 1022) By this time, Defendant was also stealing and spent time in state school. (R. 1022)

Ms. Long related that Leon brought drugs into the house, and she reported him to the police. (R. 1022) She tried to get Leon to go to community college, but he would not go. (R. 1022) Eventually, Leon wrecked Ms. Long's car and was kicked out of the house. (R. 1022) Ms. Brown also reported that Defendant had a good home as a child. (R. 1023)

After doing this work, Dr. Haber reported her results to Koch. (R. 1024) She then heard nothing further about the case. (R. 1024-25)

In preparation for the post conviction hearing, Dr. Haber was provided with background information. (R. 1025) She did not recall having been given the school records, the 1975 hospital records or the affidavits from the family members. (R. 1026-27) Dr. Haber stated that based on this information and her work pretrial, she would have been able to testify to nonstatutory mitigation. (R. 1027) Dr. Haber believed that Defendant had a severe substance abuse problem. (R. 1027-28) She also stated that she could have testified that Defendant was abused as a

child based on the affidavits. (R. 1028-29)

In reviewing the 1975 hospital records, Dr. Haber opined that the admitting diagnosis of schizophrenia was wrong. (R. 1029-30) Instead, she stated that the symptoms would have been indicative of substance abuse by a teenager. (R. 1030) She believed that the final diagnosis of unsocialized aggressive behavior was correct. (R. 1030) She believed that the records indicated that Defendant needed to be placed in a residential juvenile drug treatment program. (R. 1030)

Based on Defendant's history, Dr. Haber would have recommended neuropsychological testing. (R. 1031) She was concerned that Defendant might suffer from fetal alcohol syndrome. (R. 1031) She also had seen reports of head trauma. (R. 1032)

Dr. Haber stated that she would have read Ms. Schwartz's notes when they were provided to her pretrial. (R. 1034) These notes confirmed Dr. Haber's finding of substance abuse. (R. 1034)

On cross, Dr. Haber admitted that she had information concerning Ms. Long, Ms. Brown, Mr. Whitney, Ms. Edwards and Defendant's siblings. (R. 1036-38) She only remember speaking to Ms. Long, Ms. Brown and Ms. Edwards. (R. 1037-38) She had been told about the alleged overdose and that Defendant was allegedly

admitted to JMH. (R. 1038-39) She stated that she had never seen any hospital records to substantiate this information and did not know if it was true. (R. 1039) Dr. Haber admitted that she had been provided with contact information for Ms. Schwartz, Mr. Sastre and Drs. Lefler, Eisenstein and Sevsush. (R. 1040)

Dr. Haber was not of the opinion that any statutory mental mitigators applied. (R. 1041-42) She stated that the only thing that she could testify to was substance abuse and child abuse and that the child abuse diagnosis depended on the veracity of the family affidavits. (R. 1042-43) She stated that she would find childhood abandonment even if Defendant never lived with his mother and had been adopted into a good home. (R. 1042-43)

Dr. Haber admitted that Defendant had not been found to be on drugs when tested in prison. (R. 1043-44) She stated that if the new information regarding family abuse was not accurate, she would not find child abuse as it is contrary to the information provided pretrial. (R. 1044-45) She admitted that Defendant was already being seen by a neuropsychologist and a neurologist and stated that she would have wanted to talk to these doctors if she had continued on the case. (R. 1046)

Dr. Haber stated that the length of time that someone was in withdrawal depended upon the drug use. (R. 1047) She had seen people take a couple of days to go into alcohol withdraw and a

week to go into cocaine withdraw. (R. 1047-48)

Dr. Haber admitted that she had spoke to Dr. Lefler before trial. (R. 1050-51) She stated that she would have assisted in locating family members if she had continued on the case. (R. 1052)

Dr. Haber admitted that Defendant could not have been living with his mother between the ages of 14 and 16 because he was in juvenile detention. (R. 1054) Instead, the records indicated that Defendant had to have been 16 or 17 when he went to New York. (R. 1055)

Dr. Jethro Toomer, a psychologist, testified that he was asked to evaluate Defendant for mitigation by Koch pretrial. (R. 1087-89) In conducting this evaluation, Dr. Toomer saw Defendant on 3 occasions and reviewed school records, prison records and Ms. Schwartz's notes. (R. 1090, 1093) He also spoke to Ms. Long and Vera Edwards, one of Defendant's teachers. (R. 1090-91) Based on this information, Dr. Toomer found that Defendant came from a dysfunctional family and had borderline personality disorder. (R. 1091)

In preparation for the evidentiary hearing, Dr. Toomer had reviewed statements from Defendant's family members, prison records, the 1975 hospital records and information about the other experts opinions. (R. 1091-92) Dr. Toomer had not seen the

1975 hospital records and the toxicology report before trial. (R. 1093-94) Some of the prison records were different than the ones he saw pretrial. (R. 1093-94) Dr. Toomer had known that Defendant was being evaluated by at least one other expert but did not recall knowing who the other experts were. (R. 1095)

Dr. Toomer stated that the new information reinforced his prior opinions in the case. (R. 1095-96) He claimed that the new information provided a different version of Defendant's life with Ms. Long. (R. 1096-97) Dr. Toomer felt that the 1975 hospital records were important because of the admitting diagnosis, which he believed was based on clinical observation and indicated that Defendant was out of control. (R. 1098-99) He stated that the fact the discharge diagnosis was different did not affect his opinion of the import of the records. (R. 1099-1100) He opined that these records showed a history of impulse control and was indicative of a history of dysfunction. (R. 1104-05)

Dr. Toomer stated that the new records were important to his diagnosis of substance abuse. (R. 1101) However, he admitted that he was aware of an extensive history of substance abuse pretrial. (R. 1101) Dr. Toomer also felt that the toxicology report helped him evaluate Defendant's level of intoxication at the time of the crime. (R. 1102) Dr. Toomer did not recall

discussing substance abuse with Koch pretrial. (R. 1102)

On cross, Dr. Toomer admitted that he was aware of the 1975 hospitalization and had asked for records from it. (R. 1109-10) However, he was informed that they were unavailable. (R. 1109-10) He stated that the admitting diagnosis would have been based in part on the statements from the people who brought Defendant to the hospital. (R. 1110-11) He claimed that a "mini mental status" evaluation would also be part of the admitting diagnosis. (R. 1111-12) He had noted that the records indicated that the hospitalization may have been provoked by Defendant's attempt to get out of juvenile detention. (R. 1112) He stated that he did not consider that notation to be indicative of an attempt to manipulate the system and would have to be considered with other information. (R. 1112)

Dr. Toomer admitted that he had been aware of most of the information in the records pretrial. (R. 1113) He admitted that he had school records and prison records from Defendant's prior incarcerations pretrial. (R. 1114-15) He knew Defendant had been referred to substance abuse treatment before these crimes and had refused treatment. (R. 1115) He was aware that Defendant claimed to have been beaten as a child by his cousin Lawrence. (R. 1116-17) He knew that Ms. Long was a perfectionist, that the rules of her home were made known to Defendant and that

Defendant was swiftly punished for breaking those rules. (R. 1117-18) He was aware of the history of substance abuse and the alleged overdose. (R. 1119-20) He admitted that the 1975 hospital records did not contain new information but only provided details of existing information. (R. 1120-21)

Dr. Toomer admitted that he had still not seen any records to substantiate the alleged overdose. (R. 1121) As such, he could not be sure that it ever happened. (R. 1121-22) However, he believed it was true because it was noted in the history in the 1975 hospital records. (R. 1122-24) He admitted that the records did not show that Defendant was ever medicated or received any treatment during this hospitalization. (R. 1124-26) However, he insisted that the admitting diagnosis was more reliable that the discharge diagnosis because patients received treatment and medication while hospitalized. (R. 1124-26) He admitted that the discharge diagnosis was consistent with his trial testimony. (R. 1127) He insisted that they had to have done something with Defendant during his stay other than the observation and testing indicated in the record. (R. 1129-30) He admitted that the records did not indicate that Defendant was mentally ill. (R. 1130)

Dr. Toomer admitted that his testimony had not changed from the time of trial. (R. 1130-31) Instead, he stated that the

additional record only reinforced his original opinion. (R. 1130-31) He stated that he had not checked to see what information he had pretrial and how that information corresponded with the information he was given by post conviction counsel. (R. 1131-35) He did claim to have checked the prison record and to have determined that he was given additional record. (R. 1135)

Dr. Toomer stated that he normally would have spoke to other experts about a defendant if possible. (R. 1135) He had no recollection of his discussions with Koch. (R. 1136) He stated that even if the information for family members was not entirely true, it would not have affected his opinion because it corroborated what Defendant had told him. (R. 1136-37)

Dr. Toomer stated that the toxicology report showed a pattern of substance abuse. (R. 1138) Dr. Toomer did know what substances the tests were designed to detect. (R. 1138-40) However, he had no idea what the report meant in terms of amount consumed and time of consumption. (R. 1140) Dr. Toomer stated that he did not have sufficient information to determine if Defendant was intoxicated at the time of the crime. (R. 1141-43)

Dr. Toomer opined that Defendant had borderline to average intellectual functioning. (R. 1156) He admitted that he had previously testified that Defendant’s intellectual functioning

was average. (R. 1156) He claimed never to have determined if Defendant was competent and did not recall if he had ever communicated any concerns about Defendant's competence to Koch. (R. 1154-55) However, he stated that if he had been concerned, he would have told Koch. (R. 1155)

The State presented the testimony of Vera Edwards, Defendant's third grade teacher. (R. 1161-62, 1168) Ms. Edwards knew Ms. Long because Ms. Edwards' daughter attended Ms. Long's daycare. (R. 1163) Ms. Long had contacted Ms. Edwards pretrial and Ms. Edwards had spoken to some of the experts about Defendant pretrial. (R. 1164-655)

Ms. Edwards stated that she remembered Defendant as a very alert student whose appearance and discipline were acceptable. (R. 1165) She stated that Defendant was well prepared for school. (R. 1165) She did not recall Defendant ever having academic or disciplinary problems. (R. 1166) She stated that Defendant was an above average student. (R. 1166)

Ms. Edwards was in daily contact with Ms. Long, who was always concerned about Defendant, and had made sure that Ms. Long was a good caretaker because she kept Ms. Edwards' daughter. (R. 1166-67) As a teacher for more than 30 years, Ms. Edwards was aware of signs of abuse in children beyond simple injuries. (R. 1167) Defendant never exhibited any signs of being

abused. (R. 1167-68)

Virgil Brown testified that he is the son of Pamela Mills and Lawrence Brown. (R. 1185) He was born on April 9, 1972. (R. 1185)

Dr. Charles Mutter, a psychiatrist, testified that he did a court-appointed evaluation of Defendant at the time of trial. (R. 1187-90) Dr. Mutter evaluated Defendant between the guilt and penalty phases and was aware that Defendant was upset with Koch. (R. 1190-91) Defendant explained that he was upset because Koch had not done some of the things that he wanted done. (R. 1191) Specifically, Defendant had claimed that Koch had advised him not to testify, and Defendant thought that was poor advise. (R. 1193)

Prior to evaluating Defendant, Dr. Mutter had the hospital records for the gunshot wound, Dr. Toomer's report and deposition, police reports, prison medical records and Dr. Eisenstein's notes and records. (R. 1194-95) Dr. Mutter found Defendant competent to stand trial. (R. 1195-96) He found Defendant's thinking clear and organized and saw no signs of mental illness. (R. 1196-97) Defendant gave Dr. Mutter a family history consistent with what he had told Dr. Toomer. (R. 1198) He told Dr. Mutter about the 1975 hospitalization and the alleged overdose. (R. 1198) Defendant felt neglected and stated

that the beatings were for misbehavior. (R. 1199-1200) Defendant also told Dr. Mutter about his history of substance abuse. (R. 1200-01) Defendant acknowledged having been sent to 4 different drug rehab programs and not having attended any of them. (R. 1201) Defendant stated that he did not go because he did not need treatment. (R. 1201)

Dr. Mutter found no evidence of major mental illness. (R. 1201) Instead, Dr. Mutter stated that Defendant had antisocial personality disorder, which was consistent with the discharge diagnosis of unsocialized aggressive disorder. (R. 1201-02) Dr. Mutter found that Defendant could be manipulative. (R. 1202-03) As a sociopath, Defendant was more prone to lie and to exaggerate symptoms. (R. 1203-04) Dr. Mutter stated that Defendant's use of drugs was a voluntary choice Defendant had made. (R. 1205-04) Dr. Mutter believed that the toxicology report showed that Defendant was not intoxicated at the time of the crime. (R. 1206) Dr. Mutter did not believe that Defendant was under extreme mental or emotional distress and the 1975 hospital records did not change that opinion. (R. 1206-07) He believed that Defendant did have the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law. (R. 1226)

On cross, Dr. Mutter stated that an admitting diagnosis is

based on superficial observations and that a discharge diagnosis was a better idea of the real state of the person. (R. 1213-14)

Dr. William Hearns, the director of the toxicology lab at the medical examiner's office, testified that he had a doctorate in pharmacology with a speciality in toxicology. (R. 1238-39) He had worked in toxicology for 21 years. (R. 1239) He had studied both legal and illegal drugs and had studied the symptoms of withdraw. (R. 1239-40) He had testified as an expert on drug withdraw and the analysis of blood for illegal drugs between 200 and 300 times. (R. 1240) He had published peer reviewed articles on pharmacology and toxicology, particularly cocaine. (R. 1242) He had done research in the effects of cocaine and was affiliated with a drug treatment program. (R. 1243-44) Based on these qualifications, the State asked that Dr. Hearns be declared an expert in the areas of pharmacology, toxicology, the effects of drugs on the body and withdraw from drugs. (R. 1241) Defendant objected to Dr. Hearns being allowed to testify to the effects of drugs on the body. (R. 1244) The State asserted that Dr. Hearns was qualified to give an opinion of intoxication and withdraw. (R. 1244) The trial court permitted Dr. Hearns to testify to the physiological effects of drugs. (R. 1245)

Dr. Hearns stated that he had conducted a toxicological assessment of blood drawn from Defendant at 1:40p.m. on the day

of the crime. (R. 1245-48) The hospital records indicated that Defendant had no alcohol in his system at that time. (R. 1248) His analysis confirmed that finding. (R. 1248) The blood was also tested for the presence of opiates, including heroin, and none was found. (R. 1248-49)

The blood did show a trace of cocaine too small to measure and a metabolyte of cocaine. (R. 1249) Dr. Hearns stated that cocaine was eliminated from the body such that it is undetectable in between 6 and 10 hours. (R. 1249-50) As such, Dr. Hearns opined that Defendant had used some cocaine in the 10 hours before the blood was drawn. (R. 1250) He believed that the cocaine had been ingested at least 2 to 3 hours before the blood was drawn. (R. 1251) Because of the amount of the metabolye, Dr. Hearns stated that Defendant had taken more than one line of inhaled cocaine but had not taken a large amount. (R. 1250) The amount of cocaine in Defendant’s blood was insufficient for him to have been under the influence of cocaine. (R. 1251)

Dr. Hearns stated that heroin withdrawal would onset within 12 to 24 hours after a person last took the drug. (R. 1252) The person would become agitated and have nausea, cramps, diarrhea, vomiting and goosebumps. (R. 1252) After about 5 days, the person would come out of withdraw. (R. 1252) Dr. Hearns stated that alcohol withdraw symptoms would include hallucinations,

convulsions, an inability to regulate body temperature and electrolyte disturbances. (R. 1252-53) Alcohol withdraw can be life threatening and would have been treated with medication. (R. 1252-53) The medical records indicated that Defendant remained in the hospital for 14 days. (R. 1254) Dr. Hearns opined that Defendant would not have still been in withdraw by the time he was discharged unless he was given narcotics and sedatives in the hospital. (R. 1254-55)

Dr. Hearns stated that if the murders had been committed between 11:00a.m. and noon, Defendant could not have been intoxicated at that time based on the levels in his blood. (R. 1255-56) Instead, Defendant would only have been feeling a mild stimulant effect that would not have affected his judgment or behavior. (R. 1256) Defendant would have had the ability to appreciate the criminality of his conduct and to have conformed his conduct to the requirements of the law at the time of the crime based on the level of cocaine in his blood. (R. 1257-58) The level of cocaine in his blood would not have caused Defendant to have been under an extreme mental or emotional disturbance. (R. 1258-59)

On cross, Dr. Hearns stated that it was possible for a person to be under the influence of cocaine and not intoxicated. (R. 1277) He stated that at mild doses a person under the

influence of cocaine would exhibit increased reaction time and dexterity. (R. 1277) At higher doses, cocaine would cause agitation and behavioral changes. (R. 1277) The level of cocaine and metabolyte in Defendant's blood indicated that he was not at a high dose for several hours before the blood was drawn. (R. 1277-78)

On redirect, Dr. Hearns stated that Defendant's medical records did not reflect the administration of drugs other than Tylenol and Tylenol 3, which would not have delayed withdraw. (R. 1281, 1287) Dr. Hearns stated that cocaine did not produce symptoms of physical withdraw. (R. 1282) Instead, the person would exhibit sleep disturbances and nervousness. (R. 1282) Heroin and alcohol withdraw would have physically noticeable symptoms. (R. 1283)

On March 8, 2001, the post conviction court entered its written order denying Defendant's motion for post conviction relief. (R. 379-96) It summarily denied those claims on which an evidentiary hearing had not been ordered as legally insufficient, procedurally barred or both. *Id.* With regard to the claim of ineffective assistance of counsel, the Court found that Defendant had not proven either deficiency or prejudice. It rejected the claim that counsel was ineffective for failing to investigate and present mitigation and for failing to seek a

pretrial competency determination on both prongs of *Strickland*. *Id.*

This appeal follows.

## SUMMARY OF THE ARGUMENT

The lower court properly rejected the claims of ineffective assistance of counsel at the guilt and penalty phases. The lower court properly found that the claim regarding the motion to withdraw as counsel based on an alleged conflict of interest was procedurally barred. Moreover, the claim is meritless. Defendant has not specifically alleged what rulings on the public records issues were allegedly erroneous or what public records for what agencies he did not receive. Moreover the lower court's rulings on the public records issues were proper. The claim of insanity to be executed is not properly raised at this time.

## ARGUMENT

### I. THE LOWER COURT PROPERLY REJECTED THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE.

Defendant first asserts that the lower court erred in denying his claims that his counsel was ineffective at the guilt phase. He first asserts that the lower court should not have rejected his claim of ineffective assistance of counsel for failing to investigate and present voluntary intoxication as a defense. He next contends that the lower court improperly denied

an evidentiary hearing on his claims that counsel was ineffective for failing to present evidence of gunshot residue tests, for failing to strike Juror Carpenter, Juror Dicus and Juror Wallo, for failing to question the venire about voluntary intoxication, and for failing to ensure Defendant’s presence at critical stages of trial. However, the lower court’s resolution of these claims was proper.

## A. VOLUNTARY INTOXICATION

Defendant contends that the lower court erred in denying his claim that his counsel was ineffective for failing to investigate and present a claim of voluntary intoxication. The lower court denied this claim after an evidentiary hearing, stating:

> Defendant also asserts that counsel was ineffective for failing to present a defense of intoxication. An evidentiary hearing was held on this issue. Defendant's trial counsel, Art Koch, testified that although he may have provided the mental health experts with evidence regarding the Defendant's intoxication, because the Defendant told him he was not intoxicated at the time of the incident he chose not to present this defense. Koch further testified that in his extensive experience as a defense attorney in capital cases that juries generally did not accept intoxication as a mitigating circumstance.
>
> In light of the fact that Defendant's trial counsel was aware of the possibility of presenting an intoxication defense and chose not to do so as a matter of trial strategy, his representation can not be deemed ineffective. *Johnson v. State*, 25 Fla. L. Weekly S578, S581 (Fla. July 13, 2000)("Counsel's strategic decisions will not be second guessed on collateral attack") and *Remeta v. Dugger*, 622 So. 2d 452, 455 (Fla. 1993).
>
> Even if trial counsel was deficient for failing to present a defense of voluntary intoxication, his deficiency does not rise to the level of ineffective assistance of counsel as required by the second prong of *Strickland*, *supra*. In order to meet this second prong, the Defendant would have to show that an intoxication defense was likely to succeed and but for trial counsel's deficient performance, he would have prevailed at trial. Here, that showing was not made.
>
> The toxicology report presented as evidence showed that the level of intoxicants in the Defendant's system were insufficient to have caused him to be

> intoxicated at the time of the crime. This evidence was supported by the testimony by Dr. William Hearns, the director of the toxicology department at the medical examiners office, who reviewed the toxicology report of blood drawn from the Defendant approximately two (2) hours after the incident occurred. Dr. Hearns further testified that the amount of cocaine and metabolite found in the Defendant's blood were insufficient to have caused his intoxication at the time the murders occurred.
>
> The defense presented the testimony of both Dr. Fisher and Dr. Eisenstein, who suggested that the Defendant was in fact intoxicated at the time of the crime. However, their opinions were based on information provided to them by a number of family members and contradicted the conclusions contained in the toxicology report. Both doctors testified that they were not able to read the toxicology report, which indicated that the Defendant was not intoxicated at the time of the crime. This Court finds that both of the opinions of the doctors are contradicted by the medical evidence, based upon inadmissable hearsay, and not credible.
>
> The evidence at trial showed that the Defendant had told a nurse caring for him in the hospital that he "had to kill" the victims because they owed him money. (T. 1332) Based upon the medical evidence, as well as the Defendant's statement of intent, defense counsel's decision not to present the issue of intoxication was reasonable. Even if it had been presented, it is not probable that it would have affected the outcome of the trial.

(R. 383-85)

In reviewing these findings, this Court is required to accept the lower court's factual findings to the extent that they are supported by competent, substantial evidence. *Stephens v. State*, 748 So. 2d 1028, 1033-34 (Fla. 1999). However, this Court may independently review the lower court's determination

of whether those facts support a finding of deficiency and prejudice to support a holding that counsel was not ineffective. *Id.*

Defendant first asserts that the lower court erred in accepting Koch's testimony that he made a strategic decision not to present a voluntary intoxication defense. He instead contends that the lower court should have rejected this testimony because Koch rejected an intoxication defense as a matter of personal bias without any investigation. However, the lower court properly rejected this claim.

Koch testified that Defendant informed him that he was not intoxicated and that he had not committed the crime. (R. 521, 587-88) He stated that he had decided not to pursue an intoxication defense because such a defense was generally received badly by juries. (R. 521-22, 616-17, 620-24) While Koch did at one point characterize his rejection of intoxication as a personal bias, he went on to explain that his "personal bias" was not based on his personal feeling about intoxication. (R. 616-21) Instead, it based on his 22 years of experience as a criminal defense attorney, his 14 years of experience representing capital defendants, his discussions with people who had served on juries and his research of jury studies on the issue. (R. 616-21)

This Court has previously held that the rejection of a claim of ineffective assistance of counsel for failing to present a voluntary intoxication defense is appropriate where the defendant has denied committing the crime. *Rivera v. State*, 717 So. 2d 477, 485 (Fla. 1998); *Remeta v. Dugger*, 622 So. 2d 452, 455 (Fla. 1993). This Court has also found that a defense attorney's decision not to present an intoxication defense because the attorney thought that juries were not responsive to such defenses was an appropriate strategic decision. *Johnson v. State*, 769 So. 2d 990, 1001-02 (Fla. 2000). As a fair reading of Koch's testimony is that he did not present a defense of voluntary intoxication because he was presenting an inconsistent defense based on Defendant's statements and because juries do not accept such defenses, the lower court properly rejected this claim. It should be affirmed.

Defendant asserts that Koch's strategic decision should be overlooked because he asserts that Koch did not sufficiently investigate the issue of intoxication before making the decision. However, the Eleventh Circuit Court of Appeals recently rejected this argument. In *Williamson v. Moore*, 221 F.3d 1177, 1179 (11th Cir. 2000), the defendant contended that his counsel was ineffective for failing to present a defense of self defense. Williamson alleged that his counsel's strategic

decision was flawed because it was not made after an investigation. The Court rejected this claim, stating:

> But, no absolute duty exists to investigate a particular line of defense. Counsel's decision not to conduct a defense need only be reasonable. This Circuit has refused to conclude that tactics "can be considered reasonable only if they are preceded by a 'thorough investigation'".

*Id*. Here, counsel's decision not to investigate was reasonable.

Defendant told Koch that he had not committed the crime and was not intoxicated. Koch had read the toxicology report and knew that it showed traces amount of cocaine and a metabolite thereof. (T. 394) As Dr. Hearns testified, the amount of cocaine and the metabolite were insufficient to have caused Defendant to be intoxicated between 11:30 a.m. and noon. The report indicated that it was an analysis of admission blood, and the medical records showed that the admission blood was drawn at 1:40 p.m. on the day of the crime. Additionally, Dr. Ruben, who treated Defendant, found him to be alert and oriented at the time of his admission. (T. 1877-80) At the time of his arrest, Defendant told the police that he did not use drugs. (T. 1719)

Further, the evidence at trial showed that the victims were alive and making phone calls until approximately 11:30 a.m. (T. 1459-64, 1591-96) The victims' bodies were found around noon. (T. 1324-25, 1631-34) Defendant's car was seen at Nestor

Engineering, the scene of the crime and Defendant's place of employment, at 8:10 a.m. (T. 1322) Defendant was found in Nestor Engineering when the police arrived. (T. 1285, 1290) Defendant was not seen by Ernesto Sorondo, who worked and lived next door, and no one other than the victims entered or left Nestor Engineering on the morning of the murder. (T. 1323-24, 1328-29) Further, Defendant told Edwina Crum, a nurse who cared for him in the hospital that he "had to kill them" because "[t]hey owed me money." (T. 1832) Given that there was no one alive who had seen Defendant in the three to four hours before the crime, the medical evidence showed that Defendant was not intoxicated at the time of the crime and Defendant admitted his intent to kill the Nestors, Koch's decision not to investigate the issue of intoxication was reasonable. *Rivera*; *Koon v. Dugger*, 619 So. 2d 246, 248-49 (Fla. 1993); *Bertolotti v. State*, 534 So. 2d 386, 387 (Fla. 1988).

Defendant next contends that the lower court improperly found that Defendant had not proved prejudice. While Defendant asserted that he presented ample evidence to support an intoxication defense, this is simply not true.

As this Court has stated:

> We note that evidence of [intoxicant] consumption prior to the commission of a crime does not, by itself, mandate the

> giving of jury instructions with regard to voluntary intoxication. As this Court determined in *Jacobs v. State*, 396 So. 2d 1113 (Fla.), *cert. denied*, 454 U.S. 933, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981), where the evidence show the use of intoxicants but does not show intoxication, the instruction is not required.

*Linehan v. State*, 476 So. 2d 1262 (Fla. 1985). Moreover, a defendant must present evidence of the quantity of intoxicants used and when. *Savage v. State*, 588 So. 2d 975, 979-80 (Fla. 1991); *Jacobs v. State*, 396 So. 2d 1113, 1115 (Fla. 1981). Further, an expert can only testify that a defendant was intoxicated if direct, non-hearsay evidence of the defendant's consumption of intoxicants is presented. *Holsworth v. State*, 522 So. 2d 348, 352 (Fla. 1988); *Burch v. State*, 478 So. 2d 1050, 1051-52 (Fla. 1985); *Cirack v. State*, 201 So. 2d 706 (Fla. 1967).

At the evidentiary hearing, the only witness who testified to Defendant's alleged use of intoxicants around the time of the crime was Leon Miller. Mr. Miller was not even sure if the day on which he claimed that he was using crack and alcohol with Defendant was the day before the crime. He did not know what quantity of drugs Defendant had allegedly consumed and was unsure of the time of day or night at which the drugs were used. While Defendant asserts that Ms. Schwartz's notes show the

amount and type of substances Defendant was using, Koch testified that these notes appeared to concern one of Defendant's prior convictions. Defendant did not call Ms. Schwartz to testify about the notes. Moreover, the notes asserted that Defendant had been drinking alcohol and the toxicology report showed that Defendant was not.

Moreover, Defendant does not explain how counsel could have found a witness that would have testified that he was, in fact, intoxicated at the time of the crime. As noted previously, the only people who saw Defendant between the time he arrived at work before 8:10 a.m. until the time the police arrived at the scene after noon were the victims. As the victims were dead, there was no one who could testify to Defendant's condition between 11:30 a.m. and noon, the time at which the crime occurred.

As there was not even sufficient evidence to have merited an instruction on a voluntary intoxication defense, the lower court properly found that there was no reasonable probability of a different outcome had Koch attempted to present such a defense. *Strickland*; *see also Smith v. State*,445 So. 2d 323, 325 (Fla. 1983)(burden on defendant to prove claim). The lower court's determination that Defendant was not prejudiced should be affirmed.

He next asserts that the lower court should not have accepted Dr. Hearns' opinion that the toxicology results showed that Defendant was not intoxicated. Defendant asserts that the lower court had not found Dr. Hearns qualified to give an opinion on intoxication. However, the record reflects that the lower court did find Dr. Hearns qualified as an expert on intoxication. Moreover, the record supports this finding. Dr. Hearns had a degree in pharmacology and extensive experience in toxicology. As such, the lower court did not abuse its discretion in allowing Dr. Hearns to opine on whether or not Defendant was intoxicated.

Moreover, Dr. Hearns' opinion did show that Defendant was not intoxicated in the legal sense. He stated that the detection of a trace amount of cocaine was insufficient to have cause Defendant to be under the influence of cocaine. (R. 1251) He stated that Defendant might had been feeling a slight stimulant effect at the time he committed the crime but the amount of cocaine in his system was insufficient to affect Defendant's judgment and behavior. (R. 1255-56) He stated that the amount of cocaine in his blood would not have interfered with Defendant ability to understand the criminality of conduct or to conform his conduct to the requirements of the law. (R. 1256) Under these circumstances, the lower court properly accepted Dr.

Hearns' testimony that Defendant was not so intoxicated that he could not have formed intent. As such, the lower court properly denied this claim.

Defendant also contends that the lower court improperly rejected the opinion of his experts that he was intoxicated. He contends that the lower court should not have found his experts incredible and should not have considered the fact that their opinions were based on inadmissible hearsay. However, the lower court had an ample basis to make both of these findings.

As previously noted, an expert can only testify that a defendant was intoxicated if direct, non-hearsay evidence of the defendant's consumption of intoxicants is presented. *Holsworth v. State*, 522 So. 2d 348, 352 (Fla. 1988); *Burch v. State*, 478 So. 2d 1050, 1051-52 (Fla. 1985); *Cirack v. State*, 201 So. 2d 706 (Fla. 1967). Mr. Miller, the only witness who testified that Defendant consumed intoxicants, did not know when the intoxicants were consumed or in what amount. Moreover, while Mr. Miller claimed that he would have been available to have testified at trial, he admitted that he knew Defendant was under arrest for murder charges and to being in contact with Ms. Long and Ms. Brown, who were in contact with defense counsel. He stated that he had not come forward at the time because he could not "focus" due to his own drug use and life. Under these

circumstances, the lower court properly found that Defendant had not proven that he could have presented direct, nonhearsay evidence to have supported the admission of the experts testimony and rejected it on that basis. The denial of the claim should be affirmed.

Moreover, both Dr. Fisher and Dr. Eisenstein based their opinions on information provided to them by a number of family members, including Michael, Valerie, and Aunt Bea. Dr. Fisher particularly emphasized that his opinion was largely based on what Michael told him. However, no evidence was presented regarding whether these individuals would have been available at the time of trial. As argued previously, while Mr. Miller claimed that he would have been available, this assertion was not credible. As Defendant did not show that the basis of the opinions would have been available, he did not prove that counsel could have presented such opinions at the time of trial. In order to have shown that Koch was ineffective for failing to present these opinions, Defendant had to show that such opinions were available at the time of trial. *State v. Riechmann*, 777 So. 2d 342, 355 (Fla. 2000); *see also Elledge v. Dugger*, 823 F.2d 1439, 1466 (11th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988). As such, the lower court properly denied this claim.

Further, both Dr. Eisenstein and Dr. Fisher stated that they

had relied on the toxicology report. However, both admitted that they did not know what the report meant. As such, the lower court properly found that the doctors were not credible. The denial of the claim should be affirmed.

**B. GUNSHOT RESIDUE**

Defendant next contends that the lower court erred in summary denying his claim that counsel was ineffective for failing to present the result of the gunshot residue tests of Defendant's hand and Mr. Nestor's right hand. Defendant asserts that counsel should have used this evidence to show that Mr. Nestor had not fired the gun and that Defendant had not touched the gun either during the shooting or thereafter. However, the trial court properly summarily denied this claim as it was inconsistent with counsel's theory of the crime and the evidence.

Defendant's theory of the crime was that he was accidently shot by Mr. Nestor when he came upon Mr. Nestor and the unknown assailant struggling and attempted to pull the assailant off of Mr. Nestor. (DAT. 1275) He asserted that Defendant had then moved around the office attempted to use the phone to call for help and picked up Mr. Nestor's gun to protect himself. (DAT. 1275-76) This theory was consistent with the evidence of blood on the phone, Defendant's statement that Mr. Nestor had shot him

and Defendant's possession of the gun when the police arrived. However, it would be inconsistent with claim that the gunshot residue tests show that the unknown assailant fired the shot and that Defendant never touched the gun. As this theory is inconsistent with the defense counsel asserted, he cannot be deemed ineffective for failing to raise it. *See Rivera v. State*, 717 So. 2d 477, 485 (Fla. 1998); *Remeta v. Dugger*, 622 So. 2d 452, 455 (Fla. 1993).

Moreover, there is no reasonable probability that the presentation of the gunshot residue results would have affected the outcome of the trial. As Defendant notes, a gunshot residue test was only conducted on Mr. Nestor's right hand. Initial Brief at 63. As such, the failure to find gunshot residue on that hand did not preclude the possibility that Mr. Nestor fired the gun with his left hand. Moreover, the gun was found tucked under Defendant's left arm when the police arrived. (T. 1286, 1290, 1714) As such, the record conclusively shows that Defendant touched the gun at some point. Moreover, gunshot residue tests are not conclusive proof of whether or not someone has shot a gun. *State v. Riechmann*, 777 So. 2d 342, 355-56 (Fla. 2000); *Mills v. State*, 476 So. 2d 172 (Fla. 1985). Given all of these factors, the fact that Defendant was found in possession of the victims' property, the fact that no one was seen entering or

exiting the building, the fact that the building was secured, the fact that the murder weapon was left at the scene, the fact that there was no physical evidence that anyone else had been in the building and the fact that Defendant confessed, there is no reasonable probability that the jury would not have convicted Defendant had counsel presented the gunshot residue test results. As such, counsel cannot be deemed ineffective. *Strickland*. The lower court properly denied this claim.

**C. VOIR DIRE**

Defendant next asserts that the lower court should have granted an evidentiary hearing on his claim that counsel was ineffective during voir dire. He appears to contend that counsel should have moved to exclude Ms. Carpenter, Mr. Discus and Mr. Wallo. He also claims that counsel was ineffective for failing to question the venire about intoxication. However, the lower court properly denied these claims.

During initial questioning by the trial court, Ms. Carpenter was asked if she felt that anyone convicted of first degree murder had to be sentenced to death and responded, “If it’s proven.” (DAT. 956-57) She then stated that she would not automatically vote to impose a death sentence upon conviction and would keep an open mind in evaluating the aggravating and mitigating circumstances. (DAT. 957) During his questioning,

defense counsel made statements about the justice system being overly protective of the rights of the accused and asked for the opinions of the veniremembers on this issue. (DAT. 1178-84) When he asked Ms. Carpenter's opinion, she agreed that the accused seemed to have more rights. (DAT. 1180-81) However, when counsel asked if that opinion would affect her ability to be fair, she responded that it would not. (DAT. 1180-81) Defense counsel later asked Ms. Carpenter about her feeling regarding a defendant not testifying. (DAT. 1191) She indicated that she would like to hear his testimony and that she would wonder why he was not testifying. (DAT. 1191) When asked if it would influence her decision with regard to whether Defendant was not guilty, she responded:

> Well, no, I don't think that's difficult. I wouldn't judge someone guilt because he didn't testify on his behalf, no. I wouldn't do that.

(DAT. 1192) The trial court then indicated that it had seen Ms. Carpenter nodding during a discussion of the State's burden of proof. It inquired if she was willing to follow an instruction that the burden was exclusively on the State and that what Defendant did or did not do was irrelevant. (DAT. 1198-99) Ms. Carpenter indicated that she would. (DAT. 1199)

Mr. Dicus stated that he had been the victim of a mugging in which he was knocked unconscious and did not see the

perpetrator. (DAT. 958) The following exchange occurred about his ability to be fair:

> THE COURT: Will that experience affect you in any way considering this case?
> MR. DICUS: No.
> THE COURT: You heard Mr. Jones is charged with armed robbery.
> Do you feel you can set aside your personal experience and strictly decide this case on the law and the evidence in this case?
> MR. DICUS: If it has to be.
> THE COURT: You can set aside your personal experience?
> MR. DICUS: Yes.

(DAT. 959) The State inquired about Mr. Dicus' experience with the police in conjunction with the robbery of which he was a victim. (DAT. 1092-93) He again indicated that the prior incident would not affect his ability to be fair in this case. (DAT. 1093)

Mr. Wallo stated that he would weigh the aggravating and mitigating circumstances and follow the law regarding the imposition of a death sentence. (DAT. 1019-20) On questioning by the State, Mr. Wallo stated that he did not have any problem considering the aggravating and mitigating circumstances and following the law in making a decision whether to recommend death. (DAT. 1158-59) The following colloquy then occurred:

> [The State]: For example, if the mitigating circumstances were stronger than the aggravating circumstances you could recommend life imprisonment?
> MR. WALLO: I don't know.
> [The State]: The mitigating circumstances -- in other

> words, the things that were in favor of the defendant, if they were stronger than the aggravating circumstances the Judge would instruct you that it would be your lawful duty to recommend life imprisonment instead of the death penalty?
> MR. WALLO: Yes.
> [The State]: And if the aggravating circumstances outweigh the mitigating circumstances and the Judge instructed you that you could recommend the death penalty would you follow that instruction?
> MR. WALLO: Yes.

(DAT. 1159)

While Defendant asserts that the trial court would have been obliged to remove these veniremembers for cause had counsel so requested, this is untrue. A veniremember can only be removed for cause if the trial court has a reasonable doubt about the veniremember's qualifications. *Bryant v. State*, 656 So. 2d 426, 428 (Fla. 1995). In making a determination of whether the veniremember is qualified, the trial court is required to consider the totality of the veniremember's answers. *See Bryant*, 656 So. 2d at 428; *Taylor v. State*, 638 So. 2d 30, 32 (Fla. 1994)(same); *Trotter v. State*, 576 So. 2d 691, 694 (Fla. 1990)(same). Here, when the totality of the answers of Ms. Carpenter, Mr. Dicus and Mr. Wallo are considered, it is clear that the trial court would not have had a basis for having a reasonable doubt about their qualifications, and they would not have been removed for cause had they been challenged. As the issue was not meritorious, counsel cannot be deemed ineffective

for failing to raise it. Counsel is not ineffective for failing to raise a nonmeritorious issue. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107, 111 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). The lower court properly denied this claim.

Defendant also asserts that counsel should have used his last peremptory challenge and have requested two more to have challenged these three jurors. However, there is no requirement, in any jurisdiction, that counsel must utilize all peremptory challenges in every case. When counsel is satisfied with the makeup of a jury, it defies common sense to require him to exercise challenges and alter the makeup of the jury, solely for the sake of exhausting every peremptory. Defense counsel's performance thus cannot be deemed deficient within the meaning of *Strickland*. *See also Muhammad v. State*, 426 So. 2d 533, 538 (Fla. 1982)(there is no deficient conduct, where a claim is based on a right that was not established at the time of trial). "The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury." *State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984); *see also Ross v. Oklahoma*, 487 U.S. 81, 88 (1988)(peremptory challenges "are a means to achieve the end of an impartial jury."). Where there is a claim of loss

of a peremptory challenge, the focus is on whether the jury that actually sat was impartial. *Ross*, 487 U.S. at 88. There is no prejudice where the jury is impartial. *Id.* Here, the failure to have used peremptory challenges to have excused Ms. Carpenter, Mr. Dicus and Mr. Wallo did not result in a biased jury. As such, the claim was properly summarily denied.

Moreover, throughout the jury selection process, the trial court only denied cause challenges by Defendant. (DAT. 1204, 1206) Defendant did not use a peremptory challenge to excuse one of these jurors. (DAR. 21) As such, Defendant could only have requested one additional peremptory challenge. Further, using his two challenge to have removed these veniremember would have left Defendant in a position to have been forced to have accepted Ms. Rosen, whom he struck even from being an alternate. Moreover, the State had only used 3 of its peremptory challenges and could have excused all of the remaining veniremembers and forced Defendant to proceed to a new venire without any peremptory challenges. Under these circumstances, not excusing Ms. Carpenter, Mr. Dicus and Mr. Wallo cannot be deemed ineffective. The lower court properly denied this claim.

With regard to the failure to question the venire about their views on an intoxication defense, Defendant did not present an intoxication defense at trial. As argued in Issue I,

the lower court properly found that counsel was not ineffective for making a strategic decision not to do so. As such, there was no reason for counsel to have questioned the venire on this issue. The claim was therefore properly denied.

D. PRESENCE

Defendant next asserts that the lower court improperly summarily denied his claim that his counsel was ineffective for failing to ensure his presence at certain unrecorded bench conferences. However, the lower court properly denied these claims.

In his motion in the lower court and in his brief in this Court, Defendant simply alleged "[n]umerous example appear in the records where [Defendant] is not present for stages of his trial, including unrecorded bench conferences, that are constitutional relevant (R. 1166, 2196, 2241, 2445, 2592)." Defendant makes no assertions regarding how counsel's alleged failure to have Defendant present at these times in anyway affected the outcome of the proceedings. In fact, the record reflects that Defendant was present during the proceedings at pages 2241 and 2445 of the record. As the record reflects that Defendant was present some of the times he claims that he was not and Defendant has not attempted to allege prejudice from the other absences, the lower court properly denied this claim. *See*

*Vining v. State*, 2002 WL 1429966, *10-11 (Fla. Jul. 3, 2002).

## II. THE LOWER COURT PROPERLY DENIED THE CLAIM RELATED TO COUNSEL'S MOTION TO WITHDRAW.

Defendant next asserts that the lower court improperly summarily denied his claim of an alleged conflict of interest. However, the lower court properly summarily denied this claim.

In claim V of his final amended motion for post conviction relief, Defendant asserted that Koch had a conflict of interest at the time that he represented Defendant. (R. 245-54) The claim alleged no new facts and instead was based on a motion to withdraw filed by Koch between the guilt and penalty phases of trial and the hearings on this motion. *Id.* It then asserted that the trial court should have found that a conflict of interest existed and should have granted the motion to withdraw. *Id.* At the *Huff* hearing, Defendant again alleged that the facts from the trial record indicated that there was a conflict of interest. (R. 433-34, 444-45) The lower court denied this claim as conclusively refuted by the record and procedurally barred. (R. 388)

Defendant first asserts that the lower court erred in denying the claim as procedurally barred. However, the issue of whether Defendant and Koch had a conflict of interest such that Koch should have been permitted to withdraw was litigated at the

time of trial. The trial court refused to allow Koch to withdraw. This issue could have been raised on direct appeal. *See Wike v. State*, 698 So. 2d 817, 820-21 (Fla. 1997)(addressing merits of claim that counsel should have been allowed to withdraw after Defendant punched him). As such, the lower court properly found that this claim was procedurally barred. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991).

Moreover, this Court's opinion in *Bruno v. State*, 807 So. 2d 55 (Fla. 2001), does not show that the lower court improperly found that this claim was procedurally barred. In *Bruno*, the defendant's attorney had made statements to the trial court while it was ruling on a different issue that created a conflict of interest. This Court held that while the same facts might underlie a claim of trial court error and a claim of ineffective assistance of counsel, the legal theories of the claims were distinct. Here, however, the alleged trial court error was in failing to finding that Defendant and Koch had a conflict of interest that should have been resulted in his withdraw. As such, here, the legal theories are not distinct. As such, *Bruno* does not show that the lower court improperly summarily denied the claim.

Even if the claim was not procedurally barred, the lower

court would still have properly rejected it. As argued in Claim I.A. of the State's response to Defendant's state habeas petition, there was no conflict of interest. As such, the lower court properly denied this claim and should be affirmed.

## III. THE LOWER COURT PROPERLY REJECTED THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

Defendant next asserts that the lower court improperly rejected his claims of ineffective assistance of counsel at the penalty phase. He claims that the lower court should not have rejected his claims that counsel was ineffective for failing to investigate and present mitigation after the evidentiary hearing. He also asserts that the lower court improperly summarily denied his claim that counsel was ineffective for the manner in which he challenged Defendant's prior convictions and for failing to claim that the penalty phase jury instructions shift the burden of proof, failing to claim that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), error was committed and for failing to request a jury instruction on the merger of aggravating circumstances.

### A. MITIGATION

Defendant asserts that his counsel was ineffective for failing to investigate and present family history and mental

mitigation. The lower court rejected this claim after an evidentiary hearing stating:

> The Court conducted an evidentiary hearing on the issue of whether or not the Defendant's counsel was ineffective for failing to investigate and present evidence regarding Defendant's family history and mental state as mitigation, The evidence at the hearing indicated that counsel did in fact reasonably investigate these areas and made valid strategic decision based on that investigation. The evidence showed that Koch contacted the following people:
>
> Laura Long, the aunt who raised Defendant;
>
> Beatrice Brown, his grandmother;
>
> Greg Whitney, his friend;
>
> Vera Edwards, his teacher.
>
> The Court heard the testimony of the Defendant's sister, Pamela Mills and the Defendant's cousin, Carl Leon Miller. The Court considered their testimony not credible and finds that there is not a reasonable probability that the Defendant would have received a life sentence based on their testimony. *See Strickland, supra*. The evidence indicated that counsel also attempted to contact Defendant's sister, Pamela Mills; however, she was unavailable and out of touch with everyone in her family until 1997 or 1998.
>
> There is no credible evidence that any reasonable investigation would have produced additional family members or additional information which could have served as mitigation in this case. The record reflects that Defendant's counsel conducted a thorough investigation, contacting as many family members as possible, both personally and through his investigator and social worker.
>
> Any additional investigation by defense counsel in all probability would not have been fruitful. Koch testified that the family members painted the Defendant's life as idyllic and as such, their testimony would not have assisted in any family history mitigation.
>
> In regard to Defendant's claim that counsel was ineffective for failing to provide information to the mental health experts, the evidence is clear that his counsel chose particular experts, who were provided

appropriate information, for strategic purposes. His decision was based upon his prior experience with these experts and his evaluation of the case. Defense counsel made a reasonable, tactical decision to use certain of the psychiatrists and not to use others and cannot now be deemed deficient for failing to continue to utilize other experts further. *See Haliburton v. State*, 691 So. 2d 466, 471 (Fla. 1997).

In regard to mental health mitigation, and the alleged prejudice as a result of ineffective assistance of counsel, the Court noted that the conclusions of the experts contradict each other. Dr. Fisher found that both statutory mental health mitigating circumstances applied. Dr. Haber found that none of the statutory mitigating circumstances applied, but found that the non-statutory mitigators of substance abuse and child abuse did apply. Dr. Haber also testified that a prior diagnosis of the Defendant as schizophrenic in 1975 actually was just a symptom of drug abuse. Dr. Eisenstein felt that both mental health mitigating factors applied because the Defendant had brain damage. He further found that the Defendant was intoxicated and borderline mentally retarded and that the diagnosis of schizophrenia in 1975 was accurate. Dr. Toomer suggested that only the statutory mitigating circumstance of extreme mental or emotional distress applied.

The record is replete with conflicting findings concerning schizophrenia, anti-social personality disorder, intoxication, statutory and non-statutory mitigators and manipulative opinions concerning the manipulative nature of the Defendant’s behavior of the experts. Given that each of these doctors reached a different conclusion for different reasons, the failure to present these conflicting opinions cannot be considered ineffective assistance of counsel. Finally, in regard to mental health mitigation, the evidence presented through the testimony of family members who claimed that the Defendant was a poor student, was contradicted by the school records, Laura Long’s trial testimony and the testimony of Defendant’s teacher.

The State presented the testimony of Dr. Charles Mutter who found that the Defendant is a sociopath, fully comprehends his actions and elected to commit

> the crimes for which he now had been sentenced. Dr. Mutter's opinion was that there was no mental mitigating in this case.
>
> In light of the facts that the experts contradicted each other, base their opinions on faulty information which was ultimately contradicted by other evidence, the testimony of the experts cannot be considered reliable. Since these new opinions were unreliable, there is not a reasonable probability that this evidence would have resulted in the Defendant being sentenced to life. As such, the *Strickland* test for prejudice has not been met.

(R. 385-88) The factual findings are supported by competent, substantial evidence and should be affirmed. *Stephens*. Moreover, the legal conclusions are proper given these factual findings. The lower court should be affirmed.

Defendant attacks the lower court's conclusion, asserting that the lower court's finding that Koch did attempt to contact additional family members was erroneous, that the lower court should have found counsel deficient for failing to locate the 1975 hospital record, that the lower court should have found that Koch provided appropriate background materials to the experts he retained and that the lower court should not have found that Koch made a strategic decision not to present an intoxication defense.

With regard to the claim that the lower court should not have found that Koch did investigate Defendant's family life, the record does support the lower court's finding that Koch did

investigate. The record shows that Koch did contact Laura Long, the aunt who raised him, Beatrice Brown, his grandmother, Greg Whitney, his friend, and Vera Edwards, his teacher. The record also reflects that counsel attempted to contact Defendant's sister Valerie, to no avail. Koch testified at the evidentiary hearing that he would have attempted to contact other family members, including both Pamela Mills and Carl Leon Miller. (R. 581-82) However, Koch was unable to recall what efforts he had made in this regard. Mr. Sastre testified that he too did not recall what effort he had made in this case but stated that locating witnesses would have been his job. (R. 772, 780) This testimony supports the lower court's finding that Koch did attempt to locate Defendant's other family members. The finding should be affirmed. *Stephens*.

Defendant appears to contend that no attempt was made because Koch assigned tasks to Mr. Sastre by written request, and no written request to locate Ms. Mills and Mr. Miller was admitted at the evidentiary hearing. However, Mr. Sastre testified that he destroyed his copies of the requests. (R. 779) Neither Mr. Sastre nor Koch could testified that the public defender's file was complete. (R. 545-49, 779-80) As such, the lack of a written request did not contradict Koch's testimony that he would have attempted to locate Defendant's family

members. The lower court's finding that Koch did is supported by competent, substantial evidence and should be affirmed. *Stephens*.

Additionally, the information that was received from the investigation did not indicate that further investigation would have been fruitful. ***Bertolotti v. Dugger***, 883 F.2d 1503, 1514-15 (11th Cir. 1989). At the time of trial, Ms. Long insisted that Defendant was raised in a loving home, was a good student and behaved well. (T. 2835-37) While Defendant had told Koch that he was beaten, he related this to discipline for misbehavior. Further, Ms. Edwards informed the defense that Defendant was a good student and that she saw no signs of abuse. No one told Koch anything about the sexual relationship between Ms. Mills and Ms. Long's son, despite numerous interviews. Given that Koch's investigation did not show that additional investigation was necessary, he cannot be deemed deficient for failing to conduct such an investigation. ***Id.***

Moreover, there is no credible evidence that any reasonable investigation would have produced additional family members. Pamela Mills testified that she was living in New York City at the time of Defendant's trial and was not in touch with any of her family members. She did not own any real property or a car and had no driver's license at that time. Thus, she could not be

tracked through public records. While Defendant appears to contend that Ms. Mills could have been located because she had a social security number and received public assistance, this information is confidential pursuant to federal law. 5 U.S.C. §552a. Further, assuming that Ms. Mills could somehow have been located, she testified that she did not even recall the names of her family members between 1990 and 1997. Thus, the lower court properly found that Ms. Mills' statement that she would have been willing and able to testify if she had been contacted is not credible. It should be affirmed. *Stephens*.

As discussed earlier, Carl Leon Miller knew that Defendant was incarcerated and facing first degree murder charges. He stated that he lived in the house with Beatrice Brown and was in contact with Laura Long. Both Ms. Brown and Ms. Long were in contact with Defendant's counsel and provided information regarding Defendant. Further, Mr. Miller stated that Defendant's sister Valerie also lived in this house, and the evidence showed that Koch attempted to contact her there. He admitted that he was busy doing his own thing and did not help Defendant because he did not "focus" on it. As such, the lower court properly found that Mr. Miller's statement that he would have testified if asked was again not credible. It should be affirmed. *Stephens*.

Moreover, testimony of Ms. Mills and Mr. Miller was inconsistent with other evidence and colored by bias and other concerns regarding their credibility. Ms. Mills testified that no one used drugs in Ms. Long's home. Mr. Miller testified that everyone in the house was using drugs. Ms. Mills testified that she became pregnant with her son Virgil when she was 10 years old. However, she stated that she was born in 1957. Virgil testified that he was born in 1972. As such, Ms. Mills would have been closer to 14 years of age at the time. Both Ms. Mills and Mr. Miller claimed that Defendant was a poor student and was beaten for this. However, the school records show that Defendant was an average student until he quit attending school regularly, and Ms. Edwards testified that Defendant was a good student. Ms. Mills testified that no one used drugs at Ms. Long's house. However, Mr. Miller claimed that drug use was rampant at the house. Both Ms. Mills and Mr. Miller admitted that the physical punishment that was administered in the house was a form of discipline and was meted out for misbehavior. Ms. Mills claimed that Defendant was beaten regularly and had bruises and welts on him, but Ms. Edwards never saw any indication of this. Mr. Miller also admitted to being a convicted felon, and Ms. Mills admitted that her drug use had affected her memory. Given these consideratons, the lower court's finding that Ms. Mills and Mr.

Miller were not credible is supported by competent, substantial evidence and should be affirmed. *Stephens*.

With regard to the claim that counsel was deficient for failing to provide additional information to the mental health experts, Koch testified that he made a decision about which experts he chose to use. Koch stated that he selected Dr. Toomer because he believed as an African-American he would best be able to establish a rapport with Defendant. He also testified that he elected not to use Dr. Haber because he felt that her conclusions were superficial. Dr. Fisher is from North Carolina, and this Court has approved guidelines on the costs of experts in capital cases that require the hiring of local experts when they are available. *Orange County v. Williams*, 702 So. 2d 1245, 1249 (Fla. 1997). As the Eleventh Circuit has stated, "'counsel is not required to 'shop' for a psychiatrist who will testify in a particular way.'" *Card v. Dugger*, 911 F.2d 1494, 1513 (11th Cir. 1990)(quoting *Elledge*, 823 F.2d at 1447 n. 17). As Koch made a reasonable tactical decision to utilize the services of Dr. Toomer and Dr. Eisenstein, he cannot be deemed deficient for failing to continue to utilize other experts further. *Haliburton v. State*, 691 So. 2d 466, 471 (Fla. 1997)(quoting *Palmes v. Wainwright*, 725 F.2d 1511, 1521 (11th Cir. 1984)(quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th

Cir. 1983))).

With regard to the alleged deficiency from not presenting evidence of intoxication and substance abuse, this claim is belied by the record and was the result of a valid strategic choice. Counsel did in fact present evidence of Defendant's alleged substance abuse problem through Dr. Toomer. (T. 2611-12, 2615) However, the jury also learned that Defendant had repeatedly refused treatment for this problem. (T. 2653-54) Counsel also had Ms. Long testify regarding Defendant's substance abuse. (T. 2841-42) As such, the issue of substance abuse was presented, and counsel cannot be deemed deficient for failing to do what he in fact did.

Moreover, Koch made a valid strategic decision not to present this evidence because he believed, based on his experience, that juries were not receptive to this evidence and because of the lack of support for this claim. Under these circumstances, the lower court properly found that he had made a valid strategic decision not to present this evidence. *Johnson v. State*, 769 So. 2d 990, 1001-02 (Fla. 2000). Moreover, given the lack of evidence to support this claim, it cannot be said that there is a reasonable probability that the failure to present this issue would have resulted in Defendant being sentenced to life. *See Lambrix v. State*, 534 So. 2d 1151, 1154

(Fla. 1988); *see also Mansfield v. State*, 758 So. 2d 636 (Fla. 2000)(intoxication mitigation entitled to little weight were there was evidence of intoxicant use but not intoxication). The claim was properly denied.

With regard to the alleged prejudice from the purported deficiency regarding the mental health experts, the lower court properly found that counsel could not reasonably have been expected to have presented all of the experts before the jury because their conclusions contradicted one another. Dr. Fisher was of the opinion that both statutory mental health mitigating circumstances applied. He based this opinion largely on his belief that Defendant was intoxicated at the time of the offense. He also testified that Defendant's drug abuse history, family background and intoxication were mitigating. He believed that the admitting diagnosis in the 1975 report was accurate.

Dr. Haber was of the opinion that none of the statutory mitigating circumstances applied. Instead, the only mitigating circumstances that she found were that Defendant had a history of substance abuse and was abused as a child. She also felt that the admitting diagnosis of schizophrenia on the 1975 records was actually a misdiagnosis and that Defendant was really just showing signs of his drug abuse. She stated that the discharge diagnosis was accurate.

Dr. Eisenstein was of the opinion that both mental health mitigating factors applied because Defendant had brain damage. He also felt that Defendant was intoxicated and was borderline mentally retarded. He too believed that the admitting diagnosis on the 1975 was accurate.

Dr. Toomer believed that only the statutory mitigating circumstance of extreme mental or emotional distress applied. He did not find that Defendant was intoxicated at the time of the offense. He believed that the 1975 admitting diagnosis was accurate. He found Defendant to be of average intelligence. Given that each of these doctors reached different conclusions for different reasons, the failure to present their conflicting opinions cannot be considered ineffective.

Moreover, Dr. Fisher and Dr. Eisenstein's opinion that Defendant was intoxicated is contradicted by the toxicology report that shows that he was not. Further, Dr. Hearns testified that the level of intoxicants in Defendant's blood would not have caused either of the statutory mental mitigators to have applied.

Dr. Fisher, Dr. Eisenstein and Dr. Toomer's opinion that the 1975 admitting diagnosis was correct is contradicted by the fact that none of them found that Defendant was in fact schizophrenic. The very report from which this conclusion was

drawn show that Defendant was being manipulative. Further, there was no evidence that Defendant was ever treated for schizophrenia. The report also showed that Defendant's discharge diagnosis was unsocialized reaction to adulthood, which Dr. Haber and Dr. Mutter found accurate. This diagnosis was consistent with Dr. Mutter's diagnosis of antisocial personality disorder.

Dr. Eisenstein's opinion that Defendant was borderline mentally retarded was contradicted by both Dr. Toomer and Dr. Mutter's conclusion that Defendant was of average intelligence. Further, Dr. Eisenstein claimed that this opinion was supported by Defendant's poor performance in school. However, Defendant's school records showed that he was an average student until he stopped attending school regularly. Dr. Eisenstein also found support for this conclusion in a notation in the 1975 report but did not know if this notation had any basis in fact.

Moreover, both Dr. Eisenstein and Dr. Fisher relied heavily on the interviews with Defendant's family. As argued earlier, Defendant failed to demonstrate that these family members would have been available at the time of trial and thus failed to show that Dr. Fisher and Dr. Eisenstein's testimony could have been produced at the time of trial. Thus, the claim must fail. *Elledge*.

Moreover, there were numerous contradictions between the families' version of the events and the records and other evidence presented. The family members claimed that Defendant was a poor student, which was contradicted by the school records, Ms. Edwards's testimony that Defendant was a good student, and Laura Long's trial testimony that Defendant was a good student. Ms. Edwards also contradicted the report of physical abuse beginning at a young age, as she never saw any signs of such abuse. Finally, the information regarding drug abuse was also shown to have been inaccurate. Leon told the doctors that Defendant was using heroin and had done so the day before the crime. However, the toxicology report showed that Defendant had not used heroin. The report was also inconsistent with frequent drug use. Moreover, the trial testimony of Dr. Ruben showed that Defendant was not given pain medication at the time of his hospitalization. However, no signs of withdrawal from heroin were noted. Dr. Hearns testified that withdrawal would have started within 12 to 24 hours and would have lasted for 3 to 5 days. Finally, Ms. Mills testified that no one used drugs at Ms. Long's house. However, Mr. Miller claimed that drug use was rampant at the house. Both doctors admitted that their opinions would have been affected by the inaccuracy of the information given to them.

Finally, Dr. Eisenstein also relied upon a new version of Defendant's life provided to him by Laura Long. This version appears to have been materially different from the testimony that Ms. Long provided under oath. However, Dr. Eisenstein refused to credit the sworn version of Ms. Long's testimony and instead relied upon this new, unsworn interview because it was consistent with what other family members were telling him, without considering the fact that the family members might be telling a consistent story because they were all trying to save Defendant's life. Given the numerous inconsistencies, the lower court properly rejected these opinions. ***Walls v. State***, 641 So. 2d 381 (Fla. 1994).

Additionally, Dr. Toomer's opinion was unchanged by the production of additional background materials. Where the production of additional materials does not affect the expert's opinion, counsel cannot be deemed ineffective for failing to provide this information. ***Breedlove v. State***, 692 So. 2d 874 (Fla. 1997)(no prejudice shown where experts opinions did not change); ***Oats v. Dugger***, 638 So. 2d 20 (Fla. 1994).

Finally, Dr. Mutter was of the opinion that Defendant is a sociopath, that he fully comprehended his actions and elected to commit crimes. Dr. Mutter opined that there was no mental health mitigation in this case. Given all of this evidence, the lower

court properly rejected the new opinions of the experts and found no prejudice from the failure to present them. *Strickland*.

Even if some of the testimony could be considered credible and be deemed to have established mitigation, there is still no reasonable probability that the result of the proceeding would have been different. The jury recommended that Defendant be sentenced to death by a vote of 10 to 2 for the death of Mrs. Nestor and by a vote of 12 to 0 for the death of Mr. Nestor. The trial court found three aggravating factors applicable to each murder: under a sentence of imprisonment; prior violent felony; and during the course of a felony and for pecuniary gain - merged. The evidence showed that Defendant had been released from prison on controlled release less than a month before the murders. Mr. and Mrs. Nestor gave Defendant a job, and he repaid their kindness by literally stabbing Mrs. Nestor in the back. When Mr. Nestor heard the commotion, Defendant then stabbed him in the chest. The evidence showed that both of the Nestors were brutally attacked by surprise so that Defendant could take their money.

Defendant presented mitigation testimony that showed that he came from a dysfunctional family and had drug problems. However, the jury also heard that Defendant refused to accept treatment for these problems and instead chose to live a life of

crime. Presenting evidence, such as the 1975 report, would only have permitted the State to have shown that Defendant had been a violent criminal for a longer period of time, as that admission was based upon Defendant having attacked a guard while incarcerated. *Breedlove v. State*, 692 So. 2d 877 (Fla. 1997)(counsel not ineffective for failing to present evidence that would have opened the door to harmful evidence).

Moreover, presenting additional evidence that Defendant came from a bad family background and had a greater drug problem would not have outweighed the substantial aggravating circumstances that had been presented. As such, there is no reasonable probability that Defendant would have been sentenced to life even if additional mitigating evidence had been presented. As such, counsel cannot be deemed ineffective. *Strickland*; *Jones v. State*, 732 So. 2d 313, 320 (Fla. 1999); *Lecroy v. Dugger*, 727 So. 2d 236, 239-40 (Fla. 1998).

Defendant's reliance on *Williams v. Taylor*, 102 S. Ct. 1495 (2000), *Rose v. State*, 675 So. 2d 567 (Fla. 1996), *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995), and *State v. Lara*, 581 So. 2d 1288 (Fla. 1991), is also misplaced. In each of these cases, counsel had conducted little or no investigation and presented little evidence regarding mitigation. Here, Koch investigated Defendant's background. He spoke to family members and a school

teacher. He had Defendant evaluated by numerous mental health professionals on a variety of issues. He presented evidence that Defendant came from a dysfunctional family, abused drugs, suffered from borderline personality disorder and suffered a brain injury. As such, these cases are inapplicable here. The denial of the claim should be affirmed.

**B. PRIOR CONVICTIONS**

With regard to the alleged ineffective assistance of counsel for failing to have more thoroughly challenge Defendant's prior convictions, this Court has held that claims of ineffective assistance of post conviction counsel are not a basis for relief. *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996). As counsel was acting as post conviction counsel in attempting to have his sentences vacated, the lower court properly rejected this claim. Moreover, Defendant has still not asserted why his prior convictions were invalid other than to vaguely refer to his alleged history of mental illness and substance abuse and to contend that his pleas were involuntary. As such, the lower court properly denied these claims as facially insufficient. *See Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

**C. OTHER CLAIMS**

Defendant next asserts that the lower court should have granted an evidentiary hearing on his claim that counsel was

ineffective for failing to claim that the jury instructions shifted the burden of proof, failing to object to alleged *Caldwell* error and failing to request a jury instruction on the merger of aggravators. The lower court properly summarily denied these claims.

With regard to the alleged burden shifting, claims that the jury instructions shifted the burden of proof and claims regarding comments by the State are claims that could have and should have been raised on direct appeal. *Owen v. State*, 773 So. 2d 510, 515 n.11 (Fla. 2000); *Asay v. State*, 769 So. 2d 974, 989 (Fla. 2000); *Demps v. Dugger*, 714 So. 2d 365 (Fla. 1998); *Robinson v. State*, 707 So. 2d 688, 697-99 (Fla. 1998). As such, the lower court properly denied these claims as procedurally barred.

Moreover, the courts have repeatedly rejected the claim that the instruction improperly shifts the burden of proof. *San Martin v. State*, 705 So. 2d 1337, 1350 (Fla. 1997); *Kennedy v. State*, 455 So. 2d 351 (Fla. 1984). As such, the claim was properly summarily denied.

With regard to the alleged *Caldwell* error, this Court had held that claims of *Caldwell* error and allegations of ineffective assistance of counsel for failing to raise alleged

*Caldwell* error are procedurally barred. *Oats v. Dugger*, 638 So. 2d 20, 21 & n.1 (Fla. 1994). Moreover, informing the jury that their recommendation is advisory is a correct statement of Florida law and does not violate *Caldwell*. *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *Combs v. State*, 525 So. 2d 853, 855-58 (Fla. 1988). The claim was properly summarily denied.

With regard to the jury instruction on merger, Defendant raised the failure to merge these aggravators on direct appeal. This Court rejected the claim finding that counsel had not objected and that the trial court had merged these aggravators in the sentencing order. *Jones*, 652 So. 2d at 350-51. This Court has previously held that the failure to give the merger instruction is not reversible error if the trial court merges the aggravators in the sentencing order. *Jackson v. State*, 648 So. 2d 85, 91 (Fla. 1994). As such, it cannot be said that there is a reasonable probability of a different result had counsel requested the merger instruction. *Strickland*. As such, the lower court properly summarily denied this claim.

## IV. THE LOWER COURT PROPERLY DENIED DEFENDANT'S PUBLIC RECORDS CLAIM.

Defendant next asserts that the lower court improperly denied him access to public records. In this claim, Defendant recounts a history of his attempts to obtain public records, and the lower court's rulings on various requests. However, he never asserts what ruling he is claiming were erroneous or why. Because Defendant fails to explain what he is claim, this claim should be denied. *See Anderson v. State*, 27 Fla. L. Weekly S580 (Fla. Jun. 13, 2002); *Duest v. Dugger*, 555 So. 2d 849, 952 (Fla. 1990).

Further, in his final amended motion for post conviction relief, Defendant did not name a single state agency that had not complied with its public records obligations. (R. 213-15) He did not specify any prior order denying disclosure that was improper. *Id.* This motion was filed more than 5 months after the last public records hearing in this matter. Under these circumstances, the lower court properly denied this claim. *Vining v. State*, 2002 WL 1429966, *12 (Fla. Jul. 3, 2002).

Moreover, Defendant appears to claim that the lower court improperly sustained the Florida Department of Law Enforcement's objection to his request for records under Fla. R. Crim. P. 3.852(h)(2). In this request, Defendant sought any record held

by FDLE in which any of the jurors was a "defendant, witness, suspect and/or victim." (SR. 105-07) The request did not list any identifying information for the jurors except their names. *Id.*

At the hearing on the request, FDLE argued that Defendant request did not allege that Defendant had made a timely and diligent search for this information and had not demonstrated that the records request was calculated to discover admissible evidence. (R. 1340-41) It also asserted that the request was vague and overbroad, particularly because it did not include identifying information. (R. 1341) Defendant asserted that he was seeking to run a criminal history check on the jurors, that he was not required to have done a timely and diligent search and that the request was not vague or overly broad. (R. 1341-43) FDLE responded that criminal history checks could not be requested pursuant to a public records request and instead needed to be made as a request under §943.053, Fla. Stat. (R. 1344-45) Defendant indicated that he was unaware of this and was willing to request the records in that manner. (R. 1344) FDLE then inquired why these records had not been requested as part of the 1997 request to FDLE. (R. 1347) Defendant claimed that under prior versions of Fla. R. Crim. P. 3.852, he was limited to requesting documents about him only. (R. 1347-48) The trial

court found that the prior versions of Fla. R. Crim. P. 3.852 had not been so limited, and that the records should have been requested earlier. (R. 1348-51) However, the trial court permitted Defendant to request the records under §943.053, Fla. Stat. (R. 1351)

The lower court subsequently entered a written order finding that the motion was not timely because it was made more than 90 days after the initial production. (SR. 128-29) It also found that it was an improper supplemental request because it was not based on facts that were unknown at the time of the original request. *Id.* Finally, it found that criminal history checks were not available pursuant to Fla. R. Crim. P. 3.852. *Id.* As such, it sustained FDLE's objection.

Defendant now contends that the motion was timely because it was filed within 90 days of when the stays were lifted. However, this argument completely ignores the other bases on which his request was denied. Moreover, these other grounds are proper bases for denying this claim. This Court had stated that trial courts should not allow "fishing expeditions" in an attempt to discover juror misconduct without a specific allegation of juror misconduct. *Vining v. State*, 2002 WL 1429966, *9-10 (Fla. Jul. 3, 2002). This Court has also held that public records requests, particularly supplemental records,

should not be used for fishing expeditions. *See Sims v. State*, 753 So. 2d 66, 69 (Fla. 2000); *see also Moore v. State*, 27 Fla. L. Weekly S186 (Fla. Mar. 7, 2002). As this request was a fishing expedition to discover juror misconduct without a basis, the lower court properly denied the request.

Defendant also appears to be asserting that the lower court improperly determined that certain records were properly exempt from public records disclosure. However, the lower court properly inspected these documents in camera and determined that they were exempt. Defendant has not shown that the lower court's ruling was incorrect. The denial of the claim should be affirmed.

## V. THE CLAIM THAT DEFENDANT IS INSANE TO BE EXECUTED IS NOT RIPE.

Defendant next asserts that he is insane to be executed. However, this claim is improperly raised here as Defendant's execution is not imminent and he had yet to raise the issue before the Governor. *See Herrera v. Collins*, 506 U.S. 390, 405-06 (1993)("[T]he issue of sanity [to be executed] is properly considered in proximity to the execution."); *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997)(same), *aff'd*, 523 U.S. 637 (1998); Fla. R. Crim. P. 3.811(c)

## CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

_____
SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **TODD G. SCHER**, Chief Assistant CCRC-SOUTH, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, FL 33301, this ____ day of July, 2002.

_____
SANDRA S. JAGGARD
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief is type in Courier New 12-point font.

_____
SANDRA S. JAGGARD
Assistant Attorney General