IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-734

VICTOR TONY JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA

CORRECTED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal involves the summary denial of Mr. Jones' Rule 3.850 motion following a limited evidentiary hearing. References in the Brief shall be as follows:

(R. ___) -- Record on Direct appeal;

(PCR. ___) -- Record on postconviction appeal;

(Supp. PCR. ___) -- Supplemental Record on postconviction appeal.

Other citations shall be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Jones requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

STATEMENT OF FONT

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STATEMENT OF THE CASE AND OF THE FACTS

The Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, entered the judgments of convictions and sentences under consideration. On direct appeal, this Court affirmed Mr. Jones's convictions and sentences. Jones v. State, 652 So. 2d 346 (Fla.), cert. denied, 116 S. Ct. 202 (1995). On March 24, 1997, Mr. Jones filed an initial Rule 3.850 motion (PCR. 38-77). An amended motion was subsequently filed (PCR. 93-202), along with a motion alleging that Mr. Jones was not competent.[1] Following an evidentiary hearing, the lower court found Mr. Jones competent, and a final 3.850 was thereafter filed (PCR. 203-314). After a Huff[2] hearing, the court granted an evidentiary limited to the issue of ineffective assistance of counsel as to voluntary intoxication and mitigation (PCR. 365). An evidentiary hearing was conducted on various dates, and an order denying relief was entered (PCR. 379-96). A timely notice of appeal was filed (PCR. 397).

At the evidentiary hearing, the following evidence was adduced:

1. Art Koch. Koch has been employed with the public defender's office for 22 years, and at the time he represented Mr. Jones, he was in the major crimes unit (PCR. 470-71). At the time, each attorney was responsible for cases in three or four courts (PCR. 471-72). Although capital attorneys were, in theory, supposed to get a second chair to

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[1]See Carter v. State, 706 So. 2d 873 (Fla. 1997).

[2]See Huff v. State, 622 So. 2d 982 (Fla. 1993).

assist, it “never worked that way in reality” because “everyone in major crimes had caseloads that were too heavy to allow that” (PCR. 472). With respect to Mr. Jones’ case, although “a couple of people co-counseled the case, . . . in reality I did probably 100 percent of the lawyering that went up to the point in trial” (PCR. 473). Another attorney, Rosa Rodriguez, was later assigned assist (PCR. 474). Her role was essentially as that of “a warm body” to sit next to Koch (PCR. 474). Rodriguez had no capital trial experience and no role in preparing for the case (Id.).

Investigator Juan Sastre was also assigned to the case, but “in reality, the situation with Juan Sastre was similar to mine except perhaps exacerbated because he has responsibilities for all the cases in those three courts” (PCR. 475). Koch had a “very structured” relationship with Sastre in that “I would specifically tell him to do a task and he would go out and do it and come back and report to me” (PCR. 476). For example, if Koch wanted Sastre to speak with a witness, he would make the assignment by filling out a written request to Sastre (Id.). This same procedure would apply if Koch wanted Sastre to obtain any documents (PCR. 477). Koch had no independent recollection of the number of cases he was handling along with Mr. Jones’ but identified a motion for continuance he filed indicating he had two other capital cases going to trial at the same time as Mr. Jones’ (PCR. 479; Defense Exhibits B & C). In one of the motions, Koch

explained that he needed additional time because of staffing shortages in the public defender's offices with respect to social workers, on whom he relied to investigate penalty issues (PCR. 481). Social workers also worked in assigned courts and were available for all attorneys, not just those involved in capital cases (PCR. 482). The social worker involved in Mr. Jones' case was Marlene Schwartz (Id.). Schwartz would provide notes to Koch about her work; the notes were introduced as Defense Exhibit D (PCR. 484). Koch would have read the notes at the time he represented Mr. Jones (Id.).

The State had a "pretty strong" case at the guilt stage, and Koch spent "far greater time preparing for the first phase as opposed to the second phase" (PCR. 485). Because Mr. Jones was shot in the head when he was arrested and hospitalized (PCR. 486), several mental health experts were involved in some fashion in the case, including Dr. Hyman Eisenstein, a neuropsychologist, Dr. Steven Sevush, a neurologist, Dr. Brad Fisher, Dr. Jethro Toomer, and Dr. Merry Haber (Id.). Koch wanted Eisenstein to get an idea of Mr. Jones' neurological status and further recommendations (PCR. 487). Mr. Jones' neurological status was important in terms of his ability to communicate, his competency, his levels of medication, and possible mitigation evidence (Id.). Competency was one area that Koch was concerned about in the early stages of preparation (Id.). Koch did not recall if Eisenstein or Sevusch ever specifically said that Mr. Jones was competent, but "[t]he

implication was that he was competent" (PCR. 488). Koch could not recall if the issue of competency "was ever specifically discussed prior to trial" (Id.). Koch would have not had any reason noy to ask Eisenstein if he thought Mr. Jones was competent, although Koch himself had no question he was competent (Id.). Had Eisenstein believed that Mr. Jones was incompetent, a competency hearing would have been requested (PCR. 489). Koch could not recall what Sevusch opined as to competency, but he identified a note from his file indicating that Sevusch believed he was competent (PCR. 493; Defense Exhibit E).

Koch gave thought to hiring a mitigation specialist named Lee Norton (PCR. 494). Koch identified a letter in his file from Norton dated December 17, 1991 (PCR. 495). Over the State's objection, the court refused to allow the letter into evidence, but it was proffered into the record as Defense Exhibit A-4 (PCR. 497). Norton never worked on Mr. Jones' case (PCR. 497). He was interested in hiring a mitigation specialist due to the lack of support and investigative staff in the public defender's office (PCR. 498). Koch never requested Norton's appointment (Id.).

Koch could not recall why he requested Dr. Fisher's services (Id. at 499). Fisher never testified in Mr. Jones' case (Id.). As for Dr. Haber, Koch recalled that she saw Mr. Jones on one occasion but never testified (Id.). Koch asked for Dr. Toomer to be appointed because he is African-American and this was important to establish a "bond" with

Mr. Jones (Id.). Toomer did testify at the penalty phase (PCR. 500). Koch believed that Eisenstein testified at the second phase, but could not recall if it was in the presence of the jury (Id.). In terms of providing background information to the experts, "I would ask the expert what they want in terms of information and then respond accordingly" (PCR. 501). Some experts do not want information, and some do (PCR. 502).

Koch had no specific recollection of Mr. Jones' previous psychiatric admission in Jackson Memorial Hospital [JMH], but had no specific recollection of having seen any documents from JMH (PCR. 503). The JMH evaluation was admitted into evidence as Defense Exhibit F (PCR. 504). Koch acknowledged that Marlene Schwartz's notes referred to the fact that Mr. Jones was in the JMH "psych ward" for 60 to 90 days (Id. at 504). Koch had no strategic reason not to attempt to find these records or provide them to the experts (PCR. 505, 511).

Koch could not recall what information he had regarding whether Mr. Jones had been intoxicated at the time of the offense, but he identified a toxicology report which indicated that a blood test revealed cocaine and benzoylecgonine (PCR. 514-15). He also acknowledged that in Marlene Schwartz' notes, it indicates "Cocaine, looks like one fourth, and then in the margin `shot cocaine bag $25.00 Drank one bottle one fifth sherry with --'" (PCR. 516). These were among the notes provided to Drs. Toomer and Haber, and Koch himself

relied on them to prepare (PCR. 517). Koch presented no evidence of intoxication at either the guilt or penalty phase (PCR. 519). Substance abuse and intoxication at the time of the offense could establish both statutory and nonstatutory mitigation (PCR. 520). Koch "may have" provided the experts with information about Mr. Jones' intoxication, but he could not specifically recall (PCR. 521). According to Koch, intoxication is a "tricky piece of evidence to deal with. In theory it's supposed to be mitigation" (PCR. 521). Although the law recognizes it as mitigation, "under the circumstances of this case I probably would not consider it mitigation" because "[j]uries are not very impressed with defendants who go out and get intoxicated on illegal substances and then have their lawyers present it as mitigation" (PCR. 521). Koch was "more concerned" about Mr. Jones' neurological situation, and Mr. Jones had also told him that he was not intoxicated (Id.). He made no effort to corroborate what Mr. Jones told him, and "unless we found someone who happened to be using drugs with Mr. Jones, it would be very difficult to corroborate" (PCR. 522). Koch testified, however, that he "probably would not have attempted to corroborate it because I have a dim view of intoxication, be it alcohol or illegal drugs, as being a mitigator" (Id.). He confirmed that he "didn't pursue it or attempt to corroborate it" (PCR. 523).

Regarding penalty phase, Koch wanted to establish statutory and nonstatutory mitigation (Id.). He interviewed Mr. Jones to "get to

know him" and "to begin developing a basis for penalty phase investigation" (PCR. 524). Mr. Jones provided names of various siblings and relatives, including a cousin Carl Lee Miller; Koch's notes indicate that he put an asterix next to Miller's name (PCR. 525-26). Mr. Jones also told him about Laura Long, who was the woman that raised him (PCR. 526). Mr. Jones told Koch that he was beaten with a belt by Laura's son, Lawrence, and that "this was beating, not spanking" (PCR. 526-27). He also told Koch about his sister, Pamela Mills, who was "also beat" and that she lived in New York (PCR. 527). He told Koch that his cousin Carl was also beaten (Id.).

Laura Long was Koch's primary contact person in the family, but she was a "very reluctant participant in the whole process" (PCR. 528). In one of his notes, Koch memorialized a discussion he had with Long about "our lack of evidence in mitigation" and that Long was "upset at Victor" (PCR. 529). She told Koch she did not know why or how Victor "went wrong" and "she just does not have any idea what happened" with him (PCR. 530). He also wrote that Long was "educated, straight laced and rather cold person emotionally" (Id.). Despite this, Koch had Long testify before the judge because she provided "some evidence to humanize him to some degree. I wasn't particularly satisfied with her as a witness or a potential witness, but you had to deal with what you had" (Id.). Long portrayed the time that Victor spent in her home as "idyllic" (Id.). This was not how she had portrayed it to Koch when

they talked, but Koch explained that this was the problem the public defender's office had due to lack of investigative resources for mitigation (PCR. 531-32). Koch did not recall ever speaking to Mr. Jones' sister, Pamela, nor his cousin, Carl (PCR. 533). He did not recall if any of the experts talked with family members (Id.).

Co-counsel Rodriguez was the attorney who did the closing arguments at penalty phase (PCR. 534). This decision was made "at the last moment because she had very little participation in the case at all" (Id.). Although Koch does not "adhere to this as a general proposition," he had Rodriguez do the closing because "the rule of thumb seems to be, among defense lawyers, have one person do first phase and have one person argue second phase" (PCR. 534). From what Koch perceived at the guilt phase, he believed it "probably would be best to have someone else argue second phase" (PCR. 535).

Koch also recalled speaking to a witness named Gregory Whitney (PCR. 536). According to Koch's notes, Whitney and Mr. Jones "grew up together," he stressed the impact of drugs in Victor's life, and he lived near Orlando and was "very willing to help" (PCR. 537). Koch decided not to call Whitney because he "also got into a bit of trouble" but eventually outgrew it, and Koch did not want to compare Whitney, a white kid, with Mr. Jones, a black kid, because Whitney became a productive citizen while Mr. Jones continued to have problems (PCR. 538). Whitney's information corroborated Mr. Jones' drug history, but

according to Koch, there was never "a dispute about whether or not he had a drug history, a drug abuse history" (PCR. 539). Mr. Jones' "chronic drug problem" began in his early teens when he became "fixated with trying to find his mother" and went off to New York and Atlanta (PCR. 540). Thus, "his drug history was not something that was in dispute" (Id.). Koch was not sure if he provided Whitney's name to the mental health experts (Id.). However, even if a witness is not going to testify, he can talk to mental health experts (Id.).

On cross, Koch testified that at the time of Mr. Jones' trial, he had been doing capital cases for about four years, and this was not his first capital case (PCR. 544). At the time of Mr. Jones' case, he had about four other capital cases at the same time (PCR. 549).[3] There was never a second chair attorney involved at the outset in the capital cases and "[t]hat's exactly what the problem was" (PCR. 551). During the course of the investigation, Koch asked Sastre to obtain certain records such as school records, DOC records, and "probably" would have asked him to obtain hospital records (PCR. 555). He also would have asked Sastre to try and find family members (PCR. 556).

Koch "frequently" asked his mental experts to confer with each other and share information, and did so in this case (PCR. 567). It was especially important for Toomer to have all available information,

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[3]He later agreed with the prosecutor's statement that at the time of Mr. Jones' case, Koch had one person who had been sentenced to death (PCR. 556-57).

as he was the expert that testified at the penalty phase (PCR. 568-69). Koch was preparing for the penalty phase prior to guilt phase (PCR. 571). The decision of who to call at the penalty phase was "likely" made between the first and second phases (PCR. 572). Of the experts involved in the case, only a Dr. Lefler was unavailable due to retirement (Id.). Koch was "dissatisfied" with Haber's work, and "although she did some evaluations and some work, I at some point decided not to have her continue" (Id.).[4] Eisenstein, Sevsush, Toomer, and Fisher were those that were more "intensely involved in the end" (PCR. 572-73). Koch had no specific recollection as to Fisher's involvement (PCR. 573). Eistenstein did a lot of work with Mr. Jones, and was an expert on whom Koch relies and has a lot of respect for (PCR. 574). He also had confidence in Toomer and Fisher, with whom Koch had worked before (PCR. 584). "In all probability" Koch would have requested a competency hearing if one of the experts had opined that Mr. Jones was not competent (Id.). Even if the expert opined that Mr. Jones was not competent, Koch would want to know why the expert so believed, and "[b]ased upon that answer I would make a determination on the issue of whether to raise the issue of competency or not" (Id.).

In Koch's view, Mr. Jones' competency was not an issue prior to trial because he knew what his role was, the role of a prosecutor, the

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[4]He later explained that "I don't have a great deal of confidence in Mary [sic] Haber as a professional" (PCR. 580).

nature of the charges, etc (PCR. 575). Mr. Jones was also able to discuss his background (Id. at 575-76). After getting all the information he could from the doctors and Mr. Jones, Koch decided to present Mr. Jones in the most favorable light (PCR. 580). He agreed that child abuse, drug abuse, learning disabilities, are all nonstatutory mitigation (PCR. 581). He reiterated that Mr. Jones told him that he and his sister and cousin had all been beaten at home (Id. at 581-82). These issues "would require some further investigation" but Koch could not recall what efforts were made to locate family members (Id.). Through the investigator, Koch attempted to locate Valerie Johnson, another sister (PCR. 582; State Exhibit 3).[5] He did not recall if he had addresses for other siblings (PCR. 583).

With respect to the intoxication defense, Koch would "probably" have asked Mr. Jones whether he was under the influence of drugs or alcohol at the time of the offense (PCR. 587). Mr. Jones told him that he was innocent, and that was the defense Koch was going to present (PCR. 588). He never made a strategic decision not to employ an intoxication defense because "it never arose" (PCR. 589). In his "opinion" he did not "feel that evidence of intoxication, regardless of the circumstances, is very good mitigation evidence" but acknowledged

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[5]This exhibit consisted of a memorandum from Koch to investigator Sastre, requesting that Sastre try to locate Valerie Johnson. According to the memo, a letter with Koch's business card were left at the address purporting to be that of Johnson.

that "[t]here are some people that feel otherwise" (PCR. 589-90). Because of his opinion, Koch filed a motion in limine to keep out evidence that there was cocaine detected in Mr. Jones' blood upon his arrest (PCR. 590; R. 193-94).

Koch did present Long's testimony, but she "appeared to be embarrassed to be associated" with Mr. Jones, that she "wanted to sever ties with him, certainly publicly, maybe even emotionally" (PCR. 591). Long was "the one witness, probably the only witness, that could supply any information about the early part of his life. That's extremely important" (PCR. 592). However, Koch "never felt she was as open or candid with me as she could be" (Id.). Long presented Mr. Jones' early history as "everything was wonderful. He was wonderful. She was wonderful. Everything was wonderful" (Id.). Koch acknowledged that "there appears to be some conflict in the history concerning physical abuse" and that it was "impossible, for all intents and purposes, for a white social worker to show up to a black person's doorstep and say, `Hi, I'm a social worker. Why don't you tell me about all your family secrets'" (PCR. 594). This, Koch explained, is "why it is absolutely essential that the social worker, the mitigation investigator, have time to develop relationships. . . That was a deficiency in this particular case" (PCR. 594). Because of this lapse, "we were not able to develop the truth with respect to that situation. I don't know what it was. You don't know what it was. We were never able to develop the

truth because of limited resources we had" (PCR. 595). The "discrepancy" between the version Long presented and what Mr. Jones told him "was particularly critical to me because I think studies have shown generally that we manufacture killers, frankly, by abusing young children. So that was a very critical factor" (PCR. 596). Koch tried, to the extent possible, to investigate, but explained that because of the sensitive nature of such issues, long term rapport with family members is necessary (PCR. 599-600). Any attempts made to locate family members would be reflected in the notes of the investigator and social worker, as would any discussions with any family members (PCR. 602-03). The subject of physical violence in the family is "so critical that if there was any hint of child abuse, that would be investigated" as fully as could have been done with the resources available (PCR. 605).

On redirect, Koch could not state whether the mental health experts actually conferred with each other (PCR. 608). As for Haber, Koch did not want to "criticize her unduly" but the work she did in Mr. Jones' case was "superficial" (Id.). He acknowledged that what you get from an expert is only as good as the information that they have (PCR. 609). He also agreed that even if an expert believed the defendant to be competent, that expert could still be used for mitigation (PCR. 611). Regarding Koch's testimony that he did not view Mr. Jones' competency to be a question once he was released from the hospital,

Koch acknowledged a letter dated April 4, 1991 (well after Mr. Jones' release) which he sent to Dr. Eisenstein specifically requesting that Eisenstein evaluate Mr. Jones' competency (PCR. 612; State's Exhibit 2).

As for the attempt to locate Valerie Johnson, this effort was made in January, 1992, over a hear before trial (PCR. 613). There "should have been" further attempts to locate Johnson, and if there were they would have been memorialized in a memorandum to investigator Sastre (Id). The fact that there is no address for a witness does not preclude an attempt to locate the witness by other means; in fact, "[u]sually we don't have an address, probably in the majority of cases" (PCR. 614). This is the purpose of having investigators (Id.).

As to the intoxication defense, Koch reiterated that because Mr. Jones told him he was innocent, from that point on there was no investigation (PCR. 616). Koch's belief that intoxication evidence is not good mitigation is a "personal bias I have" (Id.). Because of his "personal bias . . . I try to avoid presenting that sort of evidence to a jury" (Id.). Koch is also not "overly impressed" with mental health testimony that can explain intoxication and its effects: "the same bias I would have with respect to presenting lay testimony of intoxication would apply to a situation where an expert may say `Yes, I can explain how intoxication is a mitigator and should be considered as a mitigator.' I'm not overly impressed with that" (PCR. 617). Koch

admitted that intoxication is significant to establish statutory mitigation, but "I don't think as a general proposition, jurors are sympathetic to a situation where a person becomes intoxicated by either illegal or legal drugs and then commits a horrific crime" (PCR. 620). He has "real problems" with this issue, based on his experience and reading studies of juries in capital cases (PCR. 620). In Mr. Jones' case, "although there was some evidence of some drug use," the defense was what Mr. Jones told him (PCR. 622). He allowed that, based on developments in the case investigation, defenses and strategies change over time (Id.). But in Mr. Jones' case, once Koch made the initial determination that the defense was going to be innocence, no further investigation was conducted into an intoxication defense (Id.). There was some investigation into the possibility of an insanity defense, which, like intoxication, is premised on the fact that the defendant committed the crime (PCR. 623).

2. Dr. Brad Fisher. Fisher is a psychologist from North Carolina with extensive experience in the area of forensic psychology (PCR. 632-35). In 1992, Koch asked him evaluate Mr. Jones, and he did so on July 13 and 22, 1992 (PCR. 635). He conducted a general preliminary evaluation to develop a "rough sense" of Mr. Jones' mental health situation (PCR. 657-38). He did not recall receiving materials from Koch and his file contained no records (PCR. 639). He did not recall speaking with Koch about why he was not going to be called as a

witness (Id.). Fisher was later contacted by collateral counsel, after which time he saw Mr. Jones again in May and June of 2000 (PCR. 640-41). Collateral counsel also provided Fisher with a number of background materials, including prior testimony and mental health evaluations, school records, prison records, medical records, affidavits of family members and acquaintances, records from a JMH hospitalization in 1975, and Marlene Schwartz's notes (PCR. 641-43). He also reviewed records surrounding an arrest of Laura Long's son, Lawrence, for a 1984 murder in Georgia (PCR. 646). Fisher also personally interviewed members of Mr. Jones' family including his sister, Valerie, his Aunt Bea, his cousin Carl, his sister Pamela, and his brother Michael, who goes by the name of Michelle (PCR. 647). All of this material was necessary for Fisher to form opinions and conclusions in Mr. Jones' case (PCR. 648).

Based on his evaluation, Fisher opined that there was mitigation that he could have testified to:

> It is my opinion that the disruptive, chaotic and troublesome in the extreme developmental background, such as, I believe he had included both his mother and Laura because he was raised by both at different times, was a significant mitigating factor. That's one.
>
> Secondly, it is my opinion that, again, with data that is, I believe, not controverted and coming from many sources, that his abuse of drugs, consistent abuse of alcohol and drugs from a very early age. I'm not talking about 15. I'm not really even talking about ten. I'm talking about younger than that, with the genetic background that includes a mother who is an alcoholic, was and is, whatever the word, a significant factor.

> Third, the prison records and my own interviews suggest some neurological problems. That's very hard to differentiate to what nature and extent they can be attributed specifically to the time that he was shot at the time of the crime versus existed there before.

(PCR. 649-50). Fisher also opined that, at the time of the crime, Mr. Jones' capacity to appreciate the criminality of his conduct to the requirements of the law was substantially impaired (PCR. 652). He was also under the influence of an extreme mental or emotional disturbance at the time of the crime (Id.). This is based on the fact that Mr. Jones was seriously addicted to drugs "to the point that I think it would have substantially diminished these capacities then in December of 1990" (PCR. 653). Additionally, to a reasonable degree of certainty, Mr. Jones was intoxicated at the time of the crime (Id.).

Fisher also discussed a report from JMH about Mr. Jones' 1975 psychiatric admission, which indicated that an admitting diagnosis was chronic schizophrenia and a discharge diagnosis of unsocialized aggressive reaction of adulthood (PCR. 655). The report also provided a history of Mr. Jones' background, including a pediatric admission in the intensive care unit for three months (PCR. 656). This information was significant: "I saw those factors as significant to the diagnosis that he got when he was admitted, the length of stay, the double stays, meaning he's going in at 14 three or four months and again for 39 days in 1975, they play a role in the different opinions that I have expressed today" (PCR. 657). This and other reports "give consistent

information about some of the troubles in his development, both in the mother and her abuse of alcohol and in the strictness of Laura, his aunt, and the problems with some of the siblings and some of his own problems at school and with drugs" (Id.). Fisher's opinion with regard to Mr. Jones' state of mind at the time of the offense is further strengthened by Schwartz's notes, which reflect that Mr. Jones had used a quarter bag of cocaine and a fifth of alcohol at the time of the offense (PCR. 658).

Fisher's interviews with Mr. Jones' family was "the strongest component" of his evaluation, as they all consistently spoke of the alcohol and drug abuse, particularly Leon and Michael, who were around Mr. Jones near the time of the crime (PCR. 659). All of the materials, as well as family interviews, would have been helpful for Fisher at the time he was asked to evaluate Mr. Jones in 1992 (PCR. 678-79). The family interviews took place in a poor section of Liberty City, and present were Mr. Jones' aunt Bea, his sisters Pam and Valerie, and the brother Michael/Michelle (PCR. 680). Dr. Eisenstein was also present at the interviews (PCR. 683). The siblings were with Mr. Jones at different parts of his life and for different amounts of time, so he was able to get a chronological history (PCR. 681). He also obtained information about Mr. Jones' substance abuse problems (PCR. 682). The family indicated that Mr. Jones' mother "had big drinking problems" (PCR. 683). They were also questioned about discipline issues, and

discussed a "major secret in the family" (PCR. 685).[6]

During a recess, Fisher proffered additional information.[7] There were several "noteworthy items" in the records he reviewed, such as prior DOC records indicating that Mr. Jones had a history of car accidents and falls resulting in his being knocked unconscious, as well as use of all types of drugs (PCR. 689). The prior DOC records also indicate an IQ test revealing a full scale score of 76 (Id.). This places Mr. Jones in "the territory of borderline intelligence, close to retardation" (Id.). All these records predate the crime (PCR. 690). The 1975 JMH report also referred to borderline intelligence (Id.). In terms of the affidavit of Mr. Jones' sister, Pamela Mills, it was significant to Fisher that she discussed the fact that their mother was never around, that Laura constantly beat her and Victor, that she made them take their clothes off when she beat them "so we would feel the pain of the belt on our skins more," that Laura's "favorite thing" was to surprise them naked in the bathtub and "just go at us with the belt for an hour," that Victor's beatings were so bad that he had welts on his skin, that Laura's son Lawrence was also physically abusive and

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[6]The State objected to Fisher discussing this issue, and the court sustained the objection (PCR. 685).

[7]This proffer came about after the State's objections to Fisher discussing the substance of the information he received from the family interviews and review of the records he was provided were sustained by the trial court (PCR. 659-78). The propriety of the court's rulings are addressed in Argument III, infra.

began sexually molesting Pam when she was six or seven years old, that she eventually got pregnant by Lawrence, that Victor would try to stop Lawrence from molesting her and that caused Lawrence to hate Victor even more resulting in Victor getting beaten on a daily basis by Lawrence (PCR. 691). All this information "would ring bells for any clinician to have need for further investigation into the icebergs that these were the tips of" (PCR. 691). His interview with Pamela confirmed the information contained in her affidavit (PCR. 692).

Fisher's meeting with Carl Leon Miller was also important to Fisher's conclusions. Miller confirmed the kind of beatings they all received from both Laura and Lawrence, and this was "consistent both with the written statement he had given" as well as the information others provided (PCR. 693). Mr. Jones' sister, Valerie, also discussed their mother's severe alcoholism (PCR. 694).

Fisher also relied on information provided by several family members in reaching conclusions about Mr. Jones' state of mind at the time of the offense. Valerie, Michael/Michelle, and Carl Leon Miller observed Mr. Jones' drug taking around the time of the crime (PCR. 694-95). Fisher also observed that Mr. Jones had told Dr. Haber that he began shooting cocaine "every day" upon his release from prison in November, 1990 (PCR. 697). All of this background information is important to know about in terms of reaching opinions, because "[t]he more you do this the better and more well founded your opinion will be"

(PCR. 698). The types of materials Fisher relied on and was provided are the types of materials routinely relied on by experts in reaching conclusions (PCR. 699). This is also the type of background information which Fisher has used to previously testify in Florida courts as to the details and specifics of family background and other issues relating to mitigation (Id.).

Fisher also explained that, in terms of the issue of organic brain damage, "if you start taking drugs when you are six or seven and you do it consistently for more than a decade or two decades, it is to be expected that there may be some neurological damage" (PCR. 700). Also, there is a history, as reflected in the DOC records, of incidents leading to loss of consciousness; these are important and suggest the possibility of brain damage prior to December of 1990 (Id.). On a scale from one to ten, with one being the perfect family and ten being the most dysfunctional, Fisher viewed Mr. Jones' family background as a ten: "You can conjure up a worse family, but I'm not quite sure how you would do that" (PCR. 703-04). Fisher also explained that because a bottle of sherry had been located at the crime scene, "I don't think it would be too much for a clinician to infer" that when Mr. Jones told Marlene Schwartz that he had consumed cocaine and a bottle of sherry at the time of the offense, Schwartz "was talking about this crime. If one needed to have the additional confirmation, they found the bottle there" (PCR. 704-05). This was the conclusion of Fisher's proffer.

Returning to direct examination, Fisher explained that the environment that Mr. Jones was brought up in was filled with drugs, alcohol, and drinking (PCR. 706). When this environment is "present, pervasive, chronic, and all inclusive, it both leads to things that I would consider mitigating, such as mental disturbance or neurological problems and be mitigating in the sense that he comes from that disturbed background" (Id.). Fisher also confirmed reviewing the toxicology report from Mr. Jones' blood analysis after the offense, which was consistent with the other information he had been provided about Mr. Jones' state of mind (PCR. 707).

On cross, Fisher testified that he had previously worked with Koch (PCR. 713). It was "a little unusual" that he was asked to evaluate Mr. Jones twice by Koch but then did no other work on the case (PCR. 716). It was also unusual that he had not been provided with background materials (Id.). Fisher inferred from his file that one of the areas that Koch wanted him to look into was a possible insanity defense; he did not, however, believe Mr. Jones to be insane (PCR. 718). There was nothing in Fisher's notes to indicate that he knew that Mr. Jones had been evaluated by other experts (PCR. 720). Fisher's file indicates that he conducted an evaluation of Mr. Jones back in 1992, as well as a Bender psychological examination (PCR. 720-21). In 2000, Fisher re-evaluated Mr. Jones, and spent several hours with him on two separate occasions (PCR. 735). He reached the

conclusion that Mr. Jones had a horrible developmental background based on his interviews with Mr. Jones and his family (PCR. 738). Mr. Jones told him that his cousin "beat him up" but did not get into great detail "about the difficulties in the family and development" (Id.). Fisher did not probe this area because "if you poke at a sore spot, it sometimes can really ruin an interview" (PCR. 739). It is "very common" for a client to understate abuse when abuse is there (Id.).

As for the 1975 JMH admission, Fisher did not know whether Mr. Jones ever received any treatment for schizophrenia, but the report suggested follow-up evaluations (PCR. 748). Fisher also was aware that Mr. Jones had been in and out of several drug treatment facilities (PCR. 748). He did not know the source of the information reflected in the JMH report that Mr. Jones was in a pediatric intensive care unit for three months (PCR. 749).

3. Juan Sastre. Sastre has been an investigator with the Miami Public Defender's Office since 1987, where he worked when he worked on Mr. Jones' case (PCR. 765). At the time, one investigator was assigned to a judicial division, and he was assigned to the division in which Mr. Jones' case was (PCR. 766). He was also working on other cases (PCR. 767-68).

The investigator's role is "strictly task oriented" in the sense that Koch would write out a memo of what he needed done and Sastre would complete the task and return the memo to Koch (Id.). If Koch

wanted him to talk to a witness or obtain a particular document, Koch would fill out a form and give it to Sastre (PCR. 770). Sastre knew Marlene Schwartz, who was a social worker with the office, but could not recall if she was involved in Mr. Jones' case (PCR. 771). A social worker's tasks were more toward seeing to the needs of the client and sometimes to see family members if they needed to be interviewed (Id.). All these efforts are coordinated by the attorney (PCR. 772). In the course of his experience, he has often been asked to locate witnesses with no address (Id.). For example, public records such as drivers license, mail, auto registrations, forwarding addresses are all means of locating witnesses (PCR. 773). Sastre would not have talked with witnesses without Koch's knowledge (PCR. 774). He did not remember ever leaving Dade County to investigate Mr. Jones' case (Id.). Had he done so, there would be documentation (Id.).

On cross, Sastre testified that he had previously worked with Koch and had a good relationship with him (PCR. 775). The written requests that Koch had made would be in Koch's file (PCR. 779). Sometimes it is difficult to find a witness depending on whether there is public information available (PCR. 782).

4. Dr. Hyman Eisenstein. Eisenstein is a forensic neuropsychologist with a diplomate from the American Board of Professional Neuropsychology (PCR. 787). He testified numerous times in the courts of Dade County (PCR. 789). Back in the early 1990s, he

was asked by Koch to evaluate Mr. Jones for purposes of conducting neuropsychological testing as to issues of competency and mitigation (PCR. 790). Koch had provided him with some background information, including medical records from when Mr. Jones was shot in the head, and police reports (PCR. 790). He testified at a competency hearing conducted between the guilt and penalty phases of trial, as well as at the sentencing before the judge (PCR. 791-92). He was retained by collateral counsel to further evaluate Mr. Jones, at which time he performed another IQ test and a brief interview (PCR. 793). When he worked with Koch prior to trial, Eisenstein saw Mr. Jones numerous times and conducted two comprehensive neuropsychological examinations, one in 1991 and the second in 1993 (PCR. 793). In terms of the collateral evaluation, Eisenstein was provided with and reviewed numerous background materials, which he identified (PCR. 795-96; 802-03). At the time of his original involvement, Eisenstein spoke with Mr. Jones's Aunt Laura, but no other family members (PCR. 797). He has since had the opportunity to do so, and those interviews further assisted him in arriving at conclusions (Id.).

Eisenstein testified that there was mitigation in Mr. Jones' case to which he could have testified, if asked, at Mr. Jones' penalty phase, including past psychological and psychiatric problems, substance abuse problems, cognitive intellectual deficits, poor academic

background, and family disfunction (PCR. 804).[8] To a reasonable degree of professional certainty, at the time of the crime, Mr. Jones' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, even before he was shot in the head at the crime scene (PCR. 805). Moreover, at the time of the crime, Mr. Jones was under the influence of an extreme mental or emotional disturbance (Id.). Mr. Jones was also intoxicated at the time of the crime (Id.).

Regarding the 1975 JMH admission, Eistenstein explained that this was significant for several reasons. First, it was reported that he had been at different institutions and youth homes and had been labeled as borderline mentally retarded (PCR. 808). This means that his IQ level was in the 70 to 79 range, which is the lower end of the general population (Id.). The report also indicated that Mr. Jones was depressed, angry, exhibited looseness of talk, his affect and mood were indicative of schizophrenia (PCR. 809). The report also indicated that there were visual and auditory hallucinations that have content common to paranoid individuals, that the hospital recommended close observation and follow-up, and that Mr. Jones "does not remember any happy moment in his life" (PCR. 809-10). It also detailed Mr. Jones' troubles with drugs, difficulties in school, and his mother's

[8]As Eisenstein explained, "[d]ysfunctional family would be mild terms in describing the environment that Victor Tony Jones grew up in" (PCR. 804).

alcoholism (PCR. 811). This information is consistent with what the family reported to him (Id.). It is also consistent with other records in terms of Mr. Jones' intellectual functioning, for example, testing done by DOC in 1988 revealed an IQ of 76 (PCR. 815). This DOC document was prepared prior to Mr. Jones' arrest (Id.). The subsequent testing conducted by Eisenstein in 1991, 1993, and 1999, was corroborative of the 1975 and 1988 testing insofar as Mr. Jones' intellectual functioning in the borderline range (PCR. 816). At the time of his evaluation when he was working with Koch, Eisenstein did not have the 1975 JMH report (PCR. 817).

Eisenstein reiterated that Koch had asked him to evaluate Mr. Jones' neuropsychological profile and for purposes of competency and mitigation (PCR. 819). His opinion at the time of his pretrial evaluations was that Mr. Jones was incompetent to stand trial (Id.). He did not recall if, prior to Mr. Jones' trial, he talked to Koch about his opinion about Mr. Jones' competency prior to trial (Id.). After having his recollection refreshed and upon questioning by the court, Eisenstein clarified his that he did discuss Mr. Jones' incompetency with Mr. Koch prior to the trial (PCR. 821). Eisenstein believed he determined that Mr. Jones was incompetent in February, 1993 (PCR. 834). Eisenstein was not sure what his conclusions were about Mr. Jones' competency prior to the trial (PCR. 835). However, he later clarified that he believed that Mr. Jones was incompetent in 1992,

before Mr. Jones went to trial, but he did not recall if he advised Koch of his opinion (PCR. 860).

Eisenstein also testified that he reviewed the notes of social worker Schwartz, which were provided to him by collateral counsel; he had not been provided the notes by Koch (PCR. 837-38).[9] The notes were important as they reveal that Mr. Jones described shooting a $25 bag of cocaine and drinking a fifth of sherry just prior to the commission of the crime (PCR. 838). Mr. Jones' intoxication at and around the time of the offense was corroborated by family members (PCR. 841-42). Family members also corroborated Mr. Jones' background, such as substance abuse history, history of drug overdoses and hospitalizations, the lack of care during Mr. Jones' developmental history, family dynamics (PCR. 840-45). He also confirmed that Laura's son, Lawrence, impregnated Mr. Jones' sister Pam, which "elicited a significant response and emotion" from Laura (PCR. 845). During his interview of Laura, her affect was "bland" and "flat" and "somewhat distant" (PCR. 847). The pregnancy by Lawrence was also corroborated by Eistenstein's interview with Pam, who also discussed how Mr. Jones handled the "discipline" administered by Lawrence (PCR. 849). Pam also discussed her mother's alcoholism, and Lawrence's abuse especially towards Victor, who he would "beat" with belts and "slam around"

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[9]Eisenstein also had not been provided with any notes from other experts about any interactions with Laura Long, nor did Koch provide him with his notes (PCR. 904-05).

because Victor wasn't good at learning (PCR. 851). Pam also reported that their mother was epileptic and was told not to drink, but she would say "Whatever, I'll die. I'll die" (Id.). Carl Leon Miller also lived with Laura, and he confirmed that she was very strict; he reported that Mr. Jones was using a lot of drugs and alcohol by the age of 14 (PCR. 852-53). Laura's son Lawrence was the "enforcer" and would whip them with belts (PCR. 853). He also recalled when Mr. Jones overdosed on pills at the age of 13 or 14 and had to be hospitalized at Jackson Hospital (Id.). In the days leading up to the offense, Mr. Jones was doing heroin and cocaine, "enough that his state of mind was different, slurring speech" (Id.). The information Eisenstein gleaned from these interviews was important in terms of corroborating Mr. Jones' history, "although the dates and times are not as important as the content of their statements" (PCR. 855). This information is also important because "it paints a picture and it's a very individual picture of understanding what was going on with him" (PCR. 856). Eisenstein had "considerably more" information at the time of the evidentiary hearing than he did at the time of his work with Koch (Id.).

Eisenstein also opined that Mr. Jones had neuropsychological problems prior to sustaining the frontal lobe injury at the time of the offense (PCR. 857). For example, the prior records indicate that he was a slow learner, and his school records revealed that he obtained

approximately 80% C's when he was seven and eight, and after that they were basically all F's (Id.). The prior records all consistently indicated borderline mental retardation (Id.). Mr. Jones also had car accidents, drug overdoses, all of which create neuropsychological impairment (PCR. 858). Based on this constellation of information, Eisenstein would certainly suspect that there "would be a considerable amount of deficits in other areas of brain behavior activity" (Id.). He reiterated that he had none of this information at the time he testified in 1993 (Id.).

On cross, Eistenstein testified that he had worked with Koch at least one time prior to Mr. Jones' case (PCR. 861). He knew that there were other experts involved in the case (PCR. 863). He knew of several of them, but had not known of Fisher's involvement (PCR. 864). It would have been important for Koch to share this information with him (Id.). He spent quite a bit of time with Mr. Jones prior to 1993, and also met with Koch on various occasions (PCR. 867-68). He reiterated that one of the areas he was looking into at Koch's request was Mr. Jones' competency (PCR. 870). As to whether or not he discussed the legal issue of competency with Koch, Eisenstein explained that "I'm not his lawyer" and "I don't raise issues of strategy. . . I"m sure I raised issues concerning his neuropsychological performance. . . Again, how this specifically relates to the specific areas of the competency and what then Mr. Koch wanted to do, that's again, I'm not counsel"

(PCR. 871-72). Eisenstein may have told Koch that Mr. Jones was not competent, but it was not Eisenstein's decision to make about how or whether to raise the issue (PCR. 872). Koch did not discuss with him the opinions of the other defense experts relating to Mr. Jones' competency (PCR. 873). He knew of the State doctors who believed that Mr. Jones was competent at the point when there was a hearing between the guilt and penalty phases (PCR. 876).

Back in 1992, Eisenstein did have the chance to speak with Laura Long, but only briefly on the telephone (PCR. 877). At the time he would have wanted to speak with other family members, but they were not made available to him by Koch (PCR. 877-78). He explained that "if resources are put into finding family members, often they can be found, but it's a very time consuming task" (PCR. 878).[10] Mr. Jones' performance in school was very poor (PCR. 880-83). The 1975 JMH report, along with other information, corroborated his conclusions about Mr. Jones' intellectual functioning (PCR. 884-85). It would not surprise Eisenstein to know that after being released from JMH, Mr. Jones committed additional crimes (PCR. 887). If JMH did not believe that Mr. Jones had some type of mental disorder, they would not have kept him for five weeks in the hospital (PCR. 888).

In terms of Eisenstein's conclusions about Mr. Jones'

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[10]He later explained that Koch did not ask him to interview anyone but Laura Long, and that if had asked him to interview others, he would have (PCR. 937).

intoxication, he was aware of the toxicology report indicating trace amounts of cocaine (PCR. 891). He is not a toxicologist, nor did he know when they drew the blood (PCR. 892). The report "is obviously indicative of something, but that's not the basis of my opinion. It was clearly based on everything that has been stated" (PCR. 892). He also relied on what Carl Leon Miller told him with respect to Mr. Jones' drug usage in the two weeks leading up to the day of the crime (PCR. 893). In terms of his conversation with Laura Long, Eisenstein agreed with the prosecutor that, in 1992, she painted a totally different picture of Mr. Jones' history than she did when he spoke with her for purposes of the postconviction evaluation (PCR. 905-06). He looked into the possibility that Mr. Jones suffered from fetal alcohol syndrome: "I didn't discount it and I don't have confirmation for it. It's a possibility and it's unclear" (PCR. 909). Mr. Jones himself did not talk at length about the details of the abuse at Laura's home, and that was consistent with his personality (PCR. 911). Child abuse is often not reported to authorities by the children themselves because "[t]hey're little kids. . . Under that environment one of the cardinal principles running through, the way that operates is a code is you don't talk because if you are going to talk, you are going to get beaten even worse. So I think it's pretty clear as to why abuse was not reported or not dealt with" (PCR. 913). Eisenstein reiterated that Mr. Jones "presents with severe neurological deficits," his

intellectual level is in the "borderline" or "mild mental deficiency range," has "deficits in his thinking process, his abstraction, in his ability to formulate conceptual thinking" (PCR. 918). Mr. Jones was not of average intellectual functioning (Id.).

5. Pamela Mills. Mills is Mr. Jones' older sister, and has been living in New York City for about 20 years (PCR. 944). She identified her signature on Defense Exhibit A-15 for identification, which was an affidavit she executed (PCR. 945-46). In addition to Victor, there was a brother, Lionel, who was killed in Miami, another brother named Frank, and one named Michael (PCR. 947). She has one sister, Valerie (Id.). Their mother's name was Constance Laverne Jones, who died in 1982 (PCR. 949). Mills was born on November 10, 1957, and when she was 6 or 7 went to live with her Aunt Laura (PCR. 949). Victor and their cousin Carl were also living with Laura, as was Laura's son, Lawrence (PCR. 950). Laura's boyfriend/husband, Reverend Long, was also in the house (Id.). Laura treated them like a stepchild "with all of this abuse going on in the household, both physical and sexually" (PCR. 951). Lawrence was "the world" to Laura, and "he could do no wrong" (Id.). Victor, Pamela, and Carl were "like stepkids" and we "got beatings" (Id.). They would get beaten on a daily basis by Laura and Lawrence, they would have to take their clothes off and "get beat with belts and buckles and whatever they could find" (PCR. 952-53). There was no different treatment for Pam, "they just came at us

like that. It was no different. We all got beat" (PCR. 952). When Pam was about six or seven years old, Lawrence took advantage of her sexually; this happened more than once, and Pam eventually got pregnant (Id.). Laura "did nothing" upon learning that Lawrence had impregnated Pam because "[s]till in her eyes Lawrence couldn't do no wrong" (Id.). Pam was "[a]pproximately ten" years old when she had the baby, who was named Virgil (PCR. 952-53). Pam eventually left to go to New York to find her mother (PCR. 953). Valerie and Michael were living in New York with their mother (Id.). Victor eventually came to New York (PCR. 954). When they were with their mother, "basically we were on our own" because she was always drunk (Id.). Her favorite drink was gin (Id.). Pam used drugs when she was living with her mother, but she later went to rehab in New York and has been clean for twelve years (Id. at 955). She later went to a halfway house, where she stayed for nine months, and then she was on her own (Id.). Pamela also suffers from AIDS, and was first diagnosed in 1992; she is getting treatment also in New York (PCR. 956).

Carl also lived in the house with Laura and also got beaten by both Laura and Lawrence, but "Victor got it worse" because "we weren't as perfect as she wanted us to be. We didn't do things fast enough for her" (PCR. 957). Victor was also "very slow in school" and had learning disabilities; this was one of the things that Laura "would get on us about, especially him" (PCR. 959). After the beatings, they

would have welts on their bodies; Victor would cry a lot (Id.). Pam was never contacted by Victor's attorney or investigator, and no one came to New York to talk with her; had she been asked, she would have come to Miami to testify (PCR. 960).

On cross, Pam agreed with the prosecutor's statement that she "had some very tough years" (PCR. 961). She was out of touch with family until around 1997 when she remembered a telephone number (Id.). She did not know about Victor's arrest (PCR. 963). She has an apartment in New York, but does not own a car (Id.). Since 1991, she has been on medication for AIDS and psychiatric problems (PCR. 964). The medications do not affect her memory (Id.). Laura raised Virgil because Pam left Miami when she was around 11 or 12 (Id.). She later got pregnant in New York, and she took care of the baby herself (PCR. 965). Prior to 1989, when she hit rock bottom, Pam was essentially living on the streets; in 1989, she went into rehab (PCR. 967).

On redirect, Pam explained that she had a social security number, received food stamps while living in New York, and received other public assistance such as the drug rehabilitation programs (PCR. 970-71). When she lived in the apartment in New York, it was under her name, and the utilities were also under her name (PCR. 972).

6. Carl Leon Miller. Miller is Mr. Jones' cousin, and has known him since he was about six years old (PCR. 974). He lived with Mr. Jones at Laura Long's house, along with Mr. Jones' sisters Pam and

Valerie, as well as Laura's son Lawrence (PCR. 975). Miller has served jail time in Miami (PCR. 976). His first incarceration was for shooting at Laura when he was about 17 years old (PCR. 976). This occurred because Laura cut Miller's hair at night when he was sleeping, and when he woke up and saw what happened, he "just went on a rampage" (PCR. 976-77).

Lawrence came into the household when Miller and Victor were young, almost as soon as they moved in with her (PCR. 978). Lawrence was about 10 years older than Miller (PCR. 979). Lawrence was "an abuser. He liked to beat people" (Id.). He would use a belt, "with his leg over us, beat us with a belt, a leather belt" (Id.). He would sometimes "do it just out of spite" or sometimes "Laura would tell him to" (Id.). "Sometimes we get it one day. Sometimes you get it two times a day, according to what you did or the way they felt" (Id.). Miller was 17 when he left Laura's house. He "couldn't put a number" on the times they were beaten, it was "[t]oo many times. I put it that way" (PCR. 980). Lawrence was not there the entire time, he was also in prison (PCR. 981). A number of men livedwith Laura, including Sergeant Hunt, who would also beat Victor, but Hunt later left (PCR. 982). She then lived with Reverend Long, who "really didn't do too much of nothing" but did not beat them too much because he did not have the strength (Id.). It was Lawrence who was "the enforcer"; "[a]nything Laura said for him to do to us, that's what he did, whether

it was right or wrong" (PCR. 982-83). His beatings were done "[f]orcefully, nasty"; sometimes he would hit, sometimes he would just grab you because he was strong (PCR. 983). He saw Victor get beaten "[p]lenty of times" and Lawrence "really didn't like him" (Id.). Miller and Victor were "like brothers, very close" at that time (Id.).

Miller and Mr. Jones often used drugs, beginning when Miller was about 13 years old, including hallucinogenics, marijuana, cocaine, acid, "You name it, we did it" (PCR. 984). He was also aware of what was going on between Lawrence and Pam: "Lawrence would always be chasing her, putting his hands on her, things of that nature" meaning "sexually" (PCR. 986-87). Pam eventually got pregnant by Lawrence (PCR. 987). The last time Miller saw Mr. Jones was in December, 1990, when they were smoking crack and drinking together (PCR. 988). Miller believed this was the day before Mr. Jones was arrested (Id.). Back in 1990-92, Miller was living in Miami with his aunt Beatrice, with part of that time in 1991 in jail in Miami (PCR. 990). He never spoke with any of Mr. Jones' lawyers or investigators (PCR. 991).

On cross, Miller reiterated that he grew up in the same house as Mr. Jones, and they were close and often used drugs together (PCR. 992-93). The day before the crime, he saw Mr. Jones injecting drugs (PCR. 995). He knew that Mr. Jones had been arrested on charges of murder (PCR. 998). It was not a secret in the house that Mr. Jones had been arrested (PCR. 1000). Miller did not know that his aunts Bea and Laura

were speaking to Mr. Jones' attorney (PCR. 1001). At that time, he had his mind focused on his own problems (PCR. 1002). If he had been asked, "I would have told you I remember everything I did in his childhood" (Id.).

7. Dr. Merry Haber. Haber is a clinical and forensic psychologist (PCR. 1009-10). On January 7, 1992, she was asked by Koch to evaluate Mr. Jones, and did so on January 20 (PCR. 1011-12). Prior to the evaluation, she received no records from Koch but did receive Marlene Schwartz's notes (Id.). She later received some prison records, and never received the addresses of Mr. Jones' family members referred to by Koch in a letter (PCR. 1013). The purpose of her evaluation was a "screening" for competency purposes, which is her standard way of evaluating a forensic client (Id.). Mr. Jones responded to her questions, for example, he told her about a car accident he had in Virgina and that he suffered bad headaches and dizziness as a result (PCR. 1015). He also told her that he was in JMH when he was around 16 years old, and Haber starred that point in her notes "as something that I would want to further look into" (Id.). He also told her about his drug history, which was "[h]ighly significant from an early age" (PCR. 1016). He also informed her that when he got out of prison in November, 1990, "he began shooting cocaine intravenously and still had marks on him at that time" (PCR. 1017). Haber did not obtain much information about Mr. Jones' background at

that time, but he did mention that his mother drank before she died, that he went to live with his Aunt Laura, that he ran away and went to New York, and mentioned his sister Valerie and cousin Carl Leon Miller (PCR. 1018). He also told her about a friend who was a white kid (PCR. 1019). After her evaluation, her standard procedure would be to call the attorney to report her initial impressions (PCR. 1019). Her notes also indicated a reference to a Nurse Erica Kimball; Haber explained that she talked to the nurse at the jail, "who told me that she saw class[ic] signs of withdrawal" (Id.).[11]

Subsequent to her initial evaluation, Haber met with Mr. Jones' aunt, grandmother, and school teacher around February 27 (PCR. 1020). Generally, the reason she would talk to such people "would be to look for mitigating factors in a death penalty sentencing" (PCR. 1021). Haber described what the witnesses discussed with her (PCR. 1021-23). Based on her discussions with Mr. Jones' aunts, "[i]t sounded like he had developed in a fairly normal household" (PCR. 1023). At no time did Koch give her any indication that Mr. Jones' developmental years were anything but what had been portrayed by Long (PCR. 1024). Koch never told her that Mr. Jones had reported physical abuse (Id.). If he had, it would have been documented in her notes (Id.). After her

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[11]This last statement was objected to on hearsay grounds and sustained (PCR. 1020). Haber then explained that she had no independent recollection of the nurse telling her this, "but I don't think I would have written it unless she had" (Id.).

interviews with the family, Haber had no further contact from Koch (PCR. 1025).

Haber was contacted by collateral counsel and provided with a number of materials (PCR. 1025-26). She had none of this information from Koch (PCR. 1026-27). Had she been provided with this material, Haber would have been able to testify to nonstatutory mitigation, including his "[s]evere" substance abuse addiction and history of same and childhood abuse (PCR. 1028). Drug abuse is mitigating evidence because "when people use drugs, they require more and more and it affects their judgment. It affects their behavior. It makes then behave in antisocial ways. It increases impulsivity, increases antisocial behavior, increases the likelihood of irresponsible behavior and gets out of control" (PCR. 1034-35). The issue of physical abuse was relevant to Haber because

> physical abuse is damaging, not only physically, but emotionally, and children don't heal from this and very often they express and exhibit symptomology that develops from being abused as a child, and that's both sexual and physical abuse, and the most common is substance abuse.

(PCR. 1029). The 1975 JMH report was significant to her in terms of corroborating Mr. Jones' mental state and the severity of his drug addiction (PCR. 1030-31). Had she had this information at the time of her initial evaluation of Mr. Jones, she would have recommended a neuropsycholical battery irrespective of whether he had been shot in the head (PCR. 1032).

On cross, Haber testified that she had worked with Koch before in other cases (PCR. 1036). She confirmed that she did not see the 1975 JMH report until it had been furnished during the postconviction proceedings (PCR. 1039). Her notes generated at the time indicated that she was not to question Mr. Jones about the homicide (Id.). She did not recall if she contacted the people listed in her notes as potential people to contact about Mr. Jones' case (PCR. 1040). It would appear that at some point she stopped work on the case and did not know why (PCR. 1041). Haber did not conclude that statutory mitigation was present in the case (PCR. 1041-42).

On redirect, Haber explained that she had not been requested to evaluate Mr. Jones' case for the purpose of determining statutory mitigation (PCR. 1051). She has testified in other capital cases to just nonstatutory mitigation without finding statutory mitigation (Id.). If Koch had ever told her that he suspected that Mr. Jones had been physically abused, Haber would "[a]bsolutely" have followed up on that (PCR. 1052). Although she recommended Eistenstein to Koch, Haber never saw any of Eisenstein's testing (PCR. 1053). Haber's notes also reflect that a bottle of blueberry brandy was found at the crime scene (PCR. 1053). Haber did not know "until later" that Koch was dissatisfied with her or that he believed she was incompetent (PCR. 1053).

On questioning by the court, Haber testified that she has done

evaluations in approximately 40 capital cases, and of the cases that have gone to trial, she could not think of one case where the attorney did not call her to testify that she found nonstatutory mitigation based on substance abuse (PCR. 1057). In no death penalty case where she had found drug abuse history to be a nonstatutory mitigating factor did the attorney ever tell her that he did not want her to testify because juries did not respond well to drug abuse as mitigation (PCR. 1058).

8. Dr. Jorge Herrera.[12] Herrera is a neuropsychologist (PCR. 1070-72). In 1993, he was appointed to conduct a competency evaluation between the guilt phase and penalty phase (PCR. 1073). He spent about 90 minutes with Mr. Jones and conducted a "neuropsychological diagnostic interview" but no testing (PCR. 1074). He was aware that Mr. Jones had been given a battery of tests by Eisenstein (Id.). Mr. Jones told him about his history of drug usage, his criminal history, and that he had been hospitalized at JMH's psychiatric unit around the age of 15 (PCR. 1075). Herrera sensed a "paranoid flavor" in Mr. Jones, this was not unusual given Mr. Jones' legal situation (PCR. 1077). Herrera found him competent to proceed to the penalty phase (PCR. 1080).

9. Dr. Jethro Toomer. Dr. Toomer is a forensic and clinical psychologist (PCR. 1088). Back at the time of trial, Koch asked him to

[12]Dr. Herrera was a state witness called out of turn.

determine Mr. Jones' mental status functioning and issues related to mitigation (PCR. 1089). He saw Mr. Jones on three occasions (PCR. 1090). Koch provided him with some background materials, including some school and corrections records, and social worker notes (PCR. 1090, 1093). He also spoke on the telephone with Mr. Jones' Aunt Laura and a school teacher, Vera Edwards (PCR. 1090-91). Toomer testifed at the penalty phase (PCR. 1091). Since that time, he was provided additional materials by collateral counsel, including family member affidavits, a 1975 JMH admission report, and prior evaluations done by other experts (PCR. 1092). Toomer did not have the 1975 JMH report at the time he testified at the penalty phase (PCR. 1093). Nor did Toomer have many of the corrections documents that were provided to him by collateral counsel, the toxicology report generated soon after Mr. Jones' arrest, or the testimony or reports of the experts who had evaluated Mr. Jones for competency purposes prior to the penalty phase (PCR. 1094). He also did not know at the time that Mr. Jones had been evaluated by Fisher and Haber (PCR. 1095). All the information he has since received and reviewed is significant because "it would corroborate and reinforce the opinions that I had rendered earlier regarding [Mr. Jones'] mental status functioning" (PCR. 1095). For example:

> One, in terms of the issues around abandonment.
>
> Two, the issues related to family dysfunction. It provided a much clearer picture and a much more detailed

> picture of the level of dysfunction that existed within the family structure.
>
> It also provided substantial information regarding substance abuse history.
>
> It also provided the kind of time frame with respect to the level and degree of dysfunction of Mr. Jones which had its onset at an early period in life.
>
> Also, in terms of just overall functioning and attempts at adapting, statements provided by individuals also provided some insight into that aspect of his life.

(PCR. 1096). Based on the information he had at the penalty phase, all Toomer could explain was that, according to what the aunt had said, she had moved Mr. Jones into a "safer higher functioning more nurturing environment" than he had been living in previously (PCR. 1096). The new information reflected that this portrayal "was anything but the truth because he was placed in an environment that was characterized by a level of dysfunction, abuse where he was also a victim, as well as an observer. So it was hardly a situation of his moving from a negative to a positive. He in fact moved from a negative to another negative" (PCR. 1096-97). This is important because it "outlines in detail the predispositional factors that significantly impact upon one's ability to develop the necessary skills for appropriate adaptive functioning in life" (PCR. 1097). The JMH document also is significant as it provides a time frame with respect to "overall deficit functioning at this point in time" and addresses family dysfunction, substance abuse, and Mr. Jones' impaired functioning (PCR. 1098-99). The behaviors and

observations of the JMH staff are consistent with Toomer's own conclusions (PCR. 1100).

Additional information about Mr. Jones' substance abuse history and information about substance abuse at the time of the offense would also have been important for him to have when he testified (PCR. 1101). He did not have Haber's report indicating that during the short period between Mr. Jones' release from prison and the offense he was using cocaine and other drugs on almost a daily basis (PCR. 1102). He also did not have the toxicology screening report revealing traces of cocaine in Mr. Jones' system, which is also consistent with Haber's report (Id.). Koch never discussed with Toomer the issue of Mr. Jones' substance abuse history nor his use of drugs in the period leading up to the offense (Id.). He has testified that substance abuse was a mitigating factor in other capital proceedings (PCR. 1103). Toomer also received documents indicating that Mr. Jones suffered head injuries prior to being shot in the head in 1990, documents which he had not previously been provided by Koch (PCR. 1105).

On cross, Toomer explained that he had testified at numerous capital proceedings, but had not worked with Koch a great deal (PCR. 1107). In comparison with other cases, it was unusual that he was not provided with the background information that now is known to exist (PCR. 1109). He recalled asking Koch for any documents relating to the 1975 JMH admission, but Koch told him no records existed (PCR. 1110).

Toomer identified what was introduced into evidence as State Exhibit 4, which was a timeline that Toomer had prepared at the time of trial based on the information he had (PCR. 1114). Toomer acknowledged knowing that Mr. Jones had said he had been physically punished by his cousin, but not in any detail (PCR. 1116). He also knew that Mr. Jones had been in the JMH psychiatric ward, but did not have any records (PCR. 1118). The discharge diagnosis by JMH of undersocialized reaction means that Mr. Jones has not "been indoctrinated into basic normal structured society" and "because of erratic nurturing and predispositional factors lives in an unpredictable or aggressive fashion" (PCR. 1126-27). The new data reinforced his opinions with respect to Mr. Jones' overall functioning (PCR. 1130).

10. Vera Edwards.[13] Edwards was a public school teacher in Dade County and taught Mr. Jones for one year when he was about 8 (PCR. 1162). She knew who Mr. Jones' "guardian" was at the time (PCR. 1163). Back in 1990-93, several doctors talked to her about Mr. Jones (PCR. 1165). Mr. Jones' guardian had contacted Edwards first, and gotten her phone number (Id.). As a student, Mr. Jones was alert, disciplined, and prepared for class (Id.). She never asked his guardian to come to the school for disciplinary or academic problems (PCR. 1166). He appeared to be of "a little above average" intelligence (Id.). Edwards would see Mr. Jones' guardian on a daily basis, as Edwards' daughter

[13]Edwards was called by the State.

was at a day care center run by the guardian (Id.). Part of her job is to look for abuse of a child (PCR. 1167). She did not see signs that Mr. Jones was abused (PCR. 1168).

On cross, Edwards did not recall what year she taught Mr. Jones because "[i]t's been a long time" (PCR. 1168). She was "positive" that it was third grade (Id.). There were 33 or 34 other students in the class (Id.). She did not remember any of the other students (PCR. 1169). Mr. Jones' guardian was a Mrs. Wright, but she never knew her first name, nor did she know if Mrs. Wright was married "because that didn't concern me" (Id.). Edwards had no records of Mr. Jones' performance in school (PCR. 1170). She knew that there were other siblings, and she recalled Virgil living with the family at the time she taught Mr. Jones (Id.). Edwards was never inside Mr. Jones' house (PCR. 1171). Edwards has taught children who although looked all right, were in fact abused at home (PCR. 1172). If a child had bruises on his body under his clothes, she would have no way of knowing that (Id.). She did not know if Mrs. Wright's day care was registered (Id.). Once Mr. Jones left her class, she did not know what happened to him (Id.). She is relying on her memory that Mr. Jones was a good student, and agreed that her memory can fade over time (PCR. 1173).

On redirect, Edwards explained that there were other signs of abuse besides bruises, such as isolation, withdrawal, and these things can be detected in their art work (PCR. 1174). On recross, Edwards

testified that she did not teach art or music at the school (PCR. 1174). She would not have been aware of any of the art that he did (PCR. 1175). She did not remember any of Mr. Jones' friends in third grade, but he was "well liked" (PCR. 1175). The art teacher would have told her if Mr. Jones had drawn something in art class (PCR. 1176).

11. Virgil Brown.[14] Brown's date of birth is April 9, 1972, and his mother is Pamela Mills and his father is Lawrence Brown (PCR. 1185). No one ever told him who is father was in relation to his mother (PCR. 1186).

12. Dr. Charles Mutter.[15] Mutter is a psychiatrist (PCR. 1187-88). He is not board certified because he failed the testing in the area of clinical neurology (PCR. 1189).

Mutter evaluated Mr. Jones for competency in the period of time following the trial and before the penalty phase (PCR. 1190). Mr. Jones told him that he was upset with attorney Koch (PCR. 1191). He also expressed concern because he was a black defendant facing the death penalty (PCR. 1192-93). Mr. Jones told Mutter that he did not commit the crime (PCR. 1193). Mutter did not ask much about the facts of the crime because his role was to determine if Mr. Jones had a mental illness that might make him incompetent (Id.). He did not ask Mr. Jones about drug usage because Mr. Jones told him he did not commit

[14]Brown was called by the State.

[15]Mutter was called by the State.

the crime, and "that was really not the issue that I had to evaluate" (PCR. 1194). In terms of documentation he had at the time of his evaluation, Mutter testified had JMH records from when Mr. Jones was hospitalized following his arrest, records from Dr. Toomer and depositions, police reports, records from prior incarcerations, data from prior psychological testing, and notes and records from Dr. Eisenstein (PCR. 1194-95). Following his evaluation, Mutter found Mr. Jones to be competent to proceed to the penalty phase (PCR. 1195).

During the interview, Mr. Jones' responses about his family background were "consistent basically with what he told Dr. Toomer" (PCR. 1198). However, Mutter did not extensively question Mr. Jones about his family background because "that really doesn't matter with where I am now" in terms of the competency question (PCR. 1199). Mr. Jones did say that he had been beaten and did not get much nurturing, and "he was beaten more than the others and he would get hit when he didn't do what he was supposed to do" (PCR. 1200). Mr. Jones also revealed his prior psychiatric hospitalization, but at the time of the evaluation, Mutter had no actual record of such (PCR. 1198). The prosecutor has since provided him with this document (PCR. 1199). Mutter's diagnosis of Mr. Jones was and is antisocial personality disorder, which, in his view, was "very close" to the 1975 JMH diagnosis (PCR. 1202). An antisocial personality is a "defect of the superego" (Id.). "[P]eople like this usually" have intelligence and

able to manipulate their environment" (PCR. 1203).

Based on Mr. Jones' history, Mutter opined that Mr. Jones had a history of substance abuse, but this was not mitigating because "that's a choice that people make" (PCR. 1205). As for whether Mr. Jones was intoxicated at the time of the crime, Mutter conceded he had no "hardcore evidence that he was or was not" (PCR. 1206). In terms of the toxicology report and its significance, Mutter would "defer that to a psychopharmacologist or a toxicologist" (Id.). At the time he evaluated Mr. Jones, Mutter was not asked to go into detail with him about his intoxication (PCR. 1206). In his opinion, Mr. Jones was not under the influence of an extreme mental or emotional disturbance at the time of the crime (PCR. 1207). About 80% of the work he does is court appointments, and 10% of the time he is hired by the State, and 10% by the defense (PCR. 1208). He has conducted over 15,000 evaluations, and 85% of the time he has found defendants competent (PCR. 1208).

On cross, Mutter acknowledged that the scope of his competency evaluation was limited to the period between the guilt and penalty phases (PCR. 1209). He did not believe that Mr. Jones was intoxicated at the time of the offense, although that opinion was based on the toxicology report which he again indicated he would defer "a final opinion" to a toxicologist (PCR. 1210-11). Mutter was not provided with any information about Mr. Jones' use of drugs in the time leading

up to the offense (PCR. 1211). In Mutter's view, for someone to be intoxicated, "it has to produce some type of a mental reaction or change in their personality structure that makes them not be able to understand what they are doing and what they are doing is wrong" (Id.). "A drug doesn't make somebody commit a crime; a choice does that" (Id.). He reiterated that the one exception is when someone takes a drug "and they lose their identity and become a different person" (PCR. 1212). In his view, this is the only time intoxication playa a role in a crime (Id.)

Mutter acknowledged that antisocial personality disorder cannot be diagnosed prior to the age of 18, according to the requirements of the Diagnostic and Statistical Manual (PCR. 1215). He has no way of knowing if Mr. Jones was lying when he told Mutter that he was physically abused, and has seen no documentation to corroborate that (PCR. 1215). Mutter could not say that Mr. Jones was lying or exaggerating about the physical abuse, "I have no way of evaluating this happened or didn't happen" (PCR. 1216). He could not state what Mr. Jones lied or exaggerated about, and then clarified that people with antisocial personalities "tended" to lie (Id.). He could not state whether Mr. Jones was lying or exaggerating about his history of drug use because it was an area that Mutter did not explore (PCR. 1217). Mutter could not say whether the law recognizes drug use as a mitigating factor in capital sentencing (PCR. 1218).

Mutter has not testified at many penalty phases, and some of those were not in capital cases but rather at sentencings for lesser crimes (PCR. 1218). He thinks he testified at "maybe two" penalty phases on behalf of a defendant, but clarified that one of those cases was actually a postconviction proceeding (PCR. 1219). He could not specifically recall a case where he testified for the defense to mitigation in a capital case (PCR. 1220).

At the time of his opinion in 1993 that Mr. Jones was competent, he did not know what information the other mental health experts had obtained (Id.). He did not have the notes from social worker Schwartz, or Dr. Haber's report or notes (PCR. 1220-21). In terms of Mr. Jones' developmental years, Mutter has no information other than what he has testified to, no information from siblings (PCR. 1222). To clarify, Mutter's testimony was only that Mr. Jones was competent to proceed at his penalty phase in 1993 (Id.). When asked if he disagreed that statutory mitigators applied, Mutter testified "I don't know what those are" (Id.). His understanding of statutory mitigating circumstances are "behaviors or events that influence a person's behavior at the time a crime is committed" (PCR. 1223). No such factors existed on a psychiatric basis (Id.). In Mutter's view, these factors mean that the defendant essentially is insane (Id.). Insanity and voluntary intoxication can also be affirmative defenses to murder (Id.).

On redirect, Mutter testified that if had been asked, he would not have believed that Mr. Jones was incompetent prior to the guilt phase of the trial (PCR. 1225). He repeated that Mr. Jones' capacity to conform his conduct to the requirements of the law was not substantially impaired, or that he suffered from an extreme mental or emotional disturbance (PCR. 1226).

On recross, Mutter acknowledged that he was never asked to evaluate Mr. Jones' competency prior to trial (PR. 1228). He reiterated that unless Mr. Jones was insane, the statutory mitigators would not apply to him (Id.) Only acute pathological intoxication would make statutory mitigators apply (PCR. 1229).

13. Dr. William Hearn.[16] Hearn is a toxicologist at the Miami Dade County Medical Examiner's Office (PCR. 1238). Hearn was permitted to testify as to the physiological effects of drugs on the body (PCR. 1244-45).

Hearn testified that blood was drawn from Mr. Jones upon his admission to the hospital (PCR. 1245). The blood was drawn on December 19 at 1:40 PM (PCR. 1247). The test results from that blood draw showed no alcohol present (PCR. 1248). The results were negative for the presence of heroin and other opiates (PCR. 1249). In terms of cocaine, there was a trace amount detected, as well as benzoylegonine [B.E.], which is a metabolite of cocaine (Id.). The combination of the

[16]Hearn was called by the State.

.54 milligrams of B.E. and the trace of cocaine "tells me that Mr. Jones had used cocaine at some time prior to the sample being collected" (Id.). According to Hearn, Mr. Jones used cocaine "within, at the most, ten hours prior to the blood sample being collected" (PCR. 1250). The inside range of when Mr. Jones used cocaine with relation to the blood draw would be two to three hours (PCR. 1251). He could not give an amount, but it was probably a few doses (Id.). If Mr. Jones was an IV drug user, Hearn would not expect to find these same results (Id.). If a trace amount of cocaine is detected, a person is not considered under the influence of cocaine (Id.). If Mr. Jones had been using heroin and suddenly stopped, he would, within 12 to 24 hours, become agitated and physically ill (PCR. 1252). The symptoms would last, on average, for a week (PCR. 1254). After Mr. Jones was discharged from the hospital, he would not expect any withdrawal symptoms unless the hospital medicated him to prevent withdrawal and the medications were cut off when he was discharged (PCR. 1255). Based upon the blood draw, Mr. Jones would not have been intoxicated at the time of the offense, but he would be experiencing some "mild stimulant effects" from the amount of cocaine he had used (PCR. 1256). Hearn's definition of "intoxicated" meant that Mr. Jones would have to be delusional and have seriously disrupted judgement and thought process (Id.). Mr. Jones' ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law would not be

substantially impaired, nor would he have been under an extreme mental or emotional disturbance (PCR. 1258).

On cross, Hearn testified that he did not know what happened with the blood sample between the time it was taken at 1:40 PM at the hospital until it got to the medical examiner's office on January 16, 1991 (PCR. 1260). The alcohol screening was performed on March 8, the basic drug screening on February 8, the test that confirmed the presence of the B.E. was conducted on February 8, and the confirmatory test, performed via gas chromatography, was not conducted until August 2, 1991 (PCR. 1260). Someone named Donny Duffy did the actual testing (PCR. 1261). Joe Rein also did some of the testing (PCR. 1265). The names of the actual person doing the testing is never provided in the final report by the medical examiner's office (PCR. 1267). Once a sample is received from a courier service, it is placed in a controlled access area of the lab, and when the sample is needed it is requested from a lab assistant (Id.). This procedure is documented now, but Hearn did not know if it was at the time of Mr. Jones' case (PCR. 1268).

Hearn agreed that cocaine is one of the faster substances to metabolize in the system, and, to some degree the rate of metabolism depends on the individual characteristics of the person (Id.). The effects of cocaine on a person also vary from person to person (PCR. 1269).

When the hospital took the sample, Hearn did not know if they kept part of it and sent the other part to his office (PR. 1270). However, part of the blood draw from 1:40 PM was kept by the hospital (Id.) According to hospital records, introduced as Defense Exhibit M, the hospital also attempted to do testing on the blood taken at the 1:40 PM blood draw but could not because it determined that the sample was contaminated (PCR. 1271). Hearn did not think it was a problem that the blood sample from which his office's testing was based was found to be contaminated by the hospital (PCR. 1272). The presence of B.E. in Mr. Jones' blood draw is further confirmation that there was cocaine in Mr. Jones' blood sample (PCR. 1273).

With respect to the issue of heroin withdrawal, one possible issue that could affect a person's withdrawal symptoms would be if that person was sedated (PCR. 1273). If a person is anesthetized and goes through brain surgery, this could block or mask the symptoms of withdrawal (PCR. 1274). Drugs such as codeine and dilantin could have a sedative affect (PCR. 1275). Hearn did not know what medications and dosages Mr. Jones was being administered in the hospital (PCR. 1276). He has never seen Mr. Jones before, and knows nothing about his history (Id.). When Hearn used the term "intoxicated," he was using it in a toxicological sense, not a legal sense (PCR. 1277). There is a difference between being "intoxicated" on cocaine and being "under the influence" of cocaine (Id.). Hearn never testified at a capital

penalty phase and does not know the legal definitions associated with statutory mitigation (PCR. 1279). He had not considered the issue of statutory mitigation until the prosecutor asked him about them on direct exam (Id.). Prior to the time his blood was drawn, Mr. Jones would have had a greater amount of cocaine in his system than the amount reflected in the screening (PCR. 1280). Hearn also explained that Tylenol three is Tylenol with codeine (Id.).

On redirect, Hearn testified that the discharge summary from Mr. Jones' hospitalization indicated a prescription for plain Tylenol (PCR. 1281). There are no physical symptoms of withdrawal from cocaine usage such as there is from heroin or alcohol withdrawal (PCR. 1282).

On recross, Hearn acknowledged that the report regarding Tylenol prescription was the discharge summary (PCR. 1285). However, other documents showed that he was given Tylenol three while he was in the hospital, as well as intramuscular injections of codeine (PCR. 1287). These would not mask heroin withdrawal symptoms, in his opinion (Id.)

SUMMARY OF THE ARGUMENTS

1. No reliable adversarial testing occurred at Mr. Jones' guilt phase due to the combined effects of trial counsel's prejudicially deficient performance. Because trial counsel harbored a personal bias against intoxication as an affirmative defense, he conducted no investigation into this area, despite evidence that Mr. Jones was in fact intoxicated at the time of the offense. Trial counsel also

unreasonably failed to present evidence that was consistent with the defense at trial, failed to challenge several jurors for cause, and failed to ensure that Mr. Jones was present at all critical stages of trial.

2. The lower court erred in failing to grant an evidentiary hearing regarding whether Mr. Jones was denied the actual or effective assistance of trial counsel due to a patent conflict of interest. Trial counsel's numerous disparaging comments about Mr. Jones created such a conflict that Mr. Jones was constructively denied counsel, or the effective assistance of counsel.

3. No adequate adversarial testing occurred at the penalty phase. Trial counsel failed to properly investigate a wealth of mitigation that was available. In addition to counsel's personal bias against the issue of intoxication as mitigation, counsel failed to develop the true nature of Mr. Jones' upbringing, secure all available documentation and provide it to the mental health experts. Substantial mitigation, both statutory and nonstatutory, was available, yet was not due to counsel's prejudicially deficient performance. Counsel was also ineffective in failing to proffer evidence to support the challenges to Mr. Jones' prior convictions, and in failing to object to constitutional error.

4. Various public records were not disclosed to the trial court. This Court must conduct an in camera inspection of the

documents withheld by the lower court, and should disclosure be warranted, Mr. Jones should be provided with the opportunity to amend his postconviction motion.

5. Mr. Jones is insane to be executed; he raises this issue for preservation purposes, as it is not yet an issue ripe for consideration.

ARGUMENT I--LACK OF GUILT PHASE ADVERSARIAL TESTING

No reliable adversarial testing occurred at Mr. Jones trial due to the combined effects of trial counsel's unreasonably deficient and prejudicial omissions, prosecutorial misconduct, and erroneous trial court rulings which rendered trial counsel ineffective. Strickland v. Washington, 466 U.S. 668 (1984). With the exception of the allegations regarding counsel's failure to investigate and present a defense of voluntary intoxication, the trial court summarily denied the remainder of these allegations.[17] The record at this point fails to reveal what, if any, reasons trial counsel may have had for the omissions set forth herein. An evidentiary hearing was and is warranted.

A. Failure to Investigate and Present Voluntary Intoxication Defense.

Under Florida law, "[v]oluntary intoxication is a defense to the

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[17]This Court's review of the sufficiency of the allegations warranting an evidentiary hearing is *de novo*, as is the Court's review over ineffective assistance of counsel claims. Stephens v. State, 748 So. 2d 1028 (Fla. 1999). Any historical facts found by the trial court after an evidentiary hearing are due deference on appeal only if supported by competent and substantial evidence. Id.

specific intent crimes of first-degree murder and robbery." Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985) (citations omitted). A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory. Bryant v. State, 412 So. 2d 347 (Fla. 1982).

Despite evidence supporting the defense of intoxication, trial counsel Koch failed to even investigate the issue as a *potential* defense, instead relying on his self-acknowledged "personal bias" against intoxication as a legal defense to murder (PCR. 616).[18] Koch admitted that he conducted no investigation into the issue, despite also acknowledging that there was evidence that Mr. Jones was intoxicated (PCR. 523) (Koch "didn't pursue it or attempt to corroborate it"). Rather than investigate the possibility of an intoxication defense, Koch, due to his "personal bias," took affirmative steps to exclude helpful information about Mr. Jones' state of mind by moving in limine to exclude mention of the toxicology report indicating the presence of cocaine in Mr. Jones' blood shortly after his arrest (PCR. 590). Koch also explained that in his first meeting with Mr. Jones, Mr. Jones told him he was innocent,[19] and thus no

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[18]As discussed in Argument III, Koch harbored the same personal bias with respect to intoxication as mitigation.

[19]Koch could not even definitively state that he questioned Mr. Jones about whether he had used drugs in the period leading up to the offense; he only acknowledged that he "probably" would have asked him about it (PCR. 587). He did at one point testify, however, that Mr.

investigation into the area of intoxication was even explored by Koch (PCR. 588; 616). He did concede that defense strategies often change over the course of representation based on investigation and other development, but in this case, Koch did not even consider investigation into the area of intoxication due to his own "personal bias." He made no strategic decision not to present intoxication at the guilt because the issue never even arose at all, as Koch's personal bias against such a defense automatically excluded even any investigation of the defense.[20] Moreover, despite the enviable position of having numerous mental health experts at his disposal, Koch never requested that the experts address the issue of Mr. Jones intoxication as a potential defense at the guilt phase, and provided the experts with none of the helpful information to support such a defense, such as the toxicology report,[21] and also never had the experts share amongst themselves the

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Jones told him he was not intoxicated (PCR. 521). Critically, Koch openly acknowledged that even if Mr. Jones *had* told him that he was intoxicated, he "probably would not have attempted to corroborate it because I have a dim view of intoxication" (PCR. 522).

[20]Thus, the lower court's conclusion that Koch "chose not to present this as a defense" is not a correct assessment of Koch's testimony and is not supported by competent and substantial evidence (PCR. 383).

[21]None of the experts had been given the toxicology report: see PCR. 639-43 (testimony of Dr. Fisher); PCR. 790; 795-96; 802-03 (testimony of Dr. Eisenstein); PCR. 1012 (testimony of Dr. Haber); PCR. 1094 (testimony of Dr. Toomer). Some of the experts (Dr. Toomer and Dr. Haber) had been provided with social worker Schwartz's notes of her interview with Mr. Jones in which he acknowledges using cocaine and alcohol in the period leading up to the offense, yet Dr. Eisenstein,

information they had gathered.[22]

Koch's performance was patently and objectively deficient. This is not a case where the attorney, after fully investigating all the available options and discussing those options with the client, made a strategic decision, after consultation with the client, about the best defense to the charges. Here, Koch's own personal bias against the issue of intoxication foreclosed even any investigation into the issue, much less any open discussions with Mr. Jones about which defense would be the most viable amongst the options available. "[M]erely invoking the word strategy to explain errors [is] insufficient since `particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances.'" Horton v. Zant, 941 F. 2d 1449, 1461 (11th Cir. 1991). "[C]ase law rejects the notion that a `strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." Id. at 1462. A defendant cannot make a decision to forego or waive a viable area of inquiry without first being fully advised of all the options after counsel has fully investigated. See Deaton v. Dugger, 635 So. 2d 4, 8

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one of Koch's primary experts, did not have her notes (PCR. 837-38).

[22]For example, none of the defense experts were provided with Dr. Haber's interview of Mr. Jones, where he acknowledged having used drugs, namely cocaine, continuously from the period of November, 1990, until the day of the crime. See PCR. 641-43 (testimony of Dr. Fisher); PCR. 790 (testimony of Dr. Eisenstein); PCR. 1095) (testimony of Dr. Toomer). Likewise, Dr. Haber had none of the information gathered by the other experts working on the case (PCR. 1012-13; 1026-27; 1053).

(Fla. 1993); Blanco v. Singletary, 943 F. 2d 1477, 1501 (11th Cir. 1991). Additionally, a lawyer may not "blindly follow" the commands of a client. Blanco, 941 F.2d at 1502. See also Rose v. State, 675 So. 2d 567, 572-73 (Fla. 1996). Indeed, Mr. Jones was never given the opportunity to decide his own course due to Koch's personal bias against intoxication evidence. Just as a juror who has a fixed bias or opinion against certain types of evidence or defenses cannot sit as a juror in a criminal trial, see Morgan v. Illinois, 504 U.S. 719 (1992),[23] so too an attorney who has a fixed predisposition against certain types of legally-recognized defenses cannot competently represent a capital defendant under these circumstances.

Mr. Jones was also prejudiced by trial counsel's objectively deficient performance. The lower court concluded that Mr. Jones did not establish prejudice because he failed to show that an intoxication defense "was likely to succeed" and that Mr. Jones "would have prevailed at trial" had such a defense been presented (PCR. 384). This

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[23]In Morgan, the Supreme Court addressed whether a juror who was automatically predisposed to sentence a defendant to death violated the defendant's right to a fair and impartial jury and must be removed for cause. Id. at 726. The Supreme Court held in the affirmative, writing that "because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror." Id. at 729. This situation is no different from that which Mr. Jones' faced; his counsel had a predisposition, or a personal bias, against even investigation into what the law clearly allows as a defense to murder.

is not a proper prejudice analysis; rather, the test is whether confidence is undermined in the outcome. Mr. Jones does not have to establish that he "would have prevailed" at trial.Under the appropriate test, Mr. Jones has established his entitlement to relief. Due to counsel's failure to even consider, much less investigate, the issue of intoxication, Mr. Jones was not provided with the opportunity to choose amongst his options. Moreover, there was ample evidence supporting such a defense and from which a jury could reasonably have concluded that Mr. Jones was in fact intoxicated. The lower court, relying solely on the testimony of toxicologist Hearn, concluded that Mr. Jones was not "intoxicated" based on the toxicology results (PCR. 384). First, the lower court erred in relying on Hearn's opinion about Mr. Jones state of mind in light of the court's own ruling limiting Hearn's expertise to the area of the physiological effects of drugs on the body (PCR. 1245). Mr. Jones had objected to Hearn being allowed to testify as an expert to opinions relating to how the drugs found in Mr. Jones would make him act, and the lower court found that Hearn could only testify to the physiological effects of the drugs on the body (PCR. 1245). When the State asked Hearn if, in his view, Mr. Jones was intoxicated at time of the offense, Mr. Jones objected because this opinion was beyond the scope of Hearn's expertise; the objection was overruled (PCR. 1255). Mr. Jones also objected when Hearn was asked about how the drugs would have affected Mr. Jones' state of mind at the

time of the offense with respect to statutory mitigation, yet the lower court overruled that objection as well (PCR. 1257). Thus, the lower court, overlooking or ignoring its own ruling limiting Hearn's expert opinion, turned around and considered that opinion testimony in rejecting Mr. Jones' claim. The lower court erred in both permitting Hearn to testify outside the scope of his proffered area of expertise, and then turning around and relying on Hearn's opinions which exceeded his expertise.

Moreover, a review of Hearn's testimony indicates that his own personal standard for "intoxication" is well beyond that which the law recognizes; in Hearn's view, a person is only "intoxicated" if they become delusional, akin to insane (PCR. 1256). He also acknowledged that his definition was made in a toxicological sense, not a legal sense (PCR. 1277). Importantly, he did concede that, based on the toxicological results, Mr. Jones was clearly under the influence of cocaine at the time of the offense (PCR. 1250-56; 1273 1277-78), and would have been experiencing mild stimulant effects from the cocaine (PCR. 1256). Aside from the toxicology report, Hearn knew nothing of Mr. Jones or his history, and in fact had never seen Mr. Jones before (PCR. 1276).

Hearn's testimony that Mr. Jones was, at a minimum, under the influence of cocaine at the time of the offense is not inconsistent with the forensic mental health experts who testified that Mr. Jones

was intoxicated in a legal sense. Hearn, a prosecution witness, simply disagreed with the effects of the cocaine on Mr. Jones' state of mind, a matter of dispute among the experts at the evidentiary hearing. Clearly this is an issue of fact which the jury should have been given the opportunity to hear. Because Mr. Koch dismissed the issue out of hand, consulted no experts, failed to depose Dr. Hearn or the analysts who actually conducted the laboratory testing, or do anything to investigate the issue, his performance was prejudicially deficient under the facts of this case.

The lower court found that the opinions of Mr. Jones' experts were "contradicted" by the toxicology report, yet that is clearly not correct and unsubstantiated by competent evidence; Hearn himself acknowledged that cocaine was present in Mr. Jones' system, and he would have been under its influence at the time of the crime. Thus, the toxicology report is entirely consistent with the opinions of Mr. Jones' experts. The lower court also concluded that the opinions of Mr. Jones' experts were "not credible" because they were premised on "inadmissible hearsay" (PCR. 385). This vague conclusion too is not supported by competent and substantial evidence or by the law. The experts on both sides of this case have relied on the same universe of background materials; in fact, Mr. Jones' experts have relied on far more background information than did toxicologist Hearn. Other than uttering the magic word of credibility, the lower court's conclusions

are not borne out by the record. The lower court never identifies what supposed "inadmissible hearsay" Mr. Jones' experts had based their opinions on. Their opinions were based on, in part, the toxicology report, the very same document relied on by Hearn. Mr. Jones' experts' opinions were also based on extensive other documentation, interviews with Mr. Jones' himself, and other individuals who saw Mr. Jones contemporaneously with the offense. None of these evidentiary bases on which the experts grounded their opinions is "inadmissible hearsay." See § 90.704, Fla. Stat.; EHRHARDT, FLORIDA EVIDENCE, § 704.1 (2000 Ed.) ("Under section 90.704, an expert may rely on facts or data that have not been admitted, or are not even admissible when those underlying facts are of `a type reasonably relied on by experts in the subject to support the opinions expressed. . . Experts may rely upon hearsay in forming their opinions if that kind of hearsay is relied upon during the practice of the experts themselves when not in court"). Based on the evidence presented below, Mr. Jones is entitled to relief. **B. Failure to present evidence consistent with the defense.**

Not only did trial counsel fail to investigate all available defenses, counsel never presented evidence which would have supported the defense that **was** presented. The defense theory was that Mr. Jones was shot in the head after he encountered a struggle between Mr. Nestor and an unknown assailant (R. 1274-76); the State contended that it was Mr. Jones who struggled with Mr. Nestor, the latter then shooting Mr.

Jones during the struggle. However, evidence substantially undermining the State's theory and buttressing the defense theory was never presented. Miami Dade Police Department criminalists had taken swabs from both Mr. Jones and Mr. Nestor to conduct a gunshot residue test. A gunshot residue test was requested of Mr. Nestor's right hand to "determine if the victim fired the submitted .22 cal short semiautomatic pistol," as well as a test of Mr. Jones' hands to determine "if the offender fired the weapon that was used to shot [sic] him or if he held it when the DOA victim discharged it. Offenders hands were bagged prior to him leaving the scene and bags are being submitted with GSR swabbings." In a report dated 4/21/29 and signed by Miami Dade Police Department Criminalist Gopinath Rao, it was revealed that "[e]xaminations conducted on items mentioned above **did not reveal the presence of Gunshot Residue Particles**."

That no gunshot residue was discovered on either Mr. Nestor or Mr. Jones is significant. For example, it was the State's position that Mr. Jones' defense that he was shot during a struggle between Mr. Nestor and an unknown assailant was "speculation, imagination, and fantasy" (R. 2134), and that defense counsel "told you in his opening things which are not even remotely in evidence in this case" (R. 2066). The fact that no gunshot residue was on Mr. Nestor's hands significantly bolstered the defense, yet, for no tactical reason, it was never presented. Moreover, the lack of any gunshot residue on Mr.

Jones' hands further strengthened the defense theory, for the lack of residue establishes that Mr. Jones neither grabbed the gun nor, after it was used to shoot, touched it in any fashion. These were important factors for the jury to fully consider, yet defense counsel unreasonably failed to put on this evidence which was wholly consistent with the chosen defense. The order of the lower court denied this portion of the claim below because "both victims were stabbed to death" and "[a]s such, [Mr. Jones] has failed to satisfy either prong of Strickland" (PCR. 383). This finding simply ignores the relevant fact that Mr. Nestor was, according to the State's theory of the case, the person who shot Mr. Jones in the head. Yet the gunshot residue test failed to confirm that Mr. Nestor was the shooter. It was error for the lower court to summarily deny this claim.

C. Failures during jury selection process.

During jury selection, counsel failed to strike several jurors who eventually served on Mr. Jones' jury. The allegations set forth below were never subjected to an evidentiary hearing, and the lower court erred. See Thompson v. State, 796 So. 2d 511 (Fla. 2001).

Counsel unreasonably failed to challenge for cause Juror Carpenter after she affirmatively answered a trial court inquiry concerning whether she would automatically vote for the death penalty for anyone convicted of first degree murder (R. 956-57). Despite attempted rehabilitation, counsel failed to question Carpenter on her

death penalty views. His questioning did reveal additional reasons to be gravely concerned about her ability to be fair; for example, she indicated that she "would like to hear" the defendant's side of the case, "would wonder" why the defendant did not testify, and it would "bother her" (R. 1191-92). Carpenter also expressed the opinion that the accused "got more rights than the good people" (R. 1180). The court's earlier exchange with Carpenter, explaining the need to weigh aggravating and mitigating factors, got the "yes" and "no" answers it was looking for, specifically that she thought she could give Mr. Jones and the State a "fair trial" (R. 957). The defense accepted Carpenter as the second juror at an early stage of the jury selection process (R. 1203). The defense used a cause challenge to Juror Morley at the same time (R. 1203). The defense did not use its first peremptory challenge, striking Juror Bluh, until later (R. 1210). And counsel **never** used all ten peremptory challenges, the ninth having been used to strike Juror Coll (R. 1220). A tenth peremptory **was** used by the defense to strike potential Alternate Juror Rosen, but only after the trial court had advised that both parties had an additional two strikes to use against alternates (R. 1220-21). A peremptory challenge was available for defense counsel to use to strike Carpenter, but he failed to do so.

The lower court denied this portion of the claim based on Carpenter's rehabilitation to the effect that she had an "open mind" as

to punishment (PCR. 382). The lower court also found that no requirement of law was breached when trial counsel negligently failed to use his tenth challenge to remove Carpenter, even when he later used it to remove an alternate juror (PCR. 382). The lower court's conclusions, however, do not contemplate the entirety of the exchange between defense counsel and Carpenter; moreover, because there was no evidentiary hearing, the record does reveal that counsel decided not to strike Carpenter based on the reason set forth by the lower court. An evidentiary hearing is warranted. See Thompson v. State, 796 So. 2d 511, 516-17 (Fla. 2001).

Trial counsel was also ineffective for failing to challenge for cause Juror Dicus based on his equivocal statements concerning his ability to set aside personal experiences. Dicus reported that he had been "knocked out and had my wallet taken by a person who I did not see" (R. 958). He gave contradictory answers upon further inquiry in that he could set aside his personal experience only "[i]f it has to be" (R. 959). Without any follow up of the questioning by the court, defense counsel accepted Dicus at the same time as Carpenter (R. 1203). Counsel failed to challenge Dicus for cause based on his equivocal answers about his ability to set aside his personal experiences, and as was the case with Carpenter, trial counsel failed to use an available

peremptory challenge.[24]

Counsel also failed to challenge Juror Wallo, who expressed uncertainty about his ability to return a life recommendation even when the mitigating circumstances outweighed the aggravating circumstances (R. 1159). Counsel failed to follow up with any questions addressed to Wallo about this issue.[25]

Counsel was ineffective for failing to identify specific jurors he would use peremptory challenges to excuse and for failing to request additional peremptory challenges. When the panel was completed and the selection of alternates began, the defense still had one of ten peremptory challenge left (R. 1220). Trial counsel was ineffective for failing to identify jurors Carpenter, Dicus and Wallo as jurors he desired two additional peremptory challenges for. If trial counsel had informed the trial court he needed two additional peremptory challenges to excuse jurors Carpenter, Dicus and Wallo, Mr. Jones would not have been tried before a biased jury. The trial court would have been required to consider giving counsel the challenges to remove those jurors.

Trial counsel failed to question potential jurors about their

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[24]The lower court's order denying relief found that Juror Discus' answers were not contradictory (PCR. 382).

[25]The order of the lower court, denying relief, found that "the totality of the questions and answers [of Juror Wallo] refutes this claim" (PCR. 383).

understanding of voluntary intoxication defense and also failed to question jurors about their feelings about the use of drugs as viable defenses to crimes or in terms of mitigation of crimes. The order of the lower court denying relief failed to address this specific portion of Mr. Jones' claim below. An evidentiary hearing is warranted. See Patton v. State, 748 So. 2d 380 (Fla. 2000).

D. Failure to ensure Mr. Jones' presence at critical stages.

Counsel also unreasonably failed to ensure that Mr. Jones was present during critical stages of his trial. Numerous examples appear in the record where Mr. Jones is not present for stages of his trial, including unrecorded bench conferences, that are constitutionally relevant (R. 1166, 2196, 2241, 2445, 2592). The internal litigation during the course of Mr. Jones's trial makes more clear the relevance of his absence from critical stages of the trial, as the defense was deliberately trying to distract their client from the proceedings (R. 2321). This issue is also relevant to the competency issues briefed elsewhere. Trial counsel's failure to ensure that Mr. Jones was present at critical stages of trial constituted ineffective assistance.[26]

ARGUMENT II--ERROR IN SUMMARY DENIAL OF CONFLICT CLAIM

In his Rule 3.850 motion, Mr. Jones alleged that he was denied

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[26]The lower court's order denied relief on this claim, stating that it was procedurally barred because it should have been raised on direct appeal (PCR. 383).

both the actual assistance of counsel and the effective assistance of counsel due to a conflict of interest with attorney Koch. See Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 466 U.S. 648, 659-60 (1984). The lower court denied without an evidentiary hearing, concluding that this claim was refuted by the record, could and should have been raised on appeal, and is now procedurally barred (PCR. 388). As to the procedural bar, the lower court clearly erred, as a claim alleging conflict of interest and/or ineffective assistance of counsel is properly raised in a collateral proceeding. See Bruno v. State, 26 Fla. L. Weekly S803 (Fla. Dec. 6, 2001).

Between the guilt phase decision and the beginning of the penalty phase, a conflict arose between attorney Koch and Mr. Jones. Koch filed a motion on February 9, 1993, seeking leave of the Court to withdraw as counsel for the defense (R. 346-47). At a hearing that same day, the serious nature of the breakdown of trust between Mr. Jones and Koch was clarified on the record:

> THE DEFENDANT: Excuse me, Judge Sorondo, could I say something?
>
> THE COURT: I think you should speak through your lawyer.
>
> MR. KOCH: No, I don't want to speak to him at all.
>
> THE DEFENDANT: That's the problem right here. Mr. Koch isn't communicating with me, so I can't find out what's happening, really going on.
>
> MR. KOCH: I have filed a motion on this, this regard. I

have no desire to speak to him. I will not speak to him and that is it.

(R. 2202). Koch then addressed the court about an incident that had occurred the preceding Thursday when he and Dr. Eisenstein had gone to visit Mr. Jones at the jail, divulging to the court that Mr. Jones "was not only verbally abusive, but on the threshold of violence, real violence" (R. 2203). He went on to say that he subsequently advised state expert Dr. Mutter, who was scheduled to interview Mr. Jones prior to the scheduled competency hearing, that in spite of Victor Jones's 6th amendment right to counsel, he, Koch, was not going to accompany Dr. Mutter to the jail and he further advised Dr. Mutter not to go (2204). Koch then made disparaging and unprofessional remarks in a diatribe directed at Mr. Jones:

MR. KOCH: ...Now, of course, Victor Jones wants to know what's going on. I am appointed to represent him. I don't need to take verbal abuse. I don't need to take the threats of physical abuse. If he wants to duke it out, fine, but I am not going to sit here and be sucker punched at the table sitting next to him during the course of these proceedings because now he wants to know what's going on. I will represent him, if I have to. I don't need to speak to him. I don't need to deal with him. I am going to suggest he be shackled during --

THE DEFENDANT: No, no, no.

MR. KOCH: -- during the penalty phase --

THE DEFENDANT: No.

MR. KOCH: Because actually based on what he said there is a real danger to Mr. Kastrenakes, to Mr. Behle and to myself and that is the situation we are in. That is the situation he has decided to create. I didn't vote him guilty. I

didn't kill anyone. I didn't confess. I didn't put wallets in my pockets. I didn't do those sorts of things. He did. The jury has found him guilty and is so often the case Defense Counsel is being blamed for the acts that the jury found beyond a reasonable doubt that Victor Jones committed. I didn't commit seven felonies. I didn't get out of prison November 27th and kill two people on December 19th, yet I am being blamed by him. That is the situation. So, if necessary I will continue to represent him, but I don't need to talk to him.

THE DEFENDANT: Excuse me, Your Honor.

MR. KOCH: I don't need to deal with him.

THE DEFENDANT: There is a reason why right now I don't want him to represent me. Okay. You heard what he just said. He just might as well say before he even started on my case that I am guilty. That is the way he felt about it. So, what reason would I need him to finish my case if he feels like I am guilty. You know I feel like that is part of the way that I got found guilty because of his attitude. That's right. I did. I was hostile towards him simply because of that reason. Right now because of what he is saying.

(R. 2204-06). After recovering some of his dignity, Koch represented to the court that he had "said nothing that is not a matter of public record" (R. 2214).

The court exhibited concern about the obvious problems with communication between attorney and client, and inquired of defense counsel about whether he had met with the client before the trial (R. 2217). Koch replied, stating he had visited with Mr. Jones "countless times" and in response to the court's inquiries about whether he had discussed the case, trial strategy and the weight of the evidence with his client, Koch said he had discussed "Everything" (R. 2217). ***

The response of the Court was to subject Mr. Jones to a lengthy

lecture and examination that appears to have been intended to allow the court to rule against the defense motion to withdraw and to simultaneously undercut the pending defense claim that Mr. Jones was incompetent (R. 2218-37). Mr. Jones's confusion and uncertainty related to his disability is exhibited by some of his comments during the court's inquiry:

> THE DEFENDANT: Yes, Judge Sorondo. I have no doubt about Mr. Koch coming to see me helping me prepare for the trial, but the problem was at the last minute during the trial all of a sudden they want to change their strategy. You know I didn't want it that way.
>
> ***
>
> Just what this was -- um -- was in a different way concerning about me -- um -- why I would not take the stand.
>
> ***
>
> It's hard for me to say because it's hard -- I really -- really it's hard for me to remember anything. I get confused a lot of times. I just don't remember things, you know, so I couldn't really say that I remember, but you're probably right.
>
> ***
>
> I don't know any thing about it (preparation for the penalty phase).
>
> ***
>
> Um -- I's rather not answer. I will take your word for it, but I would rather not say.
>
> ***
>
> Don't get me wrong. All I'm saying, okay, he's a good attorney, don't get me wrong, but since this is -- has happened, okay, but before this happened, okay, we had a strategy to go one way and then right before at the last minute it had to change. You know all pressure came on me, you know and it happened to me once before and I felt like something was wrong. You know, why should at the last

> minute all the pressure come on me.
>
> ***
>
> But Mr. Koch knows also that I can't really -- it is hard for me to make decisions like that. I am confused a lot, so it is hard for me to do that.
>
> ***
>
> No. I just told him (Mr. Koch), well, at the last minute I told him, don't come see me at jail any more. That's what I told him, you know, because he really, you know, pissed me off. What I did tell him was I -- I think he also helped set me up, you know, since all the way he had been planning and planning. It just didn't go that way at the last minute. I just let him know I'd be happy to let him know verbally or if it's going to come out physically, I'd rather let him know verbally. I don't think I did anything wrong.

(R. 2218, 2219, 2220, 2221, 2222, 2223, 2225). Further evidence of an direct conflict between attorney and client is provided by Mr. Koch's response, in which he accuses his client of lying:

> What you are hearing today from Victor Jones is not the basis upon which I filed the motion to withdraw. The reason is not -- the basis for which I filed the motion to withdraw is that <u>Mr. Jones is not telling the truth with respect to many things that occurred.</u> There is a witness to what occurred, who would substantiate everything I have said and more.
>
> ...Well, the reason I bring it up is the fact the State is standing here arguing how credible everything Victor Jones has said. You know, he doesn't want to fire his lawyer, he's perfectly happy with this, he doesn't want that. This is the same man they're trying to introduce seven convictions on. So, I simply bring it up so that it is clear that everything that Victor Jones has said today with respect to this particular problem may not necessarily be true, despite the fact that it is now convenient for the State to vouch for his credibility. That is the only reason I bring it up.

(R. 2232-33)(emphasis added).

At a subsequent hearing on February 12, 1993, Koch moved orally to renew his motions to withdraw as counsel and to have Mr. Jones shackled during the penalty phase (R. 2446). The trial court denied both motions (R. 2246).

Koch's disclosures of confidential, damaging information, including accusations that his client was a liar, to the trial court denied Mr. Jones the effective assistance of counsel. Douglas v. Wainwright, 714 F.2d 1532, 1557 (11th Cir. 1983)(emphasis in original). See also Blanco v. Singletary, 943 F.2d 1447, 1500 (11th Cir. 1991). Koch's actions were "not simply poor strategic choices; he acted with reckless disregard for his client's best interests and, at times, apparently with the intention of weakening his client's case." Osborn v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1983). Due to the level of breach occurring, Mr. Jones was actually or constructively denied counsel, and prejudice is presumed. United States v. Cronic, 466 U.S. 648, 659-60 (1984). Under either Strickland or Cronic, Mr. Jones is entitled to relief, and an evidentiary hearing is warranted.

ARGUMENT III--LACK OF PENALTY PHASE ADVERSARIAL TESTING

A. Failure to adequately investigate and present mitigation.

Ineffective assistance of counsel claims are governed by the two-step analysis set forth in Strickland v. Washington, 466 U.S. 668 (1984). In Williams v. Taylor, 120 S.Ct. 1495 (2000), the Supreme Court reemphasized that Mr. Jones "had a right--indeed a

constitutionally protected right--to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." Williams, 120 S.Ct. at 1513. Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Id. at 1524. See also id at 1515 ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background").

In addition to deficient performance, Mr. Jones must also establish prejudice, that is, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. If "the entire postconviction record, viewed as a whole and cumulative of []evidence presented originally, raise[s] 'a reasonable probability that the result of the [] proceeding would have been different' if competent counsel" had represented the defendant, then prejudice is demonstrated under Strickland. Williams, 120 S.Ct. at 1516. Mr. Jones need not establish his claim by a preponderance of the evidence; rather the standard is less than a preponderance. Williams, 120 S.Ct. at 1519 ("[i]f a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of

the evidence that the result of his criminal proceeding would have been different, that decision would be `diametrically different,' `opposite in character or nature,' and `mutually opposed' to our clearly established precedent ..."). A proper analysis of prejudice also entails an evaluation of the totality of available mitigation--both that adduced at trial and the evidence presented at the evidentiary hearing. Id. at 1515.

1. Deficient Performance. Because of Koch's unreasonable failure in developing a mental health and family history mitigation case, including his failure to investigate and to provide adequate background materials to the experts he retained, and his failure to call any expert other than Dr. Toomer and present any family member testimony to the jury, the jury and the sentencing judge failed to learn of significant mitigating evidence. Despite having an investigator and a social worker on staff and at his disposal, substantial avenues of investigation were not followed up on.[27] The roles of both the investigator, Sastre, and the social worker, Schwartz, were very limited. The testimony established that Sastre's

[27]The legal analysis is no different to the extent that the failures apparent in the investigation into penalty phase issues in Mr. Jones' case were attributable to systemic staffing and funding problems within the Public Defender's Office at the time. Interference by the State or state action that interferes with or hinders counsel's performance also violates the Sixth Amendment. United States v. Cronic, 466 U.S. 648 (1984); Blanco v. Singletary, 943 F. 2d 1477 (11th Cir. 1991).

efforts on the case were strictly task-oriented, that is, he did only what Koch asked him to do. Likewise, Schwartz's role in the case was limited to interviewing a few people from Mr. Jones' life, namely Laura Long, Greg Whitney, Beatrice Brown, and Mr. Jones himself. Evidence was also adduced that Koch made contact with Lee Norton, a mitigation specialist, yet counsel never requested funds for Norton and she was thus was not hired to conduct a mitigation investigation.[28] In addition, the second-chair attorney who was assigned to the case, Judge Rosa Rodriguez, was only brought into the case at the last minute, and, as her stipulation sets forth, she had no responsibilities for investigation at either the guilt or penalty phases of Mr. Jones' capital trial.

Koch relied almost exclusively on Ms. Long to provide a glimpse into Victor Jones' life.[29] Yet, as Koch's notes reflect, when he called Long "about our lack of evidence in mitigation," his own impressions of Ms. Long were that she "comes across as an educated, straight-laced and rather cold person (emotionally)" and who consistently told him "that she just does not have any idea --- what happened." Koch was or should have been aware of the identities of

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[28]See Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1326 (Fla. 1994) (counsel ineffective because, *inter alia*, he failed to make application for funds to investigate defendant's background in Colombia "because he did not think the court would approve such a request").

[29]Mr. Koch also arranged to have Ms. Long interviewed by some of the experts in the case, namely Dr. Toomer and Dr. Haber.

numerous sources of information about Mr. Jones' background, yet these avenues of investigation were, without a tactic or strategy, never pursued. For example, Mr. Jones himself told Koch that Long "claims that she was my mother" but that he was beaten by Laura's son, Lawrence,[30] who beat Victor "for his mother." Mr. Jones also told Koch that he had a sister, Pamela Mills, who lived in New York and who "was also beat."[31] Mr. Jones further informed Koch that a cousin named Carl Leon Miller lived with him for a while and that Carl was also beaten while they lived with Laura Long. No one from the defense team ever attempted to locate, much less speak with, either Pamela Mills or Carl Leon Miller, however.[32] And despite knowledge from numerous sources that Mr. Jones had a previous psychiatric admission to Jackson Memorial Hospital [JMH], no efforts were made to locate the records. Certainly

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[30]As the notes specified, "this was beating not spanking."

[31]The lower court found that Koch "attempted to contact Defendant's sister, Pamela Mills" (PCR. 386). This conclusion is barren of any record support whatsoever. Although Mr. Jones told Koch that he had a sister Pamela Mills who lived in New York, Koch could recall no efforts made to locate her (PCR. 533; 582). Investigator Sastre likewise testified that Koch never asked him to locate Mills in New York (PCR. 773). The only attempt made to contact any of Mr. Jones' siblings was when Koch asked Sastre to locate Valerie Johnson; however, all that was done to locate and talk to her was leaving Koch's card at an address purporting to be that of Johnson over a year before the trial started (PCR. 613). No attempts were made in the ensuing year to follow up on locating Johnson (Id.).

[32]This was confirmed by Mills and Miller, both of whom testified below that they were never contacted by Koch or a defense investigator (PCR. 960; 991).

if the attorney discussed in the Williams case was deficient for failing to return the phone call of a certified public accountant who could have testified that Mr. Williams was thriving in prison and was proud of a carpentry degree he had earned in prison, Williams, 120 S.Ct. at 1514, Koch's failure to undertake even a rudimentary investigation into Mr. Jones' background is unreasonable attorney performance. See also Phillips v. State, 608 So. 2d 778, 782 (Fla. 1992); Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1326 (Fla. 1994).

Koch's handling of the mental health experts in this case was also deficient. Being in the enviable position of having several experts at his disposal who were willing and able to assist, Koch failed to provide them with needed information and to make the most out of their involvement in the case. For example, Dr. Brad Fisher was appointed and conducted an initial general psychological evaluation of Mr. Jones in July of 1992. Fisher testified that did no formal psychological testing, only a sentence completion test, a personal history checklist, and some drawings. He never received *any materials* from Mr. Koch regarding Mr. Jones, even those materials that Mr. Koch had obtained, *i.e.* school records, some records from the Department of Corrections, or the information gleaned from Marlene Schwartz's interviews, the toxicology report establishing the presence of cocaine in Mr. Jones system shortly after the offense. Because of the paucity of information he was provided by Mr. Koch, Fisher was only able to

develop a rough sense of Mr. Jones and his impairments, but no details. After Fisher conducted his evaluation, which took place in July, 1992 (some eight months before the penalty phase), he never heard from Koch again.

Likewise, Dr. Merry Haber had been initially appointed to conduct a general evaluation of Mr. Jones' mental health. Despite Koch's assertions at the hearing that he considered Dr. Haber to be an incompetent psychologist, he nonetheless requested that she assist in the case first to evaluate Mr. Jones' competency; and, as Haber explained, her role in the case expanded a bit because she was asked to speak with some family members,[33] which she would not have done for strictly a competency evaluation.[34] Koch did provide Haber with some minimal information about Mr. Jones' case, such as the notes of Marlene Schwartz's interviews and some incarceration records. However, as she explained, she never received any other documents, such as additional Department of Corrections medical files, or any school records. She never received any notes or other documents which would have provided insight into Mr. Jones' life while living with Laura Long. She did not receive the JMH records reflecting Mr. Jones' prior psychiatric admission at JMH. Despite having helpful and mitigating evidence to

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[33]Dr. Haber testified that she had spoken with Laura Long and Beatrice Brown.

[34]Koch's actions in expanding Haber's role belies his contention that she was "incompetent."

discuss at Mr. Jones' penalty phase, Haber's last involvement with the case was in March, 1992, approximately a year before Mr. Jones' case went to trial.

Dr. Hyman Eisenstein was another of the experts retained by Koch prior to Mr. Jones' trial. Like Drs. Fisher and Haber, Dr. Eisenstein did not receive all the information about Mr. Jones' background that was available at the time. At the evidentiary hearing, Eisenstein confirmed what he had previously stated in his pretrial deposition, that is, that the only materials he had been provided with were the records from JMH regarding Mr. Jones' gunshot wound, as well as the police reports; he had also interviewed Laura Long. Eisenstein testified that he had not been provided with the plethora of background materials that collateral counsel had obtained, such as the 1975 JMH report, Department of Corrections medical records, the report from the toxicologist showing the presence of cocaine in Mr. Jones' system, or even the reports and work product of the other experts who had spoken with and evaluated Mr. Jones. And aside from the information about Mr. Jones' background that he learned from Laura Long, he had been provided with no other independent information about Mr. Jones' background or developmental years.

Finally, Dr. Jethro Toomer testified at the evidentiary hearing that, although he had actually testified at the penalty phase, he too was not provided with a number of documents such as the 1975 JMH

report, Department of Corrections files, and the toxicology report. Like all the other experts, Toomer had no independent information about Mr. Jones' developmental years except to the extent that Laura Long provided "details" about Mr. Jones' life with her. Aside from speaking with Laura Long and Vera Edwards, who was Mr. Jones' third-grade teacher, Toomer was not provided by Koch with any other independent information about Mr. Jones' background.

One of trial counsel's most serious deficiencies involved his handling of Mr. Jones' unquestionably serious and long history of drug abuse and the evidence suggesting that Mr. Jones was intoxicated at the time of the offense. As noted in Argument I, Koch's testimony at the evidentiary hearing clearly established that in no manner does he even investigate this issue, much less present it in a capital case because of his generic personal view that jurors do not have much sympathy for a defendant who claims to have a long drug history and who is intoxicated at the time of the offense. Koch's viewpoint is not in conformity with prevailing legal standards. See, e.g. Cheshire v. State, 568 So. 2d 908, 911 (Fla. 1990) ("[T]here was some evidence that Cheshire had been drinking at the time of the murder. Although the judge concluded that Cheshire was not sufficiently intoxicated, we nevertheless must acknowledge that a reasonable jury could have relied upon this evidence to conclude that Cheshire was not in full control of his faculties. . . . Thus, this is valid mitigation"); Amazon v. State,

487 So. 2d 8, 13 (Fla. 1986) (finding that jury could have reasonably found mitigation based, *inter alia*, on "some inconclusive evidence that Amazon had taken drugs the night of the murders" and even "stronger evidence that Amazon had a history of drug abuse"); Norris v. State, 429 So. 2d 688, 690 (Fla. 1983) (finding valid mitigation based on evidence of "drug abuse problem" and that defendant "claimed to be intoxicated at the time of the crime").

Koch's personal views did not vitiate his responsibility to investigate a viable issue on behalf of his client charged with capital murder. Koch made it clear at the evidentiary hearing that he does not even investigate the issue of intoxication either as an affirmative defense or as potential mitigation. This is not a situation where the issue had been investigated by Koch or pursued by mental health experts and, after full knowledge of the facts, a decision was made not to pursue the issue. An attorney cannot make a strategic decision not to present a potentially viable issue absent a diligent investigation. "[M]erely invoking the word strategy to explain errors [is] insufficient since `particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances.'" Horton v. Zant, 941 F. 2d 1449, 1461 (11th Cir. 1991) (quoting Strickland v. Washington, 466 U.S. at 691) (footnote omitted). "[C]ase law rejects the notion that a `strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable

choice between them." Horton, 941 F.2d at 1462. Mr. Jones has established deficient performance under Strickland and Williams.

2. Prejudice. As noted above, Mr. Jones needs to establish by less than a preponderance of the evidence that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In Mr. Jones' case, the prejudice is apparent. Mr. Jones' sentencing jury was entitled to know the reality of Mr. Jones' background, as it "might well have influenced the jury's appraisal of his moral culpability." Williams, 120 S.Ct. at 1515. "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) (citing Lockett v. Ohio, 438 U.S. 586 (1978)). Moreover, "[m]itigating evidence ... may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death eligibility case." Williams, 120 S.Ct. at 1516.

In Mr. Jones' case, "counsel's error[s] had a pervasive effect, altering the entire evidentiary picture at [the penalty phase]." Coss v. Lackwanna County District Attorney, 204 F.3d 453, 463 (3d Cir. 2000). That the jury and judge received a wholly inaccurate portrayal

of Mr. Jones' life is demonstrably established by a comparison of the trial court's sentencing order with what is now known. As to the mental health aspects of the case, because of trial counsel's deficient performance the court rejected *in toto* the statutory mental health mitigating circumstance of "extreme mental or emotional disturbance" to which Dr. Toomer had testified at the penalty phase (R. 471-72). The trial court barely afforded Dr. Eisenstein's testimony[35] mention because Dr. Eisenstein "has no opinion as to the defendant's state of mind on the day of the offense" (R. 472). Regarding nonstatutory mitigation, the trial court found rejected Dr. Toomer's testimony about Mr. Jones' abandonment as a child because Mr. Jones' mother "delivered the defendant into the infinitely superior environment of the Long household" and that Ms. Long and her husband raised Mr. Jones in "a decent, law abiding and God fearing home" (R. 473). As to Mr. Jones' history of drug abuse, the trial court found that "there is no evidence . . . that the defendant ever ingested drugs at all" (R. 473). And regarding whether Mr. Jones was under the influence of drugs at the time of the offense, the trial court found "absolutely no evidence that the defendant was under the influence of drugs or alcohol on the date that these crimes were committed" (Id.).[36] The testimony presented

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[35]Dr. Eisenstein did not testify before the jury, but rather for the judge at the allocution hearing. See R. 2791-2827.

[36]The trial court may have been influenced by Dr. Mutter's misrepresentation during the penalty phase that Mr. Jones had only

during the evidentiary hearing, even by some of the witnesses called by the State, clearly showed a very different picture.

Dr. Fisher testified that he had been contacted by Mr. Jones current counsel in 2000, and provided with numerous background materials about Mr. Jones; Fisher also reevaluated Mr. Jones prior to testifying at the evidentiary hearing, and, along with Dr. Eisenstein, interviewed Mr. Jones' family members. Based on all the background material, his interviews with Mr. Jones, and with Mr. Jones' family, Fisher opined that there was both statutory and nonstatutory mitigation present in Mr. Jones' case. He described Mr. Jones' formative years as a "horrible developmental background." He pointed to his interview with Pamela Mills, her affidavit, and his interviews with Michael, Leon and Valerie as sources for his opinion that Victor had been beaten and abused as a child and for his opinion that Aunt Laura's house was far from an ideal setting. Dr. Fisher also opined that Mr. Jones was intoxicated at the time of the offense. He said that he based this opinion on Mr. Jones drug history, his interviews with family members, some of whom told him they were doing drugs with Mr. Jones the night

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"traces of cannibanoid [sic] which are from marijuana, but that could be from further back" (R. 2692). This is not true; the toxicology reports showed the presence of cocaine as well as benzoylecgonine, which is a byproduct of the metabolization of cocaine, as Dr. Hearn, who was called by the State during the evidentiary hearing, explained. Mr. Jones does not recall being provided with any evidence from the State that marijuana, traces or otherwise, were found. If Dr. Mutter was correct, then this evidence has not been disclosed.

before the offense and in the weeks prior, and on the toxicology findings that some drugs were confirmed as being in Mr. Jones system on the day of the offense, a report that he was never provided by Mr. Koch. He also had reviewed Marlene Schwartz's notes which included an interview with Mr. Jones in which he told her he had been doing a $25 bag worth of drugs shortly before the offense, as well as drinking. Again, this had not been supplied to him by Mr. Koch prior to Mr. Jones' penalty phase.

At the evidentiary hearing, Dr. Eisenstein testified that there were indicia of pre-morbid brain damage in the universe of background materials, interviews and other sources that he relied on to form his opinions. These indicia included the thirty-nine (39) day 1975 Jackson Memorial Hospital juvenile psychiatric admission that Mr. Koch never obtained, the 1974 overdose admission referenced internally in the JMH report, the history of childhood beatings and trauma and childhood and adult substance abuse, the 1975 JMH diagnosis of borderline mental retardation, and the Beta IQ score of 76 in Mr. Jones' Department of Corrections records. He pointed out that the mental status reflected in the 1988 and 1975 records was generally consistent with his own findings of April 1991, a full scale WAIS-R IQ score of 72 and his March 1999 full scale IQ on the WAIS III of 67. This low level of mental ability is found in only about 1% of the population. Dr. Eisenstein testified that it would have been helpful to have had all

these materials, including the face-to-face family interviews as a basis for reaching a conclusion about Victor Jones' status prior to the gunshot wound to his frontal lobe in December 1990. The only materials that Dr. Eisenstein was provided by Mr. Koch were the hospital records from JMH related to Mr. Jones' 1990 admission for the gunshot wound to his head, Detective Burhmaster's police report and the jail records from Dade Correctional dating from 1991 up until the time of the trial.

Dr. Eisenstein testified that at the time of the 1993 trial he did not have enough background material or information about Mr. Jones' status prior to his frontal lobe injury to offer an opinion about his status prior to the injury. It was only after collateral counsel provided the background materials already described to Dr. Eisenstein, after he had the opportunity to interview Mr. Jones' Aunt Laura in her home in Cutler Ridge, his sisters Valerie and Pamela, his brother Michael and his cousin Leon at Bea's home in Liberty City, after he had the opportunity to do additional testing and interviews with Mr. Jones himself, and after he had a chance to discuss the case with Dr. Fisher that he was then able to form opinions to a reasonable degree of professional certainty as to the relevant issues in Mr. Jones' case. Only then was he was able to testify that he believed there was substantial evidence that Mr. Jones was significantly impaired and most probably brain damaged prior to the injury he suffered in December 1990, that Mr. Jones was intoxicated at the time of the offense, that

his traumatic family history, substance abuse history, history of psychiatric hospitalization in 1974 and 1975, four juvenile admissions from 1975-1978 to Okeechobee, and his mental deficiency by history all were significant mitigating factors to which he could have testified in 1993 had he had the information and asked to testify.[37]

Both Dr. Eisenstein and Dr. Fisher testified that the dysfunctional nature of the family dynamics and function in Mr. Jones life were a significant element that assisted them in forming an opinion as to the presence of non-statutory mitigation in Mr. Jones' case. Dr. Fisher testified that on a one to ten scale, with ten being the worst family situation he had seen, Mr. Jones' family life rated a ten. Both experts also testified that in their opinion there was great significance to the length of both Mr. Jones' 39 day psychiatric admission at Jackson Memorial in 1975 the three month Intensive Care

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[37]A review of the transcript of the February 22, 1993, allocution hearing reveals that the trial court raised the issue of the presence of mitigation with Dr. Eisenstein, not Koch (R. 2819). Eisenstein then testified that he did not know what Mr. Jones' state was at the time of the crime, so he refused to speculate about the criteria of extreme mental or emotional disturbance (R. 2819). On cross-examination, the State again raised the issue of mitigation and Eisenstein testified that he had no opinion as to the existence of any of the mitigating factors. He said that he had to assume that prior to the gunshot wound that Mr. Jones suffered in December 1990, Mr. Jones was "within normal limits" because he had "no data that his function was impaired" (R. 2820). As an example of the data he did have, Eisenstein referred on cross to his telephone interview with Aunt Laura Long, in which he testified Ms. Long told him that Victor Jones was treated the same as everybody else in the house and that the home was a good home (R. 2823-24).

Unit admission after a drug overdose in 1974. They both said these admissions were very unusual in their experience.

Dr. Haber's testimony also established the presence of substantial mitigation which Mr. Jones' jury never heard. Based on her evaluation of Mr. Jones, as well as the extensive background documentation that she had never been provided at the time of her initial evaluation,[38] Dr. Haber was able to discuss in detail Mr. Jones' long history of substance abuse beginning at a very early age, the fact that he had been consistently using cocaine up to and including the day of the offense, that he was under the influence of drugs at the time of the offense, that there were clear indicia of brain damage prior to Mr. Jones being shot in the head, and that Mr. Jones upbringing, far from idyllic, was in fact pervaded by emotional and physical abuse by his putative "caretakers."

Dr. Toomer's evidentiary hearing testimony further established the prejudice accruing to Mr. Jones from Koch's deficient performance. Free from the constraints of a lack of documentation and able to fully discuss Mr. Jones' history of substance abuse, Toomer was able to provide expanded testimony about the mitigating circumstances,

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[38]For example, Dr. Haber testified that she had not been provided with numerous corrections documents from Mr. Jones' prior incarceration. These materials, which were part of the background materials provided by Mr. Jones' collateral counsel, document Mr. Jones' longstanding drug abuse problems, discuss prior head injuries, history of headaches and dizziness, and other red flags indicating potential organicity.

statutory and nonstatutory, which apply to Mr. Jones, as well as corroboration for his previous testimony which had been rejected by the trial court. Dr. Toomer was able to provide more detailed information about Mr. Jones' prior psychiatric history in light of the previously-unknown JMH documents, the influence that cocaine had on him at the time of the offense, the physically and emotionally abusive childhood, and other factors which substantiated and strengthened his prior opinions. Significantly, Dr. Toomer's findings were corroborated by Drs. Eisenstein, Fisher, and Haber, none of whom were ever called by Mr. Koch at Mr. Jones' penalty phase, and none of whom he ever spoke with prior to testifying at the penalty phase in order to determine if their conclusions were consistent with his.

Pamela Mills, one of Mr. Jones' sisters, testified at the evidentiary hearing and described how she and Victor were both poor students in school and had to help each other out on their lessons. She testified that she had been physically and emotionally abused by Ms. Long and her son Lawrence, and that she had witnessed Victor and Leon being abused. She stated that they had to strip naked before they were beaten. She also testified that as a child she was impregnated by the much older surrogate caregiver Lawrence, and gave birth to a son, Virgil, as a result of this sexual contact. She also testified that shortly after leaving Laura's house after she gave birth to Virgil, she lived for a time in New York with Victor and Constance, their mother,

who had a drinking problem. She testified that after her mother's funeral (in 1983) she lost touch with her Dade County relatives and lived on the streets in New York and had severe drug problems during the period 1986-1989, but then began to work on getting her life together. She was never contacted by any of Mr. Jones' lawyers or investigators during the period 1990-1993. She testified that by 1990-91, she had completed a drug rehabilitation program, had spent 9 months at a halfway house, then spent time with a sponsor for a few weeks or months, went to a recovery house and then got her own subsidized apartment, with electric service and telephone, in New York. She also testified that she had a Social Security number, received welfare and food stamps during this period in New York, and stated that the drug rehabilitation program that she participated in was publicly funded.[39]

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[39]The lower court found that Mills "was not credible" (PCR. 386). This blanket assertion was accompanied by no explanation. What was she "not credible" about? Her name? Her date of birth? The fact that she was Mr. Jones' sister? The name of her mother and father? That she lived in the house with Mr. Jones when they were growing up? That she and Mr. Jones were physically abused? That she was impregnated by Lawrence Brown at a young age and had a child as a result? The list goes on in terms of the areas to which Mills testified, yet the lower court provides no explanation for the conclusion that she was "not credible." For such a credibility determination to be of any assistance to this Court, it must provide some detailed explanation for its basis. The fact that Mills' testimony is corroborated by other witnesses and documentation supports her testimony, and the lower court's attempt to utter the magic words of "lack of credibility" should not thwart a detailed examination by this Court of Mills' testimony. Moreover, that the lower court determined that Mills was "not credible" in order to defeat Mr. Jones' claim says nothing about how the jury would have viewed her testimony at the time of the penalty phase. Recently, the Second District Court of Appeals observed that

Carl Leon Miller, cousin to Pamela and Victor, also testified at the evidentiary hearing. He testified that he served as a "big brother" role model to Victor while living at Aunt Laura's. Leon testified that he graduated from Palmetto High School at age 17, shortly after he left Laura's house. He confirmed Lawrence's abusive beatings of all the kids, including Victor. He also knew that Lawrence had impregnated Pamela and he testified that he had seen Lawrence behaving inappropriately sexually with the much younger Pamela. Leon admitted supplying Victor Jones with drugs beginning before the age of 13, including marijuana, cocaine, and all kinds of pills and alcohol. He recalled seeing Victor overdose on a lot of pills and said that he called the ambulance that took Victor to the hospital because he was the only other person home. Leon stated that both he and Lawrence were selling drugs out of Laura's house by the time he was 17. Lawrence sold heroin and cocaine. Leon recalled that Victor was slow in school. He also remembered the last time he saw Victor. He recalled that

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while "a trial court's determinations of credibility are afforded great weight by a reviewing court," the focus of a court's determination should be on "whether the nature of the evidence is such that a reasonable jury may have believed it." Light v. State, 796 So. 2d 610, 617 (Fla. 2d DCA 2001). Thus, a trial judge's capacity to determine the credibility of the witnesses in a postconviction motion is more limited when the trial judge is examining whether the particular testimony would have had an effect *on the jury*, and the question is not whether the judge "believes the evidence presented as opposed to contradictory evidence presented at trial, but whether the nature of the evidence is such that a reasonable jury may have believed it." Id. This is the analysis that Mr. Jones submits is proper.

Victor was only home in Miami for one to three weeks after he had been released from prison. Leon testified that on the night before Victor was arrested the next day on the murder charges that landed him on death row, he saw Victor injecting drugs at Aunt Bea's house, along with his brother Michael and a man named Howard Lynn. He testified that he believed that Victor's sister Valerie was also there in December 1990 and that Aunt Bea may have been in the house. Leon testified that Victor appeared to be intoxicated on crack and booze before he injected anything. Leon says that he has lived continuously in Dade County since 1990, and was never contacted by any of Victor's attorneys or investigators prior to Victor's trial. He said he would have testified back in 1993 if he had been asked.[40]

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[40]As with Pamela Mills, the lower court brushed Miller's testimony aside as "not credible" without any explanation whatsoever (PCR. 387). Did the lower court believe that the witness was not actually Carl Leon Miller? That he was not Mr. Jones' cousin? Again, the list goes on, and due to the lower court's vague and conclusory opinion, this Court has no idea why the lower court found Miller to be not credible. As with the discussion regarding Pamela Mills, this Court should view lower court findings making such broad-based credibility finding with suspicion. It certainly should not be forgotten that no court believed Chiquita Lowe when she recanted her eyewitness testimony at Frank Lee Smith's trial, yet Ms. Lowe turned out to be entirely credible when she testified that her original identification of Smith was in fact incorrect, as subsequent DNA testing established. Although trial courts are vested with the authority to make credibility findings, this is an enormously powerful exercise of discretion, and should not be used simply because courts believe that such negative credibility findings will insulate their orders from being reversed by an appellate court. If courts are going to make credibility findings, they should be based on identifiable factors, not blanket conclusions as they were in Mr. Jones' case.

Based on the evidence presented below, Mr. Jones submits that he has established prejudice. State v. Lara, 581 So. 2d 1288 (Fla. 1991); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Rose v. State, 675 So. 2d 567 (Fla. 1996). The evidence presented at Mr. Jones' hearing is identical to that which established prejudice in these cases, and Mr. Jones is similarly entitled to relief under the standards set forth in Strickland and Williams.

B. Failure to present evidence supporting the unconstitutionality of Mr. Jones' prior convictions.

Trial counsel Koch litigated the constitutionality of Mr. Jones' prior convictions in that the pleas in those cases were legally insufficient (R. 421-34). After argument by the parties and a review of the arrest affidavits, provided by the State, the trial court denied relief as to the constitutionality of Mr. Jones' prior convictions (R. 432). Koch, however, failed to offer up any proof at the hearing that Mr. Jones was unable to make a knowing, intelligent and voluntary waiver of his rights during the plea colloquy nor did he object to the ruling of the court or file an appeal to the Third District Court of Appeal. There can be no reasonable tactical reason for failing to appeal the judge's denial of the 3.850 motions on Mr. Jones' prior convictions. Had Mr. Jones' appellate rights been properly preserved and the prior convictions vacated, Mr. Jones would be entitled to a resentencing. Johnson v. Mississippi, 108 S. Ct. 1981 (1988); Rivera

v. Dugger, 629 So. 2d 105 (Fla. 1995); Preston v. State, 564 So. 2d 120 (Fla. 1990). Mr. Jones' pleas were in fact involuntary and insufficient to withstand scrutiny and must be vacated. See Boykin v. Alabama, 395 U.S. 238 (1969). As noted elsewhere in this brief, Koch negligently failed to properly investigate Mr. Jones's history of mental health and substance abuse problems, for example, failing to obtain the Jackson Memorial Hospital records indicating Mr. Jones's 1975 psychiatric admission. These records further established a basis for challenging the prior convictions; counsel, however, unreasonably failed to investigate and use this information in support of his argument.[41]

C. Failure to object to constitutional error. Counsel unreasonably failed to object to the judge's instructions to the jury which improperly shifted the burden to Mr. Jones to prove that death was not the appropriate penalty (R. 2766-70), in violation of State v. Dixon, 283 So. 2d 1 (Fla. 1973), Mullaney v. Wilbur, 421 U.S. 684 (1975), and Apprendi v. New Jersey, 120 S. Ct. 2348 (2000). The lower court's finding of a procedural bar is incorrect, as the claim was premised on the failure to object, which is cognizable in postconviction proceedings.

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[41]The lower court found this portion of the claim procedurally barred because it should have been raised on appeal (PCR. 383). This claim, however, is premised on allegations of ineffective assistance of trial counsel, and thus no procedural bar applies.

Counsel also failed to adequately object to the jury being instructed that its role was merely "advisory." (see e.g. R. 472-73, 435, 2511, 2766, 2769, 2770, 2771). The jury's sense of responsibility was also diminished by the misleading comments and instructions regarding the jury's role. This error was compounded by trial counsel's proposed instructions which emphasized to the jury its "advisory" role (R. 355). This diminution violated the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985).

Counsel also failed to object or request an instruction regarding doubling. The jury was given no limiting instruction that if they found both the pecuniary gain and robbery aggravating factors, that they must consider the two factors as one. See Castro v. State, 597 So. 2d 259, 261 (Fla. 1992). As this Court noted on direct appeal, counsel never requested such a limiting instruction. Jones v. State, 652 So. 2d 346, 350 (Fla. 1995).

ARGUMENT IV--PUBLIC RECORDS

Mr. Jones sought public records disclosure pursuant to chapter 119, Florida Statutes, and Fla. R. Crim. P. 3.852. The lower court denied this claim, concluding that Mr. Jones failed to state which state agencies had not provided public records (PCR. 381).

On February 3, 1997, Mr. Jones made initial requests to the Dade Clerk, the Florida Department of Corrections, the Office of the State Attorney, the Medical Examiner, the Office of the Attorney General, the

Miami Police Department, the Metro-Dade Police Department and the Dade County Jail (Supp.PCR. 318-342). On May 8, 1997, the State Attorney provided a detailed listing of hundreds of pages of documents and notes being withheld (Supp.PCR. 3-7). On May 12, 1997, Mr. Jones advised that due to budget problems, he was unable to pay for a copy of the redacted State attorney file (Supp.PCR. 389). On May 14, 1997, this Court tolled the times under Rule 3.852 with respect to Mr. Jones's case until September 1, 1997 (Supp.PCR. 393-396). Mr. Jones promptly filed a motion to compel on September 2, 1997, addressed to the Florida Department of Corrections, the Office of the State Attorney, the Office of the Attorney General, the Miami Police Department, the Metro-Dade Police Department and the Dade County Jail (Supp.PCR. 9-13). The State Attorney's response to the motion to compel, which complained that Mr. Jones had failed to move forward diligently, ignored this Court's tolling order and Mr. Jones's prior notice concerning CCRC's financial status (Supp.PCR. 14-16). The response to Mr. Jones's motion to compel also noted that "[a]ll materials claimed to be exempt were copied and set aside to be reviewed by the court upon the defendant's request" (Supp.PCR. 15). The lower court later sustained the Attorney General's Objection to providing certain materials claimed exempt on September 11, 1997 (PCR. 1308-1309).

On October 10, 1997, Mr. Jones requested public records from the FDLE (Supp.PCR. 38-43). On December 11, 1997, Mr. Jones submitted a

memorandum "to address the statutory exemptions claimed by the various state agencies in this case" (R. Supp.PCR 425-432). The agencies included in the memorandum were the State Attorney and the Attorney General. A hearing was held on December 11, 1997, and counsel stated that the only pending issue with the State Attorney and the Attorney General was the validity of claimed exemptions (Supp.PCR. 267). Counsel then noted that the lower court needed to undertake an in camera inspection and to the extent that the court determined that "a part of [the records] should be exempted and withheld, the Court needs to seal those and put them in the record...for appellate review" (Supp.PCR. 272). The Attorney General was found by the court to be in compliance based on the representation that they had supplied all records without withholding anything (Supp.PCR. 286). Counsel for the Department of Corrections agreed to provide copies of "certain criminal justice information from our probation officer" and requested that the if the court found the documents should not be disclosed that they be retained under seal in the court file (Supp.PCR. 289, 304). At the conclusion of the hearing, the assistant state attorney's question, "I understand all rulings are deferred as to the State Attorney's Office, pending an in camera review of claimed exemptions," was deemed to be "Right" by the lower court (Supp. PCR. 304).

Mr. Jones filed a motion to compel directed to the Dade State Attorney on January 12, 1998 (Supp. PCR. 439-441). This Court entered

an order on January 15, 1998, tolling the time period for the filing of Mr. Jones postconviction motion until June 1, 1998 (Supp.PCR. 471-473). The Department of Corrections produced to the lower court "a sealed copy of the criminal justice information for which it has claimed an exemption" on January 30, 1998 (Supp.PCR. 491). Mr. Jones filed a Notice of Inability to Proceed on March 2, 1998, noting that "[w]ithout funds, counsel is unable to incur any expenses associated with Rule 3.852" (Supp.PCR. 479). Time limitations under Rule 3.852 were tolled from April 8, 1998 until June 25, 1998 pursuant to orders by this Court (Supp.PCR. 486-489). Following an in camera inspection, the lower court sustained the objections of the State Attorney to turning over alleged exempt materials (PCR. 1307-08).

Mr. Jones requested numerous supplemental public records pursuant to Emergency R. Crim. P. 3.852 prior to the end of December 1998 (Supp.PCR. 86-110). Included in these requests were requests for juror information directed to the State Attorney, FDLE and the Clerk of Circuit Court. An objections hearing was held on February 5, 1999 (PCR. 1315). The lower court entered an order on March 3, 1999, sustaining the FDLE's objections to the supplemental requests to FDLE made on December 29, 1998, pursuant to Emergency Rule 3.852, on the grounds that the request was untimely pursuant to former Fla. R. Crim. P. 3.852(d)(2)(C) (1996), in that the supplemental request was made more than 90 days after FDLE's initial production of records on

December 5, 1997 (Supp.PCR. 128-129).[42] Mr. Jones submits to this Court that his supplemental requests were timely, and the failure by the lower court to require production violated Mr. Jones rights, especially where other agencies, such as the City of Miami Police were required to cooperate with supplemental production based on requests in December 1998 (Supp.PCR 1335-1336.

During the same public records hearing on February 5, 1999, it appears from the transcript that the lower court examined the sealed records that had been claimed exempt by the FDLE, holding that they were exempt (Supp.PCR. 1339). At the same hearing, counsel for Mr. Jones advised the lower court that sealed records that had been provided from the Department of Corrections on January 30, 1998 should be inspected by the lower court and that an agreed upon proposed order had been prepared (PCR. 1357-1359; (Supp.PCR 494-496). Thus it appears that during the course of the case below, the lower court performed in camera inspections on documents claimed exempt by a number of agencies, yet the lower court failed to either provide any documents to Mr. Jones following the in camera inspections or to enter a written order as to

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[42]Counsel for Mr. Jones argued unsuccessfully at the public records hearing on February 5, 1999, that his December 1998 Emergency R. Crim. P.3.852 public records supplemental requests were timely because the FDLE's initial production, for example, was not until December 10, 1997, and since Mr. Jones's case was under a stay or tolling of Rule 3.852 from before that date until October 1, 1998, the date the Emergency Rule was promulgated by this Court, Mr. Jones was not barred from additional requests. (Supp.PCR. 1342, 1347-1350).

the disposition of the inspections of the documents provided by the State Attorney, FDLE, and DOC found to be exempt.

Collateral counsel has a duty to seek and obtain each and every public record that exists in order to determine whether any basis for post-conviction relief exists therein. To the extent any state agency invokes an exemption, Mr. Jones is entitled to have the circuit court conduct an in camera inspection to determine the validity of the claimed exemption. Counsel requests that this Court carefully examine the documents held to be exempt by the lower court, especially the hundreds of pages of documents held back by the State Attorney and indexed in their exemption letter (Supp.PCR. 3-7). Any documents contained in these sealed records which could form the basis of a claim on behalf of Mr. Jones should be disclosed and Mr. Jones should be permitted to amend.

ARGUMENT V--MR. JONES IS INSANE TO BE EXECUTED

Mr. Jones is insane to be executed. This claim is being raised for preservation purposes, as it is not ripe for consideration. See Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998).

CONCLUSION

Mr. Jones submits that relief is warranted in the form of a new trial and/or a resentencing proceeding. To the extent that the lower court erred in granting an evidentiary hearing, reversal is warranted as well on that basis.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Corrected Initial Brief has been furnished by United States Mail, first class postage prepaid, to Sandra Jaggard, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131, on April 8, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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