IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-2217

DAVID WYATT JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

CORRECTED INITIAL BRIEF OF APPELLANT

BRODY & HAZEN, P.A.
Attorneys at Law
P.O. Box 16515
Tallahassee, FL 32317

HARRY P. BRODY
Florida Bar No. 0977860

JEFFREY M. HAZEN
Florida Bar No. 0153060

Attorneys for Appellant

PRELIMINARY STATEMENT

This appeal is from the denial of Appellant=s motion for post-conviction relief by Circuit Court Judge William A. Wilkes, Fourth Judicial Circuit, Duval County, Florida. This appeal challenges Appellant=s convictions and sentences, including his sentence of death. References in this brief are as follows:

"R. ___." The record on direct appeal to this Court.

"PC-R. ___." The post-conviction record on appeal.

"EHT. ___." The transcript of the post-conviction evidentiary hearing.

AOrder. ___.@ The Hearing Court=s Order within EHT.

All other references will be self-explanatory or otherwise explained herewith.

REQUEST FOR ORAL ARGUMENT

This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to develop the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Appellant, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

On February 16, 1995, Mr. Jones was indicted by a Duval County grand jury for one count each of first-degree murder, kidnapping, and robbery. (R. 3-4) On March 21, 1997, a jury found Mr. Jones guilty of all charges. (R. 1516-17) On April 10, 1997, that same jury recommended death by a vote of 9-3. (R. 2120) Subsequent to the jury=s recommendation, the trial court sentenced Mr. Jones to death. (R. 2390)

Mr. Jones' timely sought direct appeal to this Court. This Court affirmed Mr. Jones= conviction and sentence. Jones v. State, 748 So. 2d 1012 (1999). Certiorari to the United States Supreme Court was denied July 12, 2000. Jones v. Florida, 120 S. Ct. 2666 (2000).

Mr. Jones filed his initial post-conviction motion on June 12, 2001. (PC-R. 1-28) On April 28, 2003, Mr. Jones filed an amended post-conviction motion. (PC-R. 110-217) A Huff1 hearing was held in the matter on August 11, 2003. (PC-R. 242) On September 10, 2003, the lower court entered an order granting an evidentiary hearing only as to claims I, II, V, and XII of Mr. Jones= amended motion. (PC-R. 242-43) An evidentiary hearing was held in this matter on December 11, 2003. The lower court denied

all relief on October 20, 2004. (PC-R. 387-445) This appeal follows.

II. STATEMENT OF THE EVIDENTIARY HEARING FACTS

Dr. Jonathan Lipman testified for the defense. (EHT. 8) Dr. Lipman stated that he is professionally trained in the field of neuropharmacology which is a branch of science dealing with the effects of drugs and toxins on the brain and behavior. (Id.) Dr. Lipman obtained a doctorate in neuropharmacology from the University of Wales and did post-doctorate work at the Tennessee Center for Health Sciences in Memphis. (Id.) Dr. Lipman worked at the Vanderbilt School of Medicine for ten years. (EHT. 12) Dr. Lipman is involved in both teaching and research in the field. (EHT. 9) Dr. Lipman also does forensic work. (EHT. 10) This involves both civil and criminal cases. (Id.) Dr. Lipman has been qualified as an expert in several Florida capital cases, including post-conviction. (EHT. 10) Dr. Lipman was accepted by the court as an expert in the field of neuropsychology. (EHT. 14)

Dr. Lipman has done research on drugs known as psychostimulants. (EHT. 13) Particularly, he has done research on amphetamines, cocaine, LSD, and PCP. (Id.)

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1 Huff v. State, 622 So. 2d 982 (Fla. 1993)

Dr. Lipman has met with the Defendant, David Jones. (EHT. 14) Before meeting with Mr. Jones, Dr. Lipman reviewed voluminous records in preparation for the evaluation of Mr. Jones. (Id.) The records reviewed included Kansas and Florida Department of Corrections records, Union Correctional institution classification records, Jacksonville parole and probation records, school and military records, a 1986 competency report, 1988 prison medical records, 1993 hospital records from Orlando, prison medical records from 1995-1997, employment records, a report of Dr. Harry Krop, a report of Dr. Wade Myers, depositions of Doug Eaton and James Trout, a sworn statement and transcript of testimony of Angela Solomon, depositions of Andre Andrews and Officer Dwayne Richardson, a deposition of Vincent Harper, an unsworn statement of a John Doe identified as David Jones: drug dealer, trial testimony, exhibits including a homicide continuation report and a medical examination report, ATM records, deposition and trial testimony of Dennis Marsh, Leonard Hutchins, Johnnie Lee Johnson, Amy Hudson, and Jackie Jones, transcripts of state and defense opening argument at trial, and the penalty phase testimony of John Bradley, a Mr. Hall, Melissa Leopard, Doug McRae, Jodi Brenner-Burney, Cynthia Bryant, Wayne Pierce, Joann Sealey, Michael Edwards, Sherry Risch, Drew Edwards, Tara Wilde, and Ronald Jones. (EHT. 15-17) Dr. Lipman

reviewed the records before and after interviewing Mr. Jones. (EHT. 17)

As an expert in the field, Dr. Lipman stated that his impression of Mr. Jones is that Ahe is an individual who is constitutionally vulnerable to experiencing the psychosis producing effects of cocaine and other stimulants.@ (Id.) Also, Dr. Lipman=s impression of Mr. Jones is that he has, in the past, been an abuser of cocaine, including both injecting and smoking the drug. (EHT. 17-18) Mr. Jones is what Dr. Lipman referred to as a Aspeed baller@, a cocaine addict who also engages in the Ainsidious and dangerous@ use of an opiate with the stimulant. (EHT. 18)

Dr. Lipman testified that when cocaine is used acutely, it has the effect of creating sensations of competence, energy, and euphoria, but also may have the side-effects of irritability and anxiety. (EHT. 18) According to Dr. Lipman, when used chronically, the side-effects of cocaine use become more pronounced, with the irritability and anxiety developing into full-blown paranoia and psychosis. (EHT. 19) Dr. Lipman added that when the user Ais in that condition they are irrationally fearful, they typically are hallucinating, they suffer from delusions, and their contact with reality is very, very poor.@ (Id.) The condition resembles schizophrenia. (Id.) This is

true in terms of the lack of contact with reality, the presence of delusions, and irrational fears. (Id.) Dr. Lipman added that the qualitative difference is that schizophrenic delusions are more bizarre. (EHT. 20) Dr. Lipman testified that individuals like Mr. Jones, who are susceptible to experiencing psychosis even without the abuse of cocaine, often experience cocaine psychosis as a full-blown schizophrenic would. (Id.) Mr. Jones susceptibility to experiencing psychosis is likely what caused him to be diagnosed as schizophrenic in the past. (Id.) In Dr. Lipman=s opinion, Mr. Jones, at the time of the instant offense, was experiencing the affects of chronic cocaine psychosis. (EHT. 21) The historical support for this opinion was extensive according to Dr. Lipman. (Id.)

Mr. Jones began smoking marijuana in junior high school and Awas sufficiently unrestrained to have swallowed what he called an unknown quantity of white powder that put him in a major psychotic trip for a number of days in which his friend had to tie him up and lock him in a closet.@ (EHT. 21-22) Dr. Lipman believed, based on Mr. Jones description of the effects of the drug, that it was PCP, also known as angel dust. (EHT. 22)

Mr. Jones enlisted in the Army in 1977 and during that time was also drinking heavily. (Id.) After discharge from the Army, Mr. Jones was incarcerated in the Kansas Department of

Corrections. (Id.) Based on Dr. Lipman=s review of records, Mr. Jones adjusted well to incarceration. (EHT. 23) In the drug-free environment of prison, Mr. Jones Abecame emotionally stable, he was conforming, and he was non-punitive, non-self-punitive and nonviolent. (Id.)

In 1982, according to the history given to Dr. Lipman, Mr. Jones returned from Kansas to Callahan, Florida and met Jackie Doll, his future wife. (Id.) Jackie introduced Mr. Jones to the intravenous use of cocaine. (Id.) As to the experience of initially injecting cocaine, Mr. Jones told Dr. Lipman, AIt was the best feeling I had ever experienced in my whole life, I couldn't speak, it was good, it was out of this world, I couldn=t move or talk. After I came down I said I couldn=t believe how good it felt. And from that day on I injected cocaine.@ (Id.) Dr. Lipman explained that Mr. Jones attachment to the drug is likely linked to Mr. Jones depression and the drug=s relief of that depression. (EHT. 24) After that first weekend injecting cocaine, Mr. Jones decided to steal money from his employer to get more. (Id.) In Dr. Lipman=s words, Ait had completely taken him over.@ (Id.) Mr. Jones was overpowered by and could not resist it. (EHT. 25) Mr. Jones was eventually introduced to heroin as a method to treat his cocaine withdrawal. (Id.) This concomitant use of cocaine and heroin is referred to commonly as

Aspeedballing.@ (Id.) Dr. Lipman stated that this type of drug use creates an Aendless cycle of each drug actually treating the side effects of the other, and although heroin does not cause any kind of psychotic affect, it does allow the cocaine user to take far more cocaine than would be otherwise possible.@ (EHT. 26)

Dr. Lipman related an incident in which Mr. Jones, while speedballing, devolved into a psychotic and hallucinatory state in which he believed aquarium fish where telling him to kill himself. (EHT. 26-27) Mr. Jones was also using qualudes, another sedative during this episode. (EHT. 27) Later, Mr. Jones began using dilaudid as the sedative in his speedball pattern. (EHT. 28) Mr. Jones was engaging in this drug activity with his wife, Jackie Doll Jones. (Id.)

Dr. Lipman stated that Mr. Jones, as is typical with drug addicts, denied any adverse effects. (EHT. 29) This denial was despite Jackie Jones= statements that Mr. Jones was paranoid, delusional, distrusting, frightened, and Arevolted by food or other stimulant effect.@ (Id.) Dr. Lipman described these symptoms as indications of psychosis. (Id.) Dr. Lipman further stated that these descriptions Aabsolutely@ credible in terms of his experience as a pharmacologist. (Id.) Additionally, Dr. Lipman stated his opinion that the descriptions were not exaggerated. (Id.)

Dr. Lipman testified that, based on the history he took, Mr. Jones was in a condition of cocaine psychosis when he was arrested, escaped, and then committed a homicide in 1986. (EHT. 30) Dr. Lipman stated that he relied heavily on the reports of other medical doctors and psychologist for this opinion about the 1986 crime. (EHT. 31) Mr. Jones had a lack of memory about the incident which Dr. Lipman described as Aconsistent with what happens when psychotic people get well. (Id.) According to Dr. Lipman, Mr. Jones description of his behavior immediately after the 1986 homicide indicates that he was possibly insane at the time. (EHT. 32) Dr. Lipman=s opinion in this regard is consistent with experts Mr. Jones saw at the time. (Id.) For an extended time, Mr. Jones was found incompetent to stand trial. (EHT. 32-33)[2] While awaiting trial, Mr. Jones was treated with anti-psychotic medications which are used to treat schizophrenic patients. (EHT. 33) These drugs were ultimately ineffective because, according to Dr. Lipman, Mr. Jones did not suffer from schizophrenia, but, rather, schizoaffective disorder. (Id.) Dr. Lipman stated that schizoaffective disorder is treated differently than schizophrenia, particularly in the use of anti-depressant medications. (Id.) In Dr. Lipman=s opinion, Mr. Jones should have been, at that time, treated with anti-depressants in addition to the anti-psychotic medications, but he was not.

(EHT. 33-34) Mr. Jones is currently being treated with anti-depressants and Afeels as though he=s discovered a new life inside himself.@ (EHT. 34)

Upon his release from his incarceration for the 1986 homicide, Mr. Jones, according to Dr. Lipman, was determined to stay clean and did so for approximately three years. (Id.) Mr. Jones reunited with his wife Jackie who ultimately relapsed into crack cocaine use. (EHT. 35) Mr. Jones was not familiar with crack cocaine, but Jackie introduced him to it. (Id.) Describing his first use of crack cocaine, Mr. Jones told dr. Lipman that Awhen he tried it and it grabbed me worse than anything ever had immediately, every penny I had went on it that night. (EHT. 36) Immediately, Mr. Jones was right back where he had been and [he and Jackie then made a living trying to get money stealing from stores, purely to supply their crack habit.@ (Id.) For a year prior to this offense, Mr. Jones was using $500 worth of crack cocaine per day. (Id.) Dr. Lipman described the effects of crack cocaine as continued craving, irritability, agitation, and depression. (EHT. 37) This was the constant cycle of pleasure and pain that Aoccupied their daily function.@ (Id.) Mr. Jones, according to Dr. Lipman=s review of a deposition of Mr. Jones drug dealer, was also speedballing again, shooting dilaudid when he would visit the dealer. (EHT. 38) Dr. Lipman

described Mr. Jones state on the night of the crime:

> [H]e was completely disorganized at this point. He was scary looking. In fact, even his drug dealer who testified about the night of this offense when Mr. Jones went over there and tried to buy more drugs, he said that the man looked frightening, he was bizarre. And this is a person who is well experienced in the effects of drugs, this is the dealer. He wouldn=t open the door. He was in this condition when the crime occurred. (Id.)

At the time of the crime, it is Dr. Lipman=s opinion that both statutory mental health mitigators applied to Mr. Jones. (EHT. 39) Speaking of the emotional disturbance that Mr. Jones was laboring under, Dr. Lipman stated that Ahis emotional control was deranged at the time.@ (Id.) Further, he was Acertainly@ substantially impaired. (Id.)

Dr. Lipman examined Mr. Jones use of the victim=s ATM card in the case. (EHT. 40) Dr. Lipman stated that Mr. Jones actions in this regard reminded him of laboratory rats that when given stimulants such as cocaine, will endlessly and exhaustively press the drug release mechanism long after it ceases to be fruitful. (EHT. 40-41) Dr. Lipman remarked, AIn my mind, I=m seeing my rat experiments here... The conviction, the one more press on the lever will give him his dose was so rat like in the Skinner box that I found myself laughing at it actually.@ (EHT. 41)

Dr. Lipman stated that depression and addiction are, in part, genetic. (EHT. 42)

On cross-examination, Dr. Lipman testified that his opinions

were not based solely on Mr. Jones= self-reports, but rather, Lipman=s review of symptomology Acame from those who evaluated him, those who saw him and those who testified as to what they themselves saw.@ (EHT. 43-44) Dr. Lipman stated that he did take into account Mr. Jones tolerance of the drugs he was using. (EHT. 44) Further, Dr. Lipman explained that drug usage increases with increased tolerance and this chronic drug use brings about the psychotic affects seen in Mr. Jones. (Id.) Dr. Lipman stated that people become sensitive to the psychosis-producing effects of cocaine, not tolerant. (EHT. 44-45) According Dr. Lipman=s research, those who are subject to cocaine psychosis often remain vulnerable to the effects upon stimulant use years later. (EHT. 45)

Dr. Lipman compiled a memorandum to his file based on his review of records and evaluation of Mr. Jones. (Id.) The memorandum was entered into evidence as State=s Exhibit 1. (EHT. 46)

When asked on cross-examination what he would have added to the trier of facts knowledge about Mr. Jones, Dr. Lipman stated:

> I don=t think they understood from my reading that this is a gentleman who suffers from an underlying psychotic vulnerability, he isn=t that far from psychosis most of the time. He has a psychosis spectrum disorder which is now

> treated with prozac actually and very effectively. And perhaps they did not realize that the commonality and continuity between his offenses was that on these occasions he used a drug that pushed him off the edge of that psychotic boundary due to his underlying condition, maybe I would have added that. (EHT. 50)

According to Dr. Lipman, his review and evaluation revealed that Mr. Jones was not able to, given his decrepit appearance and demeanor, participate in the confidence schemes that financed he and his wife=s drug habits. (EHT. 53) When Jackie Jones was arrested just days before the instant murder, Mr. Jones was left homeless and without income. (Id.) Mr. Jones was also paranoid and terrified of dealing with people. (EHT. 54) Dr. Lipman stated that the incident with the fish in the aquarium demonstrates Mr. Jones= underlying psychotic vulnerability. (EHT. 55) Further, that vulnerability has become more apparent with time. (Id.) Dr. Lipman added that the fact that Mr. Jones kept a corpse in his car trunk for two weeks is also indicative of the vulnerability. (EHT. 56) This happened as part of Mr. Jones prior murder case. (EHT. 54-55) When asked why Mr. Jones= competency issues during his prior murder case would be relevant to present to his capital jury, Dr. Lipman stated:

> ... they are, they are because of reason of loss of competence was because of the reason of his mental disease

> and defect which was existent not only during the period of incompetence but at the time of the offense. It=s the same disorder... he is insane, he was psychotic, he was delusional and this is why he couldn=t be tried and this is the condition. It didn=t develop after he was arrested, this was the condition that he was in at the time of the offense. They are one in the same thing. (EHT. 58)

Dr. Lipman testified that Mr. Jones= form of drug abuse, speedballing, Ais the most vicious and awful form of stimulant abuse.@ (EHT. 59) Dr. Lipman further described psychosis as a state in which the psychotic person=s reality and sense of perception is different such that the person is feels as if they are in another world. (EHT. 62) Dr. Lipman testified that Mr. Jones= 1986 and 1995 evaluations indicate psychosis spectrum disorder. (EHT. 63-64)

In psychometric testing given by Dr. Lipman, Mr. Jones scored 9 out of 10 on the paranoia scale, 8.9 out of ten on the psychoticism scale, and 7 on the schizophrenia scale. (EHT. 68) Dr. Lipman stated that Mr. Jones= scores indicated that he was Aover-endorsing pathology@, something that is typical of the scores of depressed people like Mr. Jones. (EHT. 70) Further, Dr. Lipman stated that this Aover-endorsement@ would not matter because the testing has a built-in mechanism to Aremove its affect from the profile.@ (Id.)

On redirect examination, Dr. Lipman stated that Mr. Jones= Adescription of drug use is absolutely typical of those who used

it to the point of paranoia and psychosis.@ (EHT. 71) Further, other witnesses descriptions were consistent with this conclusion as well. (Id.) Finally, Dr. Lipman testified that everything he testified to at the evidentiary hearing could have been introduced at Mr. Jones= 1997 trial. (EHT. 71-72)

Joann Sealey testified that she is David Jones= mother and currently lives in Jacksonville, Florida. (EHT. 73) Ms. Sealey testified at Mr. Jones= 1997 trial in the instant case. (EHT. 73-74) At the 1997 trial, Ms. Sealey answered all questions asked of her by defense counsel. (EHT. 74) Ms. Sealey was born in Dade County, Florida, but did not stay with her biological parents. (Id.) Ms. Sealey remembers that she was five years old and was living in the Baptist Children=s Home in Jacksonville. (Id.) A couple that wanted children took custody of she and her brother (Id.) The couple took Ms. Sealey to live in Micanopy, Florida, near Gainesville. (Id.) Ms. Sealey attended P.K. Yonge Laboratory School where she met Mr. Jones= father. (EHT. 74-75)

At age eighteen, Ms. Sealey married Mr. Jones= father, Carlos Jones. (EHT. 75) Mr. Jones is the youngest of three children that Ms. Sealey and Carlos Jones had. (Id.) Mr. Jones has an older brother, Carlos, Sr., and an older sister, Cynthia. (Id.) Ms. Sealey was married to Carlos Jones for eleven years. (Id.)

Ms. Sealey testified that Carlos Jones was an alcoholic. (Id.) When the children were young, Carlos Jones was a violent alcoholic towards Ms. Sealey. (EHT. 76)

Eventually, Ms. Sealey divorced Carlos Jones and was raising her three children on her own. (EHT. 76-77) Ms. Sealey stated that she Ahad to work all the time.@ (EHT. 77) She also waas working more than one job. (Id.) Ms. Sealey testified that there was Amost definitely@ a lack of parental supervision and guidance given to Mr. Jones when he was a child. (Id.)

Ms. Sealey stated that Mr. Jones grew up with a cousin of his named Ricky Bevell. (Id.) The two were close, good friends. (EHT. 78) As youngsters, they were bull riders and participated in rodeos. (Id.)

Ms. Sealey described Mr. Jones and his wife Jackie as A... the type of couple that they couldn=t live together but they couldn=t live apart. Their love was so strong, but they would just be back and forth and in and out, you know.@ (Id.) Eventually, Mr. Jones and Jackie had a child, Davy. (Id.) Ms. Sealey has had legal custody of Davie since he was 22 months old. (EHT. 79) The reason for Ms. Sealey obtaining legal custody of Davie was that Mr. Jones and Jackie could not care for him and there Awas no security for the child.@ (Id.) Ms. Sealey added that she was very concerned about Mr. Jones= and Jackie=s drug

addiction as it related to their inability to care for a child. (Id.) Ms. Sealey stated that Davy knows his father and has visited him in prison. (Id.) Ms. Sealey stated that she believes Mr. Jones and Davy have a reciprocal love for each other. (EHT. 80)

Finally, Ms. Sealey stated that she was at the hearing to testify for her son and that she loves him. (EHT. 81)

On cross-examination, Ms. Sealey agreed that she testified at Mr. Jones= 1997 penalty phase. (Id.)

Jackie Jones testified that she is Mr. Jones= wife, that they are currently married, and that she is the mother of Mr. Jones son. (EHT. 82-83) Jackie Jones stated that she did not disclose to the state, prior to her testimony at Mr. Jones capital trial, that she had pending charges against her in the State of Texas. (EHT. 83) The state attorney did not ask her if there were pending charges against her. (EHT. 84) Mrs. Jones stated that she was, in fact, wanted on pending charges in Texas. (EHT. 86) Mrs. Jones stated that she found out about the pending Texas charge when she was living in Canada prior to Mr. Jones trial. (Id.) While in Canada, she was pulled over for a traffic violation and the Canadian authorities informed her of the pending charge for drug possession. (Id.) Mrs. Jones stated that she thought the charge Adidn=t matter@ and that Aafter ten

years that they just dismiss it mentally or some kind of way.@ (Id.) However, Mrs. Jones ended up spending 13 months in prison on the charge. (EHT. 86-87) She finished her parole in South Carolina. (EHT. 87) Mrs. Jones went to prison on the charge approximately one year after her testimony at Mr. Jones capital trial. (EHT. 89)

Mrs. Jones testified that she did not receive any deal from the state in exchange for her testimony against Mr. Jones. (EHT. 87) However, she conceded that she never disclosed the fact that she had pending charges which Mr. Jones= defense team did not know of. (EHT. 88)

Mrs. Jones denied using drugs at the time of Mr. Jones capital trial. (Id.) She stated that after the trial she had a relapse and Atried some coke one other time.@ (EHT. 90)

Mrs. Jones stated that she was picked up in Canada and transported to Jacksonville for Mr. Jones trial by two Astate prosecuting attorneys.@ (EHT. 92) Mrs. Jones denied that she was Ain custody.@ (Id.)

Mrs. Jones denied that she was given assistance by the state on her Texas charges. (EHT. 94) Mrs. Jones wasn=t sure if the state ran a rap sheet on her, but conceded Athey had to find an address on me somehow.@ (Id.)

Mrs. Jones conceded that she had not completely quit using

drugs at the time she testified against Mr. Jones. (EHT. 95)

On cross-examination, Mrs. Jones conceded that she has used numerous aliases in the past and been booked in the Duval County Jail many times throughout the 1980's and 90's. (EHT. 95-96) Mrs. Jones testified that there was no detainer placed on her from the State of Texas. (EHT. 96)

Jeffery Morrow testified that he is currently incarcerated at Cross City Correctional Institution. (EHT. 101) Morrow=s incarceration is for a grand theft conviction. (EHT. 102) Morrow stated that he has approximately ten felony convictions. (Id.)

Morrow testified that he met Mr. Jones and his wife in the 1980's. (Id.) Morrow met them through his mother. (Id.) Morrow stated that his mother was a heroin dealer Aall through the 70's and 80's, so David and a lot of other people came to my mother to buy the heroin, that=s how I met David.@ (Id.) In the early A80's, Morrow and Mr. Jones Ashot a lot of dope together.@ (EHT. 103) Morrow described Mr. Jones= drug use:

> [Normally when he=s straight he=s a good guy, when he=s high every night we go out beating the streets everyday trying to get a fix. That=s the main thing with junkies is to get high... We=ve all got chemical imbalance inside of us, our focus is to get high every day, we don=t got no regard for rational thoughts. (EHT. 103-04)

Morrow added that he and Mr. Jones Adid a lot of speedballs together, mixing heroin and cocaine. (EHT. 104)

Morrow testified that he and Mr. Jones were arrested for

burglary of a church in 1986. (Id.) Morrow explained that there was supposed to be money in the church, but when this turned out not to be true, Mr. Jones attention turned to getting money from a soda machine. (Id.) Morrow explained that Awe finally got into it, I mean, I was trying to drag him off but he wouldn:t leave the coke machine, he was obsessed with getting change out of that coke machine. (EHT. 105) The money from the burglary was for drugs. (Id.) Morrow stated that at that time he and Mr. Jones Awent for days and weeks, man, sometimes we only stopped to buy a hamburger, everything else we got or stole or whatever we made went into our arms. (Id.)

Morrow stated that he knew Jackie Jones and that she was also a drug addict. (EHT. 106) Further, he stated that David loved her. (Id.)

Morrow testified that in 1997, at the time of Mr. Jones: capital trial, no representative of Mr. Jones ever contacted him about testifying. (EHT. 107) Morrow was in the county jail at that time. (Id.) Morrow would have answered questions and testified as he did at the evidentiary hearing. (Id.)

On cross-examination, Morrow testified that he saw Mr. Jones only one time after they got out of prison for murder and burglary respectively and that they shot dope together. (EHT. 108)

Carlos Jones, Jr. (Carlos) testified that he is Mr. Jones= older brother. (EHT. 110) Carlos stated that his father, Carlos, Sr., was an alcoholic and very abusive towards he an Mr. Jones= mother. (Id.) The family environment was Avery unsettled, arguing, fighting, he even had weapons involved sometimes. (EHT. 111-12) Specifically, Carlos, Sr. used a handgun and a shotgun during these abusive episodes. (EHT. 112) Carlos testified that he, his mother, his sister, and David once had to escape through a bathroom window Ajust to get out of the home.@ (Id.) They were forced to do this because Amy dad was running around the house with a firearm threatening to shoot us.@ (Id.) Carlos= father was intoxicated when this event occurred. (EHT. 113) Carlos recalled another time when his father threatened his mother with a shotgun. (Id.) This event caused her to leave Carlos, Sr. For good. (Id.) Carlos remembers times when his father would Ago to a bar and leave us in the car for, you know, hours, you know.@ (EHT. 114) Carlos recalls physical violence by his father toward both he and his mother. (Id.) Carlos recalled his father gun-whipping him to the point of unconsciousness. (EHT. 115) Carlos stated that he would have testified to these matters at Mr. Jones= 1997 capital trial, had he been asked to do so. (Id.)

On cross-examination, Carlos testified that he several years older than his brother and, as a result, probably experienced

more of his father=s violence than David. (Id.) Carlos has never murdered anyone and never been arrested. (EHT. 116). Carlos has been in the distribution industry for twenty-nine years. (Id.) Carlos does not remember talking to a lawyer about his brother=s 1986 murder conviction. (Id.) Carlos remembers Mr. Jones= trial attorneys in the instant case coming to his home to talk to his mother, Joanne Sealey. (EHT. 117) However, despite the fact that Carlos was in the house at the time they spoke with her, they never directly talked with him. (Id.)

On redirect, Carlos reiterated that he would have answered any question of him truthfully, as he did at the instant hearing. (EHT. 118)

Lewis Buzzell testified that he is an Assistant Public Defender in the Fourth Judicial Circuit and that he represented Mr. Jones in this case. (EHT. 119-20) Buzzell had not reviewed his files prior to the hearing. (EHT. 120)

Buzzell worked on the case with Alan Chipperfield. (Id.) The two split duties, but Chipperfield was lead counsel for the penalty phase. (EHT. 121) Both Buzzell and Chipperfield had previous capital trial experience. (Id.)

Buzzell stated that a jury selection expert was retained by the defense at trial. (EHT. 122) The main reason for this retention was the fact of Mr. Jones prior murder conviction and

its impact on potential jurors. (EHT. 122-23)

Buzzell did not recall the prosecutor telling the venire that the victim in the case had three young children. (EHT. 124) Buzzell maintained that he believed, in terms of the selection of the jury, that he and Chipperfield had done the best they could with what they had to work with. (EHT. 125) Buzzell stated that he may have been concerned about the venire hearing that the victim was a mother of young children, but that Athey=re going to find that out sooner or later anyway in the trial...@ (EHT. 126)

Buzzell recalled that some of the jurors were crying when they returned from their penalty deliberations and attendant recommendation of death. (EHT. 127) He found this to be unusual. (Id.)

Buzzell stated that he would have preferred to have more peremptory challenges than he did. (EHT. 128)

Buzzell stated that he was lead counsel on the case. (EHT. 129) Buzzell recalled spending a significant amount of time on psychiatric and DNA evidence. (Id.) Buzzell did the bulk of client communication with Mr. Jones. (EHT. 130) Upon meeting Mr. Jones, Buzzell stated that it was apparent that he was a person Athat needed to be seen by a mental health expert pretty quickly.@ (Id.)

Initially, the case was not charged as a homicide because

the victim=s body had not been found, but, according to Buzzell, the homicide division of his office began working the case immediately because of the prospects that it would become a homicide. (EHT. 131) Buzzell recalled sending an extensive communication to the Jacksonville Sheriff=s office asking that they not speak with Mr. Jones. (Id.)

Buzzell could not recall if Mr. Jones was receiving medication at the jail upon initially being arrested in the case. (EHT. 133) Buzzell did not assert, as part of his motion to suppress statements made by Mr. Jones to Detective Jim Parker, the fact that Mr. Jones was under the influence of any medication. (Id.)

Buzzell=s understanding from talking to Mr. Jones and from the facts he learned that Mr. Jones was a crack cocaine addict at the time he was arrested. (EHT. 133-34) Buzzell stated that he never had any doubt about this. (EHT. 134)

Buzzell understood that Mr. Jones was receiving psycho tropic medication at the time of the trial and believes a jury instruction was given regarding the issue. (Id.) Buzzell stated that he did not remember there being a Astrategy@ per se as to asking for the psychotropic medication instruction. (EHT. 135) Buzzell recalled that Mr. Jones was Aquite polite and conducted himself very well during the trial.@ (Id.) Buzzell stated that

Mr. Jones was always polite with him, even when he was agitated. (Id.)

Buzzell recalls the state bringing up the Aspider web tattoo@ issue during the trial. (EHT. 136) Buzzell testified that the issue came up because of the state=s asserted position that Mr. Jones= alleged Apolitical beliefs@ were somehow relevant. (Id.) The issue was brought during Detective Jim Parker=s direct testimony regarding Mr. Jones= statement. (EHT. 137) Buzzell stated his opinion that the evidence should not have been admitted. (Id.) Further, both he and Chipperfield took steps to prevent the evidence from being admitted. (Id.) Buzzell did not recall it being a big issue. (Id.)

Buzzell stated that there was no Aphysical@ evidence of a sex crime introduced. (EHT. 138) The state=s position on this issue seemed to be that the state of the victim=s body and the position of her clothing implied that a sexual assault occurred. (Id.) Buzzell thought that the argument was pretty weak. (Id.) Buzzell thought that he tried to keep the political, racial, and sexual evidence from being presented to the jury. (EHT. 139) Buzzell would have wanted to keep this evidence out if at all possible. (Id.) Buzzell was worried that the state was attempting to present the evidence as an aggravating circumstance. (EHT. 140) Buzzell stated that in his experience

jurors regard sexual battery as very heinous. (Id.) Buzzell testified that given Mr. Jones statements to law enforcement, the penalty phase was very much on his mind. (EHT. 141) Buzzell agreed that the state cannot admit evidence of, or argue, non-statutory aggravating factors. (EHT. 142) Further, he agreed that there is no statutory aggravator for racial or political views, or sexual battery per se. (Id.) Buzzell stated that evidence of these things might not be admissible. (Id.) Buzzell believed that he objected to the introduction of this evidence. (Id.) Buzzell stated that he wanted to keep this evidence or argument out and if it came in it would be over objection. (EHT. 143)

Buzzell stated that he attempted to develop statutory mental health mitigation, or, alternatively, non-statutory mental health mitigation. (Id.) Chipperfield retained an expert in cocaine addiction, but they were not able to present the expert at trial. (EHT. 144) Buzzell thought that they presented some expert evidence of cocaine addiction. (Id.) Buzzell was not sure if evidence of statutory mental health mitigation was presented. (EHT. 145) Buzzell believed that Doctors Krop and Miller had been retained, but could not testify to statutory mitigation. (Id.) Dr. Miller had not seen Mr. Jones subsequent to the 1995 murder. (EHT. 146) Buzzell relied on what Dr. Miller had done when

evaluating Mr. Jones in the context of the 1986 murder. (EHT. 147)

Buzzell stated that his strategy for attacking premeditation was to present evidence of cocaine intoxication. (EHT. 146) Buzzell stated that his chances of getting an acquittal where very limited and that he was trying to secure a second-degree conviction by attacking the premeditation. (EHT. 147)

Buzzell recalled investigating the possible culpability of Jamie Trout. (EHT. 148) Trout=s deposition was taken and, Buzzell believes, a defense investigator talked to witnesses about Trout. (Id.) The defense team had suspicion that Trout was involved in the murder. (EHT. 149) Buzzell recalled that the state filed a motion *in limine* regarding evidence of Trout=s culpability and that the motion was granted. (Id.) The defense was not Apermitted to cast him as a suspect.@ (Id.)

Buzzell did not specifically recall the state arguing that the victim in the case was sexually assaulted. (EHT. 150) Buzzell did state that he remembered the state=s theory was that the victim was sexually assaulted. (EHT. 151) He was not sure what the theory came from and there was no physical evidence to support it. (Id.) Buzzell testified that he was aware that at some point in the trial, the state was going to pursue the sexual battery theory. (Id.) Buzzell conceded that there is never a

reason you would, as a defense lawyer, want evidence of an uncharged sexual battery to be admitted. (EHT. 152) Buzzell does not believe the sexual battery suggestions came in by accident. (EHT. 158) Buzzell assumed the suggestions were part of a prosecution strategy. (Id.) Buzzell also stated that such argument would be prejudicial to his client. (EHT. 159) It is best to limit, as much as possible, the potential charges against your client, according to Buzzell. (EHT. 167) Buzzell was not satisfied that there was sufficient evidence of sexual battery to prove it as an underlying felony. (EHT. 170) Buzzell does not remember filing a motion *in limine* to exclude references to an uncharged sexual battery. (EHT. 181)

Buzzell recalled evidence being admitted, over his objection, of Mr. Jones making a racial slur in his statement to Detective Parker. (EHT. 153) This is not evidence a defense lawyer would ever want admitted. (Id.) There was no racial aspect to the case given that both victim and defendant were white. (Id.) Some of the jurors were African-American. (EHT. 154) Buzzell could think of no reason why the fact that Mr. Jones was allegedly a racist would be relevant. (Id.) Racism is not a statutory aggravating factor. (EHT. 155) Buzzell thought that the racially pejorative term allegedly used by Mr. Jones could have been redacted from the testimony. (EHT. 157)

Buzzell testified that he did not use Dr. Krop because Krop told him that there were negative aspects to his opinion. (EHT. 160) Buzzell made the decision regarding what experts to use. (EHT. 171) Buzzell could not recall which experts he used. (EHT. 172) Buzzell stated he considered that use of an expert in cocaine addiction because evidence of the link between Mr. Jones= addiction and the Atragic result@ in this case were Aso cogent.@

Buzzell agreed that he would have wanted to impeach the testimony of witness Amy Hudson. (EHT. 161) Hudson=s testimony was somewhat damaging. (Id.)

Buzzell stated that Chipperfield talked to Jackie Jones more than he did. (EHT. 162) A decision was made to present her testimony in the penalty phase of Mr. Jones= capital trial. (Id.) The lawyers believed her testimony was persuasive in demonstrating Mr. Jones= crack addiction at or near the time of the crime. (Id.) The thrust of Buzzell=s strategy was that Mr. Jones was a severe cocaine addict and that this fact negated the first-degree murder charge and death penalty. (Id.) Jackie Jones did not inform Buzzell that she was facing pending charges in Texas. (Id.) Buzzell did not recall Jackie Jones stating that she was using cocaine at the time of trial. (EHT. 163) Buzzell felt that Jackie was a credible witness in terms of describing her relationship with David and their behaviors *vis-a-*

vis cocaine use. (Id.) Jackie did try to present herself in a better light than Mr. Jones and Buzzell was skeptical of this. (EHT. 164) Presenting oneself this way is common criminal behavior in Buzzell=s experience. (EHT. 164-65) Jackie presented some negative testimony about Mr. Jones= behavior also, but, to Buzzell, the risk of that testimony was relatively worth the testimony as a whole. (EHT. 165)

Buzzell recalled Detective Parker testifying that Mr. Jones had asserted his 5th Amendment rights during an interview. (EHT. 174) This is something that should be objected to and Buzzell believes he did so in this case. (Id.)

Buzzell remembered there being no evidentiary support for the state=s argument that Mr. Jones was attempting to remove the victim=s shoes in order to rape her. (EHT. 175) Buzzell believes the state=s argument on this point was part of their strategy to suggest that an uncharged sexual battery occurred. (Id.)

Buzzell recalled Detective Parker testifying that Mr. Jones told him he Adidn=t give a fuck about that woman.@ (EHT. 176) Buzzell testified that it was untrue that, as the prosecutor suggested in closing, this was the only truthful thing Mr. Jones told Parker. (Id.) Buzzell stated that if he had evidence that Mr. Jones had previously suffered a schizophrenic psychotic breakdown, he would want to use that evidence. (EHT. 177)

Buzzell agreed that this evidence may be more persuasive than evidence of drug addiction. (Id.)

Buzzell recalled the state making the argument that Mr. Jones= use of the victim=s ATM card was evidence of Agoal-oriented@ behavior. (EHT. 178) Buzzell agreed that use of an expert to explain this behavior in the context of drug addiction would have been useful. (Id.) Buzzell thinks he argued that it was evidence of drug addiction. (Id.) Buzzell was aware of expert testimony that could have provided a medical/scientific context to the behavior. (EHT. 179) He believes he became aware of such evidence in this case, but doesn=t remember presenting it. (Id.) This, according to Buzzell, could be something he overlooked. (Id.) Buzzell felt drug use was one of the foci of the penalty phase. (EHT. 180) Buzzell does not remember having a strategy of using the cocaine addiction at guilt phase. (Id.)

Buzzell agreed that he would have wanted to educate the jury about crack cocaine addiction. (EHT. 181-82)

Buzzell testified that it is his practice to obtain jail medical records on his client and believes he considered introducing such records into evidence. (EHT. 182)

Buzzell remembered that both he and Chipperfield investigated Mr. Jones= prior murder conviction. (Id.) Buzzell stated that he Adidn=t really want to go into the facts@ of the

prior murder. (EHT. 183) Buzzell agreed that if you had evidence to dispute the state=s presentation of the prior murder as a n aggravator, you would want to consider using it. (Id.)

Buzzell did not recall talking with Mr. Jones= brother Carlos, but did recall talking with Joanne Sealey. (Id.) Buzzell stated that evidence that Mr. Jones father was a brutal, violent alcoholic Amay be@ the type of mitigation that you would want to present. (EHT. 184) Buzzell did not remember specifically what, if any, records he provided to mental health experts. (Id.)

On cross-examination, Buzzell testified that he and Mr. Chipperfield are both very experienced criminal defense attorneys. (EHT. 185-86) Buzzell tried to ensure that he had full discovery in the instant case. (EhT. 186) Buzzell reads discovery documents and takes diligent notes. (Id.) Buzzell stated that he obtained all the records he pertaining to Mr. Jones. (EHT. 188) Buzzell is aware that an Edwards Notice cannot prevent a criminal defendant from initiating contact with police. (EHT. 189)

Buzzell=s understanding of Florida law is that an underlying felony in a felony-murder case does not have to be charged. (EHT. 191) Buzzell stated that he believes the state may argue logical inferences from the evidence. (EHT. 191-92) Buzzell

reviewed the medical examiner:s report and photographs of the victim:s body from the crime scene. (EHT. 192) Buzzell recalled that the photographs depicted the victim:s pants being below her buttocks and pubic area. (EHT. 193) Buzzell recalled the medical examiner:s testimony that he could not, due to decomposition, determine whether a sexual battery occurred. (Id.) The medical examiner did find scratches on the victim:s arms. (Id.) Buzzell reiterated that he knew the sexual battery argument from the state was going to be an issue. (EHT. 194) Buzzell remembers there being individual and sequestered voir dire in this case. (Id.) There was no spending cap on defending Mr. Jones. (EHT. 195) Buzzell did recall that a defense expert in drug addiction ultimately refused to testify, perhaps because of pressure by his employer. (EHT. 196-97)

Buzzell recalled that evidence of the use of a racial epithet came up because Mr. Jones had used the term to describe someone who injured him. (EHT. 197)

Buzzell recalled the state using evidence of Mr. Jones spider web tattoo as a basis of identification. (EHT. 199) Buzzell remembered the law allowing for Mr. Jones tattoo to be shown to the jury, over defense objection. (EHT. 204)

Buzzell testified that the medical staff at the jail are contracted to work for the Sheriff of Jacksonville. (EHT. 207)

On redirect examination, Buzzell agreed that the experience level of an attorney does not necessarily equate with performance on a case. (EHT. 210) Buzzell agreed that attorney qualifications are irrelevant to a Strickland inquiry. (Id.)

Buzzell could not remember if he provided Mr. Jones= military medical records to his experts. (EHT. 212)

The assistance of the jury selection expert was limited to voir dire of the venire. (EHT. 214)

As to the race issue, Buzzell testified that the use of the word Anigger@ always carries highly charged emotional connotations. (EHT. 215) Buzzell stated that he objected to its use in this case because in introduced an element that was not relevant.

John Bowden testified that he is currently incarcerated at Tomoka Correctional Institution. (EHT. 218) Bowden was incarcerated in the Duval County Jail in 1995 and became acquainted with David Jones. (EHT. 219) Bowden and Mr. Jones were housed in the same cell together Afor close to a year.@ (Id.) When Bowden first met Mr. Jones, Jones= appearance was that of a Astrung out@ drug addict. (EHT. 220) Bowden stated that he is a drug addict himself. (Id.) Bowden testified that Mr. Jones expressed remorse for the instant crime Anumerous times.@ (Id.) Mr. Jones would get out his Bible out every night and

reflect on what he had done. (Id.) Mr. Jones said that he did not intend to kill the victim. (Id.) To Bowden, Mr. Jones= remorse seemed Avery genuine.@ (EHT. 221) No one representing Mr. Jones at trial ever spoke with Bowden. (Id.) Alan Chipperfield testified that he is an Assistant Public Defender in duval County and that he represented Mr. Jones at trial. (EHT. 223) Chipperfield=s responsibility was penalty phase. (EHT. 224) Chipperfield stated that his assignment as penalty phase counsel was not because of any particular expertise. (EHT. 225)

Chipperfield stated that his strategy at penalty phase was centered on demonstrating Mr. Jones= drug use and addiction and its relevance to the crime. (EHT. 226) Chipperfield was trying to show that ADavid Jones was drug addict and that this happened at a time when he was using drugs or craving drugs and that when he=s not on drugs he=s a good person. (Id.) Chipperfield testified that he would want expert testimony regarding the drug use. (Id.) They had testimony from Jackie Jones about David=s drug use. (Id.) Chipperfield thought he recalled having an expert in cocaine addiction. (EHT. 227) Chippperfield recalled the expert who was retained as an expert in addiction, but did no t testify because of objections by his employer, the University of Florida. (Id.) The person was not a mental health professional, but simply an addict who happened to have a good

career and background. (EHT. 228) The person was not provided any documents. (Id.) The person decided not to testify sometime during the trial, possibly between guilt and penalty phase. (EHT. 229) Chipperfield had not used the person before. (Id.)

Chipperfield stated that he would have wanted to establish statutory mental-health mitigation, if possible. (EHT. 230) Further, he would have wanted evidence to educate the jury about the effects of cocaine-use generally and how it would have effected Mr. Jones= ability to premeditate. (Id.) Chipperfield recalled that the defense put on the testimony of a drug counselor. (EHT. 243) The counselor was not a doctor of any kind. (Id.) Chipperfield could not remember if the counselor was asked for an opinion on statutory mental-health mitigation. (EHT. 244) Chipperfield stated that he feels mental-health mitigation can be equally powerful whether it is considered statutory or not. (EHT. 245) If the counselor was not asked about statutory mitigation, then Chipperfield Aprobably did not have the right answer.@ (EHT. 247) Chipperfield could not remember what he did to investigate Mr. Jones= prior murder conviction. (EHT. 249)

On cross-examination, Chipperfield testified that he had a good relationship with Mr. Jones, and that he Aliked David, he=s a good guy.@ (EHT. 251) Chipperfield believed then and now that

Mr. Jones is a good person when he is not using drugs. (Id.)

Chipperfield stated that his main concern in the case was Mr. Jones= prior murder conviction. (Id.) Chipperfield felt that the defense Aknew a lot about@ the prior murder case. (EHT. 252)

Chipperfield testified that he believed the drug counselor was a good witness. (EHT. 253) Chipperfield did not remember the court finding both statutory mental-health mitigating factors. (Id.) The jury was instructed on statutory mental-health mitigation. (EHT. 255)

On redirect examination, Chipperfield stated he would defer to the record as to whether statutory mental-health mitigation was found by the court. (EHT. 257) Chipperfield agreed that having an expert present evidence of cocaine use and its basis for statutory mitigation would be something he would want to present. (EHT. 260) Mr. Jones prior murder conviction was for second-degree. (EHT. 260-61)

Chipperfield testified that he would have wanted testimony regarding Mr. Jones alcoholism and violence as it effected Mr. Jones= violent childhood. (EHT. 231)

Chipperfield stated his opinion that the state may not argue uncharged crimes in the guilt-phase of the trial. (EHT. 232) Chipperfield would not want the state to argue a rape if it had

not been charged. (Id.) Chipperfield agreed that you would not, as a defense attorney, want to defend against crimes that have not been charged. (EHT. 233) Chipperfield added that if the state brought up an uncharged crime, he would hope that he objected to it. (Id.) Although Chipperfield believed the jury consultant that was used was helpful, he could not recall anyone in his office using one, before or since. (EHT. 235-36)

Chipperfield testified that he views jail medical records as being subject to Brady requirements. (EHT. 236) Chipperfield could not recall if Mr. Jones was taking medication before or during trial. (EHT. 236-37) If he asked for an instruction on Mr. Jones' use of psycho tropic medication during trial, it is because he was concerned about Mr. Jones' appearance before the jury. (EHT. 237) Chipperfield could not remember if the state introduced the crime of sexual battery into the trial. (EHT. 237) He did not believe that sexual battery was a charged crime in the case. (EHT. 238) Evidence of an uncharged sexual battery is something that the defense would want to keep out of a trial. (Id.)

Chipperfield stated that it is his understanding that evidence of the heinous, atrocious, or cruel aggravating factor may not be argued at guilt-phase. (Id.)

Chipperfield recalled Mr. Jones alleged use of a racial

epithet being an issue and, further, feels that it was prejudicial than probative. (EHT. 239) Chipperfield agreed that the racial epithet in question is highly charged and that race was not an issue in this case. (Id.) Chipperfield could not conceive of how evidence of racial bias would endear Mr. Jones to the jury. (EHT. 239-40)

If Chipperfield had evidence to impeach witness Amy Hudson, he would have wanted to use it. (EHT. 241)

Chipperfield did not recall Jackie Jones telling him the warrant for her arrest in Texas. (Id.) If he had that information, it would have been important. (Id.)

III. THE HEARING COURT=S ORDER

On October 20, 2004, Judge Wilkes enter an "Order denying Defendant=s Motion for Post-Conviction Relief," from which the instant appeal is taken.

SUMMARY OF THE ARGUMENTS

1. The Hearing Court=s ruling following the Evidentiary Hearing was erroneous. The Hearing Court erred in failing to grant Mr. Jones relief after the Evidentiary Hearing on his claims that Mr. Jones received ineffective assistance of counsel at his trial in violation of his Constitutional right to effective counsel pursuant to the Sixth Amendment.

Mr. Jones received ineffective assistance of counsel when

counsel failed to object, move to strike, or seek a curative instruction when counsel permitted the State to introduce non-statutory aggravators and otherwise introduced improper evidence and argument during voir dire; failed to object to the introduction of evidence and argument regarding Mr. Jones= tattoos; failed to object or otherwise contest or exclude the State=s strategy of arguing that an uncharged sexual battery occurred; failed to object or otherwise contest or exclude victim impact evidence; failed to investigate, argue, or present evidence regarding the State=s medication of Mr. Jones and of his mental state prior to and during the trial; failed to object to or otherwise prevent the State from argument that Mr. Jones committed a sexual battery, which inflamed the jury and procured a death sentence; failed to object to the State=s insertion of the heinous, atrocious and cruel (AHAC@) aggravator in the guilt phase of the trial; failed to seek redaction of an alleged statement by Mr. Jones wherein he employed a racial epithet that was introduced solely for the purpose of inflaming the jury; failed to impeach witness Hudson with previous and consistent sworn statements; and failed to properly impeach witness Jackie Doll Jones or reveal State leverage over her. Further, the Hearing Court erred in failing to cumulatively consider the prejudice to Mr. Jones caused by such deficient performance of

counsel, including deferring for disposition to the previously appealed assertion by the State that Mr. Jones had availed himself of the protections of the Fifth Amendment and including the failure of counsel to object to or otherwise address the prosecutorial misconduct in closing argument or to present evidence or argument regarding Mr. Jones' mental state and his inability to premeditate due to his mental state at the time of the crime. Finally, the Hearing Court erred in failing to find and conclude that such failures constitute reversible error on the ground that there is a reasonable likelihood that the jury would have, at most, found Mr. Jones guilty of second degree murder, and would not have, even assuming it did not, sentence him to death.

2. The Hearing Court committed reversible error in denying Mr. Jones' claims that his counsel was prejudicially ineffective in the penalty phase for failing to present or prepare expert testimony on Mr. Jones' addiction to drugs and to prepare or present a wide range of mitigation available at the time through a variety of credible lay witnesses.

ARGUMENT

THE HEARING COURT ERRED IN FAILING TO GRANT APPELLANT RELIEF AT THE CONCLUSION OF THE EVIDENTIARY HEARING ON THE BASIS THAT COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. The Standard of Review

In order to prove a claim of ineffective assistance of counsel, a defendant must establish two elements. First, the defendant must show that counsel=s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the Acounsel@ guaranteed the defendant by the Sixth Amendment. Second, the appellant must show that the deficient performance prejudiced the defense. This requires showing that counsel=s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish prejudice, the appellant must show 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. (Id. at 694). It is important to note that the reasonable probability language is not synonymous with the "more likely than not" standard invoked when a defendant inserts entitlement to a new trial on the basis of newly discovered evidence. The Amore likely than not@ standard is more demanding. Strickler v. Greene, 527 U.S. 263 (1999).

Therefore, when evaluating ineffective assistance of counsel claims on appeal, the Florida Supreme Court will evaluate whether the alleged errors undermine its confidence in the outcome of the proceedings. Rose v. State, 675 So. 2d 567 (Fla. 1996). Ineffective assistance of counsel presents a mixed question of law and fact subject to plenary review based on the Strickland standard. Stephens v. State, 748 So. 2d 1028 (Fla. 1999). This requires an independent review of the Trial Court=s legal conclusions, while giving deference to the Trial Court=s factual findings. (Id.)

B. Ineffective Assistance of Counsel at the Guilt Phase of the Trial

1. Juror knowledge of the case; prosecutorial tainting of the jury pool

Mr. Jones alleged that counsel rendered ineffective assistance of counsel for failing to object, move to strike, or seek a curative instruction regarding potential Juror Hayes= response in voir dire that she didn=t believe she could put aside what she had read in the newspapers about the case and render a fair and impartial verdict. Neither defense counsel Buzzell or Chipperfield recalls making a strategic or tactical decision for dealing with such extra-procedural information infecting the jury pool or the

ultimate jury, but counsel maintained generally that the jurors had done the best that they could with what they had to work with. (EHT. 125) Counsel Buzzell did testify that he found it unusual for the jury to be crying when it rendered the death recommendation and he would have preferred to have more peremptory challenges than he was ultimately allowed. (EHT. 127-128) Nevertheless, neither counsel articulated at the Evidentiary Hearing a strategy to circumscribe the jury=s exposure to prejudicial, but ultimately inadmissible, facts, such as the potential juror=s remarks regarding news coverage as asserted by Appellant in his initial allegation of ineffectiveness.

Counsel=s general circumlocutions regarding the limited number of premptories for the apparently emotional response of the jurors certainly does not qualify as a tactical approach to counter the State=s elicitation of illicit information or, as the defense details in its subsequent sections of this claim, speculative argument designed, Appellant contends, to inflame the jury=s emotions for the purpose of procuring a death sentence and the necessary prerequisite conviction of first degree murder.

2. Hearing Court=s failure to consider claim in context of case cumulatively

Although the Hearing Court isolates Mr. Jones= claim regarding the jury panel=s contamination so as to maximize the de minimis or conclusory nature of the allegation, the Hearing Court failed to consider the claim in the context of defense counsel=s accumulated failures, including the failure to tactically or strategically respond to the prosecution=s acknowledged pattern of eliciting irrelevant, extraneous, consubstantiated and, even, uncharged testimony and of launching arguments improperly based upon tidbits of innuendo which, considered in isolation, are designed to appear de minimis but which, as Appellant argues herein, were intentionally utilized to plant unsubstantiated, uncharged, and highly prejudicial statutory aggravators in the jury=s collective mind. In this manner, insinuations of Aryan tattooed teardrops, which denote murders committed, much as a gunfighter=s notches on his belt might insinuate previous killings, and who knows what else such emotionally charged, but completely irrelevant, allegations and arguments such tattoos might conjure up in the popular imagination of the jury, placed there purposefully to transform Appellant from an admittedly terrible, but also terribly pitiful, drug addict into a marching member of the Aryan SS. Such an acknowledged strategy by the State was

intended to elicit an emotional response from the jury. Similarly, the argument regarding the dishevelment of the victim=s pants and general appearance metastasized into an argument that Mr. Jones was a rapist, intending to commit, or committing, a sexual battery upon the victim, despite the complete absence of any evidence that a sexual battery or any sexual activity occurred. Thus, although there was no sexual battery, and no evidence of sexual battery, and although any allegations regarding prison tattoos or the Aryan brotherhood had absolutely nothing to do with the case, the prosecution made it the centerpiece of its attack and counsel failed to respond and protect Mr. Jones as was their duty.

Therefore, Mr. Jones contends that the Hearing Court=s findings and conclusions, that the allegations regarding potential Juror Hayes are conclusory in nature and did not result in prejudice, are erroneous, as is the Hearing Court's reliance upon the conclusory allegation aspect to the holding in Ragsdale v. State,720 So. 2d 203 (Fla. 1998), inapposite in a circumstance in which a hearing was held (hence there was no summary denial) and in a circumstance where, regarding prejudice, the Hearing Court failed to consider the allegations in the cumulative context of the

entire case, as established by the record, of the prosecutorial strategy and pattern of inflaming the jury by misleading and orally charged innuendo and of trial counsel=s corresponding breach of their duty to pursue or develop a strategy to prevent the introduction of precisely these kinds of arguments and improper presentations designed to elicit an emotional response from the jury with unproven, unsupported, and unsubstantiated theories of commission and contamination asserted solely to maximize the conviction and to guarantee a sentence of death.

3. Victim Impact Aggravators

The Hearing Court further erred in rejecting Mr. Jones= claims that counsel was ineffective for failing to object to the State's introduction of victim impact evidence in voir dire. Again, the prosecutor explicitly advised a juror, and the panel, that the victim "is a young mother of three" but then advises the jury that even this is not enough, or, that it is enough (for death) but that the jury must wait until it hears Aall the aggravation@ to impose the sanction of death (E.T. 153). Subsequently, the prosecutor wanted to make sure that the fact that AWe have a younger mother of three here who was abducted and murdered does not upset anybody so much that they don=t think they can be fair to the

defendant...@ (R. 228-9).

Of course, what happened at the trial is that the prosecution utilized voir dire to argue to the jury that Appellant should be put to death because the victim was a young mother of three, presenting this argument in the meager gruel of a guise of providing a cautionary admonition that the jury *should not* decide for death on the very grounds that the prosecution is, in reality, urging the jury to base its decision upon. Despite the obvious tactical ploy of the prosecution, defense counsel failed to challenge or otherwise strategically counter the introduction of such a subtended line of augmented, non-statutory, and improper aggravation.

4. State=s Strategy of Introducing Non-Statutory Mitigation

The Hearing Court, in its order, accepts facially the incredible quality of the prosecution=s charged questioning. Further, the Court failed to address the already apparent plan of the prosecution to fuel its demand for Appellant=s death with non-statutory, but highly inflammatory, aggravators seeking to transform the jurors= heartstrings into gallows rope. Nonetheless, defense counsel stood mute and, thus, acquiesced in the face of the prosecutorial assault on the Eight Amendment=s Constitutional mandate that

a death sentence rest upon a reliable finding, beyond a reasonable doubt, of fixed statutory aggravators which outweigh the mitigation established by a preponderance of the evidence. *See eg*, Ring v. Arizona, 536 U.S. 584 (2002).

5. Victim Impact Aggravators Considered Under Cronic Analysis

The Hearing Court rejected Appellant=s contention that the victim impact claim should be considered under United States v. Cronic, 466 U.S. 648 (1984). See also, State v. Nixon, 758 So. 2d ___, 622 (Fla. 2003) (ANixon II@). However, counsel herein acknowledges that the United States Supreme Court has reversed Nixon II=s application of Cronic. Florida v. Nixon, ___ U.S. __ (2005). Thus the Strickland standard, not the Cronic standard, is the applicable standard for determination of this claim. Nevertheless, if the Eighth Amendment=s Constitutional jurisprudence is to be consistently applied, the ad hoc admission of non-statutory aggravators should, Appellant contends, be deemed prejudicial, especially in the context of a case in which the foundations of the death sentence would seem to be infected with a high degree of intentionally planted, yet entirely unsubstantiated, non-statutory aggravation.

6. Error of Impartial Panel Argument

Thus the Hearing Court=s conclusion that the prosecutor was simply trying to ensure an impartial panel, Appellant contends, erroneously accepts the prosecution=s maneuver at face value and does not have to reach the difficult issue of whether counsel=s conduct meets either the Cronic or the Strickland standards. The Appellant urges this court to pierce the thin veil prosecutorial semantics and assess the prosecutor=s remarks for what, as Appellant reads them, they clearly appear to be. Further, under Strickland, counsel= failure to protect their client from the prosecutor=s well executed strategy of presenting the jury with a framework of non-statutory aggravation does, Appellant contends, constitute prejudicial ineffective assistance of counsel. See also, Dillbeck v. State, 29 Fla. Law Weekly S 437 (Fla. August 2004) and Bell v. Cone, 353 U.S. 685 (2002).

7. Victim Impact Testimony Elicited

The prosecutor extended the victim-impact stratagem into the testimonial portion of the guilt-phase of the trial, eliciting from the husband that he now lives with his and the victim=s (by implication) motherless Akids@ (R. 557). Again, at the Evidentiary Hearing, trial counsel offered no strategic plan for dealing with the skillfully constructed de facto victim-impact aggravator carefully constructed by the prosecutor, and

the Hearing Court rejected Appellant's contention that counsel should have objected to this testimony on the ground that it is essentially and will certainly function as aggravation. The Hearing Court concluded that, assuming *arguendo*, counsel's performance was deficient, because of extensive evidence of the defendant's involvement in the crime, the defense failed to establish prejudice. This conclusion, however, fails to address the aggravation element of the repeated presentation of testimony and argument urging a recommendation of death (and thus requiring conviction of first degree murder) based on non-statutory aggravators. While the Hearing Court relies on the evidence of Mr. Jones' involvement, the evidence may have also resulted in conviction of some lesser included offense. hus it is reasonably likely the jury would not have found Mr. Jones' death eligible had counsel circumscribed the prosecution's presentation to establishing statutory aggravation and presented evidence of Mr. Jones' addiction to cocaine and of its effect upon him. In sum, the Hearing Court's reliance on the ultimate finding Mr. Jones' culpability to, in effect, negate counsel's failure to contest the State's strategy of introducing constructive, or de facto, non-statutory aggravators erroneously renders such representation non-prejudicial as a matter of law, particularly when counsel's conduct is considered in the context of the Eighth Amendment

jurisprudence. To the contrary, however, the jury=s ultimate conclusion, in fact, supports Appellant=s claim of ineffective assistance of counsel and essentially addresses the essence of Mr. Jones= contention regarding the prejudicial impact of the prosecution=s strategy of introducing and arguing non-statutory aggravators.

8. Claims Regarding the Administration of Medication to Mr. Jones Before and During Trial

Regarding Mr. Jones= claims that counsel failed to take any pre-trial action to challenge or otherwise investigate Mr. Jones= conduct after his arrest and leading up to the time of trial, the Hearing Court denied Mr. Jones= claim on the ground that no evidence of the specific medication or its effect was presented (Order pp. 10-11). In other words, ADefendant failed to present evidence that he was not *properly medicated*@ (emphasis added). At the same time, the Court notes that A...Defendant presented no evidence that he was on or needed to be on the medication he received while in custody.@ (Id.) Subsequently, the Court concluded that the allegations themselves were conclusory, concluding that Mr. Jones was medicated. Thus it appears that the Court=s order is contradictory on this point.

9. Lay Testimony Regarding Mr. Jones= Mental State

While the Hearing Court does note that John Bowden, another prisoner at the Duval County Jail while Mr. Jones was incarcerated there, testified at the hearing that Mr. Jones appeared to be Astrung out.@ (EHT. pp 218-220) As a drug addict himself, Mr. Bowden knew of what he spoke. (EHT. 220) However, the Hearing Court failed to consider the testimony of Dr. Lipman, who testified that Mr. Jones is constitutionally vulnerable to experiencing the psychosis producing effects of cocaine and other stimulants (EHT. 117). These effects include anxiety developing to full blown paranoia and psychosis (EHT. 119). Thus, Dr. Lipman=s testimony must be read in conjunction with Mr. Bowden=s testimony and vice versa. The testimonies combined to show that, in such a condition, Mr. Jones would be hallucinating, suffering from delusions and had poor contact with reality (EHT. 119). Thus, the symptoms are those of schizophrenia (Id.). Indeed, Mr. Jones was not in contact with reality at such times, including at the time of the crime (Id.). This is likely why Appellant had been diagnosed as a schizophrenic in the past. (Id.)

10. Expert Testimony Regarding Mr. Jones= ANear Insanity@

The Hearing Court failed to consider Dr. Lipman=s testimony that after arrest for homicide in 1986, at which

time he had been suffering from cocaine psychosis, Mr. Jones was, possibly, insane and was found incompetent to stand trial for an extended period of time. (EHT. 32-33) He was then treated with anti-psychotic medications which are used to treat schizophrenic patients. (EHT. 33) Ultimately Dr. Lipman opined that Mr. Jones suffers from an underlying psychotic vulnerability and is in fault of psychosis most of the time, suffering from a psychosis spectrum disorder. (EHT. 58)

11. Counsel=s Testimony Regarding Mr. Jones= Condition

The Hearing Court failed to consider Attorney Chipperfield=s testimony that he would have requested the instruction that Mr. Jones= was on psycho-tropic medication during the trial because he was concerned about the jury understanding Mr. Jones= appearance. (EHT. 237) Thus, it would have been obvious to a layperson that Mr. Jones was on powerful drugs. The Hearing Court=s order, however, finding Detective Parker=s trial testimony, to the effect that, when Mr. Parker spoke with Mr. Jones, Mr. Jones did not appear under the influence of any drugs, dispositive fails to consider the full weight of the record. Instead, the hearing record is flush with evidence that Mr. Jones suffers from a mental malady, did so while in custody and during the

trial, was fragile at best, and, most likely, was suffering, at all relevant times, significant psychosis, depression, and the visible side effects of powerful psycho-tropic medications, the effects of which moved counsel, the State, and the court to concur on an instruction which was given to the jury to explain Mr. Jones' drugged appearance.

12. Trial Counsel's Failure to Implement a Strategy Regarding Mr. Jones' Mental Condition

Finally, the trial record reveals neither an explanation by counsel to the jury as to the condition which necessitated Mr. Jones' sedation by the psycho-tropic medication nor a strategic or tactical reason that such explanation regarding the mental conditions which Mr. Jones suffered from was not provided by counsel. Counsel did intend to call an expert witness on cocaine addiction, but, apparently, that witness declined to testify because he was worried about his job at the University of Florida (EHT. 196-197; 220-222). Counsel was aware of expert testimony that would have been useful in providing context for Mr. Jones' actions in this case, but, speaking frankly, counsel conceded that this may have been something which he overlooked. (EHT. 179) During the guilt-phase, counsel did not recall having a strategy for addressing cocaine

addiction. (Id.) As cocaine addiction was one of the main foci of the case, it would have certainly been something counsel would have wanted to educate the jury about. (EHT. 181-182)

13. Counsel=s Failure to Secure a Timely Instruction Regarding the Administration of Psycho-Tropic Medication

The Hearing Court assumed *arguendo* that counsel=s performance was deficient in that the trial court did not read the instruction advising the jury that the defendant was being given psycho-tropic medication until after the State had rested its case in-chief. (Order p. 12) The court, however, failed to find any prejudice in this deficiency, holding Abut for this error, there is not a reasonable probability the outcome would have been different.@ (Id.) However, the court does not provide a persuasive basis, or, for that matter, any basis, for this conclusion. The court certainly does not analyze this claim in the context of the plethora of insightful testimony presented at the Evidentiary Hearing explaining Mr. Jones= addiction and mental illness, and the fact remains that while the State presented its case at trial, Appellant was sedated and must have appeared drugged, as that is the

reason counsel requested this instruction, which the State apparently agreed was necessary.

14. The Hearing Court Erred in Not Considering the Medication Claim in the Context of Cumulative Evidence

The Hearing Court erred in holding that the allegations regarding the medication given the Appellant and its effect on him are conclusory, as the court failed to consider the context created by evidence introduced at the Evidentiary Hearing.

15. The Failure to Present Expert Testimony as an Effective Assistance of Counsel

Similarly to the failure to present powerful lay testimony, counsel was ineffective in failing to present expert testimony on addiction. Such testimony would have subsumed Mr. Jones= Amental state at the time of the crime@ as well as his history of addiction and mental illness. Importantly, Dr. Lipman testified that he might have been insane, and records indicated that in fact he had previously been declared incompetent to stand trial. Nevertheless, defense counsel did not present these records or the substance of Mr. Jones= medical history to the doctors they did consult. Counsel=s ineffectiveness in this area made it impossible for them to successfully defend against the

element of premeditation in the first degree murder charge which, as well as being an important guilt-phase defense, is essential to the mitigation case that would be developed at the penalty-phase was necessary.

The Hearing Court=s initial finding that Mr. Jones was examined for competency to proceed is inapposite to the allegation that counsel failed to present available expert testimony. The competency issue is, simply, a different issue and a preliminary issue. Certainly it would have been helpful for counsel to have presented the proper medical history to the doctors considering Mr. Jones= competency, but their consultation with doctors regarding competency does not insulate them from the instant claim of ineffective assistance of counsel at trial. Counsel failed to provide any doctor with records on which the facts of Mr. Jones= history of addiction and depression could have been properly analyzed and a proper diagnosis rendered. The Hearing Court, however, places great weight on the fact that Attorney Buzzell Aworked with@ these competency doctors and discussed the psycho-tropic medication with Dr. Krop, in seeming contradiction to the Court=s earlier conclusion that the record was bare of evidence regarding the psycho-tropic medications. There is, in fact, no evidence that counsel

provided documentation or medical records of Mr. Jones= medical history to any doctor or that counsel considered attacking the premeditation factor of the first degree murder charge as a guilt-phase defense or as an anticipated penalty-phase issue.

At the hearing Mr. Jones established that testimony regarding the mental health and addiction issues quite persuasively that Dr. Lipman=s testimony could have, with proper investigation and preparation, been presented as powerful mitigation evidence and as guilt-phase testimony causing the jury to question Mr. Jones= ability to premeditate. At the hearing, Mr. Jones proved that counsel=s performance was deficient, and the Court=s reliance on Rivera v. State, 859 So. 2d 495 (Fla. 2003), Asay v. State, 769 So. 2d 974 (Fla. 2000), and Freeman v. State, 859 So. 2d 319 (Fla. 2003) is misplaced. Mr. Jones has not merely secured the testimony of a more favorable expert, but has proven that counsel failed to properly investigate and present equally available testimony on the same issues at the trial and thus to present powerful evidence on the issue of whether Mr. Jones was capable of forming premeditation at the time of the offense and powerful evidence to establish and strongly support the mental health statutory mitigators.

Further, the Court=s conclusion that counsel made a tactical decision not to present evidence of Mr. Jones= mental state is not supported by the record. and Songer v. State, 419 So. 2d 1044 (Fla. 1982) and Gonzales v. State, 579 So. 2d 145 (Fla. 3d DCA 1991), regarding counsel=s Atactical decisions,@ are inapposite on the instant record. Counsel would have wanted to use the testimony of Dr. Lipman and the inquiry regarding competency is simply a different issue than the issue before the Court.

16. The Failure to Exclude the Sexual Battery Aggravator Argument

Regarding the issue of whether counsel effectively protected Mr. Jones from the State=s strategy, implemented from the opening statement and carried forward throughout both phases of the trial, portraying Appellant as a rapist and sexual batterer, despite the absence of any evidence that a rape or sexual battery occurred and the fact that no count of sexual battery was filed, the Hearing Court, in its order, reviews Attorney Buzzell=s testimony on a bare-bones basis regarding the prosecutor=s opening statement (that the victim had been sexually assaulted), the trial testimony of prosecution witness Diane Hansen (that a serological investigation for the presence of semen had been done), and

the State=s closing argument that Mr. Jones was trying to de-pant her (presumably to facilitate a sexual assault), and the Court finds, in effect, that there was sufficient evidence of a sexual assault, or an attempted sexual assault, to justify the State=s strategy using this non-statutory aggravation to procure a death recommendation from the jury. (Order p. 23) However, the Court=s reliance on Laramore v. State, 699 So. 2d 846 (Fla. 4th DCA 1997) finding counsel=s testimony more credible and persuasive than the defendant=s testimony and allegations is inapposite. Counsel=s acknowledgement that they were cognizant of the State=s evidentiary gambit and considered the argument and evidence on an attempted sexual assault Alogical inferences@ from the physical evidence and the medical examiner=s uncontroverted testimony is not dispositive of the issue of the admissibility and propriety of the State=s arguments. The Court=s conclusion, sighting the tactical flexibility afforded counsel and acknowledged by Songer v. State, 419 So. 2d 1044 (Fla. 1982) and Gonzales v. State, 579 So. 2d 145 (Fla. 3rd DCA 1991), confuses what counsel did once the improper argument in evidence came into evidence with whether counsel could and should have kept the evidence out. Further, counsel did not testify that the argument and

evidence were admitted, without objection or resistance, but counsel's testimony concerned whether counsel considered the benefits of countering them compelling. However, that analysis was not a part of the tactical decision the Court finds persuasive in the instant case. Rather, counsel and the Court merely assume admissibility and, thereafter, adopt the strategy about which the State and the Court seem to concur. However, Mr. Jones= assertion is that counsel=s ineffectiveness in introducing further non-statutory aggravation (with the earlier Amotherless children@ prosecutorial comments) was, to a reasonable probability, prejudicial to him, and this assertion is supported by the record. Since counsel had failed to educate the jury on the mental disorder, the addiction, and the insanity, or near insanity, gripping Mr. Jones when this crime was instigated, failed to provide the jury with an understanding of the fury of the cravings driving Mr. Jones, and had both allowed the prosecutor to speculate willy-nilly that Mr. Jones tried, almost nonchalantly, to slip a sexual assault in as well, the unassailable conclusion is that it is not surprising that the jury would want Mr. Jones killed. This conclusion is supported, however, by significant non-statutory aggravation, rendering it manifestly unreliable. The Court

applies the standard annunciated in Bertolotti v. State, 476 So. 2d 130 (Fla. 1985), which had been applied, among many places, in Jones v. State, 617 So. 2d 1370 (Fla. 1993): the prosecutorial must not inflame the minds and passions of the jurors so that the verdict is, in effect, an emotional response to the crime rather than the logical analysis of the evidence in the light of the applicable law. The prosecution is clearly seeking an emotional response by repeatedly cataloging the anti-allure of three motherless children and, then, by adding the one thing that could make a terrible crime worse: the almost incidental horror of Appellant=s response to the siren=s invitation to carnal satiation in the midst of the crime. Thus, assuming *arguendo*, that the arguments and testimony elicited were technically admissible as a logical inference by the prosecutor, their prejudicial effects still far outweigh any probative value. See Rule 403, Fla. R. Crim. Pro. The Hearing Court does not address this question, except to the extent that it appears, without explanation to find the comments fair, given the wide latitude afforded counsel in argument. (Order p. 24) See Occhicone v. State, 570 So. 2d 902 (Fla. 1990); Griffin v. State, 866 So. 2d 1 (Fla. 2003); Mann v. State, 603 So. 2d 1141 (Fla. 1992); Thomas v. State,

326 So. 2d 413 (Fla. 1975); and Spencer v. State, 133 So. 2d 729 (Fla. 1961).

17. State Strategy to Inflame Jury with Sexual Battery Speculation

The Hearing Court completely failed to consider or address the testimony that the prosecution had a clear strategy (understood as such by defense counsel) to introduce argument and evidence of a serious non-charged crime and of significant non-statutory aggravation, and the only reason for doing so (even the Hearing Court repeatedly cites the strength of the case, although there is argument against any finding of prejudice) to be to inflame the jury. Counsel=s alleged strategy to counter this by pointing out the absence of any evidence to support the State=s baseless exhortation of attempted sexual assault. (Of course, the victim=s clothing was disheveled **B** she had apparently been dragged when moved, but there is simply no sexual assault aspect or evidence to this crime.) The only logical explanation for the State=s conduct is that the State believes that the jury was more likely to convict Mr. Jones of first degree murder and recommend the death penalty if the State made the terrible even more terrible. The Hearing Court does not consider the powerful probative aspect of the

fact that, at the time of the trial before the jury, the State believed there was a reasonable probability that the jury would sentence Mr. Jones to life, thus necessitating the strategy to bring in the improper aggravators. That was then, and remains today, the inescapable conclusion and the only logical explanation for the State's otherwise bafflingly inexplicable conduct. For counsel to cast their response (pointing out the baselessness of the argument and evidence) as tactical seems merely an attempt to recast, after the fact, the obvious as a carefully crafted stratagem.

18. Insertion of Heinous, Atrocious, and Cruel Mitigator in the Guilt-Phase

Regarding Mr. Jones: contention that counsel rendered ineffective assistance for failing to object to this State assertion of the heinous, atrocious and cruel aggravator, a penalty-phase issue only applicable upon the resolution of the guilt-phase in the State:s favor, the only logical reason for the State:s conduct is to inflame the jury to find first degree murder and to, subsequently, reach the question of death and to dispose of both the question and the accused accordingly.

The Hearing Court erroneously applied the standard for

considering prosecutorial misconduct, the Avitiation of the entire trial@ set forth in Cobb v. State, 376 So. 2d 230 (Fla. 1979). See also Jones v. State, 612 So. 2d 137 (Fla. 1993) and State v. Murray, 443 So. 2d 955 (Fla. 1984). The Hearing Court concludes that the prosecution=s invitation to the jury to wonder Awhat exactly he did to her,@ does not vitiate the trial and the comment does not inflame the jury. Of course, the Court can=t know the impact on the jury, but Mr. Jones would point out that, despite the State=s argument herein and the Hearing Court=s assessment that the State failed yet again to accomplish its ends, we do know that the jury did comply with the State=s request in terms of its actual verdict. Further under the ***Giglio*** standard, which the Hearing Court failed to properly apply and erred in failing to find the reasonable likelihood that the State=s inflammatory conduct, the well wrought and intentionally executed plan to get the jury to recommend Mr. Jones= death, had the desired effect. See Guzman v. State, 686 So. 2d 498 (Fla. 2003) (sending case back to Hearing Court to apply ***Giglio*** tests); Giglio v. U.S., 405 U.S. 150 (1972).

19. Introduction of Racial Epithet

Regarding counsel=s failure to keep from the jury Mr. Jones= alleged use of a racial slur to inflame the jury, the

Hearing Court erred in holding that Mr. Jones was barred (apparently as a matter of law) from raising this claim because the Florida Supreme Court, in Jones, supra, found the language harmless beyond a reasonable doubt. See Jones v. State, 748 So. 2d 1012-1013 (Fla. 1999) citing State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The Hearing Court=s arguably cavalier disposal of this claim failed to consider this Court=s stern and crystal clear admonishment that no party can seek to take advantage of racial animosity or prejudice in the Florida courts. Thus, the prejudicial impact of the State=s introduction of the defendant=s allegedly racist remark and the impact of counsel=s failure to take any step to keep it from the jury, particularly when considered in the context of the State=s strategy to bring the motherless children to the fore and the arguments that Mr. Jones= tattoos identify him as an Aryan monster and that the victims= disheveled clothes and appearance means that Mr. Jones is a sexual predator, cannot be minimized. Taking this statement in the context of these earlier strategic insertions of extra evidentiary material, the Hearing Court erred in failing to find both ineffectiveness and prejudice. The impact of such statement on a jury cannot be reasonably questioned in this

case.

20. Failure to Impeach a Damaging Witness

Regarding counsel=s failure to impeach Amy Hudson with inconsistencies between her deposition testimony and her trial testimony, the Hearing Court found that counsel=s performance was not sufficient and that, assuming arguendo that the performance was deficient, Mr. Jones failed to establish prejudice. (Order p. 26) However, the Hearing Court provides little or no analysis of the impact of Ms. Hudson=s testimony that the man she saw might have been a crack addict. While Mr. Jones argues that the record is clear that he was a crack addict, counsel still had cause to question the veracity of a witness and to inquire regarding inconsistencies in sworn testimony provided by the witness. Further, in analyzing the extent of prejudice, the Hearing Court must consider the deficient performance in the context of the case presented. If nothing else Ms. Hudson=s testimony, and the discrepancies between her deposition and trial testimony, highlights the grievous error of counsel in failing to present the testimony of a witness like Dr. Lipman to educate the jury on the effects of crack cocaine in general and on Appellant, with his unique vulnerabilities, specifically.

Crack addiction, and the savage ravages that it entails, are at the heart of the defense, and counsel erred in allowing Hudson=s negative, and questionable, lay testimony to go unchallenged, without presenting the available, and necessary, expert testimony to explain, perhaps, though not to excuse, Mr. Jones= conduct in the context of the four corners of the case, and their failure to do so constitute deficient performance which prejudiced the outcome.

21. Failure to Investigate and Impeach Jackie Doll Jones

Regarding Mr. Jones= allegation that counsel failed to properly investigate his wife, and fellow addict, Jackie Doll Jones, the Hearing Court=s finding that Mrs. Jones= testimony, that she didn=t know that she had a warrant in Texas when she testified, is erroneous given Mrs. Jones= extensive criminal history. There is no way that a woman of her experience would not know that a warrant was issued if she failed to appear in court. Similarly, her testimony, that she returned to Florida to testify with two Assistant State Attorneys but that she was not in their custody arguably, stretches the limit of credibility. (EHT. 86-87; 93-94; 91-92; 94) The finding that her testimony was free of any coercive pressure by the State is itself not credible. The fact that the defense called Mrs. Jones in

the penalty-phase, after she provided damaging testimony during the guilt-phase, does not negate Mr. Jones= contention that important aspects of her testimony were elicited under pressure and coercion by the State. The Hearing Court=s findings of credibility regarding Mrs. Jones are not supported by the weight of the evidence. By a straightforward investigation, counsel could have easily discovered the existence of the Texas warrant and used that to argue that Mrs. Jones was testifying under pressure from the State. Far from being a reformed addict voluntarily testifying, counsel could have challenged her credibility and questioned both her conduct and the State=s actions, instead of lamely accepting her statements to the jury without challenge.

The Hearing Court holds that this Court=s determination on direct appeal, that Detective Parker=s comment on Mr. Jones= exercise of his Fifth Amendment Right to Remain Silent was error but that the error was harmless, is dispositive of Mr. Jones= claim that counsel was ineffective for failing to accept the State=s offer of a curative instruction. See Jones v. State, 748 So. 2d 1012, 10321 (Fla. 1999); (Order at pp. 28-29) fails to consider in the context of the other errors asserted herein.

22. Cumulative Analysis

The Hearing Court erred in failing to analyze counsel=s conduct in light of the evidence adduced at the hearing and the claims asserted therein, including the cumulative impact of counsel=s actions and omissions. Considered cumulatively, the detective=s testimony regarding Mr. Jones= assertion of his rights and counsel=s failure to protect Mr. Jones from the prosecution=s acknowledged strategy of obtaining a death sentence by arguing and asserting a litany of non-statutory aggravation, the prejudicial impact is apparent. By couching Mr. Jones= assertion of his rights as a calculated effort to manipulate the police, the State misrepresents Mr. Jones= true state of mind and presents a dismissive picture of the withdrawal symptoms he suffered, minimizes his actual remorse, as Mr. Bowden testified Mr. Jones often and sincerely expressed in the extended time they were incarcerated together, and mis-diagnosis the underlying mental disorder which very much resembled insanity, pursuant to the testimony of Dr. Lipman. Presenting testimony that portrayed Mr. Jones as gaming the system would cut against the optimal case effective counsel could have presented as well as providing yet another in the ever increasing list of non-statutory aggravators, building cumulatively to the

inevitable crescendo of the sentence of death.

23. Inflammatory Argument in Closing

Regarding Appellant=s claim that counsel failed to object to inflammatory argument in the State=s closing, whereby the prosecutor mocked the defense contention that Athe only point@ the defense made throughout the trial was that Mr. Jones was a crack addict (TT. 1462-1466), the prosecutor, taking advantage of the defense=s failure to present expert testimony such as Dr. Lipman=s regarding Mr. Jones= addiction, his mental state, and the effect of his year-long crack and drug binge, argues that Mr. Jones= actions show Ahe knows what he=s doing.@ (Id.) The prosecutor inflames the jury by saying that one of the few times he told the truth was when he said crack makes him paranoid. The prosecutor says, AThe most truthful thing he said...was...@I didn=t give a fuck about that woman.@ Then the prosecutor concludes his lamentation with a litany, AThis defendant is so guilty, he is guilty, guilty, guilty.@ (Id.) As the Hearing Court notes, attorneys do have latitude during argument. Thomas v. State, 326 So. 2d 413 (Fla. 1975); Spencer v. State, 133 So. 2d 729 (Fla. 19601) However, the Court again applies the standard of whether Athe error was so prejudicial as to vitiate the entire

trial.@ Cobb v. State, 376 So. 2d 230 (Fla. 1979); (Order p. 31) thereafter, the Court appears to apply the Bertolotti test. Bertolotti v. State, 476 So. 2d 130 (Fla. 1985) The Court ultimately holds that the argument did not inflame the jury=s emotions, but provides no basis for this conclusion. As the State=s entire case consisted of the piling on of non-statutory aggravators, in an acknowledged strategy which, arguably, reaches a crescendo in the argument in which the defendant=s alleged remark to the police is so damningly asserted, it is difficult to conceive how the case, or the argument (and particularly the statement) was not intended to detonate an emotional response or how, if appealing to reason and logic, the calm calculus of that logic could be expressed.

24. Failure to Present Evidence of Lack of Premeditation

The Hearing Court=s dismissal of the Appellant=s argument that counsel would have presented evidence of the Appellant=s mental state erroneously ignores the majority the evidence presented at the Evidentiary Hearing. The evidence presented at the hearing establishes that counsel could have, but failed to, present strong evidence of Mr. Jones= mental health history and history of drug abuse, much of it educating the jury about the condition resembling insanity

that Mr. Jones was in at the time of this terrible, but explainable, though not excusable, crime, such that, when the claims are considered together and cumulatively, there is the real probability that the jury would have convicted Mr. Jones of, at most, second degree murder. Certainly, the Hearing Court, upholding Mr. Jones' conviction, has erred in ignoring the weight and credibility of the evidence presented at the hearing.

C. Ineffective Assistance of Counsel in the Penalty-Phase

1. Failure to Present Expert Witness

The Hearing Court committed reversible error in denying Mr. Jones' claim that his trial counsel was prejudicially ineffective for failing to present expert testimony to establish substantial and compelling mitigation on cocaine and other drug addictions, on the effect of such addictions on the human brain, on Mr. Jones' drug use and addiction, both throughout his life and prior to and at the time of the commission of the crime at issue, on Mr. Jones' history of mental health problems, and, finally, on Mr. Jones' mental health problems at the time of the commission of the crime.

The Hearing Court failed to consider the vast majority of the compelling testimony presented at he hearing. Dr. Lipman testified that he is professionally trained in the

field of neuropharmacology which is a branch of science dealing with the effects of drugs and toxins on the brain and behavior. (Id.) Dr. Lipman obtained a doctorate in neuropharmacology from the University of Wales and did post-doctorate work at the Tennessee Center for Health Sciences in Memphis. (Id.) Dr. Lipman worked at the Vanderbilt School of Medicine for ten years. (EHT. 12) Dr. Lipman is involved in both teaching and research in the field. (EHT. 9) Dr. Lipman also does forensic work. (EHT. 10) This involves both civil and criminal cases. (Id.) Dr. Lipman has been qualified as an expert in several Florida capital cases, including post-conviction. (EHT. 10) Dr. Lipman was accepted by the court as an expert in the field of neuropsychology. (EHT. 14)

Dr. Lipman has done research on drugs known as psychostimulants. (EHT. 13) Particularly, he has done research on amphetamines, cocaine, LSD, and PCP. (Id.)

Dr. Lipman has met with the Defendant, David Jones. (EHT. 14) Before meeting with Mr. Jones, Dr. Lipman reviewed voluminous records in preparation for the evaluation of Mr. Jones. (Id.) The records reviewed included Kansas and Florida Department of Corrections records, Union Correctional institution classification records,

Jacksonville parole and probation records, school and military records, a 1986 competency report, 1988 prison medical records, 1993 hospital records from Orlando, prison medical records from 1995-1997, employment records, a report of Dr. Harry Krop, a report of Dr. Wade Myers, depositions of Doug Eaton and James Trout, a sworn statement and transcript of testimony of Angela Solomon, depositions of Andre Andrews and Officer Dwayne Richardson, a deposition of Vincent Harper, an unsworn statement of a John Doe identified as David Jones= drug dealer, trial testimony, exhibits including a homicide continuation report and a medical examination report, ATM records, deposition and trial testimony of Dennis Marsh, Leonard Hutchins, Johnnie Lee Johnson, Amy Hudson, and Jackie Jones, transcripts of state and defense opening argument at trial, and the penalty phase testimony of John Bradley, a Mr. Hall, Melissa Leopard, Doug McRae, Jodi Brenner-Burney, Cynthia Bryant, Wayne Pierce, Joann Sealey, Michael Edwards, Sherry Risch, Drew Edwards, Tara Wilde, and Ronald Jones. (EHT. 15-17) Dr. Lipman reviewed the records before and after interviewing Mr. Jones. (EHT. 17)

As an expert in the field, Dr. Lipman stated that his impression of Mr. Jones is that Ahe is an is an individual

who is constitutionally vulnerable to experiencing the psychosis producing effects of cocaine and other stimulants.@ (Id.) Also, Dr. Lipman=s impression of Mr. Jones is that he has, in the past, been an abuser of cocaine, including both injecting ans smoking the drug. (EHT. 17-18) Mr. Jones is what Dr. Lipman referred to as a Aspeedballer@, a cocaine addict who also engages in the Ainsidious and dangerous@ use of an opiate with the stimulant. (EHT. 18)

Dr. Lipman testified that when cocaine is used acutely, it has the effect of creating sensations of competence, energy, and euphoria, but also may have the side-effects of irritability and anxiety. (EHT. 18) According to Dr. Lipman, when used chronically, the side-effects of cocaine use become more pronounced, with the irritability and anxiety developing into full-blown paranoia and psychosis. (EHT. 19) Dr. Lipman added that when the user Ais in that condition they are irrationally fearful, they typically are hallucinating, they suffer from delusions, and their contact with reality is very, very poor.@ (Id.) The condition resembles schizophrenia. (Id.) This is true in terms of the lack of contact with reality, the presence of delusions, and irrational fears. (Id.) Dr. Lipman added that the

qualitative difference is that schizophrenic delusions are more bizarre. (EHT. 20) Dr. Lipman testified that individuals like Mr. Jones, who are susceptible to experiencing psychosis even without the abuse of cocaine, often experience cocaine psychosis as a full-blown schizophrenic would. (Id.) Mr. Jones susceptibility to experiencing psychosis is likely what caused him to be diagnosed as schizophrenic in the past. (Id.) In Dr. Lipman=s opinion, Mr. Jones, at the time of the instant offense, was experiencing the affects of chronic cocaine psychosis. (EHT. 21) The historical support for this opinion was extensive according to Dr. Lipman. (Id.)

Mr. Jones began smoking marijuana in junior high school and Awas sufficiently unrestrained to have swallowed what he called an unknown quantity of white powder that put him in a major psychotic trip for a number of days in which his friend had to tie him up and lock him in a closet.@ (EHT. 21-22) Dr. Lipman believed, based on Mr. Jones description of the effects of the drug, that it was PCP, also known as angel dust. (EHT. 22)

Mr. Jones enlisted in the Army in 1977 and during that time was also drinking heavily. (Id.) After discharge from the Army, Mr. Jones was incarcerated in the Kansas

Department of Corrections. (Id.) Based on Dr. Lipman=s review of records, Mr. Jones adjusted well to incarceration. (EHT. 23) In the drug-free environment of prison, Mr. Jones Abecame emotionally stable, he was conforming, and he was non-punitive, non-self-punitive and nonviolent. (Id.)

In 1982, according to the history given to Dr. Lipman, Mr. Jones returned from Kansas to Callahan, Florida and met Jackie Doll, his future wife. (Id.) Jackie introduced Mr. Jones to the intravenous use of cocaine. (Id.) As to the experience of initially injecting cocaine, Mr. Jones told Dr. Lipman, AIt was the best feeling I had ever experienced in my whole life, I couldn=t speak, it was good, it was out of this world, I couldn=t move or talk. After I came down I said I couldn=t believe how good it felt. And from that day on I injected cocaine.@ (Id.) Dr. Lipman explained that Mr. Jones attachment to the drug is likely linked to Mr. Jones depression and the drug=s relief of that depression. (EHT. 24) After that first weekend injecting cocaine, Mr. Jones decided to steal money from his employer to get more. (Id.) In Dr. Lipman=s words, Ait had completely taken him over.@ (Id.) Mr. Jones was overpowered by and could not resist it. (EHT. 25) Mr. Jones was eventually introduced to heroin as a method to treat his cocaine withdrawal. (Id.)

This concomitant use of cocaine and heroin is referred to commonly as Aspeedballing.@ (Id.) Dr. Lipman stated that this type of drug use creates an Aendless cycle of each drug actually treating the side effects of the other, and although heroin does not cause any kind of psychotic affect, it does allow the cocaine user to take far more cocaine than would be otherwise possible.@ (EHT. 26)

Dr. Lipman related an incident in which Mr. Jones, while speedballing, devolved into a psychotic and hallucinatory state in which he believed aquarium fish where telling him to kill himself. (EHT. 26-27) Mr. Jones was also using qualudes, another sedative during this episode. (EHT. 27) Later, Mr. Jones began using dilaudid as the sedative in his speedball pattern. (EHT. 28) Mr. Jones was engaging in this drug activity with his wife, Jackie Doll Jones. (Id.)

Dr. Lipman stated that Mr. Jones, as is typical with drug addicts, denied any adverse effects. (EHT. 29) This denial was despite Jackie Jones= statements that Mr. Jones was paranoid, delusional, distrusting, frightened, and Arevolted by food or other stimulant effect.@ (Id.) Dr. Lipman described these symptoms as indications of psychosis. (Id.) Dr. Lipman further stated that these descriptions

Aabsolutely@ credible in terms of his experience as a pharmacologist. (Id.) Additionally, Dr. Lipman stated his opinion that the descriptions were not exaggerated. (Id.)

Dr. Lipman testified that, based on the history he took, Mr. Jones was in a condition of cocaine psychosis when he was arrested, escaped, and then committed a homicide in 1986. (EHT. 30) Dr. Lipman stated that he relied heavily on the reports of other medical doctors and psychologist for this opinion about the 1986 crime. (EHT. 31) Mr. Jones had a lack of memory about the incident which Dr. Lipman described as Aconsistent with what happens when psychotic people get well. (Id.) According to Dr. Lipman, Mr. Jones description of his behavior immediately after the 1986 homicide indicates that he was possibly insane at the time. (EHT. 32) Dr. Lipman=s opinion in this regard is consistent with experts Mr. Jones saw at the time. (Id.) For an extended time, Mr. Jones was found incompetent to stand trial. (EHT. 32-33)[2] While awaiting trial, Mr. Jones was treated with anti-psychotic medications which are used to treat schizophrenic patients. (EHT. 33) These drugs were ultimately ineffective because, according to Dr. Lipman, Mr. Jones did not suffer from schizophrenia, but, rather, schizoaffective disorder. (Id.) Dr. Lipman stated that

schizoaffective disorder is treated differently than schizophrenia, particularly in the use of anti-depressant medications. (Id.) In Dr. Lipman=s opinion, Mr. Jones should have been, at that time, treated with anti-depressants in addition to the anti-psychotic medications, but he was not. (EHT. 33-34) Mr. Jones is currently being treated with anti-depressants and Afeels as though he=s discovered a new life inside himself.@ (EHT. 34)

Upon his release from his incarceration for the 1986 homicide, Mr. Jones, according to Dr. Lipman, was determined to stay clean and did so for approximately three years. (Id.) Mr. Jones reunited with his wife Jackie who ultimately relapsed into crack cocaine use. (EHT. 35) Mr. Jones was not familiar with crack cocaine, but Jackie introduced him to it. (Id.) Describing his first use of crack cocaine, Mr. Jones told dr. Lipman that Awhen he tried it and it grabbed me worse than anything ever had immediately, every penny I had went on it that night. (EHT. 36) Immediately, Mr. Jones was right back where he had been and [h]e and Jackie then made a living trying to get money stealing from stores, purely to supply their crack habit.@ (Id.) For a year prior to this offense, Mr. Jones was using $500 worth of crack cocaine per day. (Id.)

Dr. Lipman described the effects of crack cocaine as continued craving, irritability, agitation, and depression. (EHT. 37) This was the constant cycle of pleasure and pain that Aoccupied their daily function.@ (Id.) Mr. Jones, according to Dr. Lipman=s review of a deposition of Mr. Jones drug dealer, was also speedballing again, shooting dilaudid when he would visit the dealer. (EHT. 38) Dr. Lipman described Mr. Jones state on the night of the crime:

> [He was completely disorganized at this point. He was scary looking. In fact, even his drug dealer who testified about the night of this offense when Mr. Jones went over there and tried to buy more drugs, he said that the man looked frightening, he was bizarre. And this is a person who is well experienced in the effects of drugs, this is the dealer. He wouldn=t open the door. He was in this condition when the crime occurred. (Id.)

At the time of the crime, it is Dr. Lipman=s opinion that both statutory mental health mitigators applied to Mr. Jones. (EHT. 39) Speaking of the emotional disturbance that Mr. Jones was laboring under, Dr. Lipman stated that Ahis emotional control was deranged at the time.@ (Id.) Further, he was Acertainly@ substantially impaired. (Id.)

Dr. Lipman examined Mr. Jones use of the victim=s ATM card in the case. (EHT. 40) Dr. Lipman stated that Mr. Jones actions in this regard reminded him of laboratory rats that when given stimulants such as cocaine, will endlessly and exhaustively press the drug release mechanism long after it

ceases to be fruitful. (EHT. 40-41) Dr. Lipman remarked, AIn my mind, I=m seeing my rat experiments here... The conviction, the one more press on the lever will give him his dose was so rat like in the Skinner box that I found myself laughing at it actually.@ (EHT. 41)

Dr. Lipman stated that depression and addiction are, in part, genetic. (EHT. 42)

On cross-examination, Dr. Lipman testified that his opinions were not based solely on Mr. Jones= self-reports, but rather, Lipman=s review of symptomology Acame from those who evaluated him, those who saw him and those who testified as to what they themselves saw.@ (EHT. 43-44) Dr. Lipman stated that he did take into account Mr. Jones tolerance of the drugs he was using. (EHT. 44) Further, Dr. Lipman explained that drug usage increases with increased tolerance and this chronic drug use brings about the psychotic affects seen in Mr. Jones. (Id.) Dr. Lipman stated that people become sensitive to the psychosis-producing effects of cocaine, not tolerant. (EHT. 44-45) According Dr. Lipman=s research, those who are subject to cocaine psychosis often remain vulnerable to the effects upon stimulant use years later. (EHT. 45)

Dr. Lipman compiled a memorandum to his file based on his

review of records and evaluation of Mr. Jones. (Id.) The memorandum was entered into evidence as State=s Exhibit 1. (EHT. 46)

When asked on cross-examination what he would have added to the trier of facts knowledge about Mr. Jones, Dr. Lipman stated:

> I don=t think they understood from my reading that this is a gentleman who suffers from an underlying psychotic vulnerability, he isn=t that far from psychosis most of the time. He has a psychosis spectrum disorder which is now treated with prozac actually and very effectively. And perhaps they did not realize that the commonality and continuity between his offenses was that on these occasions he used a drug that pushed him off the edge of that psychotic boundary due to his underlying condition, maybe I would have added that. (EHT. 50)

According to Dr. Lipman, his review and evaluation revealed that Mr. Jones was not able to, given his decrepit appearance and demeanor, participate in the confidence schemes that financed he and his wife=s drug habits. (EHT. 53) When Jackie Jones was arrested just days before the instant murder, Mr. Jones was left homeless and without income. (Id.) Mr. Jones was also paranoid and terrified of

dealing with people. (EHT. 54) Dr. Lipman stated that the incident with the fish in the aquarium demonstrates Mr. Jones= underlying psychotic vulnerability. (EHT. 55) Further, that vulnerability has become more apparent with time. (Id.) Dr. Lipman added that the fact that Mr. Jones kept a corpse in his car trunk for two weeks is also indicative of the vulnerability. (EHT. 56) This happened as part of Mr. Jones prior murder case. (EHT. 54-55)

When asked why Mr. Jones= competency issues during his prior murder case would be relevant to present to his capital jury, Dr. Lipman stated:

> ... they are, they are because of reason of loss of competence was because of the reason of his mental disease and defect which was existent not only during the period of incompetence but at the time of the offense. It=s the same disorder... he is insane, he was psychotic, he was delusional and this is why he couldn=t be tried and this is the condition. It didn=t develop after he was arrested, this was the condition that he was in at the time of the offense. They are one in the same thing. (EHT. 58)

Dr. Lipman testified that Mr. Jones= form of drug abuse, speedballing, Ais the most vicious and awful form of stimulant abuse.@ (EHT. 59) Dr. Lipman further described psychosis as a state in which the psychotic person=s reality and sense of perception is different such that the person is feels as if they are in another world. (EHT. 62) Dr. Lipman testified that Mr. Jones= 1986 and 1995 evaluations indicate

psychosis spectrum disorder. (EHT. 63-64)

In psychometric testing given by Dr. Lipman, Mr. Jones scored 9 out of 10 on the paranoia scale, 8.9 out of ten on the psychoticism scale, and 7 on the schizophrenia scale. (EHT. 68) Dr. Lipman stated that Mr. Jones= scores indicated that he was Aover-endorsing pathology@, something that is typical of the scores of depressed people like Mr. Jones. (EHT. 70) Further, Dr. Lipman stated that this Aover-endorsement@ would not matter because the testing has a built-in mechanism to Aremove its affect from the profile.@ (Id.)

On redirect examination, Dr. Lipman stated that Mr. Jones= Adescription of drug use is absolutely typical of those who used it to the point of paranoia and psychosis.@ (EHT. 71) Further, other witnesses descriptions were consistent with this conclusion as well. (Id.) Finally, Dr. Lipman testified that everything he testified to at the evidentiary hearing could have been introduced at Mr. Jones= 1997 trial. (EHT. 71-72)

At trial, counsel presented only a lay witness, Drew Edwards, whose testimony is both quantitatively and qualitatively dwarfed by the informative and persuasive elegance of Dr. Lipman=s testimony. (TT. 1906-1928) The

Trial Court concluded its modest presentation by noting that a PhD, Sherry Risch, who testified that Mr. Jones had a low IQ and couldn=t analyze a situation and consider consequences. (TT. 1854-1856) As trial counsel conceded at the Evidentiary Hearing, counsel would have wanted to present statutory mental health mitigation, or, alternatively, non-statutory mental health mitigation. (EHT. 143) In fact, counsel retained an expert in cocaine addiction but could not present that witness because the witness didn=t show up, apparently worried about losing his job (he was a lay person who was going to testify how cocaine get its hooks in him but he apparently got worried about his job). (EHT. 144) Doctor Krop and Doctor Miller were consulted, Dr. Krop regarding competency to stand trial, and Dr. Miller regarding the 1986 case. (EHT. 145-147)

Counsel did testify, that in this case, evidence of the link between Mr. Jones= addiction and the Atragic result,@ or the crime, is Aso cogent.@ (EHT. 172) In fact, Jackie Jones was used to demonstrate the severity of Mr. Jones= crack addiction, and the strategy, in guilt-phase, was simply to negate Apre-meditation@ and in the penalty-phase the death penalty. (EHT. 162)

Thus, at the hearing, Attorney Buzzell confirmed that, if he had evidence that Mr. Jones had previously suffered from a schizophrenic psychotic breakdown, he would have wanted to use it. (EHT. 177) At the hearing, Appellant proved that his trial attorneys could have presented such evidence. Further, at the hearing, trial counsel iterated that it would have been useful, at trial, to counter the State=s argument that the use of the ATM card was evidence of Agoal-oriented@ behavior, by presenting expert testimony to explain that this behavior, in the context of drug addiction, does not necessarily establish premeditation. (Importantly, the Hearing Court cites the persuasiveness of such an argument in its Order several times). (Order at page 7, 25) In fact, Attorney Buzzell was aware that such testimony could have been presented. (EHT. 179) Unfortunately, he conceded, this was something he could have Aoverlooked,@ even though the drug use was one of the foci of the trial. (EHT. 179-180) Nonetheless, he did not recall even having a strategy of using cocaine addiction testimony in the guilt-phase. (Id.) At the Evidentiary Hearing, Attorney Buzzell directly stated that he would have wanted to educate the jury about crack cocaine addiction. (EHT. 181-182)

Regarding records, Attorney Buzzell testified that he usually obtains jail records and thought he had introduced them into evidence. (EHT. 182) In regarding the prior violent felony aggravator, Attorney Buzzell admitted that, if he obtained evidence to dispute or contest the State=s presentation of evidence seeking to establish that aggravator, he would have wanted to consider using it. (Id.) He also admitted that evidence, such as Mr. Jones= brother, Carlos, and his mother provided, that Mr. Jones= father was a brutal, violent alcoholic, may be mitigation to present in the penalty-phase. (EHT. 184)

Finally, Attorney Buzzell didn=t recall if he furnished any records or documents to an expert. (Id.). Attorney Chipperfield testified at the Evidentiary Hearing that the penalty-phase centered on demonstrating Appellant=s drug use and his addiction and its relevance to the crime. (EHT. 226) Chipperfield boldly stated that he=d want an expert regarding drug use. Attorney Chipperfield admitted that even the lay addict people ultimately refused to testify was not presented any documents. (EHT. 228)

Attorney Chipperfield certainly would have wanted to establish the mental health mitigators and would have wanted evidence and testimony to educate the jury about the effect

of cocaine use generally and how it would affect Mr. Jones' ability to premeditate. Mental health mitigators, according to Chipperfield, are powerful, even if such mitigation does not meet all the statutory criteria. (EHT. 245) Attorney Chippenfield would want to present evidence and cocaine addiction is a basis for statutory mitigation. (EHT. 260) Also, he'd want to use evidence of Mr. Jones' father's alcoholism and violence during Mr. Jones' early childhood. (EHT. 231)

The Hearing Court has overlooked or ignored the great weight of evidence presented on the issue of counsel's failure to investigate, prepare, and present evidence in the penalty-phase to an expert witness on cocaine addiction and mental health. There is nothing in the records that support the Hearing Court's conclusion that counsel was not deficient investigating and presenting mental health testimony to establish mitigation during the penalty-phase. (Order p. 34) The Court erroneously relies on Rivera v. State, 859 So. 2d 495 (Fla. 2003) and Asay v. State, 769 So. 2d 974 (Fla. 2000) for the principle that presentation of a more favorable expert is, in and of itself, not enough to establish violation of the *Strickland* standard. See also, Freeman v. State, 858 So. 2nd 319 (Fla. 2003). The Hearing

Court=s holding provides little or no analysis of the application of the facts presented at the hearing to the *Strickland* standard. In analysis of those facts, as summarized herein, establishes that counsel did not retain an expert on addiction, like Dr. Lipman, even though such an expert was available and counsel knew that the issues needed to be addressed. Counsel provided no strategic or tactical reason for not presenting the evidence, and even acknowledged that it was both available and desirable. Attorney Buzzell, perhaps, expressed the deficiency best, when he admitted he must have Aoverlooked@ the evidence. Further, trial counsel did not dispute the importance of addressing the principle issue in the case that counsel did have a Alay expert@, but when he didn=t show up counsel took no steps to replace him. Further, counsel did not provide any documents to an expert, and did not even obtain a full family history. The Trial Court erred in failing to grant Mr. Jones relief on this claim.

2. Inflammatory Hyperbole in Argument

Further, counsel failed to object to the State=s use of inflammatory hyperbole in opening statements in the penalty-phase. The State=s mis-characterization of the nature of mitigation is Aan excuse as intended to cause the

jury to question the defense=s motivation in presenting the very evidence that it had as duty and the burden to present. By challenging the nature of mitigation with no objection by the defense, the State was permitted to skewer the process and, in essence, advise the jury to question the motivation for the presentation of mitigation rather than to judiciously weigh the mitigation presented.

Both Attorney Buzzell and Chipperfield testified that they used Jackie Doll Jones (and presented some damaging testimony) to present evidence about Mr. Jones= drug addiction. However, this testimony (which the Hearing Court finds credible (Order p. 37) is specious, at best, when presented without an expert to explain the nexus between the addiction and the crime cogently to the jury.

The Hearing Court erred in rejecting Mr. Jones= relief on this claim as well.

3. Failure to Present Mitigation Through Lay Witnesses

Regarding trial counsel=s failure to present mitigation through lay witnesses, Mr. Jones presented a strong range of testimony at the hearing which would have truly allowed the jury to know Mr. Jones, whose life and fate they were charged to decide. The hearing has overlooked or failed to consider the great majority of this testimony. The Hearing

Court=s cursory review of the testimony of Mr. Jones= mother and brother fails to assess the weight and credibility of the testimony presented.

Joann Sealey testified that she is David Jones= mother and currently lives in Jacksonville, Florida. (EHT. 73) Ms. Sealey testified at Mr. Jones= 1997 trial in the instant case. (EHT. 73-74) At the 1997 trial, Ms. Sealey answered all questions asked of her by defense counsel. (EHT. 74) Ms. Sealey was born in Dade County, Florida, but did not stay with her biological parents. (Id.) Ms. Sealey remembers that she was five years old and was living in the Baptist Children=s Home in Jacksonville. (Id.) A couple that wanted children took custody of she and her brother (Id.) The couple took Ms. Sealey to live in Micanopy, Florida, near Gainesville. (Id.) Ms. Sealey attended P.K. Yonge Laboratory School where she met Mr. Jones= father. (EHT. 74-75)

At age eighteen, Ms. Sealey married Mr. Jones= father, Carlos Jones. (EHT. 75) Mr. Jones is the youngest of three children that Ms. Sealey and Carlos Jones had. (Id.) Mr. Jones has an older brother, Carlos, Sr., and an older sister, Cynthia. (Id.) Ms. Sealey was married to Carlos Jones for eleven years. (Id.)

Ms. Sealey testified that Carlos Jones was an alcoholic. (Id.) When the children were young, Carlos Jones was a violent alcoholic towards Ms. Sealey. (EHT. 76)

Eventually, Ms. Sealey divorced Carlos Jones and was raising her three children on her own. (EHT. 76-77) Ms. Sealey stated that she Ahad to work all the time.@ (EHT. 77) She also was working more than one job. (Id.) Ms. Sealey testified that there was Amost definitely@ a lack of parental supervision and guidance given to Mr. Jones when he was a child. (Id.)

Ms. Sealey stated that Mr. Jones grew up with a cousin of his named Ricky Bevell. (Id.) The two were close, good friends. (EHT. 78) As youngsters, they were bull riders and participated in rodeos. (Id.)

Ms. Sealey described Mr. Jones and his wife Jackie as A... the type of couple that they couldn=t live together but they couldn=t live apart. Their love was so strong, but they would just be back and forth and in and out, you know.@ (Id.) Eventually, Mr. Jones and Jackie had a child, Davy. (Id.) Ms. Sealey has had legal custody of Davie since he was 22 months old. (EHT. 79) The reason for Ms. Sealey obtaining legal custody of Davie was that Mr.

Jones and Jackie could not care for him and there Awas no security for the child.@ (Id.) Ms. Sealey added that she was very concerned about Mr. Jones= and Jackie=s drug addiction as it related to their inability to care for a child. (Id.) Ms. Sealey stated that Davy knows his father and has visited him in prison. (Id.) Ms. Sealey stated that she believes Mr. Jones and Davy have a reciprocal love for each other. (EHT. 80)

Finally, Ms. Sealey stated that she was at the hearing to testify for her son and that she loves him. (EHT. 81)

On cross-examination, Ms. Sealey agreed that she testified at Mr. Jones= 1997 penalty phase. (Id.)

Jackie Jones testified that she is Mr. Jones= wife, that they are currently married, and that she is the mother of Mr. Jones son. (EHT. 82-83) Jackie Jones stated that she did not disclose to the state, prior to her testimony at Mr. Jones capital trial, that she had pending charges against her in the State of Texas. (EHT. 83) The state attorney did not ask her if there were pending charges against her. (EHT. 84) Mrs. Jones stated that she was, in fact, wanted on pending charges in Texas. (EHT. 86) Mrs. Jones stated that she found out about the pending Texas charge when she was living in Canada prior to Mr. Jones

trial. (Id.) While in Canada, she was pulled over for a traffic violation and the Canadian authorities informed her of the pending charge for drug possession. (Id.) Mrs. Jones stated that she thought the charge Adidn=t matter@ and that Aafter ten years that they just dismiss it mentally or some kind of way.@ (Id.) However, Mrs. Jones ended up spending 13 months in prison on the charge. (EHT. 86-87) She finished her parole in South Carolina. (EHT. 87) Mrs. Jones went to prison on the charge approximately one year after her testimony at Mr. Jones capital trial. (EHT. 89)

Mrs. Jones testified that she did not receive any deal from the state in exchange for her testimony against Mr. Jones. (EHT. 87) However, she conceded that she never disclosed the fact that she had pending charges which Mr. Jones= defense team did not know of. (EHT. 88)

Mrs. Jones denied using drugs at the time of Mr. Jones capital trial. (Id.) She stated that after the trial she had a relapse and Atried some coke one other time.@ (EHT. 90)

Mrs. Jones stated that she was picked up in Canada and transported to Jacksonville for Mr. Jones trial by two Astate prosecuting attorneys.@ (EHT. 92) Mrs. Jones denied

that she was Ain custody.@ (Id.)

Mrs. Jones denied that she was given assistance by the state on her Texas charges. (EHT. 94) Mrs. Jones wasn=t sure if the state ran a rap sheet on her, but conceded Athey had to find an address on me somehow.@ (Id.)

Mrs. Jones conceded that she had not completely quit using drugs at the time she testified against Mr. Jones. (EHT. 95)

On cross-examination, Mrs. Jones conceded that she has used numerous aliases in the past and been booked in the Duval County Jail many times throughout the 1980's and 90's. (EHT. 95-96) Mrs. Jones testified that there was no detainer placed on her from the State of Texas. (EHT. 96)

Jeffery Morrow testified that he is currently incarcerated at Cross City Correctional Institution. (EHT. 101) Morrow=s incarceration is for a grand theft conviction. (EHT. 102) Morrow stated that he has approximately ten felony convictions. (Id.)

Morrow testified that he met Mr. Jones and his wife in the 1980's. (Id.) Morrow met them through his mother. (Id.) Morrow stated that his mother was a heroin dealer Aall through the 70's and 80's, so David and a lot of other people came to my mother to buy the heroin, that=s how I met

David.@ (Id.) In the early A80's, Morrow and Mr. Jones Ashot a lot of dope together.@ (EHT. 103) Morrow described Mr. Jones= drug use:

> Normally when he=s straight he=s a good guy, when he=s high every night we go out beating the streets everyday trying to get a fix. That=s the main thing with junkies is to get high... We=ve all got chemical imbalance inside of us, our focus is to get high every day, we don=t got no regard for rational thoughts. (EHT. 103-04)

Morrow added that he and Mr. Jones Adid a lot of speedballs together, mixing heroin and cocaine. (EHT. 104)

Morrow testified that he and Mr. Jones were arrested for burglary of a church in 1986. (Id.) Morrow explained that there was supposed to be money in the church, but when this turned out not to be true, Mr. Jones attention turned to getting money from a soda machine. (Id.) Morrow explained that Awe finally got into it, I mean, I was trying to drag him off but he wouldn=t leave the coke machine, he was obsessed with getting change out of that coke machine. (EHT. 105) The money from the burglary was for drugs. (Id.) Morrow stated that at that time he and Mr. Jones Awent for days and weeks, man, sometimes we only stopped to buy a hamburger, everything else we got or stole or whatever we made went into our arms. (Id.)

Morrow stated that he knew Jackie Jones and that she

was also a drug addict. (EHT. 106) Further, he stated that David loved her. (Id.)

Morrow testified that in 1997, at the time of Mr. Jones= capital trial, no representative of Mr. Jones ever contacted him about testifying. (EHT. 107) Morrow was in the county jail at that time. (Id.) Morrow would have answered questions and testified as he did at the evidentiary hearing. (Id.)

On cross-examination, Morrow testified that he saw Mr. Jones only one time after they got out of prison for murder and burglary respectively and that they shot dope together. (EHT. 108)

Carlos Jones, Jr. (Carlos) testified that he is Mr. Jones= older brother. (EHT. 110) Carlos stated that his father, Carlos, Sr., was an alcoholic and very abusive towards he an Mr. Jones= mother. (Id.) The family environment was Avery unsettled, arguing, fighting, he even had weapons involved sometimes. (EHT. 111-12) Specifically, Carlos, Sr. used a handgun and a shotgun during these abusive episodes. (EHT. 112) Carlos testified that he, his mother, his sister, and David once had to escape through a bathroom window Ajust to get out of the home.@ (Id.) They were forced to do this because Amy dad was running around

the house with a firearm threatening to shoot us.@ (Id.) Carlos= father was intoxicated when this event occurred. (EHT. 113) Carlos recalled another time when his father threatened his mother with a shotgun. (Id.) This event caused her to leave Carlos, Sr. For good. (Id.) Carlos remembers times when his father would Ago to a bar and leave us in the car for, you know, hours, you know.@ (EHT. 114) Carlos recalls physical violence by his father toward both he and his mother. (Id.) Carlos recalled his father gun-whipping him to the point of unconsciousness. (EHT. 115) Carlos stated that he would have testified to these matters at Mr. Jones= 1997 capital trial, had he been asked to do so. (Id.)

On cross-examination, Carlos testified that he several years older than his brother and, as a result, probably experienced more of his father=s violence than David. (Id.) Carlos has never murdered anyone and never been arrested. (EHT. 116). Carlos has been in the distribution industry for twenty-nine years. (Id.) Carlos does not remember talking to a lawyer about his brother=s 1986 murder conviction. (Id.) Carlos remembers Mr. Jones= trial attorneys in the instant case coming to his home to talk to his mother, Joanne Sealey. (EHT. 117) However, despite the

fact that Carlos was in the house at the time they spoke with her, they never directly talked with him. (Id.)

On redirect, Carlos reiterated that he would have answered any question of him truthfully, as he did at the instant hearing. (EHT. 118)

Trial counsel did not present a tactical or strategic reason for not presenting any of this strong, persuasive testimony. Further, counsel had access to all of these witnesses. The Hearing Court notes that Mr. Jones= mother did testify at the trial, but her limited testimony there evidences the lack of preparation or strategy or plan for the presentation of lay testimony. Further, the lay testimony not presented, when considered in conjunction with the expert testimony of Dr. Lipman presents the full sweep, depth, and expanse of Mr. Jones= life. The trial jury had virtually none of this crucial information at its disposal when it rendered its death recommendation.

As Lockett, and its progeny, make clear, the touchstone of the Eighth Amendment jurisprudence is the effective execution of counsel=s duty to help the jury know the real human being whose life counsel is asking them to spare. In Mr. Jones= case, there was a plethora of relevant mitigation which could and should have been presented through lay and

expert witnesses to educate the jury on the place of near insanity where a lifetime of ever increasing paranoia, schizophrenia, and addiction had pushed Mr. Jones, tragically, into the path of the victim, but his actions and perceptions were those of a man to whom imprisoned fish spoke of the need to shatter and destroy, a place so strange, a landscape where nothing moves but wind over ice, and, sadly, nothing survives.

Unless those jurors understood the world in which Mr. Jones was stranded and could be convinced that the weight of the mitigation, the weight of the strange, violent, and terrifying world, outweighed the terrible crime, no one would survive. And so the State, seeking death, showed the jury Mr. Jones= tattoos, to make him an Aryan Supremacist, rendered him a sexual predator, with no evidence to support the claim, and put racial hatred in his mouth...but his demon was the drug, snow in an ice world, and counsel=s awesome burden was to show the jurors the reality of that horrible world. Counsel could have but, in this case, did not do that. Had counsel performed effectively, there is a reasonable probability that the jury would have recommended that Mr. Jones live, in prison, for the days allotted to him, his terrible crime having turned the ice world into a

world of steel.

Conclusion and Relief Sought

Based upon the foregoing, Mr. Jones respectfully urges this Court to reverse the Order of the Hearing Court and to grant him relief on his claims as this Court deeps proper, including ordering the vacation of his convictions and sentences and granting him a new trial.

Certificate of Service

Counsel for Mr. Jones certifies that all parties were served with a true copy of this Corrected Initial Brief of Appellant on December 30, 2005 by U.S. Mail.

Certificate of Type Size and Style

Counsel certifies that this Corrected Initial Brief was generated in a Courier non-proportional 12-point font.

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Harry Brody
Florida Bar #0977860

Jeffrey M. Hazen
Florida Bar #0153060

Brody & Hazen P.A.
PO Box 16515
Tallahassee, Florida 32317
850-942-0005
Attorneys for Appellant