IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1301

LOWER TRIBUNAL NO. 97-9232-CF

JASON DEMETRIUS STEPHENS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court=s denial of Mr. Stephens= motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied Mr. Stephens= claims after an evidentiary hearing.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

AVol. R.@ **B** record on direct appeal to this Court;

APC-R.@ **B** record on appeal after an evidentiary hearing;

AT.@ - transcript of evidentiary hearing;

APC-S.@ - supplemental record on appeal after an evidentiary hearing;

AD-Ex.@ - Defense exhibits entered at the evidentiary hearing;

AS-Ex.@ - State exhibits entered at the evidentiary hearing.

REQUEST FOR ORAL ARGUMENT

Mr. Stephens has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Stephens, through counsel, urges that the Court permit oral argument.

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STATEMENT OF THE CASE

On August 7, 1997, Mr. Stephens was indicted with one count of first degree murder, one count of armed kidnaping, six counts of armed robbery, two counts of attempted armed robbery, one count of burglary, and one count of aggravated burglary (Vol. I, R. 8). On December 8, 1997, Mr. Stephens pled guilty to eight of these charges (Vol. II, R. 232-34).

Mr. Stephens= jury trial on the remaining counts (three counts of armed robbery and one count of first degree murder) resulted in a guilty verdict on one count of armed robbery and one count of first degree murder. On January, 15, 1998, as to count I (first degree murder), the jury recommended a sentence

of death by a vote of nine (9) to three (3) (Vol. V, R. 798). On April 7, 1998, the trial court sentenced Mr. Stephens to death for the first degree murder charge and to accompanying consecutive and concurrent terms of life on the robbery and kidnaping counts (Vol. XV, R. 397-8).

The Florida Supreme Court affirmed Mr. Stephens' conviction and sentence on direct appeal. Stephens v. State, 787 So. 2d 747 (Fla. 2001), *rehearing denied* June 4, 2001. The United States Supreme Court denied certiorari on November 13, 2001.

Mr. Stephens' initial Fla. R. Crim. P. 3.850 motion was filed on October 23, 2002. A case management conference was conducted on March 10, 2003, after which the circuit court granted an evidentiary on a number of Mr. Stephens' claims.

Mr. Stephens filed an amended 3.850 motion on August 4, 2004. Subsequent to the State's response, which was filed on August 11, 2004, an evidentiary hearing was conducted on August 25-26, 2004. Following the submission of written closing arguments, on April 29, 2005, the circuit court issued an order denying relief (PC-R. 252-283). This appeal follows.

STATEMENT OF THE FACTS

During the postconviction evidentiary hearing, testimony was presented regarding several issues. One such issue involved the ineffective assistance of counsel during Mr. Stephens' penalty phase proceedings. At the penalty phase of

Mr. Stephens= trial, counsel presented evidence that Mr. Stephens Awas good with children, had been raised in a good Catholic family, had an ability to work with his hands to build things, had been deeply affected by his father=s death, was remorseful for Sparrow III=s death, and was religious.@ Stephens, 787 So. 2d at 752. No mental health mitigation testimony was presented and no statutory mitigating factors were found.

In support of his penalty phase ineffective assistance of counsel claim, Mr. Stephens presented the testimony of family members, other lay witnesses and a mental health expert during the postconviction evidentiary hearing.[1] Brian Stephens, Jason=s younger brother, testified that he and Jason had a close relationship and that Jason was Brain=s protector (T. 145-46). Jason was the black sheep of the family, and he got more and more into the street life as he got older (T. 146-47). Jason left school around the ninth or tenth grade, and he was around seventeen when he left home (T. 147).

For the most part, Brian testified that he came from a close and loving family, and that his parents made them go to church every Sunday (T. 152). However, in terms of discipline, the children used to get a lot of beatings, mostly

[1]In rebuttal, the State presented the testimony of one of Mr. Stephens= attorneys, Refik Eler.

by their father (T. 147). He would beat them with a switch, stick or P.V.C. pipe (T. 148).[2]

During his testimony, Brian also recounted an incident where Jason accidentally shot his brother Michael in the family living room (T. 149). Jason was upset about that longer than Brian ever thought he would be (T. 150). Brian only saw Jason cry twice, once over shooting his brother and once when his father died (T. 150).

Brian did not testify at Jason=s trial (T. 151). No one asked or talked to him about testifying (T. 151).

Michael Stephens, Jason=s younger brother by six months, testified that he and Jason had a good relationship (T. 154). They fought and got into trouble a lot, but they loved and took up for each other (T. 154).

When they got into trouble, they would be punished: AMost of the time it was whoppings. Sometimes we have to go to bed early. We barely got grounded but most of the times it was whoppings.@ (T. 155). They were beaten with belts, switches and pipes, mostly by their dad (T. 155). Sometimes the beatings would be 20, 30 or 40 strikes, and sometimes it seemed like forever until they stopped crying (T. 155).

[2]According to Brian, HRS was never called about the incidents involving the switch, stick or PVC pipe (T. 153).

Their dad was in the military and he gave them military-type discipline (T. 155). They would have to stay in push-up position for a while or stand against the wall holding encyclopedias in both hands (T. 155-56). Their dad showed a good side when he wasn't involved in discipline, and they all loved him (T. 156). In fact, when their dad passed away, Jason cried for two days and he didn't say anything for about a month (T. 156).

Michael explained what occurred during and after the accidental shooting. Jason was unloading the gun and it went off, and Michael was shot in the face (T. 157). Michael was in the hospital for 26 days (T. 157). The first three or four nights, Jason didn't leave the hospital (T. 157). He was upset, remorseful and had a lot of guilt for a while (T. 157). Michael and Jason became a lot closer after this incident, and Jason became Michael's protector (T. 157). Jason would walk Michael to school and make sure that nobody bothered him (T. 157).

They went to counseling after the incident, but the psychiatrist decided Jason had shot Michael on purpose, so they never went back (T. 158). This upset Jason and Michael (T. 158).[3]

[3]Jason started getting into more trouble after he shot Michael, but it really hit the top after their father died (T. 158).

Jeremy Tinsley has known Jason Stephens since they were about fourteen or fifteen years old (T. 8). Tinsley testified as to his knowledge of Jason=s drug use (T. 12). Jason used marijuana and powdered cocaine on a regular basis, as did Tinsley (T. 12, 16, 17).[4] Back in 1997, when the crime in question occurred, Jason used cocaine every night (T. 12-13). Sometimes, he would engage in bizarre behavior and his mood would quickly become extremely angry (T. 13). The amount of cocaine that Tinsley and Jason bought depended on how much money they had and what they were doing at the time (T. 16). Sometimes, it might have been a quarter or an eight ball (T. 16).

Sharron Davis has known Jason Stephens since 1994, and they had dated for a little while (T. 164-65). Sharron testified that Jason was never violent toward her, and he never put a hand on her if they had an argument (T. 165).

[4]Tinsley also sold cocaine, but he didn=t know if Jason sold it as well (T. 16).

Sharron and Jason knew a woman named Tyra Brown Wilkerson (T. 165). Tyra had children, and Jason had a great relationship with them (T. 166).[5] He would take care of the kids, including Tyra=s daughter, when she was three years old (T. 166). During this time period, Tyra=s daughter could open and unlock a car door (T. 166-67). Sharron witnessed Tyra=s daughter open and unlock the car door with Jason present (T. 167).[6]

Sharron Davis never had contact with Mr. Stephens= attorney (T. 167). She would have been available to testify had she been contacted (T. 168).

Tyra Brown Wilkerson has been friends with Mr. Stephens since 1993 or 1994 (T. 169). Back in 1997, Tyra saw Jason often (T. 170). Tyra had two children in 1997 and Jason had a great relationship with them (T. 170). Tyra allowed Jason to care for her children (T. 170). Also, Tyra verified that her daughter was able to open and unlock a car door at three years old, and that Jason was present when she had done this (T. 170).

Tyra further testified that she sometimes saw Jason get angry, but that he had to be provoked just like anyone else

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[5]Sharron is the godmother of Wilkerson=s daughter (T. 166).

[6]After he was arrested, Jason told Sharron how much he cared for Tyra=s daughter, and he stated that she could open a door at the age of three (T. 167).

(T. 171). Tyra had that relationship with Jason where she could talk to him and he would get under control (T. 171-72). According to Jason=s sister, Tyra was the only one who could seem to get Jason under control when he was angry (T. 172).

Shondra Brown is Tyra Brown Wilkerson=s sister (T. 174). Jason was a friend of the family and Shondra knew him back in 1997 (T. 174). Shondra testified that Jason would take care of Tyra=s children, and he was present when at three years old, one of the children would open and unlock the car door (T. 175).

According to Shondra, Jason could get angry very quickly, and only Tyra could get him under control by talking to him (T. 175-76). When Shondra first met Jason, she thought he was crazy (T. 176). Jason walked around in a bullet-proof vest and he kept his gun on him at all times (T. 176). He was always looking out the window saying stuff like, AI got to get them before they get me.@ (T. 176). With regard to his personal appearance, Jason cut one side of his hair completely off, so he was completely bald on one side (T. 179). Jason commented that this was for his personality, for different people (T. 180).

With regard to drug use, Shondra testified that Jason used to smoke marijuana (T. 177). On the day of the crimes in question, Shondra saw Jason at her sister=s house (T. 177). Jason seemed very paranoid and he kept looking out the window

(T. 177). He got a phone call and flipped out; he went crazy (T. 177-78). Shondra testified that Jason was smoking marijuana in the living room area; the marijuana had a funny smell to it (T. 178). Shondra thought there was powder or cocaine in the marijuana (T. 178).

Shondra was interviewed by the police, but no one from Jason's defense team contacted her (T. 180). She would have testified had counsel contacted her (T. 180).

Dr. Jethrow Toomer, an expert in clinical and forensic psychology, evaluated Mr. Stephens in August, 2000, for about four to five hours (T. 23, 24-25). Dr. Toomer also reviewed the Florida Supreme Court opinion, police reports, transcripts from the trial, reports from experts, school records, and D.O.C. records, which included testing that was conducted there (T. 24).

During Mr. Stephens' evaluation, Dr. Toomer administered a battery of tests to assess personality functioning, academic skill, intellectual functioning and substance abuse (T. 25). Dr. Toomer also spoke with several of Mr. Stephens' family members, including his mother Delena, his sister Angela, and his brothers, Michael and Eric (T. 25).

In addition, Dr. Toomer reviewed prior evaluations, including reports from Dr. Miller and Dr. Knox (T. 27).[7] The

[7]Prior to Mr. Stephens' trial, Dr. Miller and Dr. Knox were appointed to determine whether Mr. Stephens met the criteria for involuntary hospitalization, whether Mr. Stephens was competent to stand trial, and whether Mr. Stephens was

purpose of those evaluations looked primarily at issues related to competency and sanity of Mr. Stephens (T. 27). As Dr. Toomer explained, one would look at different factors and want different records if you were making an assessment as to whether a statutory mitigator applied as opposed to sanity or competency (T. 28-30).

Dr. Toomer administered the Bender Gestalt Designs test, which is a screening instrument that provides some indication as to whether or not there is the likelihood of some thought processing disturbance, personality disorganization or underlying neurological involvement (T. 31). On that test, Mr. Stephens showed soft signs of underlying neurological involvement, and Dr. Toomer indicated that a further neuropsychological evaluation should follow to pinpoint the nature and extent of any possible organic impairment (T. 32).

Dr. Toomer also administered the Wide Range Achievement Test, which assesses academic skill functioning (T. 34). Mr. Stephens is capable of reading at the high school level, but in terms of spelling and arithmetic, he is at the fourth grade level and seventh grade level respectively (T. 34). While Mr. Stephens I.Q. is in the average range, there was a break in

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insane at the time of the crime (Vol. I, R. 36-39), (Vol. II, R. 212-215).

the difference of verbal and non-verbal (T. 34). When you start to see gaps between the performance levels, then it suggests there are other kinds of factors that are operating (T. 35).

Dr. Toomer also administered the Milan Clinical Multiaxial Inventory, which is an instrument that assesses overall personality functioning (T. 37). Mr. Stephens' responses suggested psycho active substance abuse as a diagnostic category, borderline personality disorder and a judgment disorder with anxiety (T. 37).

Additionally, Dr. Toomer administered the Structured Clinical Interview, which is an instrument that's designed to assess overall substance abuse (T. 38). This test reflected a history of substance abuse on the part of Mr. Stephens dating back to the age of sixteen, and it was also characterized by an increased tolerance (T. 38). When you see this increase in tolerance, it usually signifies that you have someone who is in increasing emotional pain and is self medicating (T. 39).

Further, Dr. Toomer administered the Carlson Psychological Survey, which assesses personality functioning and compares individuals who are in the criminal justice system (T. 40). While Mr. Stephens didn't fit any preestablished profile, his responses reflected underlying emotional turmoil, cynicism, hostility and mistrust of

environment and people around him (T. 41). This suggests a pattern of underlying personality disturbance (T. 41).

Dr. Toomer gathered information from his interviews with Mr. Stephens= family members. This information reflected a history characterized by significant deficits in adaptive functioning in terms of inter-personal relationships, impulse control, overall behavior and school adjustment (T. 44):

> His behavior vacillated from one end of the continuum to the other, from adaptive to being maladaptive. His mother for example talked about the fact that he was diagnosed with attention deficit hyper-activity disorder at an early age. There were instances of fire setting, school problems, moving from one school to another, issues related to just unusual, unpredictable behavior, darting into traffic, jumping off of buildings, all those kinds of incidents that have characterized behavior and behavior that his family members describe as being accident prone, that he seemed to be injured a lot and the injury wasn=t of his own doing or just by accident but it was unusual to the point that most family members mention and describe him as being accident prone.

(T. 45). There were numerous accidents that Mr. Stephens experienced during his developmental history, including an accident where Mr. Stephens had some fairly severe head trauma (T. 46). When you put everything together, what they strongly suggest is underlying neurological involvement (T. 47).

> They suggest that there are factors, that there may be organic factors influencing behavior when you get this wide range of behavior, when you get the vacillating behavior. For example, where on the one hand you get behavior that violates the norms of society, on the other hand you get - - you have an individual who also apparently cares very much for children, can be empathetic, has a history of being empathetic and being helpful and being of service when called upon to do so.

(T. 47). The significance of being empathetic is that it suggests the existence of a conscience, as having the ability to care for someone other than yourself as opposed to a sociopath who is incapable of doing that (T. 48).

Mr. Stephens= problems seemed to be exacerbated by the family dynamics (T. 46):

> The father was described as a stern, strict disciplinarian that, you know, basically what was described would today - - would today constitute abuse and would probably - - probably result in a call to DCF or some similar agency, and so that kind of - - that kind of strict discipline coupled with distance in terms of emotional distance appeared to have exacerbated existing problems that the defendant had over his - - over his lifetime.

(T. 46-47).

Dr. Toomer testified that the idea of impulsivity means that you simply act on the spot; you don=t project consequences (T. 49):

> When individuals grow up in an environment that is not nurturing, that is not caring, that is unpredictable and is not characterized by saneness, what you have is you have fixation at an earlier stage of development while the individual continues to advance chronologically.
>
> So you have an individual who is like 18, 19, 20 years of age chronologically. Emotionally they are six, seven, eight, whatever, because what has happened is because of that - - those predispositional variables adversely impact on their development. Emotionally are still at a much younger, younger age, so as a result just like children, children at a young age have no impulse control. Children act. They don=t think. They don=t predict consequences.
>
> So you have someone who is 18, 19 or 20 and they are still acting as if they were much younger

because of those deficits and that=s what you have with Mr. Stephens.

(T. 50-51).

The school records reflected that Mr. Stephens was in and out of various schools over his developmental history Aand that suggests once again that what you have got is someone who is - - who isn=t equipped to manage in a way that=s commensurate with his chronological age (T. 53).

Mr. Stephens came into contact with the juvenile justice system and, in 1988, he was referred for short-term counseling (T. 55). Mr. Stephens also participated in a program called the Alligator Stop Program (T. 55). However, Athe red flags were there at a very early age and what was done always seemed to be too little too late in terms of their impact...@ (T. 55).

Mr. Stephens was also involved in the accidental shooting of his brother (T. 56). He was extremely remorseful and was at his brother=s bed throughout the entire hospitalization (T. 56). There was nothing specific done in terms of helping Mr. Stephens deal with the guilt and remorse over this incident (T. 56-57). Mr. Stephens attempted to deal with it by himself, but was incapable of doing so (T. 58).

Based on the totality of the data, Dr. Toomer concluded that Mr. Stephens was acting under an extreme emotional disturbance at the time of the crime (T. 60).

I would characterize it based upon the totality of what I have done and based upon the likelihood of

> numerous, numerous areas of dysfunction contributing to that particular disturbance. I believe that there is - - there is significant data to suggest the likelihood of organicity. There is a history of psychiatric substance abuse. There is definitively borderline personality disorder.
>
> There are a number of factors in terms of impulse control that have contributed to his functioning. There is the likelihood of possible anxiety disorder. There are a number of provisional diagnoses that are reflected in the totality of the data that have influenced his behavior for a long time.

(T. 61). Further, Dr. Toomer concluded that Mr. Stephens did not have the ability to conform his conduct to the law at the time of the crime (T. 62). Mr. Stephens has an inability to conform because he's acting on impulse, which has characterized his developmental history for most of his life (T. 62).

On cross examination by the State, Dr. Toomer agreed that the mitigation testimony by Mr. Stephens' family at trial is very different from the picture now being presented (T. 65).

Dr. Toomer also reiterated his general conclusion of a borderline personality disorder, with the dominant characteristic of this disorder being instability and impulsivity (T. 68-69). Dr. Toomer agreed that personality disorders can co-occur, and that there are anti-social traits in Mr. Stephens (T. 75, 77-78). However, Dr. Toomer subsequently explained that one can manifest anti-social traits but that doesn't mean that you meet the criteria for sociopathy or for the anti-social personality disorder (T.

100). Someone with anti-social personality disorder would not have the ability to show any kind of empathy, and Mr. Stephens was able to show empathy (T. 100). Also, remorse is something that would rule out anti-social personality disorder (T. 105). Mr. Stephens showed remorse (T. 106).

Dr. Toomer was aware that at trial, Dr. Knox evaluated Mr. Stephens and also determined that there was a significant difference between his verbal and performance I.Q.=s (T. 81). Dr. Toomer was also aware that Dr. Knox concluded that people that test with this much difference in scores may be sociopaths (T. 81-82). However, Dr. Toomer disagreed with Dr. Knox=s opinion that Mr. Stephens may be a sociopath, as this was an incomplete assessment for what that difference means (T. 82). Dr. Toomer testified that even the manufacturers of the test indicate that a difference in scores between verbal and performance may be of neuropsychological significance (T. 82).

Dr. Toomer believes that Mr. Stephens suffers from a major mental illness (T. 89):

> That=s what we have been talking about. When you talk about psychoactive substance abuse, when you talk about the possibility of borderline personality disorder, when you talk about cognitive disorder, when you talk about those - - I mean even - - even the testing that was done by D.O.C. indicate the same, that he suffers from psychological disturbance.

(T. 89-90).[8] From a psychological and psychiatric perspective, borderline personality disorder is a major mental illness (T. 90-91).

Refik Eler, who was called at the evidentiary hearing as a State witness, is an attorney with the law firm of Tassone and Eler (T. 188). Eler, who practices primarily in criminal defense law, has handled probably a dozen capital cases, and he has done over 100 to 200 jury trials (T. 188, 190-91).

[8]Dr. Toomer noted that organicity and substance abuse magnified Mr. Stephens= mental illness (T. 108).

Eler was appointed by the trial court to assist attorney Richard Nichols in representing Mr. Stephens (T. 191). Nichols was lead counsel and Eler was penalty phase counsel, Aand I assisted him in anything else he requested me to help him with.@ (T. 191).[9] Eler testified that Nichols was responsible for the guilt phase and took the lead as to any decisions regarding strategy (T. 239-40). During the guilt portion of the trial, Eler sat at counsel table and made notes and conferred with Nichols as well (T. 205).

Eler also observed interactions between Nichols and Mr. Stephens (T. 205). From what he could observe, it seemed as though they had a good rapport and that Nichols was responsive to Mr. Stephens= questions (T. 206). However, Eler didn=t recall if he was present in court when Mr. Stephens forwarded a letter to the court regarding Nichols= representation of him (T. 242, 43). Eler, after being shown the letter, stated that he had never seen it before and was unaware of it previously (T. 242). Eler was unaware that Mr. Stephens had requested a new lawyer (T. 242).

As mitigation counsel, Eler employed an investigator, Donald Marks (T. 226-27). When he is responsible for defending a penalty phase proceeding, Eler testified that he gets an investigator to gather prior records, look for employment and educational history, talk with family members,

[9]Richard Nichols is deceased (T. 192).

and to get him witnesses that he can call in the penalty phase to humanize the client (T. 227). In this case, they called family and friends to testify that Mr. Stephens was a loving person who had good relations with kids (T. 227). This was especially important since this was a child death (T. 238).

According to Eler, Mr. Stephens was as close to a volunteer for the death penalty as Eler had seen in his career (T. 228). Eler had an ethical dilemma because you are supposed to abide by your client=s wishes (T. 230). Slowly, Mr. Stephens= attitude drifted to the middle ground, where he was okay with what they wanted to do (T. 229). Eler was comfortable with that quantity or quality of evidence as well (T. 230). Eler testified that Mr. Stephens never told him that he wanted other people called; he never supplied Eler with information about other potential witnesses (T. 230).[10]

In preparation for the penalty phase proceedings, Eler testified that he contacted two mental health experts, Dr. Miller and Dr. Knox (T. 231). Eler consulted them for a number of reasons (T. 231). He wanted to know if Mr. Stephens was competent or insane at the time (T. 231).

> [I]n addition, I wanted some information and I always look to - - you look to other folks to help you in gathering this information. You look to your investigator, Don Marks, to gather - - to do the foot work to get all the people.

[10]Contrary to Eler=s testimony, according to a letter from investigator Marks dated November 18th, there was a list of nine names from Mr. Stephens of people who would like to testify on his behalf (T. 307).

> You look to your mental health evaluators to maybe put you on a lead that you need to further - - do further testing perhaps or do other sociological studies and things like that, so it's all part of this fact gathering process, so in addition to the competency I was hopeful that they would maybe steer me in a little more direction towards mental mitigation which was not available.

(T. 232). The consultations were confidential, but there was stuff that, if revealed to the State, would be detrimental to Mr. Stephens (T. 232). Dr. Miller's report noted that Mr. Stephens had a hair trigger temper, and that he partly burned down a neighbor's house (T. 232-33). Also it was learned that Mr. Stephens accidentally shot his brother and that he was suspended from school for fighting (T. 233). Additionally, Mr. Stephens had a character disorder (T. 233). Eler was trying to get the jury to hear good things about Mr. Stephens, and these are bad things that the State had no knowledge about (T. 233).

According to Eler, Dr. Knox's report was equally alarming (T. 233). Mr. Stephens' disparity in scores between performance and verbal indicated to Eler that this could be considered manipulative (T. 234). After consulting with Mr. Stephens and Nichols, it was Eler's decision not to call mental health experts (T. 234).

Eler further stated that if a client has an anti-social personality disorder, he will certainly not put on mental mitigation (T. 234). After being shown a paragraph from Dr. Knox's report in which he suggested that Mr. Stephens may be a

sociopath because of the disparity in scores, Eler concluded that this was also a reason as to why he didn:t present a mental health expert (T. 235).[11]

On cross examination by collateral counsel, Eler agreed that as to penalty phase investigation, it is important to get a thorough life history (T. 257). Eler agreed that you should speak to family, friends, teachers, employers, obtain relevant information from the criminal justice system and talk to people who were in contact with Mr. Stephens on the day of the crime (T. 257). Eler agreed that his duty to investigate existed regardless of the express desires of his client (T. 257-58). Eler agreed that medical history is often extremely important, particularly as to mental health evaluations being conducted in the past (T. 258). Eler agreed that a lot of information that is gleaned for penalty phase is sensitive information and that there needs to be a lot of rapport and trust between the attorney, the client, and even the client:s family (T. 260).

[11]Eler testified that he had no reason to believe that the mental health mitigators applied to Mr. Stephens (T. 235-36).

According to Eler, while he obtained an order granting a confidential psychiatric evaluation as to sanity and competency, mitigation would have been encompassed in the evaluation and pointed out by the experts had they found it (T. 261).[12] Eler could not recall what information, if any, he provided to his experts:

> Q Did you send any information to Doctors Miller and Knox?
>
> A I don=t remember. I can tell you it would be normal routine or habit to provide them with police reports, statements of Mr. Stephens, things of that nature, so I don=t remember if I did or not but that=s - - that would not be unusual for me to send them copies of depositions, homicide reports, things like that. Maybe - - in fact I have had some **B** - mental health experts request to speak

[12]Despite Eler=s statement, both reports clearly reflect that an evaluation was being conducted to determine competence and sanity. Dr. Miller=s report concludes, AAddressing your specific concerns, the patient in my opinion merits adjudication of competence to proceed and was not insane at the time of the alleged crime. It is further my opinion that he does not meet any criteria for commitment.@ (S-Ex. 1, at 3). Dr. Knox=s report states, AMr. Stevens {sic} was interviewed and tested for approximately one hour and fifteen minutes on November 14th, 1997 by the undersigned, to assess his competency to proceed and to determine his current intellectual functioning.@ (S-Ex. 1, at 5).

> with family members so they may have even spoken to family members in this case. I don=t know.

(T. 261).

According to Dr. Miller=s report, which was shown to Eler during the hearing, he met with Mr. Stephens for an hour, conducted a mental status examination, and he reviewed the report of Dr. Knox (T. 262). There is no indication that Dr. Miller reviewed anything else (T. 262).[13] The report from Dr. Knox just says psychological evaluation, competency to proceed (T. 264). The report doesn=t reference any information that Dr. Knox may have reviewed in coming to his conclusion (T. 264).[14] Subsequently, Eler was shown a document entitled motion for interim attorneys fees and costs (T. 265). On October 21, 1997, Eler prepared a motion and the order for the psychiatric report and an investigator (T. 265). On November 11th and November 18th, Eler had a conference with his

[13]In fact, Dr. Miller=s report specifically states that his evaluation of Mr. Stephens and the report from Dr. Knox are the data which form the basis of the report (S-Ex. 1, at 1).

[14]Rather, it states that AThe conclusions in this report are based upon integration of information from the clinical interview, behavioral observations, and the results of the psychological testing.@ (S-Ex. 1, at 5).

investigator (T. 265). On November 24th, Eler received Dr. Miller's report (T. 266).

Eler didn't know if he obtained any releases for Mr. Stephens' records:

> Q Did you get Mr. Stephens to sign any releases in regards to information or did you leave that to your investigator?
>
> A In regards to what - - in regards- -
>
> Q Such as school records or medical records or anything such as that.
>
> A That would be - - I don't recall that. That's something Mr. Marks would have done. I am not sure. He might have done it. I am not sure.

(T. 266). Eler didn't know if school records were requested, but from the glimpse he saw, he didn't want to proceed any further (T. 267). Eler recalled that school records were referenced in the mental health experts' reports, but that could have been self-reported or from a family member (T. 267).

Eler didn't recall if either he or Marks went through a medical history with Mr. Stephens (T. 268). Eler didn't recall any evidence of closed head injuries; that would be something he would want to know about and share with his expert (T. 268-69). That would be relevant as to whether Mr. Stephens suffered from brain damage (T. 269).

Later, in reviewing Dr. Miller's report, Eler noted that it mentioned a car accident (T. 272-73). That is something

that Mr. Stephens apparently relayed to him (T. 273). When asked if he got any medical records relating to the car accident, Eler stated that he assumed Dr. Miller would have suggested a series of other tests if that had been an issue (T. 273). AI mean he is the expert. I am not so that=s why I defer to him on that.@ (T. 273).

Eler was subsequently shown a report from his investigator (T. 274). The report indicated that Marks met with Mr. Stephens for the first time on November 10th (T. 274-75). From there, Marks went and spoke with Father Parker (T. 275).[15] The next activity was November 19th (T. 275). Eler received Dr. Miller=s report on November 20th; it doesn=t state which day the interview with Mr. Stephens was actually conducted (T. 275).

Eler=s bill also indicates that he saw Mr. Stephens on August 29, 1997, for two and one quarter hours (T. 277). Between then and November 20th, there are no more bills for conferences with the client (T. 278). In fact, the next time Eler billed for seeing Mr. Stephens was January 30, 1998 (T. 278). According to Eler, he conferred with Mr. Stephens every time they were in court (T. 278). There may have been times he saw Mr. Stephens with his investigator and didn=t bill for it (T. 278). However, other than the two times listed, Eler

[15]Father Parker was called as a mitigation witness during Mr. Stephens= penalty phase proceedings (Vol. IV, R. 663-74).

had no independent recollection of seeing Mr. Stephens in the jail (T. 279).

Eler basically relied on Marks to assemble the family history (T. 304). Marks would speak to the family and relay that information to Eler (T. 304). Eler also spoke with Mr. Stephens= mom on the phone and he spoke to Father Parker many times (T. 304).[16]

> Q Was that regarding history or more explaining what=s going on and procedural-type issues and hearing dates and things of that nature?
>
> A Probably a mix of both. I am sure it was procedural of what is going on in the next court date, and like I said I relied - - I relied heavily on Mr. Marks to get the background that I needed.
>
> Q Do you have any - - in your file do you have any notes as - - in regard to your conversation with Mrs. Stephens?
>
> A Let me look for a second. I know that - - well, let me see here. I am sorry. What was the question again?
>
> Q Whether you had any notes in regards to your conversation with Mrs. Stephens.
>
> A You mean specific notes? I know we had a teleconference on September 12th, ›97, brief one.
>
> Q I guess my question is do you have any notes from the teleconference where you recorded what was said or left notes for yourself as to what was said or not.
>
> A I don=t believe so. I would have - - I don=t believe so. I would have like I said relied on Mr. Marks= notes and report to me which I

[16]However, Eler=s bill reflects that he only spoke to Father Parker on one occasion (D-Ex. 4).

> think was pointed out on the November 10th letter that you had.

(T. 304-05).

Eler didn=t recall if he spoke to any of Mr. Stephens= brothers, other than the one who was called as a witness (T. 307).[17] According to a letter from Marks dated November 18th, there was a list of nine names from Mr. Stephens of people who would like to testify on his behalf (T. 307). Eler explained that his attempts to contact them were problematic (T. 307). For instance, he left a message for Tyra Brown and Adrika Patterson (T. 308). When pointed out that a deposition was taken of Ms. Brown, Eler stated that:

> [B]ut subsequent to that what I am suggesting is these witnesses were problematic because I would leave messages on recorders and not get - - one of them was paged. Trajetta Reed was paged. All I had was pager numbers, page this number and input 666, so I would have to input that number hoping that she would call me back which didn=t occur, and I am just trying to be responsive to your question and this is the format that I would use.

(T. 308). Investigator Marks would have been sent out to investigate and would have interviewed Mr. Stephens more than Eler (T. 308-09). AIt looks as though from the record that the only thing he could track down was addresses perhaps and

[17]David Stephens testified briefly at Mr. Stephens= penalty phase that he and Jason got along and went to church together, that Jason was a really funny guy, that he has never known Jason to use drugs or alcohol, and that Jason is a very loving brother (Vol. IV, R. 630-33).

phone numbers, and then in addition to him trying to talk with them it=s clear to me that I tried to talk with them as well.@ (T. 309). Eler didn=t think he went to any of these addresses (T. 309).

It also didn=t appear that Eler had any notes in his file reflecting that he personally spoke with Michael Stephens, Brian Stephens or Shondra Brown (T. 309-10). There is no indication in Eler=s notes that Marks spoke to any of these people, although Eler didn=t have any reports from Marks in his file (T. 309-10).[18]

With regard to the family, Eler never asked them about discipline in the home, as he was instead trying to emphasize good things:

> Q Did you ever specifically question any of the Stephens= family about discipline in the home?
>
> A You know, you were talking about sensitive stuff before. It=s a sensitive matter and I asked - - in general, and once again this is not a specific recollection. I know I met with the family, and when I say family Mrs. Stephens, and I was trying to ask for good things, good points out of Jason=s life to present to the jury, and I don=t recall if I specifically asked about any abuse.
>
> I don=t recall specifically asking about that. I would have hoped that that had been the case - - and they are bright individuals. They are very

[18]On redirect examination by the State, Eler stated that he was now aware that Michael Stephens is the brother who was shot by Jason (T. 335). He would not want this information in front of the jury (T. 335). Had he listed Michael Stephens as a witness, the State could have deposed him and discovered this information (T. 336).

articulate family and folks, that they would have brought that to my attention.

Q But you don't specifically recall asking that?

A No. I don't recall and I don't think Mr. Stephens presented with any of that even at the clinical stage with Doctors Miller or Dr. Knox because I didn't see that in their reports. That's something that I would have looked into had I known.

(T. 311).

Eler didn't speak to any of Mr. Stephens' friends about his drug use (T. 311-12). Eler had no information about any prior mental health evaluations (T. 312). To his knowledge, there were no prior mental health issues (T. 312). He didn't personally remember obtaining the Department of Juvenile Justice records relating to Mr. Stephens, but maybe Marks had done it (T. 312). No information regarding those records was in his file (T. 312).

Q Did you - - did you ever attempt to get any of Mr. Stephens' juvenile records?

A I don't recall. I don't think we did. It's something I wouldn't have done.

(T. 314).

Eler didn't recall any information of a head injury Mr. Stephens incurred while playing football (T. 314). Eler never received any information as to a diagnosis of attention deficit hyper-activity disorder (T. 314-15). However, if Eler had information with which he could have presented both mental

health statutory mitigators, he would have done so (T. 315-16).

Eler also didn't recall asking the family as to how they helped Mr. Stephens deal with the situation of the accidental shooting of his brother or with the fire setting incident (T. 317-18).

Eler agreed that evidence to show that the child could get out of the car would be important (T. 251). As to the penalty phase, Eler agreed that such evidence would be relevant to an Enmund Tison issue (T. 252-53).

> Q So if there were witnesses out there that could testify that Mr. Stephens had indeed cared for a child that had the ability to get in and out of a car that was that same age, that would indeed be something that would be presented.
>
> A Something to look into, yes, sir.

(T. 254). Eler's notes do not reflect that he spoke to Sharron Davis, Mr. Stephens' girlfriend (T. 289). With regard to Shondra Brown, Eler identified a homicide supplemental report by Detective Dubberly (T 321-22). It is something he reviewed or would have received without formal discovery (T. 322). On page 3, the report indicates that the police spoke to Shondra Brown, and that she was at Tyra Brown's house until 11:00 am on the day of the homicide (T. 322). Eler never independently went to speak with Shondra Brown and didn't recall receiving any information from Marks regarding her (T. 322). Eler didn't recall ever deposing her (T. 323). Eler

did attend the deposition of Tyra Jarene Brown, during which she reported that Mr. Stephens said that he left the car unlocked because he figured a three year old could get out of the car (T. 289).

Eler was also asked about his failure to object to the prosecution=s penalty phase argument regarding the victim=s uniqueness and the great loss to his friends, the family and the entire community (T. 219). Eler didn=t think the argument borders on name calling and didn=t think it was objectionable (T. 220). With regard to the prosecutor describing the Alittle boys hopes and little boy dreams@ and being transformed into a corpse, Eler felt the word Acorpse@ was a little inflammatory, but there are a lot of other words the prosecutor could have used (T. 221).[19] Eler is aware that jurors are not supposed to use sympathy (T. 223). As a practical matter, however, Eler agreed that jurors do consider it (T. 223).

[19]With regard to the prosecutor=s use of the photos of Alittle Rob@, Eler did not find this objectionable (T. 222).

During the postconviction evidentiary hearing, collateral counsel also presented evidence regarding trial counsel=s failure to challenge or neutralize the weight of the prior violent felony aggravator.[20] Jeremy Tinsley described an altercation that he and Mr. Stephens became involved in at the home of Latonya Jackson (T. 9-10). The father of Jackson=s child, Sammie Washington, went over to her house to see his child (T. 10). When he got there, Jackson was in bed with another man, Donald Washington (T. 10). At that point, a fight broke out (T. 10-11). Mr. Stephens, who was present along with Tinsley, took Jackson outside (T. 11). Donald Washington took off running and Tinsley and Sammie Washington went outside, at which point Washington started arguing with Jackson (T. 11). According to Tinsley, Stephens never pulled a gun on Jackson, as he didn=t have any reason to (T. 11). Mr. Stephens pulled Jackson out of the fight and was never violent with her (T. 11-12). He never said anything about wanting to kill her (T. 12). After Stephens got arrested, Tinsley did not call the police to tell them his side of the

[20]During the penalty phase, the State introduced the testimony of Latonya Jackson, who stated that Mr. Stephens, Sammie Washington, and a man named Jeremy entered her home; Mr. Washington, holding a handgun, and Mr. Stephens brandishing a sawed-off shotgun. (Vol. IV, R. 594). Furthermore, once they went outside, Mr. Stephens threw her up against the car, held a gun to her head and said AI want to kill this B.@ (Vol. IV, R. 596).

story (T. 14).[21] Tinsley is aware that Mr. Stephens pled guilty to a burglary (T. 17).

During his testimony, Eler testified that with regard to the 1992 prior violent felony conviction, he thought he had police reports from it (T. 291). Eler is now aware that he represented the co-defendant, Sammie Washington, in that case (T. 225). If he had learned anything from Washington that might have assisted Mr. Stephens, he would have used it (T. 226). If a conflict had arisen, he would have moved to withdraw (T. 226).

There were no indications that Eler spoke to Latonya Jackson before she testified, nor did he speak to Jeremy Tinsley or any other witnesses involved in the case (T. 291-92).[22] Eler didn=t recall anything Sammie Washington told him

[21]Tinsely has been twice convicted of a felony, but never for a crime involving falsehood or dishonesty (T. 15).

[22]Subsequently, on redirect examination by the State, Eler reviewed a transcript of the trial and now believed that he did in fact depose Latonya Jackson (T. 334). However, Eler later acknowledged that he didn=t know if he deposed Latonya Jackson in this case or in Sammie Washington=s case (T. 340). So when he took that deposition, he had no recollection as to whether he was advocating for Sammie Washington or for Mr. Stephens (T. 340).

about the case, and he frankly didn't even know he represented him (T. 292).

Eler testified that he would never introduce evidence to lessen the weight of a prior violent felony aggravator:

> Q Now in regards to a prior violent felony, would you agree that sometimes it's a viable strategy to introduce evidence even though you know that something may qualify as a prior violent felony, that you may be able to introduce evidence to possibly lessen the weight the jury and the Court give that particular crime as an aggravator?
>
> A Yeah. That's one course of thought, Mr. Doss. I will be honest with you though a lot of times that can backfire, and I know what you are saying, try to put evidence forward, positive evidence on that, it's not really egregious as it perhaps sounds by the charge, but I will tell you the last spot I want to be in is cross examining a victim of a crime, of a prior violent crime and have the jury for whatever reason once again alienate me or my client or just have it backfire. I wouldn't really follow that course at all.
>
> Q But as far as if you had witnesses independent of the alleged victim that would be a different scenario, wouldn't you agree?
>
> A Maybe.
>
> Q And wouldn't you agree with me that you would need to know what each one of those witnesses could possibly testify to before you could make the decision as to whether or not that might be a viable attack on that particular aggravator?
>
> A Well, it's still coming in. It's still going to come in as an aggravator, but I guess what you are saying is do you want to litigate the validity of whether it's a violent aggravator, get in through the back doo what you don't get in through the front door, and certainly you can do that. I don't necessarily - - I probably wouldn't do that but that's certainly something you could do.
>
> Q I guess my question would be would

you never do that or would you want the facts surrounding it before you made that call?

A **I would probably never do that. I probably would never do that because it's coming in any way. I want the jury to hear about it, forget about it and move on and let's talk about good things. I probably never would do that.**

(T. 318-20)(emphasis added).

With regard to issues involving ineffective assistance of counsel at the guilt phase, collateral counsel presented the testimony of Alan Chipperfield and Bill White. Alan Chipperfield is an assistant public defender who represented Mr. Stephens' co-defendant, Horace Cummings (T. 124). The two defendants were tried together (T. 124).

Chipperfield testified that Mr. Stephens' attorneys were not present for some of the depositions involving their client (T. 125).[23] Chipperfield became concerned about their lack of attendance (T. 128-29).[24] When Chipperfied was doing the depositions in which Eler or Nichols didn't attend, he did not ask questions on behalf of Mr. Stephens (T. 134).[25]

[23]The depositions for Cummings and Stephens were scheduled at the same time (T. 138).

[24]Chipperfield would not have had copies of the transcribed depositions delivered to all counsel involved (T. 133). When private counsel is involved, they are responsible for copying, but the public defender's office would have made the depositions available for copying (T. 133). Chipperfield didn't recall if Mr. Stephen's counsel copied the depositions (T. 133).

[25]In fact, Chipperfield made a motion to sever the case, as Cummings and Stephens had inconsistent defenses (T. 130-32).

Chipperfield also testified that it was he and White who decided to call Dr. Dunton (T. 129-30). Chipperfield contacted Dr. Dunton and worked with him (T. 130). However, Chipperfield acknowledged that Refik Eler had supplied the name of Dr. Dunton, as he was using him in another case (T. 133). Bill White works for the public defender=s office for the Fourth Judicial Circuit (T. 137). His office represented Mr. Stephen=s co-defendant, Horace Cummings (T. 138). White testified that there were some depositions that neither counsel for Mr. Stephens attended (T. 138).[26] During depositions, White never asked any questions with Mr. Stephens= defense in mind (T. 143). White felt that the defense for Stephens and Cummings was not harmonious (T. 143). AWe felt that Mr. Cummings= participation was significantly less than Mr. Stephens= and that there was a theory of independent act that we could put forward, and we felt we had to strongly separate the two at every opportunity throughout the case (T. 143).[27]

[26]Also, in some of the depositions in which Mr. Stephens= counsel did attend, there was less participation by Nichols and Eler than White would have expected (T. 138).

[27]Eler was aware that Chipperfield and White were representing Cummings as having an antagonistic defense to Mr. Stephens (T. 255). Eler agreed that if Nichols or Eler weren=t

While in chambers with Chipperfield one morning, White suggested that the court might want to speak to Nichols about his lack of attendance and attentiveness to the depositions (T. 140). It is White=s recollection that the court did so (T. 140).

According to White, Chipperfield was responsible for the hiring of Dr. Dunton (T. 141). White did not recall getting any copies of correspondence from Eler or Nichols to Dr. Dunton (T. 141). White did not recall any of the coordinating of Dunton=s testimony being done by Eler or Nichols (T. 141). The purpose of Dr. Dunton=s testimony was to contest the cause of death (T. 144). White agreed that the testimony benefitted both of the defendants to the extent it suggested that the death was not intentionally caused (T. 144).

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at the depositions, nobody was there advocating for Mr. Stephens (T. 256).

During his testimony, Eler stated Nichols was lead counsel, so the depositions that Eler attended were either at Nichols= request or because Eler wanted to attend to get a Aflavor for the case.@ (T. 215, 240).[28] Eler didn=t think Nichols was there when Eler was there (T. 216). If Nichols chose to just not show up and hadn=t contacted Eler to be there, he would have no way of knowing one way or the other (T. 241). Eler didn=t know if they had transcripts of all the depos that had been taken in the case, whether attended or not (T. 216).

[28]Nichols was primarily responsible for attending depositions (T. 240).

With regard to specific depositions, Eler acknowledged that it didn=t appear that either he or Nichols attended the depositions of Dr. Floro or Derrick Dixon (T. 281-83).[29] Moreover, according to the cover page of the depositions of Christopher Robinson, Dave Bisplinghoff, C.L. Terry and Derrick Dixon, the only defense attorneys present were Chipperfield and White (T. 285).[30] According to the depositions of Thurmond Davis and Richard Stachnick, neither Eler nor Nichols attended (T. 286-87).[31] Eler=s notes also reflect no indication that either he or Nichols covered the deposition of Roderick Gardner (T. 288).

With regard to discovery, Eler testified that Nichols Awould not normally file for discovery, perhaps not even take depositions in a case because he was of the school that that was sort of like a trial by ambush kind of tactic.@ (T. 198). Eler also believed there are strategic advantages to a criminal defense attorney not participating in discovery, although he has never not participated in discovery (T. 199).

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[29]Eler=s notes from his file reflect that Nichols was to cover those depositions (T. 284).

[30]The armed robbery of Mr. Dixon was one of the charges that Mr. Stephens pled guilty to, and that Cummings ended up receiving a judgment of acquittal on (T. 285).

[31]Eler=s notes reflect that he had a conversation with Nichols, and that Nichols was supposed to cover these depositions (T. 287).

Eler is aware of instances in this community where other criminal defense attorneys have exercised that option (T. 200).

With regard to counsel=s decision to enter pleas of guilty to some of the charges in the indictment, Eler testified that he did not participate in this decision, although he was present for the discussion between Nichols and Mr. Stephens (T. 206). Nichols went through the charges with Mr. Stephens on the day of jury selection or the actual beginning of the trial (T. 206-07). The conversation took place in the sallyport, which is where the prisoners come in and out (T. 207). Nichols asked Mr. Stephens which charges he committed and felt the State could prove (T. 207). Eler didn=t recall any specifics as to what evidence Nichols may have gone over with Mr. Stephens (T. 245).[32] Mr. Stephens gave articulate answers to each charge, admitting to the charges he had done (T. 207-08).

Eler discussed his concerns with Nichols after he learned what Nichols was planning to do (T. 207). Eler was surprised by the decision:

> I can tell you that I - - when he told me that that=s what he was inclined to do and Mr. Stephens had agreed I suggested to him that I disagreed with

[32]Since he hadn=t seen the letter to the court in which Mr. Stephens stated he wasn=t provided with any documents, Eler wasn=t aware of this fact (T. 245).

> that. I am being quite candid with the Court and with you. **I wouldn't have done that.**

(T. 209)(emphasis added). Pleas of guilty were entered as to the charges Mr. Stephens admitted he had done (T. 208).[33] Nichols explained to Mr. Stephens that he felt as though a conviction was almost certain, and in an attempt to get a rapport with the jury as to the remaining charges and/or the penalty phase, it was in Mr. Stephens' best interest to plead guilty to those charges (T. 208). At that point Mr. Stephens seemed to indicate that he trusted Nichols' judgment and he entered pleas of guilty to the counts that Mr. Stephens indicated he was guilty of (T. 208, 248).[34]

Eler agreed that the State had a pretty good case on the charges Mr. Stephens' pled to (T. 209). When asked what he thought would have happened had Mr. Stephens not pled guilty to anything and had gone to trial on the entire indictment, Eler stated that he thought an outright acquittal would have been slim to none (T. 213).

> At best in my opinion had he maintained not guilty pleas maybe we could have argued for a culpable negligence kind of scenario with the hypothermia kind of issue. The problem is there were these felonies, and I think his statement,

[33]As for the effect of the guilty pleas, Eler thought it threw the State off guard (T. 209).

[34]Mr. Stephens was acquitted of a couple of the counts that were tried (T. 210). Eler felt quite frankly that the jury believed Mr. Stephens about what he said he didn't do (T. 210).

> also, his confession kind of hurt us in that effect so I didn't see a way out of a conviction. That's why we went to trial.

(T. 213).[35]

Eler acknowledged that on one of the counts that Mr. Stephens pled guilty to, the robbery of Derrick Dixon, the jury returned a JOA as to Mr. Stephens' co-defendant. According to Eler, Nichols never moved to withdraw the guilty plea as to this issue (T. 247-48).

Eler agreed that Mr. Stephens never indicated he wanted to plead guilty to first degree murder (T. 248). Mr. Stephens' position from day one was that he didn't intend to kill anyone, and certainly that was consistent with his desire not to plead guilty to that count (T. 249). Eler disagreed with Nichols' decision, and he thought that there was the possibility of arguing culpable negligence as opposed to first degree murder (T. 249-50).[36] Eler communicated that to Nichols when they were in the sallyport (T. 250).

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[35]As to whether the pleas of guilty assisted Eler in the penalty phase, Eler felt that this was a two-edged sword (T. 211). They were used as contemporaneous aggravators, but also would show that Mr. Stephens was remorseful, that he didn't intend to kill the child (T. 211). Eler usually argues that contemporaneous aggravators are part of the underlying offense, and the jury shouldn't give them any weight (T. 211-12).

[36]Counsel for Mr. Stephens never informed counsel for Mr. Cummings of any strategy as to pleading Mr. Stephens guilty to eight counts before the beginning of the guilt phase (T. 142).

Since they didn't go with the culpable negligence, they were stuck with felony murder (T. 251). In order to avoid the felony murder after pleading guilty to the underlying felonies, the defense tried to argue that:

> Well, perhaps there was a break in the chain of circumstances, superseding events. There was the issue of hypothermia. The actual crime had been committed and completed was one of the arguments I made.

(T. 251).

Eler also testified with regard to counsel's failure to preserve the change of venue issue. Eler testified that this is a guilt-phase motion and would have been Nichols' responsibility (T. 294). Eler did not recall making such a motion, but thinks that Cummings' attorneys moved for a change of venue (T. 294). When asked if he recalled adopting their motion, Eler stated that had they done one, he probably would have adopted it (T. 294-95).[37]

SUMMARY OF ARGUMENT

1. Mr. Stephens was deprived of the effective assistance of counsel at the penalty phase of his capital trial when counsel unreasonably failed to present evidence of compelling

[37]During his testimony, Bill White also testified as to a conversation he had with Nichols in either this case or another one about Nichols adopting motions that White or Chipperfield filed (T. 142). White suggested to Nichols that there was a standard that would require him to do more than just come on the record and say he was adopting motions (T. 142-43).

and substantial mitigating circumstances. Further, counsel failed to challenge or neutralize a prior violent felony conviction with available evidence. Counsel also conceded improper aggravating circumstances, failed to make proper objections, or to otherwise challenge the State=s case.

2. Mr. Stephens was deprived of the effective assistance

of counsel at the guilt phase of his capital trial. Counsel entirely failed to subject the prosecution=s case to a meaningful adversarial testing. Trial counsel further demonstrated a complete disregard for their client by their absence, either constructively or actually, from critical stages of the proceedings.

3. Trial counsel was operating under a conflict of interest through his representation of one of the co-defendants from Mr. Stephens= prior violent felony conviction. But for this conflict, counsel could have elicited favorable information from this witness to rebut or neutralize the prior violent felony aggravating circumstance.

4. Mr. Stephens was deprived of the effective assistance

of counsel when his lawyer failed to pursue a motion requesting a jury interview after the jury foreman was quoted in the newspaper as stating that Mr. Stephens was convicted because he removed the victim from the house.

5. The trial court committed fundamental error when it permitted the jury to be instructed on aggravating circumstances which it knew did not apply to Mr. Stephens= case.

STANDARD OF REVIEW

The constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court. The legal conclusions of the lower court are to be reviewed independently. See Ornelas v. U.S., 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); Stephens v. State, 748 So.2d 1028 (Fla. 1999).

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING MR. STEPHENS= CLAIM THAT HE WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Legal Standard

As explained by the United States Supreme Court, an ineffective assistance of counsel claim is comprised of two components:

> 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 >counsel= guaranteed the defendant by the Sixth Amendment. Second, the defendant 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 reliable.

Williams v. Taylor, 120 S.Ct. 1495, 1511 (2000), quoting Strickland v. Washington, 466 U.S. 668, 687 (1984).

In Williams, the Supreme Court found deficient performance where counsel failed to prepare for the penalty phase of a capital case until a week before trial, Afailed to conduct an investigation that would have uncovered extensive records,@ Afailed to seek prison records,@ and Afailed to return phone calls of a certified public accountant.@ 120 S.Ct. at 1514. Justice O=Connor in her concurring opinion explained Atrial counsel failed to conduct investigation that would have uncovered substantial amounts of mitigation,@ and as a result this was a Afailure to conduct the requisite, diligent investigation.@ Id.

In Wiggins v. Smith, 123 S.Ct. 2527 (2003), the Supreme Court discussed counsel=s decision to limit the scope of the investigation into potential mitigating evidence and the reasonableness of counsel=s investigation. The Court stated:

> [A] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [trial counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Wiggins, 123 S. Ct. at 2538.

More recently in Rompilla v. Beard, 125 S.Ct 2456, 2466 (2005), the United States Supreme Court reiterated that:

> ›It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused=s admissions or statements to the lawyer of facts constituting guilt or the accused=s stated desire to plead guilty.= 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

(Emphasis added)(note omitted).

B. Failure to Present Mitigation

1. Deficient Performance

Mr. Stephens= trial counsel failed in his duty to provide effective legal representation for his client at the penalty phase. There was a wealth of mitigation that trial counsel never presented because his inadequate investigation failed to discover it. As a result, Mr. Stephens was deprived of the full impact of substantial and compelling statutory and nonstatutory mitigating evidence.

During his evidentiary hearing testimony, penalty phase counsel, Refik Eler, agreed with the assessment that it is important to get a thorough life history (T. 257). He agreed with the proposition that the defense should speak to family, friends, teachers, employers, obtain relevant information from the criminal justice system and talk to people who were in

contact with the defendant on the day of the crime (T. 257). He agreed that medical history is often extremely important, particularly as to mental health evaluations being conducted in the past (T. 258).

Yet, despite his agreement with the aforementioned principles, Eler failed to follow through on his duty to investigate and prepare. Rompilla, 125 S.Ct at 2466. During his testimony at the evidentiary hearing, it was revealed that Eler didn:t know if school records were requested (T. 267)[38]; he didn:t know if either he or his investigator went through a medical history with Mr. Stephens (T. 268); he didn:t recall if he spoke to any of Mr. Stephens: brothers, other than the one who was called as a witness (T. 307)[39]; he didn:t think he went to any of the addresses of the list of nine people that Mr. Stephens provided as willing to testify on his behalf (T. 307, 309); he didn:t speak to any of Mr. Stephens: friends about his drug use (T. 311-12); he had no information about any prior mental health evaluations (T. 312)[40]; he didn:t personally remember obtaining the Department of Juvenile

[38]Eler didn:t know if any releases were given to Mr. Stephens in order to obtain school or medical records (T. 266).

[39]It didn:t appear that Eler had any notes in his file reflecting that he or his investigator spoke with Michael or Brian Stephens (T. 309-10).

[40]To his knowledge, there were no prior mental health issues (T. 312).

Justice records relating to Mr. Stephens, and no information regarding those records was in his file (T. 312); he didn=t recall any information of a head injury Mr. Stephens incurred while playing football (T. 314); he never received any information as to a diagnosis of attention deficit hyper-activity disorder (T. 314-15); he didn=t recall asking the family as to how they helped Mr. Stephens deal with the situation of the accidental shooting of his brother or with the fire setting incident (T. 317-18); while he agreed to the importance of demonstrating that Mr. Stephens believed a three year old could get out of a vehicle (T. 251; 254), he didn=t obtain or present any such readily available evidence.

Without conducting an adequate investigation, trial counsel=s Astrategy@ was to present a Agood guy@ defense (T. 311). Eler readily admitted this was his focus to the exclusion of other investigation, including potential abuse in the home:

> Q **Did you ever specifically question any of the Stephens= family about discipline in the home?**
>
> A You know, you were talking about sensitive stuff before. It=s a sensitive matter and I asked - - in general, and once again this is not a specific recollection. **I know I met with the family, and when I say family Mrs. Stephens, and I was trying to ask for good things, good points out of Jason=s life to present to the jury, and I don=t recall if I specifically asked about any abuse.**
>
> I don=t recall specifically asking about that. I would have hoped that that had been the case - - and they are bright individuals. They are very

articulate family and folks, that they would have brought that to my attention.

Q **But you don=t specifically recall asking that?**

A **No.** I don=t recall and I don=t think Mr. Stephens presented with any of that even at the clinical stage with Doctors Miller or Dr. Knox because I didn=t see that in their reports. That=s something that I would have looked into had I known.

(T. 311)(emphasis added).

Despite Eler=s lack of investigation and preparation, the lower court determined that Eler=s action, or inaction, did not constitute deficient performance:

Eler=s strategy at the penalty phase was to portray Stephens as a decent person from a good and supportive family, and to emphasize that he did not intend to kill the child. Eler stressed the testimony of Dr. Dunton, which supported Stephens= claim that he did not strangle or suffocate the child, and did not intend for the child to die. Witnesses were called to show that Stephens was a person who was entrusted to watch children, genuinely liked children, and protected vulnerable children.

(PC-R. 268). In finding that Eler=s performance was not deficient, the lower court ignored the precedent of this Court, the Eleventh Circuit Court of Appeals and the United States Supreme Court. While trial counsel may make decisions based on strategy, A[w]e have clarified, however, that ignorance of available mitigation evidence, such as family background, precludes counsel=s strategic-decision reasoning and constitutes ineffective assistance of counsel.@ Hardwick

v. Crosby, 320 F.3d 1127, 1186, n. 208 (11th Cir. 2003). As this Court has held: A[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant=s background for possible mitigating evidence.@ State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000), quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996). Favorable evidence, including mitigation, ***must*** be investigated before an attorney turns to some other line of defense. And it must be investigated well. Wiggins, 122 S. Ct. at 2536-37. Using the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty, the Court in Wiggins held that counsel=s minimal investigation into the defendant=s background (only reviewing the defendant=s PSI report and a DSS file), and abandonment of that investigation in order to focus on lingering doubt, fell short of reasonable professional standards:

> Counsel=s conduct...fell short of the standards for capital defense work articulated by the American Bar Association...standards to which we have long referred as guides to determining what is reasonable. The ABA Guidelines provide that investigations into mitigating evidence Ashould comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.@ (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty 11.4.1(C), p. 93 (1989)).

Id. at 2537 (citation omitted). Here, trial counsel failed to discover many of the details which established compelling

mitigation. Thus, counsel=s strategy to present a Agood guy@ defense was not a reasonable one.

With regard to mental health testimony, Eler failed to request the assistance of experts to evaluate Mr. Stephens for mitigation. Rather, Eler requested and was appointed two mental health experts by the Court to determine:

> (a) whether the Defendant meets the criteria for involuntary hospitalization pursuant to the provisions of 394.467(1), Florida Statutes. ... (b) whether he is incompetent to stand trial within the meaning of Florida Rules of Criminal Procedure 3.211, ie., whether Defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as factual, understanding of the proceedings against him. ... (c) whether the Defendant was insane at the time of the commission of the crime charged herein, i.e., whether the Defendant was suffering from a mental illness and that, as a consequence thereof, was not able to understand the nature, quality and wrongness of his acts.

(Vol. I, R. 36-39), (Vol. II, R. 212-215).

During the evidentiary hearing, Eler claimed that mitigation would have been encompassed in these evaluations and pointed out by the mental health experts had they found it (T. 261). However, it is clear that that the mental health experts were never asked, nor did they evaluate Mr. Stephens for mitigation. As Dr. Miller=s report concludes, AAddressing your specific concerns, the patient in my opinion merits adjudication of competence to proceed and was not insane at the time of the alleged crime. It is further my opinion that

he does not meet any criteria for commitment.@ (S-Ex. 1, at 3). And as Dr. Knox=s report states, AMr. Stevens {sic} was interviewed and tested for approximately one hour and fifteen minutes on November 14th, 1997 by the undersigned, to assess his competency to proceed and to determine his current intellectual functioning.@ (S-Ex. 1, at 5).

Moreover, the evidence of Eler=s deficient performance is evident by the fact that Dr. Miller=s report indicates that he only reviewed the report of Dr. Knox (T. 262)[41]; Dr. Knox=s report specifically states that AThe conclusions in this report are based upon integration of information from the clinical interview, behavioral observations, and the results of the psychological testing.@ (S-Ex. 1, at 5); and Eler testified that he did not recall sending the experts any information, but that it would have been routine to provide them with police reports and statement of Mr. Stephens (T. 261).[42]

In its order denying relief, the lower court sidesteps the fact that the experts did not evaluate Mr. Stephens for mitigation. Moreover, the court ignores the fact that Eler

[41]In fact, Dr. Miller=s report specifically states that his evaluation of Mr. Stephens and the report from Dr. Knox are the data which form the basis of the report (S-Ex. 1, p. 1).

[42]Of course, even if Eler had provided the experts with information in accordance with his Aroutine@, police reports and statements of the defendant certainly would not qualify as conducting a thorough investigation.

did not provide any necessary background information to his experts:

> Eler testified that he avoided presenting any evidence of mental health mitigation because of the possibility the State would present evidence that Stephens might be a sociopath. Dr. Toomer agreed that an opinion rendered by an expert that Stephens was a sociopath would have been very damaging at the penalty phase hearing. Eler further testified that he had no reason to believe that Stephens suffered from any mental health mitigator at the time of trial or that Stephens suffered from a major mental illness.
>
> Eler was in possession of reports from mental health experts, Dr. Miller and Dr. Knox. **Although both examined Stephens for purposes of competency and sanity**, Dr. Knox, a psychologist, also found the same gap between Stephens= verbal IQ and his performance IQ score. However, Dr. Knox opined in his report that this gap was indicative of conduct disorders in children and sociopaths in adults. Eler inquired of them about the possibility of any mental health mitigation and concluded none existed or what did exist was potentially harmful.

(PC-R. 274-75). Here, Eler=s lack of investigation, his failure to provide the mental health experts with any background materials, and his failure to request an evaluation for mitigation purposes logically led to a finding of no mental mitigation. Thus, Eler=s decision not to present mental health testimony, because of his own incompetence, cannot be a strategic one. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v.

Morrison, 477 U.S. 365 (1986). A criminal defendant is constitutionally entitled to competent and appropriate expert psychiatric assistance when the State makes his mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). What is required is a Apsychiatric opinion developed in such a manner and at such a time as to allow counsel a reasonable opportunity to use the psychiatrist=s analysis in the preparation and conduct of the defense.@ Blake v. Kemp, 758 F.2d 523, 533 (11th Cir. 1985). In this regard, there exists a Aparticularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel.@ United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client=s mental health background. Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). Here, counsel failed to provide his client with Aa competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of a defense.@ Ake, 105 S.Ct. at 1096.

2. Prejudice

Defense counsel failed to investigate, prepare and present a case for life in the penalty phase and as a result, the jury was never informed about the mitigation which existed that it should have considered, found and weighed in favor of a life sentence. For example, the jury was never informed through lay witness testimony that the Stephens= children were beaten regularly, mostly by their father, and that the form of discipline involved switches, sticks, belts and P.V.C. pipes (T. 147-48, 155); the jury was never informed that beatings would consist of 20, 30 or 40 strikes, and Asometimes it seemed like forever until they stopped crying@ (T. 155); the jury was never informed that the children were given other military-type discipline, wherein they would have to stay in push-up position for a while or stand against the wall holding encyclopedias in both hands (T. 155-56); the jury was never informed that Jason protected his brothers (T. 145-46, 157); the jury was never informed that Jason had a drug problem, that he used marijuana and powdered cocaine on a regular basis (T. 12, 16, 17); the jury was never informed that in 1997, Jason used cocaine every night (T. 12-13); the jury was never informed that on the day of the offense, Jason was smoking marijuana, and that it had a funny smell to it (T. 178); the jury was never informed that a witness thought there was powder or cocaine in the marijuana (T. 178); the jury was

never informed that on the day of the offense, Jason seemed very paranoid and he kept looking out the window (T. 177), that he got a phone call and flipped out; he went crazy (T. 177-78); the jury was never informed that Jason would engage in bizarre behavior (T. 13; 175-76), that he walked around in a bullet-proof vest and he kept his gun on him at all times (T. 176)[43]; the jury was never informed that with regard to his personal appearance, Jason cut one side of his hair completely off, so he was completely bald on one side (T. 179), and that Jason commented that this was for his personality, for different people (T. 180); the jury was never informed that Jason had previously seen another three year old exit a locked car door on her own, and that he believed the victim could also do so (T. 166-67, 170, 175).

In denying relief, the lower court=s order fails to evaluate the constitutional magnitude of trial counsel=s failure to present the aforementioned testimony from lay witnesses. Rather, the lower court makes several curious and erroneous findings. With regard to the testimony by Stephens= brothers, Brian and Michael, the court found that AIt would have established minimal mitigation, and perhaps opened the door to the conduct for which Stephens was punished by his

[43]He was always looking out the window saying stuff like, AI got to get them before they get me.@ (T. 176).

father.@ (PC-R. 269-70). First, evidence of physical abuse as a child, here by means of pipes, whips and sticks, is certainly forceful mitigation, as recognized by the precedent of this Court. Ragsdale v. State, 798 So. 2d 713, 719-20 (Fla. 2001); Walker v. State, 707 So. 2d 300 (Fla. 1997); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991). Likewise, the United States Supreme Court recognizes this type of evidence as mitigating. Wiggins v. Smith, 539 U.S. 510, 535 (2003); Rompilla v. Beard, 125 S.Ct. 2456, 2468-9 (2005). Second, any insinuation by the court that a child deserves to be beaten in such a manner is simply not a credible finding. Moreover, there was no testimony by trial counsel that he didn=t present this evidence because it would open the door to Mr. Stephens= conduct. Rather, trial counsel simply failed to investigate and prepare. Strickland.

With regard to Mr. Stephens= drug use, the lower court erroneously concluded that AThere was no evidence presented at the 3.851 hearing that Stephens was an all day and everyday cocaine user.@ (PC-R. 271). The record obviously contradicts the lower court=s finding, as evidenced by the testimony of Jeremy Tinsley, who specifically testified to Mr. Stephens= drug use on a regular basis (T. 12, 16, 17).[44]

[44]As Mr. Tinsley stated, back in 1997, Mr. Stephens used cocaine every night (T. 12-13).

Further, with regard to Mr. Stephens= drug use, the lower court stated that, AAlthough such evidence is not aggravation per statute it, nevertheless, has the potential to be aggravating to a jury.@ (PC-R. 271). This finding is not only speculative, but erroneous. Again, there was no testimony by Eler, or anyone else for that matter, that he didn=t present evidence of drug use because he thought it would be considered by the jury as an aggravating circumstance.[45] Secondly, even if this were true, such a decision would not constitute a reasonable one. This Court has repeatedly found that an individual=s chemical dependency on drugs and alcohol constitutes valid mitigation. See Miller v. State, 770 So. 2d 1144, 1150 (Fla. 2000); Mahn v. State, 714 So. 2d 391, 400-1 (Fla. 1998); Kokal v. Dugger, 718 So. 2d 138, 142 (Fla. 1998); Robinson v. State, 684 So. 2d 175, 179 (Fla. 1996); Besaraba v. State, 656 So. 2d 441, 447 (Fla. 1995); Caruso v. State, 645 So. 2d 389, 397 (Fla. 1994); Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076, 1080 (Fla. 1992); Clark v. State, 609 So. 2d 513, 516 (Fla. 1992); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Carter v. State, 560 So. 2d 1166, 1169 (Fla. 1990); Heiney v. Dugger, 558 So. 2d 398, 400 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Ross v. State, 474 So. 2d 1170, 1174

[45]The fact is that Eler was unaware of the drug use due to his failure to investigate and prepare. Strickland.

(Fla. 1985); Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985); Norris v. State, 429 So. 2d 688, 690 (Fla. 1983). Moreover, as the Eleventh Circuit Court of Appeals stated in Hardwick, 320 F.3d at 1163 n9 (11th Cir. 2003):

> To the extent that Tassone has attempted to justify his omission of Hardwick=s drug and alcohol addictions as well as his voluntary use of drugs and alcohol during the relevant time period encompassing Pullum=s murder as purposeful because of the negative effect this information would have had on the jury, we have found such alleged strategic rationale to be unreasonable. **We concluded that, when >counsel did not probe [a capital defendant=s] drug problems because they believed that a [local] jury would not be sympathetic to an account of voluntary drug use,= this was insufficient strategic reasoning to justify not presenting the evidence to the sentencing jury.** *Brownlee, 306 F.3d at 1054.* Such evidence is critical at the sentencing phase because it is relevant to the mental state of the capital defendant at the time of the murder and to the legal mitigating factor of conforming conduct to the dictates of law. **Tassone=s ignorance or misunderstanding of this crucial mitigating evidence cannot masquerade in the guise of strategy.**

(Emphasis added).[46]

Not only were significant and numerous examples of lay mitigation available, assistance of an appropriate mental health expert, provided with a history of Mr. Stephens=

[46]Likewise, the lower court=s finding regarding Mr. Stephens= drug use on the day of the crime that A[h]ere again, the risk of presenting this evidence to establish a statutory mitigator, could, nevertheless, be potentially damaging to Stephens.@ (PC-R. 272), is erroneous.

background, would have been able to educate the jury as to why Mr. Stephens acted as he did and draw a critical connection between his actions and his background. Instead, because of his failure to investigate and prepare, counsel for Mr. Stephens presented no mental health testimony.

If trial counsel had investigated and provided the necessary materials to a mental health expert, his evaluation would have produced a diagnosis of a major mental health illness, two statutory mitigating factors, as well as other mental health problems. During the postconviction evidentiary hearing, counsel presented the testimony of Dr. Toomer, who is an expert in clinical and forensic psychology. Dr. Toomer reviewed the Florida Supreme Court opinion, police reports, transcripts from the trial, reports from experts, school records, and D.O.C. records, which included testing that was conducted there (T. 24). Dr. Toomer also spoke with several of Mr. Stephens' family members, including his mother Delena, his sister Angela, and his brothers, Michael and Eric (T. 25). As Dr. Toomer explained, unlike a competency or sanity evaluation, one would look at different factors and want different records if you were making an assessment as to whether a statutory mitigator applied as opposed to sanity or competency (T. 28-30).

As a result of the information he was provided, coupled with testing, Dr. Toomer was able to conclude that Mr.

Stephens= responses suggested psycho active substance abuse as a diagnostic category, borderline personality disorder and a judgment disorder with anxiety (T. 37).[47] Dr. Toomer explained that Mr. Stephens= background information reflects a history characterized by significant deficits in adaptive functioning in terms of inter-personal relationships, impulse control, overall behavior and school adjustment (T. 44). There were numerous accidents that Mr. Stephens experienced during his developmental history, including an accident where Mr. Stephens had some fairly severe head trauma (T. 46). When you put everything together, what they strongly suggest is underlying neurological involvement (T. 47).

> They suggest that there are factors, that there may be organic factors influencing behavior when you get this wide range of behavior, when you get the vacillating behavior. For example, where on the one hand you get behavior that violates the norms of society, on the other hand you get - - you have an individual who also apparently cares very much for children, can be empathetic, has a history of being empathetic and being helpful and being of service when called upon to do so.

(T. 47). As Dr. Toomer explained, the significance of being empathetic is that it suggests the existence of a conscience,

[47]The Structured Clinical Interview, which is an instrument that=s designed to assess overall substance abuse, reflected a history of substance abuse on the part of Mr. Stephens dating back to the age of sixteen, and it was also characterized by an increased tolerance (T. 38). When you see this increase in tolerance, it usually signifies that you have someone who is in increasing emotional pain and is self medicating (T. 39).

as having the ability to care for someone other than yourself as opposed to a sociopath who is incapable of doing that (T. 48).

Dr. Toomer also testified that Mr. Stephens= problems seemed to be exacerbated by the family dynamics:

> The father was described as a stern, strict disciplinarian that, you know, basically what was described would today - - would today constitute abuse and would probably - - probably result in a call to DCF or some similar agency, and so that kind of - - that kind of strict discipline coupled with distance in terms of emotional distance appeared to have exacerbated existing problems that the defendant had over his - - over his lifetime.

(T. 46-47).

As Dr. Toomer further explained, Mr. Stephens= school records reflected that he was in and out of various schools over his developmental history Aand that suggests once again that what you have got is someone who is - - who isn=t equipped to manage in a way that=s commensurate with his chronological age (T. 53).

Dr. Toomer explained that Mr. Stephens came into contact with the juvenile justice system and, in 1988, he was referred for short-term counseling (T. 55). Mr. Stephens also participated in a program called the Alligator Stop Program (T. 55). However, Athe red flags were there at a very early age and what was done always seemed to be too little too late in terms of their impact...@ (T. 55).

Dr. Toomer also described the effect that the accidental shooting of his brother had on Mr. Stephenes (T. 56). He was extremely remorseful and was at his brother=s bed throughout the entire hospitalization (T. 56). There was nothing specific done in terms of helping Mr. Stephens deal with the guilt and remorse over this incident (T. 56-57). Mr. Stephens attempted to deal with it by himself, but was incapable of doing so (T. 58).

Based on the totality of the data, Dr. Toomer concluded that Mr. Stephens was acting under an extreme emotional disturbance at the time of the crime (T. 60). Further, Dr. Toomer concluded that Mr. Stephens did not have the ability to conform his conduct to the law at the time of the crime (T. 62). Finally, Dr. Toomer concluded that Mr. Stephens suffers from a major mental illness, a borderline personality disorder (T. 89-90).

Here, contrary to the lower court=s order, this evidence is, by itself, mitigation (PC-R. 274). As this Court has found, mental health disorders have been recognized as non-statutory mitigation and can, like in Mr. Stephens= case, also be considered as statutory mitigation. See Orme v. State, 896 So. 2d 725, 732 (Fla. 2005); Davis v. State, 875 So. 2d 359, 372 (Fla. 2003); Arbelaez v. State, 775 So. 2d 909, 912 (Fla. 2000); Marquard v. State, 641 So. 2d 54, 56 n.2 (Fla. 1994);

Cochran v. State, 547 So. 2d 928, 932 (Fla. 1989); Mann v. State, 420 So. 2d 578, 581 (Fla. 1982).

In denying relief, the lower court also concluded that Dr. Toomer's testimony would have opened the door to devastating evidence:

> Had Eler secured an expert, who reached the same conclusions as Dr. Toomer, presenting such testimony would present serious risks for Stephens. Dr. Toomer testified that Stephens was not a sociopath because he was able to demonstrate remorse and empathy, and had a history of being helpful and of service to others. Since cross-examination extends to the entire subject matter of direct examination including all matters which may clarify facts testified to on direct (see Francis v. State, 808 So. 2d 110, 140 (Fla. 2001)(quoting Embrey v. Southern Gas and Electric Corp., 63 So. 2d 258, 262 (Fla. 1953)), the State would have been able to inquire of Dr. Toomer about his knowledge of Stephens' criminal history as it relates to Stephens' ability to empathize. The prosecutor's cross-examination of Dr. Toomer at the 3.851 hearing, about his knowledge of Stephens' criminal history and acts perpetrated against other victims, would have been devastating to Stephens' cause. Further, absent an expert's opinion about Stephens' ability to empathize, this evidence was likely inadmissible.

(PC-R. 275).

In making this assessment, the lower court once again overlooks that this was not the reason that trial counsel failed to present such evidence. Rather, trial counsel failed to investigate and prepare, and thus was unaware of it. Further, the lower court ignores the fact that the jury had already been presented with extensive evidence of Mr. Stephens' criminal behavior during the penalty phase, and that

the State used this to tear apart the paltry mitigating evidence:

> Let=s talk about the evidence presented today. You heard testimony about how loving and wonderful a child Jason Stephens was up until the time his father died. But you will also recall the evidence presented to you that in 1992 he was convicted of a crime you heard about from Mr. Taylor and from the witness this morning about the sawed-off shotgun. That was what he was doing in 1992.
>
> **You heard about a work history, but frankly, it wasn=t much of a work history for a 23 year old.**
>
> **You heard testimony from these people who said how this defendant liked children, how he loved children, but you also heard that he robbed Kahari Graham, that he smashed Little Rob=s mother in the face while Little Rob watched, and that he suffocated or strangled Little Rob**, or, if you believe the doctor from Atlanta, left him in the car to die.
>
> We proved an intentional, aggravated, terrorizing murder. **Each witness was asked, Well, he never did drugs or alcohol. If you remember his testimony, that was the purpose of going to that location. That was his testimony. That was his defense.** A**I didn=t go to kill anybody or rob anybody, I went to buy drugs.**@

(Vol. IV, R. 747-8) (emphasis added). Here, had counsel performed his duties in an effective manner, the jury would been given an explanation as to why Mr. Stephens acted the way he did. Due to counsel=s failure, Mr. Stephens was denied the individualized sentencing to which he was entitled. Strickland.

Finally, the lower court takes issue with the fact that:

> Dr. Toomer=s conclusions seem to ignore entirely the testimony of Stephens= witnesses at the penalty phase

> hearing. He seems to suggest that their description of his childhood was false. Absent evidence that Eler or Nichols knew it to be false, they certainly were not deficient for presenting it. This also raises questions about the legitimacy of Dr. Toomer=s opinions.

(PCR. 274-76). In making this assessment, the lower court seemingly faults Dr. Toomer for thoroughly reviewing Mr. Stephens= background. His information was derived from records that trial counsel never obtained and from witnesses who trial counsel never spoke to. Contrary to the lower court=s conclusion, Dr. Toomer should not be faulted for his thorough review, and trial counsel should not be shielded because he failed to conduct an adequate investigation and instead relied on a Agood guy@ defense.

The prejudice here is clear. Rather than offering such powerful testimony at Mr. Stephens= penalty phase, trial counsel was limited to offering that Mr. Stephens Awas good with children, had been raised in a good Catholic family, had an ability to work with his hands to build things, had been deeply affected by his father=s death, was remorseful for Sparrow III=s death, and was religious.@ Stephens, 787 So. 2d at 752.

Faced with the inadequate amount of mitigation presented by trial counsel, the jury recommended death by a vote of 9-3. In its sentencing order, the trial court dismissed virtually all of the Amitigation@ trial counsel presented, giving it

either little weight, no weight, or finding that it was not reasonably established by the evidence (Vol. V, R. 885-91).[48]

Had counsel properly prepared and investigated, he would have discovered and utilized the wealth of mitigation available in Mr. Stephens' background -- mitigating evidence without which no individualized consideration could occur. Had Mr. Stephens' jury been presented with the poignant, powerful mitigation now of record and available at trial, there is a reasonable probability that the outcome would have been different.

C. Failure to Challenge or Neutralize Prior Violent Felony Conviction

1. Failure to Challenge

During the penalty phase of Mr. Stephens' trial, the State introduced a 1992 burglary conviction as a prior violent felony aggravator (Vol. IV, R. 587). In his 3.850 motion, Mr. Stephens argued that defense counsel was ineffective for failing to challenge the aggravator, as it did not constitute

[48]The only mitigating factors which the trial court gave some or significant weight to were: the defendant did not intend to kill the child (Vol. V, R. 889); and the co-defendant received a life sentence (Vol. V, R. 890).

a prior violent felony within the meaning of Fla. Stat. ' 921.141(5)(b).

In Mann v. State, 420 So. 2d 578, 580 (Fla. 1982), this Court found that a Aprior conviction of a felony involving violence must be limited to one in which the judgment of conviction discloses that it involved violence.@ Subsequently, the Court elaborated that a burglary could be used as an aggravating circumstance when the State properly proved that the conviction was predicated on an incident of violence, through a combination of the conviction itself, the victim=s testimony and the original indictment in the case, alleging the requisite violence. Mann v. State, 453 So.2d 784, 785 (Fla. 1984).

Here, Mr. Stephens was originally charged, by Information, with burglary, aggravated assault and carrying a concealed firearm. Mr. Stephens eventually pled guilty to the lesser included offense of burglary to a dwelling, and to carrying a concealed firearm. The crime involving violence, the aggravated assault charge against Mr. Stephens, was dropped by the State. Mr. Stephens= remaining judgment of conviction of burglary to a dwelling does not fit this Court=s interpretation of a prior violent felony, and as such, it was improperly used as an aggravating circumstance. Consequently, the use of this prior violent felony conviction is invalid and its use during Mr. Stephens=s capital proceedings violated his

constitutional rights. Johnson v. Mississippi, 486 U.S. 578 (1999).[49]

In denying relief on this issue, the lower court determined that trial counsel did in fact raise an objection:

> In ground four, Stephens claims that counsel was ineffective for not properly challenging Stephens= prior burglary conviction as a prior violent felony aggravator and not properly attacking the underlying facts of the conviction with evidence readily available.
>
> Eler did challenge the use of the conviction as an aggravator. Although the objection was made with little argument, he cannot be deemed ineffective for failing to object, when, in fact, he did object.

(PC-R. 261). The lower court=s factual finding is erroneous. Initially, while trial counsel made some sort of minimal attempt to argue against the admission of the prior violent

[49]Additionally, this case differs from precedent in that the State never introduced sufficient evidence regarding the violence of the incident in question. The State introduced the burglary conviction and victim testimony, but no evidence was entered showing the original charges against Mr. Stephens. The original information or indictment, charging a violent act, was necessary to establish the aggravating circumstance. Without this document, this Court Acannot determine whether it alleged, and the jury convicted him of, a breaking with intent to commit a crime of violence.@ Mann, 453 So.2d at 786.

felony, ultimately, however, counsel stipulated to the admission of it as an aggravating circumstance:

> MR. ELER: Judge, I just want to object on the record. I don't think we put this on the record before, but I want to object to that coming in. I understand that one of the aggravators they are asking for is conviction of a felony involving the use or threat of use of force, and intend to present evidence to that effect. **I think they are legally entitled to it, however, I would like to object for the record as I don't think a burglary with an assault in this particular case should be admitted as an aggravator**. I just wanted to put that on the record.
>
> MR. TAYLOR: **By earlier agreement you agreed if the Court finds that it is relevant that this is a judgment of sentences of your client evidencing his convictions of these two crimes.**
>
> MR. ELER: **I did, that's correct.**
>
> THE COURT: Well, that's fine, but do we have a stipulation that in this burglary under this conviction there was an assault with a firearm on another human being?
>
> MR. ELER: Yes, sir, I have deposed the victim who identified Mr. Stephens.
>
> MR. TAYLOR: Yes, sir, we're prepared to prove that.

(Vol. IV, R. 588) (emphasis added). Contrary to the lower court's finding, counsel erroneously conceded that the burglary conviction did constitute a prior violent felony. (Vol. IV, R. 754). Counsel's inability to effectively litigate this issue was prejudicially deficient performance under Strickland v. Washington, 466 U.S. 668 (1984).

2. Failure to Rebut or Neutralize

In addition to defense counsel=s failure to properly challenge the burglary conviction as a prior violent felony aggravator, counsel also failed to rebut or neutralize the conviction with readily available evidence.

During her penalty phase testimony, Latonya Jackson, the victim of the burglary conviction, testified that Mr. Stephens, Sammie Washington, and a man named Jeremy entered her home; Mr. Washington, holding a handgun, and Mr. Stephens brandishing a sawed-off shotgun. (Vol. IV, R. 594). Furthermore, once they went outside, Mr. Stephens threw her up against the car, held a gun to her head and said AI want to kill this B.@ (Vol. IV, R. 596).

Defense counsel could have effectively rebutted or neutralized the State=s only offer of proof to this incident by presenting testimony contrary to that of Ms. Jackson. During the postconviction evidentiary hearing, Jeremy Tinsley described the altercation that Mr. Tinsley and Mr. Stephens became involved in at the home of Latonya Jackson(T. 9-10). The father of Jackson=s child, Sammie Washington, went over to Jackson=s house to see his child (T. 10). When he got there, Jackson was in bed with another man, Donald Washington (T. 10). At that point, a fight broke out (T. 10-11). Mr. Stephens, who was present along with Tinsley, took Jackson outside (T. 11). Donald Washington took off running and Tinsley and Sammie Washington went outside, at which point

Washington started arguing with Jackson (T. 11). According to Tinsley, Mr. Stephens never pulled a gun on Jackson, as he didn't have any reason to (T. 11). Rather, Mr. Stephens pulled Jackson out of the fight and was never violent with her (T. 11-12). He never said anything about wanting to kill her (T. 12).

In its order finding that trial counsel was not deficient, the lower court stated that:

> In light of Stephens' pleas to burglary and carrying a concealed firearm, the time of the offense (1:30 a.m.), and Mr. Tinsley's criminal history and personal involvement in the offense, this Court doubts that Tinsley's testimony would have assisted Stephens in mitigating his role in the offense or make Jackson appear to be a less sympathetic victim. Accordingly, the Court does not find Eler or Nichols deficient for failing to present this evidence.

(PC-R. 261-62). Here, the lower court's order as to counsel's deficient performance is erroneous, as counsel never investigated and was not aware of the aforementioned facts. Thus, counsel's inaction could not possibly be based on a reasonable strategic decision. In any event, even if he had known, Eler testified that he would never introduce evidence to lessen the weight of a prior violent felony aggravator:

> Q Now in regards to a prior violent felony, would you agree that sometimes it's a viable strategy to introduce evidence even though you know that something may qualify as a prior violent felony, that you may be able to introduce evidence to possibly lessen the weight the jury and the Court give that particular crime as an aggravator?

A Yeah. That's one course of thought, Mr. Doss. I will be honest with you though a lot of times that can backfire, and I know what you are saying, try to put evidence forward, positive evidence on that, it's not really egregious as it perhaps sounds by the charge, but I will tell you the last spot I want to be in is cross examining a victim of a crime, of a prior violent crime and have the jury for whatever reason once again alienate me or my client or just have it backfire. **I wouldn't really follow that course at all.**

Q But as far as if you had witnesses independent of the alleged victim that would be a different scenario, wouldn't you agree?

A Maybe.

Q And wouldn't you agree with me that you would need to know what each one of those witnesses could possibly testify to before you could make the decision as to whether or not that might be a viable attack on that particular aggravator?

A Well, it's still coming in. It's still going to come in as an aggravator, but I guess what you are saying is do you want to litigate the validity of whether it's a violent aggravator, get in through the back door what you don't get in through the front door, and certainly you can do that. I don't necessarily - - **I probably wouldn't do that but that's certainly something you could do.**

Q I guess my question would be would you never do that or would you want the facts surrounding it before you made that call?

A **I would probably never do that. I probably would never do that because it's coming in any way. I want the jury to hear about it, forget about it and move on and let's talk about good things. I probably never would do that.**

(T. 318-20)(emphasis added).

Eler's action, or in this situation, inaction, constitutes ineffective assistance of counsel. A[I]nvestigations into

mitigating evidence ›should comprise efforts to discover all reasonably available mitigating evidence and **evidence to rebut any aggravating evidence** that may be introduced by the prosecutor.=@ Wiggins, 123 S.Ct. at 2527. (emphasis on original)(citations omitted). In a sentencing proceeding, A[t]he basic concerns of counsel during a capital sentencing proceeding are to **neutralize the aggravating factors advanced by the state**, and to present mitigating evidence.@ Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994), cert. denied, 115 S. Ct. 499 (1994)(emphasis added). Recently, in Rompilla v. Beard, 125 S.Ct. 2456 (June 20, 2005), the United States Supreme Court found trial counsel ineffective for failing to review the circumstances of a prior violent felony conviction which the State was going to utilize as an aggravating circumstance. As the Court explained:

> Nor is there any merit to the United States=s contention that further enquiry into the prior conviction file would have been fruitless because the sole reason the transcript was being introduced was to establish the aggravator that Rompilla had committed prior violent felonies. Brief for United States as *Amicus Curiae* 30. The Government maintains that because the transcript would incontrovertibly establish the fact that Rompilla had committed a violent felony, the defense could not have expected to rebut that aggravator through further investigation of the file. **That analysis ignores the fact that the sentencing jury was required to weigh aggravating factors against mitigating factors. We may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution=s characterization of the conviction would suggest.**

Rompilla, 125 S.Ct. at 2465, n5 (emphasis added).

Mr. Stephens was prejudiced as a result of counsel=s ignorance of the law as well as his failure to investigate. Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings. Strickland v. Washington, 466 U.S. 668 (1984). In this case, the prejudice is clear. With effective counsel, the burglary conviction would not have been introduced, or at the very least, would have suffered a substantial factual challenge, one that would likely have eliminated or minimized the weight of this aggravator.

D. Failure to Object

Prior to the penalty phase, the trial court reviewed a portion of the prosecutor=s proposed closing statement. (Vol. IV, R. 734). The trial court stated,

> The record should reflect that Mr. Shorstein has presented opposing counsel and the Court with a portion of his intended closing argument. **I find that it=s designed to appeal to the sympathy of the jury, and he can identify that this was a unique child, loved child, but that=s about it. And you should let him know if he=s going to go much further than that, he will probably receive an objection and it will be sustained.**

(Vol. IV, R. 734)(emphasis added). Despite the trial court=s warning, the prosecutor did indeed go much further. And in

spite of the trial court=s advance warning, counsel failed to object. During the State=s penalty phase closing argument, the prosecutor made several improper comments, specifically designed to appeal to the sympathy of the jury.

The prosecutor first commented:

> You will hear their explanations for Jason Stephens= murderous conduct. You heard some of that this morning. That he lost his father. But you also heard from Little Rob=s mother and his grandparents. And I want to talk to you about Little Rob, and I want you to remember what his mother and grandparents said. **Just as defense counsel today presented evidence of this defendant=s family, the State wants you to think about the loss of Little Rob, what this senseless murder has done to his mother and to little Kahari, who you met during the guilt phase of this trial.**
>
> **What happened to Consuelo, Kahari and others must be considered in determining Jason Stephens= personal responsibility and guilt, his blameworthiness.** The jury may consider Little Rob=s uniqueness as an individual human being, what a great loss to Little Rob=s friends, his family and the entire community. **Just as this murderer should be considered a human being, so should Little Rob.**

(Vol. IV, R. 744)(emphasis added). The prosecutor continued his impermissible argument:

> Ladies and gentlemen, murder is the ultimate act of depersonalization. **It transforms a living person, in this case a little boy living a happy life with his mother and brother, his little boy hopes and little boy dreams, and it transforms that person into a corpse.**

(Vol IV, R. 748)(emphasis added). The prosecutor capped off his inflammatory argument by showing the jury numerous photos of the victim, both before and after his death:

> This is what Little Rob saw happen to his mother shortly before he died (publishing photograph).
>
> This is the Little Rob who existed that morning before Jason Stephens went in and terrorized these people and murdered Little Rob (publishing photograph).
>
> **And this is the Little Rob that Jason Stephens left (publishing photograph).**

(Vol. IV, R. 748)(emphasis added). Finally, the prosecutor summed up his argument by stating, ADon=t base your decision on sympathy,@ after having made numerous remarks all but asking the jury to consider just that. (Vol. IV, R. 749).

During the postconviction evidentiary hearing, trial counsel Eler testified that he didn=t find the prosecutor=s arguments objectionable (T. 220). While he did feel that the word Acorpse@ was a little inflammatory, he also felt that there were a lot of other words the prosecutor could have used (T. 221).[50]

Contrary to Eler=s testimony, in its order denying relief, the lower court acknowledged that several of the comments were improper and objectionable; however, the court ultimately found that they did not deny Mr. Stephens a fair trial:

> Since the State is permitted to introduce victim impact evidence during the penalty phase, some comment about this evidence by the prosecution must

[50]With regard to the prosecutor=s use of the photos of Alittle Rob@, Eler did not find this objectionable (T. 222).

> be permissible. However, since victim impact evidence is not a matter relevant to the jury=s ultimate recommendation of a life or death sentence, a prosecutor walks a fine line when he argues victim impact evidence to the jury. This argument, when considered in its entire context, did not approach that line. Had an objection been made, the Court would have likely instructed the prosecutor to move on to a different subject. The Court does not find that these comments denied Stephens a fair trial or affected the outcome of the jury=s decision.
>
> * * * *
>
> It is certainly permissible for the State to exhibit photographs of the victim admitted into evidence to argue a point or factual issue to be determined by the jury.
>
> * * * *
>
> However, when such photographs of young victims are displayed to the jury without arguing the photograph=s evidentiary relevance to a disputed issue, one must conclude that the purpose is designed to appeal to sympathy and is improper. However, this was not that egregious, nor does the Court conclude that it affected the outcome of the jury=s recommendation. This is especially true considering the jury was at liberty to view without limitation this evidence in the jury room.

(PC-R. 260-61).

In making this assessment, the lower court overlooked the fact that the cumulative effect of the prosecutor=s comments was to Aimproperly appeal to the jury=s passions and prejudices.@ See Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). This Court has held that when improper conduct by a prosecutor Apermeates@ a case, as it has here, relief is proper. Nowitzke v. State, 572 So.2d 1346 (Fla.

1990). Although a decision to impose the death penalty must Abe, and appear to be, based on reason rather than caprice or emotion,@ Gardner v. Florida, 430 U.S. 349, 358 (1977), here, because of the prosecutor=s inflammatory argument, death was imposed based on emotion, passion, and prejudice. See Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991). Trial counsel=s unreasonable failure to object to the improper commentary of the prosecution prejudiced Mr. Stephens.

E. Concession of Aggravating Factors Not Found By the Trial Court

In his closing argument, counsel conceded aggravating factors to the jury which the trial did not even find in its sentencing order. First, counsel conceded that the pecuniary gain aggravating circumstance had been proven, and that it should be given Aadequate weight.@ (Vol IV, R. 756-57). Second, counsel conceded the heinous, atrocious and cruel aggravator: AYou should give **very little weight** to this particular aggravator because there was no proof of enjoyment of punishment or of some kind of pleasure in making Little Robert suffer the way he did.@ (Vol. IV, R. 759) (emphasis added).

In its sentencing order, the trial court did not find either of these aggravating circumstances (Vol. V, R. 883). Here, counsel=s concession of these aggravators to the jury,

ones which were not found by the trial court, prejudiced the outcome of the penalty phase.

F. Concession of Aggravating Circumstances through Guilty Pleas

Trial counsel=s Adefense@ involved pleading Mr. Stephens guilty to many of the charged offenses. Counsel pled Mr. Stephens guilty to Counts II (kidnapping), IV (robbery), VI (robbery), VIII (robbery), IX (attempted robbery), X (attempted robbery), XI (burglary), and XII (aggravated battery) of the indictment (Vol. VI, R. 4).

Counsel for Mr. Cummings recognized the deficiency of this action: ANow today he comes in and gives the State basically eight aggravating circumstances that they can argue, because they are crimes of violence that they can argue to give him the death penalty.@ (Vol. VI, R. 15). Further, Mr. Stephens= penalty phase counsel, Eler, also disagreed with this decision and he thought that there was the possibility of arguing culpable negligence as opposed to first degree murder (T. 249-50). Eler discussed his concerns with Nichols after he learned what Nichols was planning to do (T. 207). Eler was surprised by the decision:

> I can tell you that I - - when he told me that that=s what he was inclined to do and Mr. Stephens had agreed I suggested to him that disagreed with that. I am being quite candid with the Court and with you. **I wouldn=t have done that.**

(T. 209)(emphasis added).

In denying relief, the lower court determined that AIt is apparent that Nichols was concerned that if Stephens vigorously contested every charge of the Indictment in light of the overwhelming evidence the State was prepared to present, the jury might disregard his arguments to find Stephens not guilty of murder in the first degree, or spare his life if he was found guilty of this charge.@ (PC-R. 265). The lower court also stated that AThe wisdom of this strategy is supported by the fact that Stephens was found not guilty on two counts (robbery) of the Indictment.@ (PC-R. 265).

Contrary to the lower court=s determination, there is no evidence that Nichols= decision was based on a reasonable strategy. Rather, Nichols, not having attended many depositions or having paid much attention at all to the case, asked Mr. Stephens in the sallyport on the day of jury selection or the actual beginning of the trial which charges he committed and felt the State could prove (T. 206-07). Nichols then plead Mr. Stephens guilty to these charges. Here, Nichols acted in violation of his duty to investigate and prepare and to neutralize the aggravating circumstances and present mitigation. Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994); Rompilla v. Beard, 125 S.Ct. 2456 (2005); Wiggins, 123 S.Ct. at 2527;

Moreover, the fact that Mr. Stephens was found not guilty on two charges does not support Nichols= Astrategy.@ Co-defendant Cummings vigorously contested every charge and was found not guilty on the same counts (Vol. XIII, R. 1953). Further, the jury did find Mr. Stephens guilty of first degree murder and still returned a death recommendation.[51] Mr. Stephens was prejudiced by counsel=s deficient performance. Strickland.

G. Cumulative Analysis

Here, the lower court evaluated each claim of ineffectiveness separately, item-by-item. The United States Supreme Court has explained that the Aprejudice@ component of a Brady standard, the same standard as the one used for ineffective assistance of counsel claims, requires evaluation of the evidence that the jury did not hear Acollectively, not item-by-item.@ Kyles v. Whitley, 514 U.S. 419, 436 (1995). No cumulative analysis of the prejudice was undertaken. When the prejudice to Mr. Stephens is evaluated cumulatively, as opposed to item-by-item, confidence is undermined in the outcome of the trial.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING MR. STEPHENS= CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE, IN VIOLATION OF THE

[51]Interestingly, the jury obviously did not believe Mr. Stephens= testimony that Horace Cummings had nothing to do with the crime (Vol. XIII, R. 1530-32), as Mr. Cummings was also convicted of first degree murder (Vol. XIII, R. 1953).

SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During the course of Mr. Stephens= case, trial counsel entirely failed to subject the prosecution=s case to a meaningful adversarial testing. Trial counsel further demonstrated a complete disregard for their client by their absence, either constructively or actually, from critical stages of the proceedings.

A. Failure to Attend Depositions

In his postconviction motion, Mr. Stephens pled that counsel abandoned him by failing to attend as many as ten critical depositions in his case. During the evidentiary hearing, Alan Chipperfield and Bill White, co-counsel for co-defendant Cummings, testified that they became concerned about the lack of attendance at depositions by Stephens= counsel (T. 128-29, 138). White became concerned to the point that while in chambers with Chipperfield one morning, White suggested that the court might want to speak to Nichols about his lack of attendance and attentiveness to the depositions (T. 140).

During his testimony, trial counsel Eler stated that Nichols was primarily responsible for attending depositions (T. 240). Eler acknowledged that it didn=t appear that either he or Nichols attended the depositions of Dr. Floro, Derrick Dixon, Christopher Robinson, Dave Bisplinghoff, C.L. Terry,

Thurmond Davis, Richard Stachnick or Roderick Gardner (T. 281-83, 285, 286-87, 288).[52]

B. Failure to Argue Motions

Trial counsel=s failure to subject the prosecution=s case to a meaningful adversarial testing was equally evident in their failure to argue motions. For example, with regard to a motion for judgment of acquittal, trial counsel stated, AJudge, without argument, we move for judgment of acquittal on all counts.@ (Vol. XIII, R. 1486). As this Court noted on direct appeal, AThis claim was not preserved for appeal because Stephens= counsel made a bare bones motion for judgment of acquittal, without any specific argument.@ Stephens v. State, 787 So. 2d 747, 753 (Fla. 2000).

Additionally, with regard to Mr. Stephens= Motion for New Trial, trial counsel presented the motion without further argument (Vol. V, R. 808). Again, this Court stated, AThis issue has not been properly preserved for appeal because Stephens= counsel made a bare bones motion for a new trial.

[52]According to Eler, Nichols Awould not normally file for discovery, perhaps not even take depositions in a case because he was of the school that that was sort of like a trial by ambush kind of tactic.@ (T. 198).

Such motions are not sufficient to preserve specific argument for appellate review.@ Stephens, 787 So. 2d at 753.

Another example involved counsel=s failure to raise and argue a motion for a change of venue. Instead, counsel attempted to rely on Cummings= attorney to handle this task. In the middle of jury selection, Cummings= attorney, Chipperfield, raised a motion for a change of venue on behalf of his client (Vol. VIII, R. 569). Chipperfield cited as grounds the fact that there had been extensive pretrial publicity (Vol. VIII, R. 569). Mr. Chipperfield also referred to some of the jurors= comments regarding publicity during the past few days (Vol. VIII, R. 572-74). At the end of Chipperfield=s argument, Mr Stephens= attorney, Refik Eler, commented briefly, AYour Honor, on behalf of Mr. Stephens, we would adopt that motion.@ (Vol VIII, R. 575).

In denying the motion, the Court stated:

> In this case the defense never moved for a change of venue until the third day of juror questioning, **and that was as to Mr. Cummings. And with respect to Mr. Cummings, I think it=s clear that the evidence or pretrial publicity as to Mr. Cummings was not nearly the amount of pretrial publicity as it=s related to Mr. Stephens.**

(Vol. X, R. 967) (emphasis added).

Unfortunately, Mr. Stephens= counsel never argued for a change of venue on behalf of his client.[53] Here, a change of

[53]On appeal, the State noted in its response to defense=s motion to supplement the record:

venue should have been ordered in Mr. Stephens= case A . . . because pretrial publicity precluded selection of a fair and impartial jury.@ Gaskin v. State, 591 So. 2d 917, 919 (Fla. 1991). There was extensive pretrial publicity in Mr. Stephens= case. At least twenty-six people were excused from Mr. Stephens= jury by the time the motion for change of venue was heard. (See Direct Appeal Initial Brief of Appellant, p. 53). It was Mr. Stephens who received most of the negative pretrial publicity, and it was Mr. Stephens who was commonly being referred to as APsycho.@ Yet, counsel failed to advocate on behalf of their client.[54]

C. Concession of Guilt

In addition to pleading their client guilty to many of the charged offenses based on a conversation in the sallyport, counsel also pled Mr. Stephens= guilty to first degree murder

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> As for the motion to supplement the appellate record with a copy of Stephens= co-defendant=s motion for change of venue, the state does not necessarily agree that Stephens= trial counsel preserved this issue by properly adopting the co-defendant=s motion **or that the trial court ruled on a motion for change of venue as to Stephens**.

(Supp. Vol., R. 2)(emphasis added).

[54]During his testimony, Bill White also testified as to a conversation he had with Nichols in either this case or another one about Nichols adopting motions that White or Chipperfield filed (T. 142). White suggested to Nichols that there was a standard that would require him to do more than just come on the record and say he was adopting motions (T. 142-43).

without his permission by pleading him guilty to the underlying felony.[55] As Mr. Chipperfield, counsel for Mr. Cummings, pointed out:

> Judge, I guess there is just one more thing that I would point out, and I don=t want to beat a dead horse and argue too much on the severance, but I think there is one more thing. And that is that, **although Mr. Stephens has not pled guilty to the murder, he has pled guilty to the felony which underlies the murder. And Count I he=s charged in the alternative, either premeditated murder or felony murder during the kidnapping.**

(Vol. VI, R. 33) (emphasis added).

The State, at every opportunity, focused on counsel=s blunder: AYou will hear evidence possibly that he died of hyperthermia. Hyperthermia, if it were true would be the medical cause of death, they would still be murderers.@ (Vol. X, R. 996).

* * * *

> I must have missed something on Dr. Floro, I don=t mean to be sarcastic, but I want to ask a question right now. **I don=t have the slightest idea, can somebody tell me what difference it makes in this case whether the child died of hyperthermia or suffocation? It is felony murder equally.** The only difference is if he suffocated him, he=s guilty of both premeditated murder and felony murder, and he=s guilty of felony murder. I don=t have the slightest idea and cannot even envision a legal theory that, if during the course of burglary, robbery,

[55]Mr. Stephens was charged with one count of first degree murder (Vol. I, R. 8), which includes either premeditation or felony murder.

> kidnapping, you take a child, leave a child in a car, and that child dies of hyperthermia, that it=s not first degree murder. I can=t even begin to suggest a theory of anything other than first degree murder. Maybe it=s me, maybe I=m stupid.

(Vol. XIV, R. 1791) (emphasis added).

* * * *

> Now, lets go to Dr. Dunton. And, again, for this I apologize, **I do not understand the difference between hyperthermia and suffocation as it relates to felony murder.**

(Vol. XV, R. 1809) (emphasis added).

* * * *

> You know, it=s like saying, and I think it was said in the opening statement, AHe didn=t die as a result of these murders, he died as a result of hyperthermia.@ That is so absurd I can=t even think of an analogy. You throw somebody off of a 50 story building and you say he didn=t die because I threw him off, he died because of the contact with the ground. **And, again, it=s applied, because in felony murder if you commit certain crimes, and even if the death accidentally occurs, as we explained in the felony murder, it=s felony murder.** And the reason is, you don=t take a three year old during the course of those felonies, and if you do and he dies, under these circumstances, it=s felony murder.

(Vol. XV, R. 1810) (emphasis added).

Trial counsel entirely failed to subject the prosecution=s case to meaningful adversarial testing. By conceding guilt as to the underlying crime, counsel=s actions guaranteed a first degree murder conviction. Counsel did not discuss this strategy with Mr. Stephens and the presumption of innocence was negated by defense counsel before the trial ever began.[56]

[56]Eler agreed that Mr. Stephens never indicated he wanted to plead guilty to first degree murder (T. 248). Mr. Stephens= position from day one was that he didn=t intend to kill anyone, and certainly that was consistent with his desire not to plead

D. Guilty Plea on Armed Robbery Charge

Trial counsel=s level of representation was so inadequate that counsel pled their client guilty to a charge of armed robbery of Derrick Dixon, which even the State later conceded should have resulted in a directed verdict:

> THE COURT: Well, I=ll take that under advisement. Do you have a response as to the motion as to Mr. Dixon, that nothing was taken from him?
>
> MR. SHORSTEIN: Your Honor, I think that the Court is right, then, **there should be a directed verdict from robbery.**
>
> THE COURT: That=s not my - - I don=t recollect his testimony, that=s what Mr. Chipperfield - -
>
> MR. SHORSTEIN: I think he is right, there should be a directed verdict from robbery to attempted robbery on that witness.
>
> MR. NICHOLS: Your Honor, on that issue, if I might? I=m not sure what to do about this evidence, I=ve never seen anything like this before. Mr. Stephens entered pleas of guilty in Count VI, and that=s on robbery on Dixon. And I believe you asked for a factual basis for it, and based on Dixon=s tesimony there is not a factual basis for it, so I would move to withdraw the plea, and ask that you direct a judgment of acquittal. But I=ve never been in this case before, and I don=t have any law, and I don=t know where we stand.
>
> MR. SHORSTEIN: Well, there is possibility, Your Honor, that the victim himself is in error, and Stephens know better than the victim, but **we really have no argument on that point and probably have no objection to reduction on that count.**
>
> THE COURT: Well, I don=t think that can be taken care of at this time.

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guilty to that count (T. 249).

(Vol. XIII, R. 1492-94) (emphasis added).

Unfortunately, Mr. Stephens= counsel never bothered Ato take care of@ the issue. As this Court noted in its= opinion on direct appeal,

> Additionally, during the jury instruction conference, the trial court noted the fact that a judgment of acquittal had been granted the codefendant on the armed robbery charge and **indicated that Stephens= counsel would be filing a motion to withdraw his plea on that particular count. No further motion was ever made by the defense. Since no further motion was made, the trial court did not err in failing to rule on the Anonexistent@ motion to withdraw the plea.** Contrary to Stephens= assertion, the trial court in this instance did not deny a motion to withdraw plea; he simply told the defendant to file his motion at a more appropriate time.

Stephens, 787 So. 2d at 753 (emphasis added).

E. Failure to Object

While showing the jury photos of the victim during the opening statements, the prosecutor, without objection, repeatedly stated that the child had been Abrutally and savagely murdered,@ adding that the victim=s fate was to Aslowly fry to death.@ (Vol. X, R. 991, 996). Later, during the closing statements, the prosecutor first opined that Mr. Stephens testimony came from a Awarped concern@ for his co-defendant, then went on to query the jury, Awhere was the concern that he showed for a 3 yr old child? There=s the

concern,@ **while again flashing a photo of the victim to the jurors** (Vol. XV, R. 1820).

While photos are indeed admissible when relevancy is shown, defense counsel should have objected to the prosecutor=s use of the photos during arguments to the jury. This Court has stated that the relevancy test is by no means Acarte-blanche@ for photographic evidence, as the photos must be Aprobative of an issue that is in dispute.@ Pope v. State, 679 So.2d 710, 713 (Fla. 1996).

Additional comments by the prosecutor during the guilt phase also crossed the line of acceptable advocacy. The prosecutor sought to bolster the credibility of the State=s case by remarking to the jury that AMy job is to represent the State of Florida to seek justice@ (Vol XIV, R. 1767), and by stating that AIf the State hasn=t proven the defendant=s guilt beyond a reasonable doubt, then I=m not sure it can be done in any case.@ (Vol. XIV, R. 1768). The prosecutor then contrasted this with his conclusions about Mr. Stephens= Atheatrical testimony, melodramatic, lying,@ further charging that Mr. Stephens= had Abragged and lied so much and so often about so many crimes.@ (Vol. XV, R. 1819). While this Court has permitted counsel to make conclusions regarding the veracity of witnesses, the prosecutor=s remarks go far beyond simply characterizing the defendant as a Aliar,@ and is therefore an improper form of argument. Craig v. State, 510

So.2d 857 (Fla. 1987). This argument goes on to imply the existence of other crimes and instances of untruth, when there is no basis in the record for such a claim. The comments about Mr. Stephens, paired with the prosecutor=s comments about seeking justice through his conviction, extended an open invitation to the jury to convict Mr. Stephens for a reason other than his guilt. Ruiz v. State, 743 So.2d 1, 6 (Fla. 1999). Yet, in each of the aforementioned instances, trial counsel failed to object.

F. Delegation of Responsibilities

Either through neglect or willfulness, counsel essentially delegated the role of attorney for Mr. Stephens to counsel for the co-defendant, Mr. Cummings. Counsel for Cummings conducted the vast majority of arguments, filed virtually all of the pretrial motions (which Mr. Stephens= attorneys copied), conducted the vast majority of cross-examinations and other work involved in the defense of Mr. Stephens.[57] Additionally, as evidenced by the record in this case, counsel for Mr. Cummings covered depositions, hearings, and called the witness most critical to Mr. Stephens= defense, Dr. Dunton. In

[57]Trial counsel failed to cross examine the following State witnesses: Consuelo Brown, Robert Sparrow, Derrick Dixon, Roderic Gardner, Tammy Cobb, David Cobb, Alexis McClain, Officer Chase, Officer Carol Markham, and Kahari Graham (Vol. XI, R. 1092, 1094, 1192, 1213-14; Vol. XII, R. 1267, 1272, 1290, 1318, 1328, 1345, 1366; Vol. XIII, R. 1476).

addition to counsel=s absence and their failure to subject the prosecution=s case to meaningful adversarial testing, these actions created an impermissible conflict of interest (See Argument III).

G. Lower Court=s Order

In several of the aforementioned circumstances, the lower court in fact found counsel=s performance to be deficient. With regard to counsel=s failure to attend depositions, the lower court stated:

> **The absence of trial counsel at discovery depositions is very disturbing.** Nichols assumed primary responsibility for the guilt phase and Eler assumed primary responsibility for the penalty phase. Both had the responsibility to make sure that one or the other attended these depositions. Although transcripts were available of these depositions, the failure to attend is presumptively deficient. The decision not to participate in the discovery process in order to avoid the State being educated about the case, which Eler suggested May have been Nichols= strategy, does not excuse the failure to attend a deposition. This Court notes that in Judge Harris=s concurring opinion to 5500 North Corp. V. Willis, 729 So. 2d 508, 516 (Fla. 5th DCA 1999), he opined that A[c]ertainly there is no requirement that a lawyer attend all depositions. The lawyer should be free to assess the deposition=s importance to his case and weigh that against the time and cost of attending.@ Judge Harris=s discussion on a lawyer=s ability to weigh the time and cost of attending depositions was in the context of civil litigation, whereas this is a criminal case in which the death penalty was sought by the state. **As such, this Court believes that counsel should not be afforded the luxury of weighing the time and cost of attending depositions and should attend all depositions.** However, because no prejudice is demonstrated, the Motion on this ground must be denied.

(PC-R. 255-56)(emphasis added).

The lower court also found counsel deficient for pleading guilty to the underlying felony:

> **However, the Court does find that Nichols= recommendation to plead guilty to kidnaping was not a reasonable recommendation.** It is a questionable strategy to enter a plea of guilty to the underlying felony [kidnaping] when charged with felony murder. By pleading guilty to the underlying felony, the State, under the law, was assured of a conviction absent a jury nullification. Since the only purpose advanced for the strategy was to maintain credibility with the jury, this purpose was served by pleading guilty to seven (7) other counts. By pleading guilty to kidnaping, counsel was left with an unpersuasive legal argument that the dearth occurred after the crime had been completed, despite the child never being returned to a place of safety. See Stephens v. State, at p. 754.

Additionally, with regard to the guilty plea for the robbery of Derrick Dixon, the lower court stated:

> Stephens pleaded guilty to the robbery of Derrick Dickson and subsequently at trial Dickson testified that nothing had been taken from him by Stephens. Nevertheless, Stephens testified at trial that he did take money from Dickson. At trial, Nichols raised this issue and was advised to file a Motion to Withdraw Stephens= plea of guilty to this count. **Counsel failed to do it and this was ineffective assistance of counsel.**

(PC-R. 257-58).

Despite these findings, the lower court ultimately concluded that there was a lack of prejudice on these and the other guilt phase issues raised by Mr. Stephens (See PC-R. 255-56); (see also PC-R. 266)(AAlthough the Court finds the recommendation to plead guilty to the underlying felony of kidnaping was unwise, the Court finds no prejudice because the

result, again, would not have been different had Stephens gone to trial on the kidnaping count. Stephens= guilt as to kidnaping and felony murder was overwhelming.@); (PC-R. 257) (A[N]o prejudice can be established on the claim that Cummings= counsel took the lead in filing most of the pretrial motions, which were adopted by Stephens. Most, if not all, of these motions were denied.@); (PC-R. 256-57)(No prejudice in trial counsel=s failure to call Dr. Dunton as the direct examination of Dr. Dunton by Cummings= lawyer benefitted both Cummings and Stephens); (PC-R. 257)(AThe Court finds that a more forceful argument for a change of venue, judgment of acquittal, or a new trial would not have produced a different outcome.@); (PC-R. 258)(No prejudice as to the Derrick Dixon issue, Asince robbery or attempted robbery are both violent felony aggravators, any prejudice to Stephens does not exist beyond this count.@); (PC-R. 258)(AAlthough the Court finds that some of the prosecutor=s comments were objectionable, the Court does not find that they were so prejudicial that the Defendant was denied a fair trial.@).

H. Legal Analysis

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court explained that under the Sixth Amendment:

> . . . a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

466 U.S. 668, 685 (1984). In order to insure that a constitutionally adequate adversarial testing, and hence a fair trial, occur, defense counsel must provide the accused with effective assistance. Accordingly, defense counsel is obligated Ato bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.@ Strickland, 466 U.S. at 685.

Where defense counsel fails in his obligations and renders deficient performance, a new trial is required if confidence is undermined in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). Here, Mr. Stephens= was ultimately prejudiced by counsel=s deficient performance. While Mr. Stephens= co-defendant, Horace Cummings, was also convicted of first degree murder, he was given a life sentence as the State did not pursue his case to a penalty phase. However, subsequent to Mr. Stephens= conviction, he was sentenced to death.

Moreover, as Mr. Stephens argued in his postconviction motion, which the lower court failed to address in its order denying relief, although Strickland generally requires a defendant to pled and demonstrate unreasonable attorney performance and prejudice, there are situations where the absence of counsel at critical stages of a defendant=s trial undermines the fairness of the proceeding and therefore requires a presumption that the defendant was prejudiced by

such deficiency. See United States v. Cronic, 104 S.Ct. 2039 (1984).

A finding of per se ineffectiveness is not limited to trial counsel=s absence from the proceedings:

> In addition to the absence of counsel during critical stages of trial, *Cronic* suggested three other circumstances in which a presumption of prejudice would be required to ensure the fairness of a proceeding: (1) A**if counsel entirely fails to subject the prosecution=s case to meaningful adversarial testing**;@ (2) Awhen although counsel is available during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial;@ and (3) A**when counsel labors under an actual conflict of interest.**@ *Cronic*, 466 U.S. at 659-60, 662 n. 31, 104 S.Ct. at 2047, 2048 n. 31.

Burdine v. Johnson, 262 F.3d 336, 345, fn 4 (5th Cir. 2001) (emphasis added); See also Bell v. Cone, 535 U.S. 685, 695-96 (2002). As demonstrated herein, trial counsel entirely failed to subject the prosecution=s case to meaningful adversarial testing and trial counsel was absent, either constructively or actually, from critical stages of these proceedings.[58] Mr. Stephens submits that prejudice is to be presumed, and that he is entitled to a new trial.

ARGUMENT III

[58]Mr. Stephens also submitted that trial counsel labored under an actual conflict of interest which adversely affected their performance (See Argument III).

THE LOWER COURT ERRED IN DENYING MR STEPHENS= CLAIM THAT TRIAL COUNSEL WAS OPERATING UNDER A CONFLICT OF INTEREST WHICH VIOLATED MR. STEPHENS= RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. Representation of a Co-Defendant on the Prior Violent Felony Conviction

During Mr. Stephens= penalty phase, the State utilized a burglary conviction as a prior violent felony aggravator. Trial counsel for Mr. Stephens, Refik Eler, represented Mr. Stephens= then co-defendant, Sammie Washington, on the same prior violent felony case. This represented an actual conflict of interest, thereby mandating relief.

Rendering effective assistance pursuant to the Sixth Amendment requires that defense counsel avoid an Aactual conflict of interest@ that adversely affects his representation. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Here, Eler=s representation of Washington created divided loyalties between his former and present client. Eler thereby placed himself in an untenable situation where he had previously represented one co-defendant (Washington), and subsequently, he had a duty to represent the other co-defendant (Mr. Stephens) in challenging the conviction as a prior violent felony.

In its order denying relief, the lower court stated that it found Ano evidence that Eler=s representation of Mr. Washington negatively affected or impacted Stephens= defense.@ (PC-R. 263).

The lower court=s finding is erroneous. Because Mr. Eler was bound by the attorney-client privilege as well as his loyalties to his former client, Washington, he was therefore restrained from properly challenging Mr. Stephens= prior violent felony conviction (See Argument I). For example, Eler was prevented from either calling Washington as a witness or from taking a position antagonistic to Washington. Here, there was an actual conflict of interest which adversely affected counsel=s performance on behalf of Mr. Stephens. Cuyler, 446 U.S. 335 at 350.[59]

B. Representation of Co-Defendants with Adverse Interests

This case presents a unique situation where counsel for the co-defendant, Cummings, actually assumed representation of Mr. Stephens for a majority of pre-trial and guilt phase proceedings.

Horace Cummings, Mr. Stephens= co-defendant, was represented by the Public Defender=s Office-Duval County. In light of the Public Defender=s representation of Cummings, on

[59]To the extent that the Court finds Eler=s statement to be credible, that he didn=t recall anything Sammie Washington told him about the case, and he frankly didn=t even know he represented him (T. 292), then trial counsel was ineffective for failing to investigate.

July 29, 1997, the trial court issued an order permitting the Public Defender to withdraw from Mr. Stephens' case due to conflict (Vol. I, R. 7).

The subsequent appointment of Nichols and Eler to Mr. Stephens' case was in name only. Counsel's defense on behalf of their client included pleading him guilty to the maximum sentence on eight counts of the indictment (See Argument I), conceding his guilt to first degree murder (See Argument II), and pleading him guilty to a charge which even the State later conceded should have resulted in a directed verdict (See Argument I). Counsel's inaction included their failure to object, to argue motions, to investigate and prepare, to appear at depositions, to call critical witnesses, and to conduct cross-examinations (See Arguments I and II).

In contrast, counsel for Mr. Cummings conducted the vast majority of arguments, filed virtually all of the pretrial motions (which Mr. Stephens' attorneys copied), conducted the vast majority of cross-examinations and performed other work involved in the defense of Mr. Stephens. Additionally, counsel for Mr. Cummings covered depositions, hearings, and called the witness most critical to Mr. Stephens' defense, Dr. Dunton.

These actions gave rise to a conflict of interest.[60] While counsel for Cummings was taking on the added load of defending Mr. Stephens, counsel=s ultimate loyalty lay with their own client, Mr. Cummings. As Chipperfield stated during the trial, AIn this case we have positions in the case that are about as antagonistic as we can get.@ (Vol. VI, R. 14). For example, the State=s position was that Cummings choked the child, and the child said to Cummings, AAre you going to kill me.@ (Vol. VI, R. 31). Counsel for Cummings was attempting to prove that it was Mr. Stephens who choked the victim. When Cummings presented his defense, counsel called and elicited the following testimony from Officer Theodore Jackson:

> Q And while you were there at the scene at 1537 Logan Street on June the 2nd, did you talk with Consuelo?
>
> A Yes, I did.
>
> Q And did Consuelo Brown tell you at that time that one suspect had come into the house, grabbed her son by the neck, choked him, and carried him with him throughout the residence?
>
> A Yes, sir.

(Vol. XIII, R. 1598-99).

Trial counsel for Cummings elicited similar testimony from C.L. Terry:

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[60]In its order denying relief, the lower court failed to address this issue, nor was an evidentiary hearing granted.

Q Did Consuelo Brown tell you that the man who choked her son was the one who showed her his ID card and the one who hit her in the face?

A That=s correct.

(Vol. XIV, R. 1604).

During closing arguments, Chipperfield stated to the jury, AAre you going to hold Horace Cummings criminally responsible for the acts of Jason Stephens? That=s your question.@ (Vol. XV, R. 1827). Counsel continued to put the blame on Mr. Stephens. (Vol. XV, R. 1830). Chipperfield concluded his closing argument by stating AHe=s [Horace Cummings] not criminally responsible for what Jason Stephens did, so we ask you to return verdicts of not guilty on every count that he=s charged with.@ (Vol. XV, R. 1876).

During the postconviction evidentiary hearing, Chipperfield testified that when he was doing the depositions in which Eler or Nichols didn=t attend, he did not ask questions on behalf of Mr. Stephens (T. 134).[61] Likewise, Bill White never asked any questions with Mr. Stephens= defense in mind (T. 143). White also testified that he felt that the defense for Stephens and Cummings were not harmonious (T. 143). AWe felt that Mr. Cummings= participation was significantly less than Mr. Stephens= and that there was a theory of independent act that we could put forward, and we

[61]In fact, Chipperfield made a motion to sever the case, as Cummings and Stephens had inconsistent defenses (T. 130-32).

felt we had to strongly separate the two at every opportunity throughout the case (T. 143). Even Mr. Stephens= trial counsel, Eler, acknowledged that he was aware that Chipperfield and White were representing Cummings as having an antagonistic defense to Mr. Stephens (T. 255).

A defendant is deprived of the sixth amendment right to counsel where (i) counsel faced an actual conflict of interest, and (ii) that conflict Aactually affected@ counsel=s representation of the defendant. Strickland, 466 U.S. at 692 (1984)(quoting Cuyler, 446 U.S. at 350). Because the right to counsel=s undivided loyalty Ais among those constitutional rights so basic to a fair trial . . ., [its] infraction can never be treated as harmless error.@ Holloway v. Arkansas, 435 U.S. 475, 489 (1978). Although the general rule is that a criminal defendant who claims ineffective assistance of counsel must show both a lack of professional competence and prejudice, the prejudice test is relaxed where counsel is shown to have had an actual conflict of interest. Strickland, 466 U.S. at 693; Kimmelman v. Morrison, 477 U.S. 365, 381 n.6 (1986); Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980). Where an actual conflict is present, the defendant need only show that the conflict had Asome adverse effect on counsel=s performance.@ McConico v. Alabama, 919 F.2d 1543, 1548-49 (11th Cir. 1980); Buenoano v. Dugger, 559 So. 2d 1116, 1120 (Fla. 1990). Clearly, the conflict that existed here Ahad

some adverse effect on@ the representation of Mr. Stephens. A new trial is warranted.

ARGUMENT IV

DEFENSE COUNSEL=S FAILURE TO PURSUE A MOTION REQUESTING A JURY INTERVIEW AND/OR A NEW TRIAL DENIED MR. STEPHENS EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

AA trial by jury is fundamental to the American scheme of justice and is an essential element of due process.@ Scruggs v. Williams, 903 F.2d 1430, 1434-35 (11th Cir. 1990)(citing Duncan v. Louisiana, 391 U.S. 145 (1968)). Implicit in the right to a jury trial is the right to an impartial and competent jury. Tanner v. United States, 483 U.S. 107, 126 (1987).

In imposing the death penalty, the jury specifically found, by answers given on the advisory sentence form, that their conclusion was that the defendant killed the victim, attempted to do so, intended the death of the victim, or acted with reckless disregard of life (Vol. II, R. 335). After the conclusion of the penalty phase proceedings, the jury foreman, Roland Buck, was interviewed by a reporter for the *Florida Times-Union*. In this interview, Mr. Buck told the reporter that the jury believed that Mr. Stephens did not intend to kill the victim,@[b]ut the child died as a result of the robbery...that=s why we convicted him. If he had not removed

the child from the house, the child would be alive today. A (Vol. II, R. 345-6). The reasons cited by the jury foreman for the death recommendation are inconsistent with the jury=s advisory sentence, and they do not comport with the requirements of the Court=s penalty phase jury instructions, AYou may not consider the death penalty as a possible punishment unless you are convinced beyond a reasonable doubt that the defendant killed the victim, or intended that the victim be killed, or that he played a significant role in the underlying felony and acted with reckless indifference to human life. Your finding in this regard must be unanimous.@ (Vol. V, R. 785).

The adversarial process in Mr. Stephens=s trial broke down when defense counsel failed to pursue a motion for a jury interview. Defense counsel moved for a jury interview and/or reconsideration, but withdrew the motion upon an agreement with the State that the trial court would review the newspaper article and consider the material as mitigation. (Vol. V, R. 812, 866). The trial court, however, did not consider it in making the sentencing decision. In its sentencing order, the court stated that Aconsideration of the foreman=s remarks would be improper.@ (Vol. II, R 388).

This Court has recognized that overt acts of misconduct by members of the jury violate a defendant=s right to a fair and impartial jury and equal protection of the law, as

guaranteed by the United States and Florida Constitutions. Powell v. AllState Insurance Co., 652 So. 2d 354 (Fla. 1995). While juror misconduct during the guilt phase certainly raises serious Sixth Amendment problems, misconduct during penalty phase proceedings comes under greater scrutiny due to the Eighth and Fourteenth Amendment restrictions on capital sentencing. Gardner v. Florida, 97 S. Ct. 1197 (1977).

Here, further inquiry was necessary to determine if there existed an improper jury determination or an indication of juror misconduct in rendering the verdict and/or advisory sentence. Trial counsel should have pursued the motion for a jury interview, for it was the most immediate and proper means by which to determine if juror misconduct had taken place. Trial counsel=s withdrawal of the motion, and further failure to pursue a motion for a new trial constituted ineffective assistance of counsel.

In denying relief, the lower court concluded that AForeperson Buck=s statement is not inconsistent with the jury=s finding that Stephens played a significant role in the underlying felony and acted with reckless indifference to human life.@ (PC-R. 277). However, the plain statement by Foreman Buck simply states that Mr. Stephens deserved blame because he removed the child from the house; there is no mention of reckless indifference on the part of Mr. Stephens.

Certainly, under these circumstances counsel should have moved to interview the juror.

In order to prove this claim during postconviction proceedings, Mr. Stephens filed a Motion/Notice of Intent to Interview Jurors (PC-R. 76-80) However, that Motion/Notice was denied by the lower court (PC-R. 103-04). This case should be remanded so that postconviction counsel can conduct an interview with Foreman Buck.

ARGUMENT V

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY INSTRUCTING THE JURY REGARDING AGGRAVATING FACTORS WHEN, AS A MATTER OF LAW, THESE FACTORS DID NOT APPLY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY OBJECT AND FOR CONCEDING THESE AGGRAVATORS TO THE JURY.

A. HAC Aggravator

In Mr. Stephens: case, the jury was instructed on the heinous, atrocious and cruel aggravating factor (HAC) (Vol. V, R.

787).

In order for the judge properly to instruct the jury, and for the judge to find established, the HAC aggravator, the State must show beyond a reasonable doubt that the defendant intended to inflict a high degree of pain, or that the defendant was indifferent to or enjoyed the suffering of the victim. State v. Dixon, 283 So. 2d 1 (Fla. 1973),

Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). Here, however, Mr. Stephens clearly did not have this requisite intent. As the trial court explained in its sentencing order, AThe Court, unable to conclude beyond a reasonable doubt, that the Defendant **intended** to kill the child, does not find that this aggravator was proved beyond a reasonable doubt.@ (Vol. II, R. 391)(emphasis added).

Despite its findings, the Court erroneously permitted the jury to be given this aggravating circumstance instruction. Trial counsel compounded the error by conceding to the jury that this aggravating circumstance applied, A**You should give very little weight to this particular aggravator** because there was no proof of enjoyment of punishment or of some kind of pleasure in making Little Robert suffer the way he did.@ (Vol. IV, R. 759) (emphasis added).

The jury, a co-sentencer, is presumed to have considered an aggravating circumstance that, as a matter of law, did not apply here. Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). The sentencing court was in turn required to give weight to the jury=s recommendation. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Walton v. Arizona, 497 U.S. 639, 653 (1990). Thus, an extra thumb was placed on the death side of the scale. Stringer v. Black, 112 S. Ct. 1130 (1992). As a result, Mr. Stephens= sentence of death must be vacated. See Espinosa v. Florida; Sochor v. Florida, 112 S. Ct. 2114

(1992). To the extent that trial counsel failed to adequately challenge this aggravating factor, counsel was ineffective.

B. Pecuniary Gain

During the penalty phase of Mr. Stephens= trial, the judge gave the jury the following instruction:

> The crime for which the defendant is to be sentenced was committed for financial gain. If you find that the killing of the victim was done for financial gain and was done during a robbery, you shall consider that only as one aggravating circumstance rather than two. Those circumstances are considered to be merged. The State may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more aggravating circumstances are supported by a single aspect of the offense, you may only consider that aspect as supporting a single aggravating circumstance.

(Vol V, R. 787).

This instruction was unconstitutionally vague. This Court has held that in order for the pecuniary gain aggravator to apply, it must have been the primary motive for the killing. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). The trial court=s instruction to Mr. Stephens= jury did not inform them that >primary motive= was one of the factors. Such instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and the Eighth and Fourteenth Amendments to the United States Constitution.

Moreover, this Court has repeatedly held that in order for the pecuniary gain aggravator to be applicable, it must be proven beyond a reasonable doubt. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988); Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987). This aggravating factor and the resulting instruction were not supported in Mr. Stephens= case by the evidence. See Rogers; Simmons v. State, 419 So. 2d 316 (Fla. 1982).

The trial court was well aware at the close of the guilt phase that this aggravator did not apply. In its sentencing order, the trial court stated that the pecuniary gain was not applicable because the theft of any property had been completed by the time the murder happened (Vol II, R. 390). This is information that was available to the jury by the end of the guilt phase. The trial court had the benefit of caselaw which instructed it that this aggravator was inapplicable[62]. The jury did not have the benefit of this same caselaw when arriving at its= recommendation. However, the jury was still instructed on the pecuniary gain aggravator.

[62] The trial court cited to Hardwick v. State, which stated that this aggravator only applies where the Amurder is an integral step in obtaining some sought-after specific gain.@ Hardwick v. State, 521 So. 2d 1071, 1076 (Fla. 1988). The court also cited to Elam v. State, which held this aggravator does not apply if the theft of money or other property is over and the murder was not committed to facilitate it. Elam v. State, 636 So. 2d 1312 (Fla. 1994).

Trial counsel compounded the error by conceding to the jury that the pecuniary gain aggravating circumstance had been proven, and that it should be given Aadequate weight.@ (Vol IV, R. 756-57). The jury, a co-sentencer, is presumed to have considered an aggravating circumstance that, as a matter of law, did not apply here. Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). Moreover, as stated *supra*, the sentencing court was in turn required to give weight to the jury=s recommendation. To the extent defense counsel failed to adequately challenge this aggravating factor, counsel was ineffective.

CONCLUSION

Mr. Stephens submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by U.S. Mail, postage prepaid, to Charmaine Millsaps, Office of the Attorney General, 400 South Monroe Street, PL-01, Tallahassee, FL 32399-6536, this 29th day of August, 2006.

CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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