

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC10-450
Lower Tribunal No.: 05-1992-CF-17795**

JOHNNY HOSKINS aka JAMILE ALLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Johnny Hoskins a/k/a Jamil Alle's motion for postconviction relief which was brought pursuant to *Fla.R.Crim.P.* 3.851. Citations shall be as follows: The record on appeal concerning the trial proceedings shall be referred to as "R. ____" followed by the appropriate page numbers from the original record. The postconviction record on appeal will be referred to as "PC-ROA ____" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this appeal will determine whether Mr. Hoskins lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate given the seriousness of the claims involved and the fact that a life is at stake. Mr. Hoskins accordingly requests that this Court permit oral argument.

STATEMENT OF THE CASE AND FACTS

The Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County, Florida, entered the judgment of convictions and sentences which formed the basis for this post-conviction proceeding. On November 10, 1992, the Brevard County, Florida, a Grand Jury indicted the Defendant, Johnny Hoskins (hereinafter referred to as “Hoskins”), for the First-degree Murder, Burglary, Sexual Battery, Kidnapping, and Robbery of Dorothy Berger. (R. - p.2061). Trial by jury resulted in guilty verdicts on all counts on March 21, 1994. The Jury found the Defendant guilty of Count I, First Degree Murder, Count II, Burglary with a Battery, Count III, Sexual battery with Great Force, Count IV, Kidnapping, and Count V, Robbery.

The case proceeded to a penalty phase, held from March 28 to 29, 1994,

wherein the defense objected to the standard jury instruction and requested a special instruction on the cold, calculated, and premeditated aggravator. (R. - pp. 2443-2445). Following the penalty phase hearing but before the court imposed the sentence, the trial court reconsidered Hoskins objection and granted a new penalty phase before a new jury on August 26, 1994. The Court found that it should have given the expanded jury instruction for the cold, calculated, and premeditated aggravator instead of the standard jury instruction. (R. - p. 2485).

Prior to the start of the second penalty phase proceeding and at the suggestion of Hoskins' mental health expert, the defense requested neurological testing, at the Public Defender's expense for Hoskins to undergo a Pet Scan in order to determine the extent of brain damage to his frontal lobe for presentation as mitigation evidence. (R. - pp.2501-2504 & pp.2505-2507). The trial court denied Hoskins's request. (R. - p.2514). The second penalty phase was conducted from October 3 to October 6, 1994, and the jury in its advisory verdict, recommended death by a vote of twelve to zero for Count I. (R.- p.2553). The trial court sentenced Hoskins to death for Count I, to a term of natural life in the custody of the Department of Corrections for Counts II, III, and IV, and to 15 years in the custody of the Department of Corrections for Count V. The sentences under Counts II, III, IV, and V were to run consecutive to the sentence under Count I and

concurrent to each other. (R. - pp. 2588-2592).

The following factual history is taken from this Court's opinion in *Hoskins v. State*, 702 So.2d 202, 203-204 (Fla. 1997) on direct appeal:

Police went to eighty-year-old Dorothy Berger's home on Sunday, October 18, 1992, after neighbors discovered her door was open but no one was home. The television and air-conditioning were on; a small amount of blood, a bent pair of eyeglasses, and a green hand towel were on the bed; several items in the room appeared to be out of place; a shoe impression was visible in the dust on the floor; and Berger's car was gone. There was no sign of forced entry. The victim had last been heard from around 6:30 p.m. on Saturday, October 17.

Hoskins lived with his girlfriend in the house next door to the victim's house. On the evening of October 17, a witness saw him driving a car similar to the victim's. At about 5 a.m. on October 18, Hoskins arrived at this parent's house in Georgia driving that same car. After he got to his parents' house, he borrowed a shovel and left. He returned about twenty minutes later. On Monday, October 19, he was stopped in Georgia for a traffic violation. Police subsequently determined that the car Hoskins was driving belonged to the victim. Police found vegetation and blood in the trunk of the car. Thereafter, Hoskins' father led police to an area near his home where the type of vegetation found in the trunk grew. The victim was discovered there in a grave with her hands tied behind her back and a gag in her mouth.

Further examination revealed that the victim had been raped; had numerous injuries to her body; had several blows to her head, one of which likely caused her to become unconscious; and had died of strangulation, which occurred after the sexual battery and beating.

Hoskins, 702 So.2d at 203-204.

The trial court found two aggravating circumstances: (1) the murder was

committed during the course of a sexual battery or kidnapping; and (2) the murder was especially heinous, atrocious, or cruel. *See Hoskins*, 702 So.2d at 204. The trial court also found the following non-statutory mitigators:

(1) Hoskins had a loving relationship with his family; (2) he was a father figure to his siblings; (3) he had protected his siblings from his father's violence and received beatings; (4) he has low mental abilities; (5) he has a mild brain abnormality; (6) he came from an impoverished and abusive background; (7) he was influenced by racial problems during his school years; (8) he helped support his family; and (9) other miscellaneous aspects of Hoskins' life (tended to his pets, adept at woodworking and making clocks, and not a behavioral problem at school).

Id. at 204.

On direct appeal the conviction and sentences were affirmed, except for the death sentence. *See Hoskins*, 702 So.2d at 202 & 210-211. As to the death sentence the Florida Supreme Court remanded the case for a Positron Emission Tomography (hereinafter referred to as "PET Scan") and a subsequent evidentiary hearing. *See id.* at 210-211. Following the PET Scan and evidentiary hearing, the trial court found that the PET Scan had shown a brain abnormality, and the court ruled that Dr. Krop's testimony had changed. *See Hoskins v. State*, 735 So.2d 1281 (Fla. 1999). As a result of these findings, the Florida Supreme Court then vacated the death sentence and remanded the case for a new sentencing proceeding. *See id.* at 1281. The State objected to the admissibility of the PET Scan evidence and the

trial court conducted a *Frye* hearing pursuant to *Frye v. United States*, 293 F. 1013,1014 (D.C. Cir. 1923). At the conclusion of the hearing, the court overruled the State's objection to the admissibility of the PET Scan evidence.

A Third Penalty Phase was conducted from July 19 to 24, 2004. At the conclusion of the third penalty phase proceeding the jury's advisory verdict recommended death by a vote of eleven to one under Count I. (R. - p.1702-1703). The jury and the trial court found the following three aggravating circumstances: (1) the capital felony was committed during the course of or in flight after committing the crimes of robbery, sexual battery, or kidnapping; (2) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and (3) the capital felony was especially heinous, atrocious, or cruel. *See Hoskins v. State*, 965 So.2d 1, 6 (Fla. 2007). The trial court found the following mitigating circumstances:

(1) Hoskins formed and maintained loving relationships with his family (little weight); (2) the Defendant was a father figure to his siblings (little weight); (3) the Defendant protected his mother from his father's abuse (little weight); (4) low IQ (little weight); (5) low mental functioning ability (little weight); (6) some abnormalities in the brain which may cause some impairment (little weight) (7) an impoverished and abusive background (some weight); (8) mental age equivalent (between fifteen and twenty-five) (little weight); (9) the Defendant helped support his family financially (little weight); and (10) the Defendant had and cared for many pets (little weight); (11) no disciplinary problems in school (little weight); (12) the Defendant suffered from poor academic performance and left school at age sixteen to work to help his family (little weight); (13) the Defendant

was not malingering (little weight); (14) the Defendant expressed remorse (little weight); (15) potential for rehabilitation and lack of future dangerousness (little weight); and (16) good jail conduct including death row behavior (little weight).

Hoskins, 965 So.2d at 6.

The court concluded “that any one of the aggravating circumstances standing alone far outweighed all of the mitigating circumstances and resentenced Hoskins to death” for Count I as to the first-degree murder charge and a consecutive term of life imprisonment for Burglary, Sexual Battery, Kidnapping, and fifteen years consecutive sentence on the Robbery charge. *Hoskins*, 965 So.2d at 6-7. On April 19, 2007, this Court affirmed the death sentence. *See Hoskins*, 965 So.2d at 1 & 22. A timely motion for rehearing was denied on August 8, 2007.

The Defendant filed a timely petition for writ of certiorari to the United States Supreme Court that was denied on January 14, 2008. *See Hoskins v. Florida*, 552 U.S. 1152, 128 S.Ct. 1112 (2008). On January 9, 2002, a timely motion for postconviction relief pursuant to *Fla.R.Crim.P.* 3.851 was filed. (PC-ROA Vol- IV - pp.544-630). An Answer to the Motion was filed by the State on February 24, 2009. All claims for relief raised in this motion were asserted as claims for relief under both the federal and state constitutions. A Case Management Conference was conducted by the court on March 13, 2009, and the Court granted the Defendant an evidentiary hearing. The evidentiary hearing was

held from August 24 to August 25, 2009. The lower court denied Hoskins' 3851 motion on January 14, 2010 and the motion for rehearing on February 10, 2010. (PC-ROA. V-VI - pp.900-945, V-VII - pp.1189-1245, V-VIII - pp.1246-1445, & V-IX - pp.1446-1479). This timely appeal follows.

The facts elicited at the evidentiary hearing are summarized as follows:

RANDALL MOORE, Trial Counsel for Penalty Phase 1 and 2.

During the evidentiary hearing trial counsels Randall Moore and Ernest Chang both testified. Trial counsel Moore testified that he had been employed with the Public Defender's Office for the Eighteenth Judicial Circuit since April, 1983. Trial counsel Moore stated that he is currently the Chief Assistant Public Defender and testified that he has tried a dozen death penalty cases and five non death penalty capital cases in the course of his career. Trial counsel Moore testified that the Hoskins case was early in his career and his second death penalty case. He served as lead counsel for Hoskins with Ken Rhoden, Esquire, who was assigned as co-counsel. Trial counsel Moore recalled that he handled the penalty phase and that he and Mr. Rhoden split the responsibilities as to the guilt phase portion of the case. Trial counsel Moore testified that there was no specific investigator assigned to the case exclusively and that investigative work was assigned to various investigators. (PC-ROA. V-III - p.354).

In addition to Hoskins case, trial counsel Moore testified that he had a full felony docket, one other death penalty case which he tried shortly after being appointed to represent Hoskins and a couple of other non-capital first-degree murder cases. He estimated that he was handling between 200 to 250 cases in total at the time of his appointment to Hoskins' case. (PC-ROA. V-III - p.354). Trial counsel Moore testified that he was familiar with the ABA guidelines and recommendations and took death penalty training prior to handling Hoskins case. (PC-ROA. V-III - p.356). Counsel Moore testified that he had not conducted any independent testing of hair and blood samples taken from Hoskins in Georgia following his arrest. (PC-ROA. V-III - p.359). Counsel testified that the blood draw would have been taken about three or four days following the crime and as such of limited value. (PC-ROA. V-III - p.359). He testified that no motion for any toxicology or blood testing was filed. (PC-ROA. V-III - p.354). Counsel testified that substance abuse was not seriously considered in this case because he had no proof of it and Hoskins denied involvement in the crime. (PC-ROA. V-III - p.360). Counsel testified that it is beneficial to present evidence of intoxication with the approval of the client. (PC-ROA. V-III - p.360). Counsel acknowledged that Theresa Kovatch had been identified as a witness. (PC -ROA. V-III - p.362). Counsel testified that Ms. Kovach had witnessed Hoskins attack another individual

in a frenzied manner and considered this relevant mental health testimony for use at penalty phase. (PC-ROA. V-III - p.362). Following the remand in 1999, trial counsel testified that he spoke with Dr. Krop several times and asked him to meet with Hoskins and administer additional tests. (PC-ROA. V-III - p.362). He could not recall doing anything further after the test results were received. (PC-ROA. V-III - p.363). He could not recall specific discussion with trial counsel Chang (Hoskins' subsequent counsel) concerning Dr. Krop's evaluation or testing information. (PC-ROA. V-III - p.363).

Trial counsel Moore testified that Hoskins had indicated to him that around the time of the homicide he (Hoskins) had a cocaine addiction problem. (PC-ROA. V-III - p.373). Counsel testified that he believed that Hoskins' girlfriend also indicated that Hoskins was abusing drugs. (PC-ROA. V-III - p. 373). Counsel could not recall discussion of cocaine intoxication or addiction with expert, Dr. Krop. (PC-ROA. V-III - p.376). At the State's request, Counsel reviewed but could not recall State Exhibit A, a letter written to him by Dr. Krop and dated October 21, 1993. (PC-ROA. V-III - p.354). Counsel testified that the letter from Dr. Krop advised that Hoskins presented with no evidence of any major mental illness or drug or alcohol abuse. (PC-ROA. V-III - p.372) On cross-examination Counsel testified that an attachment to the letter sent by Dr. Krop dated September 23,

1994, referenced drug and alcohol activity by Hoskins. (PC-ROA. V-III - p.380). Counsel testified that he did not recognize the handwriting on the attachment. (PC-ROA. V-III - p.380). The attachment appeared to be a memorialization of an interview by Dr. Krop with Hoskins and referenced abuse of both cocaine and alcohol by Hoskins. (PC-ROA. V-III - p.380). Trial counsel Moore testified that he may have re-evaluated and re-assessed a decision to use Dr. Krop in a third penalty phase based upon new evidence or information that may have been obtained. (PC-ROA. V-III - p.377).

ERNEST CHANG, Trial Counsel for Penalty Phase 3

Trial counsel Chang testified that he had been a trial counsel for approximately twenty years. His first three years as a lawyer were spent with the Brevard Public Defenders Office he then continued doing criminal defense work for two years with a private law firm and has been in his own practice doing criminal defense work since 1995. (PC-ROA. V-III - p.377). Hoskins' death penalty proceeding was the second such case handled by trial counsel Chang. (PC-ROA. V-III - p.385).

Trial counsel Chang was unable to recall how many times he met with prior counsel, trial counsel Moore to discuss Hoskins' case. (PC-ROA. V-III - p.385). Trial counsel Chang testified that he did not retain an investigator or mitigation

expert to assist him in the case. (PC-ROA. V-III - p.385& p.386). He testified that he has used investigators to search for mitigating evidence in other cases, but he did not hire one in the Johnny Hoskins case. The reason that he gave for not retaining a mitigation expert or investigator to assist was because the work had already been done twice. (PC-ROA. V-III - p.386). Trial counsel Chang testified that his philosophy was to do everything that trial counsel Moore (prior counsel) had done in the previous two penalty phase proceedings, plus anything else that he could think of. (PC-ROA. V-III - p.386). Counsel testified that he did not locate any new witnesses. (PC-ROA. V-III - p.388).

Trial counsel Chang filed a notice of appearance in Hoskins case on December 23, 2003. The penalty phase proceeding was conducted in July, 2004. In cross examination, trial counsel Chang testified that he had spoken to Dr. Krop via telephone on a number of occasions, and had spoken with Dr. Krop after he had administered additional tests and met with Hoskins in 2003. (PC-ROA. V-III - p.413). He testified that during these telephone conversations with Dr. Krop he discussed generally what Dr. Krop's testimony was going to be at hearing. (PC-ROA. V-III - p.387). Trial counsel Chang testified that he first met face to face with Dr. Krop either the night before or on the morning of the penalty phase proceeding. (PC-ROA. V-III - p.387).

Trial counsel Chang testified that he put on all of the same witnesses that had testified in the previous penalty phase proceedings. (PC-ROA. V-III - p.388).

Trial counsel Chang testified that he reviewed Hoskins' PSI and that he was aware that drug and alcohol abuse are mitigating factors. (PC-ROA. V-III - p.388).

Counsel testified that he met with various members of Hoskins' family. (PC-ROA. V-III - p.387). He stated that he did not make any independent effort to investigate drug or alcohol abuse in Hoskins' case. (PC-ROA. V-III - p. 388). Counsel acknowledged that he might have come across some information that Hoskins had snorted cocaine. (PC-ROA. V-III - p.389). Counsel testified that such information would be relevant to pass along to a mental health expert and a single indication in and of itself might not be something to have been further explored. (PC-ROA. V-III - p.389). Counsel could not recall discussing substance abuse with Dr. Krop or with Hoskins. (PC-ROA. V-III - p.389 & p.399). Counsel testified that he had no reason to believe that drug or alcohol abuse was a factor that he could raise in mitigation. (PC-ROA. V-III - p.401). Counsel testified that a witness named Theresa Kovatch was a familiar sounding name but did not have an independent recollection. (PC-ROA. V-III - p.389). Counsel testified that he discussed the issue of impulse control with Dr. Krop as to Hoskins (PC-ROA. V-III - p. 389). He acknowledged having had records from the Department of Corrections as to

Hoskins history. (PC-ROA. V-III - p.390).

Trial counsel Chang testified that he reviewed all material in the case prior to his involvement. (PC-ROA. V-III - p.399). Counsel testified that he is generally familiar with the ABA guidelines with regards to requirements for representing clients in post conviction but would not state that he uses them like the bible. (PC-ROA. V-III - p.390). Counsel testified that he believed that Dr. Krop had informed him that he had been asked by trial counsel Moore to administer additional tests to Hoskins. (PC-ROA. V-III - p.409). Counsel testified that he knew the names of the tests but had not been provided any reports, and nothing with dates on it. (PC-ROA. V-III - p.409). Trial counsel Chang testified that on the date he arrived for Hoskins' penalty phase proceeding, he had not reviewed the tests and he expected that Dr. Krop would orally report his findings and conclusions. (PC-ROA. V-III - p.410).

Trial counsel Chang testified that Dr. Krop's statements as to the defendant's admissions made in 2003, were simply admissions of guilt and not an issue at penalty phase as guilt had already been established. (PC-ROA. V-III - p.416). Trial counsel testified that if he had known about the admissions prior to calling Dr. Krop he would still have called him as he had done the entire work up and the only alternative was to go out and find another expert to do everything that

Dr. Krop had already done. (PC-ROA. V-III - p.417).

DR. ALEXANDER MORTON.

Dr. Alexander Morton Jr., Professor of Pharmacy Practice at Medical University of South Carolina, was called as an expert in the field of Neuropharmacology to testify at Hoskins' evidentiary hearing. Dr. Morton stated that he was retained to look at Hoskins' substance use. (PC-ROA. V-II - p.142). Dr. Morton was accepted as an expert in the field of psycho pharmacology. (PC-ROA. V-II - p.146).

Dr. Morton testified that he reviewed voluminous series of records, he consulted with other experts, he reviewed the neurological examination conducted by Dr. Weiss, he conducted several clinical interviews with Hoskins, and he also reviewed court records and decisions. (PC-ROA. V-II - p.154). Dr. Morton specifically reviewed Dr. Frank Wood's PET Scan for an understanding of Hoskins' dysfunctions in the frontal lobes resulting from a prior head injury and he also reviewed Dr. Krop's neuropsychological assessment. (PC-ROA. V-II - p.154).

Dr. Morton explained during his testimony that drugs adversely affect the frontal lobe areas which control a subject's executive thinking functions, and noted that individuals who have frontal lobe impairments will realize a worsening of their pre-existing conditions following subsequent drug use. (PC-ROA. V-II -

p.154). To corroborate the information provided by Hoskins during clinical interviews, Dr. Morton noted that evidence of substance abuse was contained in a deposition of witness, Carrie Jacobs taken in preparation for trial, a Georgia criminal record report also showed that Hoskins had a 1988 arrest for dangerous drugs in his past and the drug arrest recorded in a pre-sentencing assessment report. (PC-ROA. V-II - p.155).

A comprehensive history was compiled by Dr. Morton after consulting with Mitigation/Clinical Social Worker, Shirley Furtick, and Dr. Hyman Eisenstein, a neuropsychologist, along with interviews of lay witness Willie Hunt. (PC-ROA. V-II - p.157). Dr. Morton learned that Hoskins began smoking as a child and by the age 16 was smoking cigarettes on a daily basis. Dr. Morton described nicotine as one of the most addicting drugs. (PC-ROA. V-II - p.158). Dr. Morton testified that Hoskins was next introduced to alcohol by his father as early as age 15 and that he abused alcohol on a regular basis with his father from the age of 15 to 19, abusing gin, beer and moonshine. (PC-ROA. V-II - p.159). He explained that Hoskins' alcohol abuse escalated to the point that by the age of 19 he was drinking alcohol on a regular basis. Hoskins' expanded his drug use from alcohol to marijuana use by age 18 and by 1992 Hoskins at age 29 was drinking one to two drinks per day followed by marijuana on a regular basis. (PC-ROA. V-II - p.159). When he

relocated from his rural Georgia home to Florida, Hoskins reported that he was introduced to cocaine and described its pleasurable effects, which made him feel superior, stronger, quicker and a sense of being on top of things. (PC-ROA. V-II - p.161). As Hoskins' use of cocaine became more prevalent he reported experiencing a continual feeling of paranoia and growing very suspicious. Additionally, Hoskins related experiencing mild auditory hallucinations, and feeling tactile hallucinations. Hoskins admitted to engaging in peeping, hyperactive and irritable behavior following his cocaine use. (PC-ROA. V-II - p.161). At the time of the offense in 1992, Hoskins reported that his cocaine and marijuana use was occurring daily in very large amounts. Marijuana was being ingested in one or two large cigars termed "blunts" while the accompanying cocaine intake was often in the form of an "8-ball" which is approximately 3 ½ grams. (PC-ROA. V-II - p.162). Hoskins daily intake of cocaine during this period was between two and four grams daily and he used substances intra-nasally. (PC-ROA. V-II - p.162). Hoskins reported having easy access to cocaine and admitted that he supported his addiction to cocaine by small time dealing. (PC-ROA. V-II - p.162). Hoskins admitted use of crack cocaine once but informed Dr. Morton that he did not use it further because he did not like its effect. (PC-ROA. V-II - p.162). Dr. Morton testified that this is consistent with conduct by abusers and that Hoskins preference

for intra-nasal use of illicit substances would allow him to experience euphoric effects for a longer period of time. (PC-ROA. V-II - p.163). Dr. Morton provided expert testimony that when drugs are introduced into the system there is a likelihood that a percentage will develop drug addiction which is a condition well known and accepted as a brain disease. (PC-ROA. V-II - p.151). He testified that drugs can produce really severe psychiatric symptoms over a period of time from the time the use starts, after drugs are used, and some drugs can have a profound effect that can last for weeks or months, even after abuse of the substance has been stopped. (PC-ROA. V-II - p.151). Dr. Morton testified that the disease of addiction affects 10 to 15 percent of people that abuse drugs. (PC-ROA. V-II - p. 164). Dr. Morton explained the change from voluntary to involuntary use as a switch that takes the user on a different track in life, where the ability to control drug use is gone and the individual will never be able to control how much is used. (PC-ROA. V-II - p.164). Dr. Morton testified that there is a biological basis involved in drug addicts as addictive people's bodies do not make chemicals in the same way that non-addictive people do in order to give their brain the message to stop using the substance. (PC-ROA. V-II - p. 164). Following his review of records, history and clinical evaluation of Hoskins, Dr. Morton opined that at the time of the crime, leading up to the crime and shortly after the crime, Hoskins would have been quite

impulsive, irritable, aggressive and a potential risk for violence demonstrating behavior ranging in nature from a little hyper or anxious to very anxious. Hoskins would be activating his fight or flight type nervous system and would misperceive things. He would see something, hear something, and feel something that was not there. He would be paranoid and suspicious of others. He would be potentially psychotic reporting some hallucinations, would not be able to think clearly or logically and suffer withdrawal symptoms. Any pre-existing psychiatric disorders would have worsened as a result of drug use.

Dr. Morton testified that some of Hoskins' behavior during the crime was especially unsettling and difficult to understand. (PC-ROA. V-II - p.199). He described behaviors when people use substances as difficult to comprehend and are particularly gruesome at times. He explained that the behaviors sometimes do not make any sense as one lapses in and out of making sense, having some kind of goal directed behavior versus inappropriate non directed behavior. (PC-ROA. V-II - p.200). Dr. Morton testified that the facts of the offense had bearing in his reaching opinions and conclusions as it helped him understand how substances would possibly lead Hoskins to attack a nice 80 year old neighbor. (PC-ROA. V-II - p.200). He stated that Hoskins' substance abuse history and use leading up to the crime was important to an understanding of why someone would do something like

that. (PC-ROA. V-II - p.200). Dr. Morton testified that there were impulsive elements involved in this crime and it would assist to see how cocaine could facilitate that, how it would have affected Hoskins' brain, how cocaine abuse would have exacerbated parts of Hoskins' brain to make sense out of how someone does such a thing. (PC-ROA. V-II - p.200). Agreeing that it is not all cocaine related in cross examination, Dr. Morton stated that the cocaine use factor just jumps out. He opines that this [Hoskins' behavior] is consistent with what people do when they are using large amounts of cocaine for a period of time, consistent in the literature and in his experience as an expert Neuropharmacologist. (PC-ROA. V-II - p.201). Dr. Morton testified that cocaine was a factor in impulsivity in terms of Hoskins not thinking clearly, in terms of his response. He stated that from his experience, cocaine use definitely causes some behaviors like that and it would be helpful for people making a decision to know that substances were there and were a factor in the way he thought and behaved, that it would be incredibly useful to know that he's using these two drugs that have profound effects on the brain. He stated that it would be useful information and it wasn't presented at trial. (PC-ROA. V-II - p.202).

Dr. Krop wrote a letter to Defense Counsel that indicated that there was no indication of drug and alcohol abuse. He provided copies of interview notes dated

9/23/1984, 1994, and 1998, which were introduced by the State at Hoskins' evidentiary hearing. (PC-ROA. V-II - p.208). (See: State's Exhibit 1). Although Dr. Krop's letter to counsel communicated that there was no indication of drug or alcohol abuse, the interview notes attached to the letter documented Hoskins' admissions to Dr. Krop that he had abused drugs. (PC-ROA. V-II - p. 211).

SHIRLEY FURTICK.

The Defendant called Shirley Furtick who had been employed by the South Carolina Department of Mental Health since 1984 (25 years) as a social worker. Ms. Furtick had prior experience working to stabilize individuals who have chronic mental illness for return to the community and she worked in a closed facility for persons incarcerated who suffer mental illnesses. Ms. Furtick worked at the South Carolina State Hospital supervising staff that provided long term treatment and placement for individuals with severe persistent mental illness. At the William and Hall Psychiatric Institute she had worked as a liaison with the Department of Mental Health's Forensic Unit and community health services providing services for persons with mental illness in need of follow up at community health centers following release from jail. Ms. Furtick conducted training for law enforcement, correctional and jail staff.

Ms. Furtick testified that she graduated from Benedict College in 1970 with

a B.A. in Social Work and B.A. of in Science. She attended the University of South Carolina, College of Social Work and she graduated with a Masters Degree in Social Work in 1972. Ms. Furtick testified that she had been retained as a licensed social worker in seven cases, three in Florida and three in South Carolina. Her task is to look at mitigation issues to explain how the person came to be, life cycles and to explain behaviors. She testified that she has previously been accepted as an expert in this capacity by the courts in Florida courts. Ms. Furtick was accepted by the court as an expert in social work. (PC-ROA. V-II - p.214-220). In explaining the role of a mitigation expert, Ms. Furtick testified that as many documents as possible must be reviewed, interviews conducted with potential witnesses and with family members, and interviews with the Defendant. The mitigation expert reviews legal and civil documents and consults with other experts on the issues. Literature on various issues and their implication are analyzed along with the most current research available in order to look at the Defendant's life cycle from birth within their environment, culture and life situation. (PC-ROA. V-II - p.220). Prenatal issues that the parents may have had and the kind of stressors that existed in the family prior to and after the Defendant's birth are identified along with any developmental issues based upon milestone, achievements and/or delays when communicated by family are studied. (PC-ROA. V-II - p.221). To

study the life cycle, the mitigation expert conducts clinical interviews with the Defendant, and available family members or employees. The mitigation expert will gather information from a sibling group, ascertain the relationship among members of the sibling group, their marital relationship, and also their relationships with extended family members. The mitigation expert will determine what external supports were there from family, identify any preschool, marital, sex issues or developmental information that help to explain the Defendant's development and life span cycle. (PC-ROA. V-II - p.221).

Extemporaneous issues that the mitigation expert examines include events that were occurring in the community, climate of the community and country, possible toxins, and medical records of the Defendant or other family that may impact upon the Defendant. (PC-ROA. V-II - p.221-222). As many legal records as possible should be reviewed and examined along with additional interviews with sources that can corroborate information found within records. (PC-ROA. V-II - p.222). An accepted practice for a clinical social worker acting as a mitigation expert is to create a Genogram. The Genogram (referred to as a family tree), is useful for therapists in developing treatment plans or mapping out illness or identifying recurring themes in families. (PC-ROA. V-II - p.223). Ms. Furtick identified several relatives on the Genogram prepared for Hoskins. Linda Hoskins

was Hoskins younger sister who died at age 16, Sammy Hoskins, Defendant's brother, James Hoskins, Defendant's deceased brother and several women identified as "girlfriends" who had relationships with Hoskins. (PC-ROA. V-II - p.214-223). The Genogram documented that Defendant's mother, Ms. Jessie May Blanks, gave birth to an illegitimate daughter, Jessie May, prior marrying the Defendant's father. (PC-ROA. V-II - p.224). Ms. Furtick testified that the importance of doing a Genogram is to look for long term trends and identify issues within the family tree. (PC-ROA. V-II - p. 224). Ms. Furtick identified generational issues that she deemed significant in this case. She documented evidence of alcohol use, juvenile correctional involvement and records that Hoskins had dropped out of school. (PC-ROA. V-II - p.224). The prevalent abuse of alcohol in the Hoskins household was documented objectively by evidence in the records that Hoskins' half sibling, Jessie May, had died due to cirrhosis of the liver caused by her alcohol abuse and brothers James, and Lonnie abused substances as did the Defendant. (PC-ROA. V-II - p.225). Ms. Furtick corroborated that Hoskins began abusing alcohol at a young age with older peers that were using beer. Hoskins dropped out of school and worked on the farm with his father and continued to abuse alcohol. Family members reported that alcohol was used for relaxation. (PC-ROA. V-II - p.226). Ms. Furtick testified that in

conducting her duties in social work she is required to familiarize herself with possible mental health issues that can arise in the case. (PC-ROA. V-II - p.226).

During her work in Hoskins case Ms. Furtick testified that she became aware that intermittent explosive disorder (hereinafter referred to as “I.E.D.”) might be a potential issue. (PC-ROA. V-II - p.226).

Ms. Furtick testified that she found a history of mental illness present in Hoskins’ family, and his sibling James presented a history of schizophrenia. (PC-ROA. V-II - p. 228). Ms. Furtick testified that this is significant because it presents another set of stressors for a family to deal with, and is particularly important as dealing with issues related to James’ schizophrenia would have arisen during Hoskins’ adolescence. (PC-ROA. V-II - p.228).

Ms. Furtick testified that in the course of assisting in the identification of I.E.D., she examines the record to ascertain if any events or incidents reflect some of those behaviors. (PC-ROA. V-II - p.228-229). In Hoskins’ records, Ms. Furtick found information that could bear upon a formal diagnosis of I.E.D. (PC-ROA. V-II - p.229-230). Ms. Furtick referenced Hoskins’ correctional records and communicated her findings to Psychologist, Dr. Eisenstein. (PC-ROA. V-II - p.230).

DR. HYMAN EISENSTEIN.

The Defendant called Dr. Hyman Eisenstein a clinical psychologist with a sub-specialty in Neuropsychology to testify. Dr. Eisenstein has a Doctorate Degree in Clinical Psychology from the University of Health Science at the Chicago Medical School. He completed a one year internship at Fairfield Hills Hospital, a state psychiatric hospital in Connecticut. (PC-ROA. V-II - p.242). Dr. Eisenstein testified that his graduate and internship program focused on neuropsychology, including diagnostic testing, evaluation, assessment, training neuroanatomy, and pharmacology. (PC-ROA. V-II - p.242). Dr. Eisenstein completed a post-doctorate in neuropsychology at Yale University's West Haven VA Hospital. (PC-ROA. V-II - p.242). Dr. Eisenstein spent the first five years after acquiring his degree working at Fairfield Hills Hospital, a large state psychiatric hospital teaching interns in neuropsychology and teaching the components of practical evaluations and assessments. (PC-ROA. V-II - p. 242 & p.245). Additionally, he worked in a forensic unit at the State Hospital servicing as the unit psychologist for 35 males that had been deemed by the courts to be either incompetent or insane. (PC-ROA. V-II - pp.243-244). Following a year as the psychologist directing a Head Trauma Program at Sunrise Rehabilitative Hospital and teaching other to conduct neuropsychological evaluations, he began a private

practice in 1987 and is Board Certified. (PC-ROA. V-II - pp. 243-244). Dr. Eisenstein testified that he has been qualified to testify in Florida court over a hundred times with the mass majority of cases being criminal cases and estimated involvement in close to 75 capital cases in both State and Defense assignments. (PC-ROA. V-II - p. 246). Dr. Eisenstein was offered as an expert in clinical psychology with a sub-specialty in the area of neuropsychology and accepted without objection. (PC-ROA. V-II - pp.246-247).

Dr. Eisenstein explained that there is a difference between a psychologist and neuropsychologist. That the neuropsychologist looks at the brain functioning for capacity of what the brain can and cannot do. The neuropsychologist assesses the various lobes of the brain that entail different cognitive and executive functioning to determine what the individual can and cannot do in terms of practice functional level. (PC-ROA. V-II - p. 248). In contrast, the clinical psychologist deals with more of a broad spectrum of psychological and emotional disorders, personality issues and general intellectual issues. Therefore, neuropsychology is really a sub-specialty that focuses on brain behavior relationships. (PC-ROA. V-II - p.249). He testified that mood is an integral part and also behavior in evaluation and assessment of an individual's brain functioning. (PC-ROA. V-II - p.249). Dr. Eisenstein testified that he had reviewed background materials on Hoskins,

reviewed evaluations performed by other clinicians, evaluated jail records, conducted several collateral interviews with various individuals familiar with Hoskins and spent a considerable amount of time with Hoskins to interview, conducted a comprehensive neuropsychological examination and evaluate him. (PC-ROA. V-II - p. 249-250). Dr. Eisenstein was retained to conduct a neuropsychological examination, review background information, and to determine after evaluation if Hoskins would meet the criteria for a variety of different mitigation statutes. (PC-ROA. V-II - p. 250).

Neuropsychological Examination and Motor Testing

Dr. Eisenstein conducted a comprehensive neuropsychological examination and tests that included, the Halstead right-hand battery, I.Q., Memory, Sensory Language, Achievement, validity measures and clinical interview to assess Hoskins' emotional level. (PC-ROA. V-II - p.251). Hoskins' motor measures were also tested. Motor measure is the evaluation of an individual's dexterity, the ability to demonstrate motor efficiency with upper extremity motor measure, meaning the individual is tested with a variety of different motor instruments.

Hoskins was tested on three different types of motor instruments, one being the grip done several times and alternating with right and left hands with Hoskins' right being his dominate side. (PC-ROA. V-II - p.251). The motor strength results

for the **Grip Test** were within a **high normal range**. Dr. Eisenstein found his performance to be significant as it is indicative of the fact as was demonstrated throughout the evaluation process that Hoskins level of performance was one where he was trying and gave his utmost ability. (PC-ROA. V-II - p.252).

Index finger tapping is a measure where an individual is asked to, within 10 seconds, to press down on a disk and the number of times they press down is counted and counted both with the dominate right hand and the non dominate left hand of the subject. (PC-ROA. V-II – p.252-253). A ten percent (10%) discrepancy is expected between the dominate and the non- dominate hand.

Although there was a greater discrepancy 57 taps per 10 second interval with right hand as opposed to 44.5 taps within the 10 second interval with the left, the scores are still so high that Dr. Eisenstein reported Hoskins' performance within the **high normal range**. (PC-ROA. V-II - p.253). The third test, called the **Laffiate**

Pegboard requires the subject to put pegs into a board where each peg looks like a keyhole and place the 25 pegs into the 25 holes as quickly as possible. Hoskins completed the task in 72 seconds with his right hand and 75 seconds with the left.

Dr. Eisenstein reported **no apparent motor problems** demonstrated during this task. (PC-ROA. V-II - p. 252-253). The motor measures are frontal lobe activities.

In reviewing Hoskins' overall performance on all motor tests, Dr. Eisenstein

testified that there was some indication that there may have been greater relative impairment on the left hand corresponding to the right brain with slightly greater impairment noted in the left frontal activities one measure. Motor strength is the motor output so there was **slight impairment** noted in the left hand corresponding to the right frontal lobe. (PC-ROA. V-II - p.254).

Sensory Perceptual Testing

Sensory perceptual was explained as dealing with the ability to integrate information, both from a visual context as well as a tactile context as well as the ability to draw and to see things in a variety of different dimensions and multi-dimensions. (PC-ROA. V-II - p.255). Dr. Eisenstein administered the following tests to assess Hoskins' brain functioning.

The Ray Ostrage figure of the Ray complex Figure.

The **Ray figure** is a complex drawing that the subject must draw. They need to copy it. A variety of different elements are scored and Hoskins obtained a perfect score of 36 of 36 with 100 percent accuracy. (PC-ROA. V-II - p.255). The subject is asked to draw the same figure again half hour later to measure the delayed recall as the subject is not shown the original picture again. Hoskins got 10 out of 36. This is a score on 18 different items and equaled 27 percent ability. Dr. Eisenstein stated that this performance indicates Hoskins was **mildly**

impaired. (PC-ROA. V-II - p.256). **Trail Making Test Part A** is a test that requires the subject to connect numbers in order. A sample is first provided and then the individual is asked to connect the number one through 25 in order as quickly as possible. Hoskins took 56 seconds to complete Trail Making Test Part A and committed one error. Dr. Eisenstein testified that a score of 56 is severely impaired as it is three standard deviations below. On a task that requires an individual just to connect numbers in order, he found Hoskins showed **significant impairment.** (PC-ROA. V-II - p.256). When **Trail Making Test Part B** was administered which requires the subject to alternate between numbers and letters, Hoskins took 70 seconds, one minute and 10 seconds, that indicates a score indicating **mildly impaired.** (PC-ROA. V-II - p.256). Dr. Eisenstein reported that since Trail Making Test Part A was worse than Part B this indicates that there may be more of a right brain impairment in Hoskins (severe) versus the left brain impairment (mild) as reflected by the test results. (PC-ROA. V-II - p. 256).

Hopper Visual Organization Test.

A **Hopper Visual Organization** test was administered to Hoskins. In this test there are various different options that are broken into pieces and the subject must look at it and figure out what the overall picture is. Hoskins had 5.5 errors and 82 percent accuracy which reflected results of a subject who is **mildly**

impaired. (PC-ROA. V-II - p. 256).

Language

Evaluation of a subject's language and different components to language is part of the process included when conducting a neuropsychological test battery. The subjects' ability to understand spoken language, repeat words, express oneself, and ability to name objects are all components.

Naming (Five Tests)

Naming is a very complex task in itself that has a variety of components to it. (PC-ROA. V-II - p.257). For that reason, Dr. Eisenstein testified that he gave five different tests to Hoskins that would assess the various different functions of communication, expression, receptive to language and understanding spoken language. (PC-ROA. V-II - p. 257). Dr. Eisenstein explained that the ability to name is an extremely complicated neuropsychological phenomena and it requires the ability to integrate information from a variety of sources.

Hoskins was given the **Boston Naming Test** which is a test that looks at the ability to name objects. Hoskins obtained 80 percent accurately which is two deviations below the mean and indicative of **moderate impairment.** (PC-ROA. V-II - p. 258). A **Bunton Word Fluency Test** was given to Hoskins, This test provides an individual three letters and with each letter directed to generate as

many words as possible within 60 seconds. Hoskins score of 29 places him in the **mildly impaired range**. (PC-ROA. V-II - p.258).

A **Word and Color Test** was administered that consists of **three components**. These Stroop tests look both at word fluency as well as an inhibition test. The individual is given 45 seconds to simply say the three words on the page (i.e. red, green and blue) as quickly as possible. The raw score is converted to a T score and the T score for a word is 36 with the mean at 50 and a standard deviation at 10. Dr. Eisenstein testified that Hoskins' score was one and a half standard deviations below the mean, just for word fluency, which means that Hoskins is **mildly impaired**. (PC-ROA. V-II - p.259). The next sheet involved colors which Hoskins was required to state as quickly as possible. He obtained a T score of 35, which again indicates that he is **mildly impaired**. (PC-ROA. V-II - p.259). The next sheet is word color where words are in the wrong color. A word reading green will be colored red. The subject needs to exhibit the color and state the word. This requires a disinhibition or an inhibition which is a frontal lobe activity to be able to control one response and give another answer. Dr. Eisenstein reported that Hoskins obtained a T score of 31 which indicates that he was **moderately impaired**. (PC-ROA. V-II - p. 259).

A frontal lobe test involved with both multi functions - both language and

frontal lobe was given to Hoskins. Eisenstein reported that Hoskins was given the **Peabody Picture Vocabulary Test, Third Edition**. On this test four pictures are on one card and an individual is asked to identify the same word and have to correctly point out the accurate picture. The raw score was converted to a standard score with a standard score with a mean of one hundred. Dr. Eisenstein reported that Hoskins obtained a standard score of 98, and a percentile of 45, with an equivalent of 22 years. Eisenstein testified that 50 percent of the population would score above 50 percent or below. (PC-ROA. V-II - pp.259- 260).

Another language test given to Hoskins was an Expressive Vocabulary Test that gives a word to a subject and then asks the subject to give back a word they have come up with that is similar to the word given while they look at a picture. Dr. Eisenstein reported that Hoskins scored 80 which placed him in the **low average range**, in the ninth percentile of the general population and age equivalent of 15 years one month. This particular test involved frontal lobe ability because Hoskins not only had to get the word in receptively but needed to get the word across the language brain mechanism and get the word out which requires frontal lobe activity to do it. (PC-ROA. V-II - pp.260-261). Dr. Eisenstein testified that Hoskins' ability to understand spoken language is greater than his ability to express himself. Hoskins demonstrated greater difficulty identifying a word that is

a somewhat easy task and then demonstrated a greater break down in his ability as the task got more complex. When there are several demands on the task it is more difficult for Hoskins and a greater reduction is noted in terms of his brain function and ability. (PC-ROA. V-II - p.261).

Hoskins was given the **Wechsler Adult Intelligence Scale, Third Edition**. Hoskins scored a verbal I.Q. of 84, a performance I.Q. score of 78 and a full scale I.Q. score of 77¹ in the borderline range of intellectual functioning at the 8th percentile of the general population. (PC-ROA. V-II. - p. 262). Ninety two percent of the general population would score above this score. In analyzing Hoskins performance on the sub-tests that are administered in the course of testing intelligence, Dr. Eisenstein identified weakness in Hoskins performance of skills that require attention, concentration and arithmetic computation. (PC-ROA. V-II. - p.266). Dr. Eisenstein described the multi tasks involved in matching symbols to correct numbers in digit circle and coding testing where scores are based on accuracy and speed. He testified that Hoskins demonstrated significant weakness in his scores on the coding and digit symbol sub-tests which demonstrates that when more than one demand is put on Hoskins he takes longer, his efficiency is lower demonstrating deficiencies in his brain's functioning. (PC-ROA. V-II. - p.267).

¹ Dr. Eisenstein corrected his testimony during cross examination as Mr. Hoskins' full scale I.Q. score was 79 and not 77. (PC-ROA V- II, p. 304)

Dr. Eisenstein noted that both the high and low in Hoskins' test scores are reflective of the fact that he was trying, exerting a genuine effort and that the skills that he can do he will do. Hoskins high scores are reflective of his true abilities and his low scores indicative of his weaknesses and lower abilities. (PC-ROA. V-II. - p.267). Hoskins processing speed (ability to work efficiently) was his lowest individual index score at 76 or at the fifth percentile. (PC-ROA. V-II. - p.267). Dr. Eisenstein explained that when there is an element of time that is introduced into the performance of a task it requires another mental efficiency which results in a drop in skills evidenced by greater deficiencies in terms of Hoskins' test results. (PC-ROA. V-II. - p.267).

Dr. Eisenstein obtained the raw data for a **Minnesota Multi-Facet Personality Inventory** (hereinafter referred to as "MMPI") from the State's expert, Psychologist Harry McClaren which he gave to Hoskins on June 25, 2009. (PC-ROA. V-II. - pp.268-269). He submitted the MMPI raw data to Psych Corporation that runs Pearson, a professional firm that maintains the MMPI data base and who routinely provides computerized scoring and interpretive reports to psychologists nationwide. (PC-ROA. V-II. - p.269). Upon receipt of raw data, Pearson utilizes research data in their data base then score and compare the test results to the normative sample. (PC-ROA. V-II. - p.270). Pearson Corporation is

the only computer company that has authoritative normative data on the MMPI-2. (PC-ROA. V-II. - p.270). Dr. Eisenstein testified that the validity profile must be examined to determine whether the subject tested is telling the truth, genuine in responses and consistent in test responses. (PC-ROA. V-II. - p.271). He explained that there are items that will score for consistency, validity measures as to whether the subject is lying, faking, exaggerating, trying to look better or worse, or exaggerating their symptomatology. (PC-ROA. V-II. - p. 271). Explaining how an interpretation of the MMPI is done, Dr. Eisenstein stated that a T score goes in 10's and is one standard deviation. He stated that a raw score is converted into T score and any T score above 65 is abnormal and that 10 segments is one standard deviation. Dr. Eisenstein found that all scores, all validity scores that were obtained by Dr. McClaren on Hoskins' **MMPI test were within normal limits.** He testified that there were no scores that were elevated and no scores above 65. (PC-ROA. V-II. - p.272). As a result, there was no indication of faking, malingering, lying, deceit, dishonesty, disingenuous or trying to look worse than he is. (PC-ROA. V-II. - p.272). Dr. Eisenstein testified that the MMPI administered to Hoskins was valid and accurately reflective of Hoskins. Once the test is determined as valid, the interpreter will look to the clinical scales for further interpretation of results. Hoskins' MMPI results indicated one scale elevated over

the T score of 65 on the schizophrenia scale where the T score was 67. (PC-ROA. V-II. - p.273). The next scale elevated slightly but below 65 was paranoia at 64, mania and psychopathic deviant scales were within the normal range with 62 as T scores for both. (PC-ROA. V-II. - p.273).

Dr. Eisenstein testified that no one should say that the MMPI assesses for neurological conditions per se but there are neuropsychological and neurological impairments that can be found. The schizophrenia scale is within the clinical scales themselves, but problems of alienation, problems of withdrawal, problems of emotional isolation, and problems of suspiciousness, of paranoia and of mistrust can be found. (PC-ROA. V-II. - pp. 274-275). Supplemental scales can be requested from Pearson by testing psychologists in addition to the MMPI's clinical scale. For example, the Andrew Scale looks for alcoholism and there is another scale that looks for addiction. (PC-ROA. V-II. - p.275). In Hoskins MMPI scales both the alcoholism and addiction scales were significantly elevated. (PC-ROA. V-II. - p.275). Problems were noted based upon negativity, emotional withdrawal, some isolation, with interpersonal relation skills, with communication and with cognition with others. (PC-ROA. V-II. - p.276).

Dr. Eisenstein testified that the MMPI's PD or psychopathic deviant scale looks at impulsivity, and antisocial tendencies. The psychopathic deviant scale in

Hoskins MMPI is totally normal. Therefore, there is no basis in the MMPI in either the clinical or validity scales to make or even contemplate making a diagnosis of antisocial personality disorder. (PC-ROA. V-II. - p.278).

Dr. Eisenstein gave Hoskins a test of memory malingering called a **Tom** which is routinely given by clinicians to specifically test subjects for malingering. (PC-ROA. V-II. - p.278). It was described by Dr. Eisenstein as the gold standard test for malingering. (PC-ROA. V-II. - p. 278). Hoskins results on this test were all normal suggesting no malingering on his part. (PC-ROA. V-II. - p. 278). In addition to the Tom, an expert with a neuropsychological background looks at other things too to see if an individual is malingering. Dr. Eisenstein testified that he looked at Hoskins' responses given throughout his testing, and looked to see how he performed, looked at his high and low scores, his strengths and weaknesses, and looked to see Hoskins true abilities. (PC-ROA. V-II. - p. 280). Dr. Eisenstein explained that the neuropsychological tests are created to go from simple to more difficult to complex and an individual will not be able to answer at a certain cut off point where the test is stopped. Individuals that are attempting to malingering, or fake will guess wrong on the simpler items, guess, will not try hard or put forth a genuine effort. Therefore, the malingering can be identified in the neuropsychological data itself. (PC-ROA. V-II. - p.280). There was no indication

of malingering based upon the neuropsychological tests themselves and the MMPI-2 was another indicator that confirmed that no malingering or faking occurred during the course of Hoskins' testing and evaluation. (PC-ROA. V-II. - p.280).

Dr. Eisenstein reported reviewing Dr. Krop's testimony regarding prior case proceedings and reviewing depositions taken in Hoskins' case. He stated that he had reviewed witness statements and testified that one statement was given by a Ms. Hunt. He stated that he had conducted his own interviews also of several collateral sources, and reviewed school records. He reviewed official records of court proceedings and transcripts and met with Hoskins. In reviewing all of this information Dr. Eisenstein noted discrepancies with regard to the facts that Hoskins has communicated to different individuals surrounding this incident. (PC-ROA. V-II. - p.283). Dr. Eisenstein testified that he has spent a significant number of hours evaluating Hoskins and has concluded that the tests reflect an accurate assessment of his functioning, deficits and problems. Dr. Eisenstein opines that in Hoskins' own mind he lacks the ability to really differentiate between fact and fiction. (PC-ROA. V-II. - p. 283). Dr. Eisenstein testified that there are gaps and missing pieces and a sort of conglomeration of trying to put the pieces together and information it fits and exactly what occurs himself he stated on numerous occasions that he is not sure and he certainly does not have an accurate recitation of facts and I think has an

inability to actually recall and restate actually what occurred. He's heard, read and been told and he has been to several court proceedings. He's heard a lot from people and after a while it becomes unclear as to what really happened. (PC-ROA. V-II. - p. 284). Dr. Eisenstein took into consideration the various version of facts throughout the record in rendering his opinion. (PC-ROA. V-II. - p.284). He reviewed the sentencing order in the case and noted that the court found evidence of brain abnormality. (PC-ROA. V-II. - p.284). Based upon his testing, all information reviewed, and independent interviews conducted, Dr. Eisenstein reached an opinion that Hoskins' brain abnormality involves impairment of his frontal lobes as evidenced by his neuropsychological testing and evidence presented by Dr. Krop. The lack of malingering or faking was documented initially by Dr. Krop and Dr. Eisenstein testified is supported by current test results. (PC-ROA. V-II. - p.285). Dr. Eisenstein testified that he administered the same test as Dr. Krop did to Hoskins but the difference is that Dr. Krop discontinued the test such an early stage that the number of correct responses were so few and far between that Hoskins never got the concept. As a result, very little could be explained.

In contrast, Eisenstein stated that he was able to administer tests completely (Wisconsin Card Sorting) to Hoskins in order to test his frontal lobe functioning. (PC-ROA. V-II. - p.286). Dr. Eisenstein opines that Hoskins' brain damage renders

him severely impaired. (PC-ROA. V-II. - p. 286). Dr. Eisenstein opines that Hoskins' deficits are noted in the right and left frontal hemispheres of the brain and seems more lateralized to the right brain but involves both frontal lobes. (PC-ROA. V-II. - p.287). Dr. Eisenstein reports that the brain damage is static and permanent in nature based upon the similarities in his current test with Dr. Krop's testing 15 years ago. (PC-ROA. V-II. - p.287). In addition to brain impairment, Dr. Eisenstein testified that Hoskins frontal lobe disorder is also a disorder that falls under the category of impulsivity and I.E.D. (PC-ROA. V-II. - p.288). Intermittent disorder is described as dealing with an individual that has the lack of ability to control their impulses. The individual lacks the ability to maintain the necessary control over their own behavior. They have an inability to resist aggressive impulses and have inability to control whether to individual, to bodily harm or to physical damage. (PC-ROA. V-II. - p.288). Dr. Eisenstein testified that this disorder is assigned a diagnostic code in the Diagnostic and Statistical Manual of Mental Disorders, DSM-IV, it is 312.34 and that Johnny Hoskins meets the criteria. (PC-ROA. V-II. - p. 289). Dr. Eisenstein testified as to the factors that he found which support his conclusion that Hoskins meets the criteria for a diagnosis of the I.E.D. Dr. Eisenstein pointed to the level of particular acts of aggressive behavior that is not explained or that is disproportionate for the particular event. Dr.

Eisenstein pointed to the crime itself and conference with Ms. Kovatch who described an incident that occurred between Hoskins and a girlfriend. She was a female friend of Hoskins who was present during an incident where Hoskins lost it with a girlfriend named Katrina without a precipitating event and suddenly had his arms around her and was choking her. (PC-ROA. V-II. - p.291). Ms. Kovatch tried unsuccessfully to intervene by striking Hoskins in his private parts. (PC-ROA. V-II. - p.292). Another individual had to intervene (Ismael) by forcibly striking Hoskins with a baseball bat on his head before Hoskins actually released his grip from Katrina's throat. (PC-ROA. V-II. - p.292). Ms. Kovatch described the incident as startling, totally out of the norm and inexplicable. (PC-ROA. V-II. - p.292). According to Dr. Eisenstein it was significant that following this incident Hoskins had no recall of the event. (PC-ROA. V-II. - p.292). This incident was found by Dr. Eisenstein to be of the type of behavior that meets the criteria of the I.E.D. (PC-ROA. V-II. - p.292).

Dr. Eisenstein testified that following interviews with Hoskins, consult with Dr. Morton and his interviews he found evidence to support the contention that Hoskins abused alcohol, marijuana and cocaine. (PC-ROA. V-II. - p.293). (EH. - p. 160) Dr. Eisenstein testified that reactive impulsivity is a situation where an individual is unable to control their response to a given situation. (PC-ROA. V-

II. - p. 293). He opined that Hoskins suffered from a brain impairment, was susceptible to reactive impulsivity and exacerbated his problems by using drugs. (PC-ROA. V-II. - p. 296). Dr. Eisenstein disagreed with Dr. Krop's opinion in this case. Due to Hoskins' inability to control his impulses, and brain impairment, Dr. Eisenstein opined that Hoskins behavior was a string of events that were reactive in nature, impulsive and uncontrollable. Hoskins response was based upon an inaccurate and wrong response and he continued to engage in the same type of behavior. (PC-ROA. V-II. - p. 296). Drug addiction and sleep deprivation are two types of stressors that can trigger the impulsive behavior. (PC-ROA. V-II. - p. 296). Dr. Eisenstein testified that Hoskins suffers from a mental or emotional disturbance. (PC-ROA. V-II. - p. 300). His mental and emotional disturbance is of an extreme nature based upon his frontal lobe impairments. (PC-ROA. V-II. - p. 301). Further, Dr. Eisenstein concluded that Hoskins meets the criteria for I.E.D. not only on previous examples and cases but also based upon his actions in this crime. (PC-ROA. V-II. - p.301). Dr. Eisenstein testified that in his opinion there was substantial drug use involved in Hoskins' offense. Based upon his knowledge of the case, facts gathered, consultation with other experts and all work performed, Dr. Eisenstein testified that it is his opinion that Hoskins was under the influence of intoxicants at the time of the offense. (PC-ROA. V-II. - p.307). Dr. Eisenstein

testified that those intoxicants were a combination of alcohol, marijuana, and cocaine. (PC-ROA. V-II. - p.307). He testified that his opinion is based upon a combination of different factors, from information communicated to him by Hoskins, information obtained from consultations with other experts and from information received from other collateral sources. (PC-ROA. V-II. - p.308). Dr. Eisenstein testified that he is not an expert in cocaine usage and relies upon other experts who have stated that intranasal use of cocaine leads to aggressiveness. (PC-ROA. V-II. - p.308). Dr. Eisenstein testified that he diagnosed Hoskins with I.E.D. under the criteria contained in the DSM 4th Edition, revised. (PC-ROA. V-II. - p. 308). The criteria in the DSM is (A) several discrete episodes of failure to resist aggressive impulses that result in serious acts or destruction of property (B) the degree of aggressiveness expressed during the episodes is grossly out of proportion to any precipitating psycho social stressors and (C) the aggressive episodes are not better accounted for by another mental disorder, i.e. antisocial personality disorder, borderline personality disorder, psychotic disorder, manic episode, conduct disorder, attention deficit/hyper activity disorder and they're not due to direct psychological effects of a substance, i.e. drug or abuse of medication or general medical condition, i.e. head trauma, Alzheimer's disease. (PC-ROA. V-II. - p.308). In addition to the incident that he previously described related to him through

interview with witness Ms. Kovatch occurring between Hoskins and his girlfriend Katrina, Dr. Eisenstein testified that he had read about other incidents of verbal hostility between Hoskins and other girlfriends and depressive acts by Hoskins mentioned in Dr. Krop's notes. Dr. Krop recorded three incidents in his notes under impulse control history where Hoskins displayed an aggressive attitude in response to racial comments. One of the incidents occurred while Hoskins was incarcerated within the Department of Corrections record in Georgia and two while he was in the community. In reviewing the Department of Corrections records, Dr. Eisenstein found evidence of Hoskins engaging in threatening language toward guards on numerous occasions which he testified is indicative of his inability to control his impulses. (PC-ROA. V-II. - pp.311-312). According to Dr. Eisenstein the Department of Corrections records show 15 disciplinary reports for Hoskins over the last 15 years. Recorded is an incident where Hoskins physically attacked another inmate, threatened officers in another incident, and directed verbal abuse to officers when he was asked to do something. (PC-ROA. V-II. - p.312). A variety of different behaviors all tolled are indicative of individuals whose behavior is at times out of control with no rational explanation. (PC-ROA. V-II. - p.312). Dr. Eisenstein testified that by the time of Hoskins' first arrest there was some history of multiple head injuries and the first indication that he suffers from an inability to control his

impulses is noted after this first arrest occurred. (PC-ROA. V-II. - p.312). Dr. Eisenstein testified that Dr. Krop was aware of the incident described by Dr. Eisenstein which Teresa Kovach witnessed when Hoskins' behavior was out of control without rational explanation and he was violent in the presence of Teresa Kovach and a girlfriend. (PC-ROA. V-II. - p.314). He stated that Hoskins has shown remorse for the offense. (PC-ROA. V-II. - p. 314). Dr. Eisenstein testified that he looked at anti social personality disorder as a diagnosis in this case and explained why this diagnosis does **not** apply to Hoskins.

1) No Evidence of Onset of a Conduct Disorder Prior To Age 15.

When anti social personality disorder is present, he testified that the diagnostic criteria specifies that there be evidence of the conduct disorder with onset at age 15 and without this evidence cannot make this diagnosis. Hoskins school records revealed problems, he suffered a learning disability, he was failing academically but no issues of conduct disorder were recorded. (PC-ROA. V-II. – p.313 & p.325). Testimony previously provided by one of Hoskins' school counselors was reviewed and contained no indication of any kind of conduct disorder demonstrated by Hoskins in behavior before the age of 15. (PC-ROA. V-II. - p.325).

2) All of Hoskins MMPI test scores are normal.

Dr. Eisenstein testified that none of Hoskins' MMPI test scores support an anti-social personality disorder diagnosis. A prior MMPI given to Hoskins showed no elevation of the PD, 4 Scale. The MMPI-2 recently administered to Hoskins by the State's expert is also essentially normal. He testified that with both the validity and clinical scales normal and with no indication of elevations in terms of what would normally be seen where antisocial personality disorder is present no MMPI supports a diagnosis of antisocial personality disorder in Hoskins. (PC-ROA. V-II. - p. 326).

3) Clinician's Responsibility to Apply Diagnosis that Best Fits

Dr. Eisenstein testified that the clinician looks at all of the available data, at the history, the corroborating evidence, what has already been established in the case, the neuropsychological and collateral witness information and what meets the criteria in order to apply the best diagnosis that is the best fit. (PC-ROA. V-II. - p.327). Dr. Eisenstein testified that he did not apply the antisocial personality disorder because it was ruled out by the criteria, tests and is better explained by the more accurate diagnosis of I.E.D. for Hoskins. (PC-ROA. V-II. - p. 327). Dr. Eisenstein testified that Hoskins is mentally ill, that I.E.D. is listed at page 28 of the DSM and it is listed under Axis I. He testified that as outlined in the DSM manual

a disorder listed in the DSM under Axis I, is considered a major mental illness. (PC-ROA. V-II. - p.328).

Dr. Eisenstein testified that it is possible to use drugs and alcohol and still be diagnosed with I.E.D. (PC-ROA. V-III. - p.344). The level of addiction would determine whether it would be rule in or ruled out. (PC-ROA. V-III. - p.344). The literature permits a diagnosis of I.E.D. on Axis I to be made and diagnose substance abuse as a secondary element or factor in a case. The use of alcohol or drugs by Hoskins does not interfere in terms of ruling out the diagnosis of I.E.D. in his case. (PC-ROA. V-III. - p.345).

Trial counsel Moore's primary responsibility was the penalty phase proceeding. (PC-ROA. V-III. - p. 353). Trial counsel Moore testified that he did not think that substance abuse was seriously considered in the case due to lack of proof of it and the defense was that Hoskins did not commit the crime. (PC-ROA. V-III. - p.360). Trial counsel Moore testified that he became aware of a witness named Teresa Kovatch during this investigation in this case and an affidavit was obtained from her. The substance of her testimony was that she had seen Hoskins attack a woman by grabbing her by the throat and choking her and he would not stop and he was like in a frenzy. Trial counsel Moore considered this information relevant to his penalty phase presentation. (PC-ROA. V-III. - p.362). Trial counsel Moore

disagreed with the State's assertion that intoxication was irrelevant. (PC-ROA. V-III. - p. 370-371). Trial counsel Moore testified that if he had the option in a case like Hoskins' to argue both theories he would do that and has done it before. The theory that the Defendant did not commit the crime would be pursued and if evidence of intoxication was also available it would be used to suggest that if it is believed that the Defendant committed the crime then the evidence shows that he was too impaired for him to be guilty. (PC-ROA. V-III. - p.371). Trial counsel Moore testified that he did not have evidence either way as to whether Hoskins was intoxicated or not intoxicated. (PC-ROA. V-III. - p.371). However, trial counsel Moore conceded that Hoskins indicated to him that he had a cocaine addiction problem around the time of the homicide. (PC-ROA. V-III. - p.373). Trial counsel Moore testified that he couldn't be certain but believed Hoskins' girlfriend who lived next door [to the victim] had indicated that he was abusing drugs. (PC-ROA. V-III. - p.371). State's Exhibit "A" - a typed business letter dated October 21, 1993, with Dr. Krop's Office letterhead addressed to Mr. Randall Moore at the Public Defender's Office was shown to trial counsel Moore by the State. Trial counsel Moore communicated that he had no independent recollection of receiving and reading it. The State referenced the contents of the letter from Dr. Krop to trial counsel Moore which communicated that Hoskins presented "with no evidence of

any mental illness, drug or alcohol abuse.” (PC-ROA. V-III - p.372). Trial counsel Moore was not asked to review any of the notes attached to Dr. Krop’s correspondence. On redirect and following the review of the entire Exhibit A, consisting of the aforementioned letter from Dr. Krop and several notes attached to it, trial counsel Moore testified that he did not recognize the handwriting on the notes attached to Dr. Krop’s letter. He testified that a note dated September 23, 1994, attached to Dr. Krop’s correspondence, however, appeared to be Dr. Krop’s note of an interview with Hoskins which read: “his shots”, “Snorted some more Coke”, “We snorted some more Coke”, “Smith brought up some liquor”, and “Defendant drank about three glasses.” He testified that the references in the note did refer to episodes of drug and alcohol use. (PC-ROA. V-III - p.380).

At the conclusion of the evidentiary hearing held from August 24 to August 25, 2009, the parties filed Written Closing Arguments and the lower court denied Hoskins 3.851 Motion on February 10, 2010. This timely appeal follows.

SUMMARY OF THE ARGUMENT

The lower court erred in failing to grant relief for the following reasons.

Counsel failed to render effective assistance by failing to conduct a competent mitigation investigation and present evidence that was available. Counsel failed to use a mitigation specialist or investigator to obtain a comprehensive social history, biological history, or psychological history to present mitigating evidence regarding the extent of Hoskins' mental illness, drug addiction, and brain damage. Counsel failed to present evidence of Hoskins' drug abuse and he failed to present evidence that Hoskins suffered from an Axis I mental illness, Intermittent Explosive Disorder, along with his frontal lobe brain damage. Counsel was deficient for failing to present evidence as to the extreme nature of Hoskins' mental illness for the purpose of establishing statutory or non-statutory mitigation. The trial court erred by failing to find that statutory or non-statutory mitigation presented in postconviction did not outweigh the aggravating factors.

STANDARD OF REVIEW

The standard of review is *de novo*. See *Stephens v State*, 748 So.2d 1028, 1032 (Fla. 2000). The United States Supreme Court determined that trial counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. See *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984). Under *Strickland*, ineffective assistance of counsel claims are a mixed question of law and fact; with the lower court's legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. See *Sochor v.State*, 883 So.2d 766, 772 (Fla. 2004).

ARGUMENT I

THE LOWER COURT ERRED IN FINDING THAT TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CONDUCT A REASONABLE COMPETENT MITIGATION INVESTIGATION AND FAILING TO PRESENT AVAILABLE MITIGATING EVIDENCE.

Trial counsel was ineffective in failing to investigate and present mitigation during the penalty phase in various areas. Trial counsel failed to develop and present evidence that Hoskins' frontal lobe brain damage manifested in reactive impulsivity recognized as a mental illness diagnosis of I.E.D. in the Diagnostic and Statistical Manual, that he suffered a mental and emotional disturbance of an extreme nature due to the extent of his brain damage, that he lacked the ability to conform his conduct to the requirements of the law, that he had a genetic predisposition to substance abuse, and that his actions on the night of the crime were a string of events that were reactive in nature, impulsive and uncontrollable. This Court has recognized that "failure to investigate and present available mitigation can be prejudicial. *Sliney v. State*, 944 So.2d 270 (Fla. 2006) (citing *Phillips v. State*, 608 So.2d 778(Fla.1992)). The United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge that will render the trial a reliable adversary testing process. *See Strickland*, 466 U.S. at 688. Specifically, counsel has a duty to investigate in order to make the adversarial

testing process work in the particular case. *See id.* at 690. The following two prongs must be established for an ineffective assistance of counsel claim:

First, a petitioner 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, whose result is reliable.

Id. at 687. In addition, to establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688.

In *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003), the United States Supreme Court held that "*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*, 539 U.S. at 527 (citing *Strickland*, 466 U.S. at 691).

The court held that

[s]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Wiggins, 539 U.S. at 521-522 (citing *Strickland*, 466 U.S. at 690-691).

In making this assessment, the 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.” *Wiggins*, 539 U.S. at 527. In finding that counsel's investigation and presentation “fell short of the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which we have long referred as ‘guides to determining what is reasonable,’” the Court held the ABA Guidelines set the standards for counsel in investigating mitigating evidence. *Wiggins*, 539 U.S. at 524 (citing *Strickland*, 466 U.S. at 690-688, and *Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

In *Williams v. Taylor*, trial counsel was held to be ineffective when they only considered a narrow set of sources and did not attempt to introduce evidence of Williams’ borderline intellectual functioning, prison records showing commendations, and testimony from prison guards that Williams would not likely be a danger in prison. *See Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Citing the commentary to the ABA Guidelines, the Court found that counsel’s failures and omissions “clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant’s

background.” *See Williams*, 529 U.S. at 397.

In *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456 (2005), the United States Supreme Court held that “even when a capital defendant’s family members and the defendant himself have suggested that no mitigation evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.” *Id.* at 2460. The Court, in finding that counsel rendered deficient performance, cited counsel’s failure to review Rompilla’s prior conviction, failure to obtain school records, failure to obtain records of Rompilla’s prior incarcerations, and failure to gather evidence of a history of substance abuse. *Id.* at 2463. The *Rompilla* Court further found that “this is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts, including interviews with Rompilla and some members of his family, and examinations of reports by three mental health experts who gave opinions at the guilt phase.” *Id.* at 2462. However, despite the scope of this mitigation investigation, the Court still found that counsel rendered deficient performance.

The United States Supreme Court recently reiterated that according to “prevailing professional norms” counsel has an “obligation to conduct a thorough

investigation of the defendant's background.'" *Porter v. McCollum*, 130 S.Ct. 447, 452-453, 175 L.Ed.2d 398 (2009) (citing *Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). In *Porter*, the Court held that a state court unreasonably applies *Strickland's* prejudice standard when it fails to give weight to mitigating evidence of a capital defendant's abusive childhood, brain damage, and post-traumatic stress disorder. *See Porter*, 130 S.Ct. at 455.

In addressing the importance of counsel's duty to investigate for the penalty phase, this Court has said:

Trial counsel's obligation to zealously advocate for their clients is just as important in the penalty phase of a capital proceeding as it is in the guilt phase. There is no more serious consideration in the sentencing arena than the decision concerning whether a person will live or die. When an attorney takes on the task of defending a person charged with a capital offense, the attorney must be committed to dedicate both time and resources to thoroughly investigate the background and history, including family, school, health and criminal history of the defendant for the kind of information that could justify a sentence less than death. I believe that the constitution and the case law from this court and the United States Supreme Court requires no less.

Coday v. State, 946 So.2d 988, 1015-1016 (Fla. 2006) (*Quince, J., concurring*).

Dr. Eisenstein testified that he administered the same tests (Wisconsin Card Sorting) to Hoskins that had been given by Dr. Krop in order to assess Hoskins' frontal lobe functioning. (PC-ROA.V-II - p.286). In explaining the difference between his conclusions and those reached by Dr. Krop, Dr. Eisenstein explained

that Dr. Krop discontinued administration of the test at an early stage whereas his test was not a partial but complete one. (PC-ROA.V-II - p. 287). Consequently, Dr. Eisenstein concluded that Hoskins suffers from brain damage that renders him severely impaired, and on the night of the crime was subject to I.E.D. Importantly, he described Hoskins' conduct on the night of the crime along with his actions in Georgia as a string of events, reactive, impulsive and uncontrollable in nature. (PC-ROA.V-II- p.287& p.296).

Dr. Eisenstein also conducted a series of interviews with collateral witnesses and testified that based upon all of the information gathered he opined that there was substantial use of drugs by Hoskins and he believed him to have been under the influence of intoxicants at the time of the crime. (PC-ROA.V-II- p.308). In addition to the impact that the drugs had upon Hoskins' already damaged brain, Dr. Eisenstein opined that Hoskins suffers from I.E.D. This is a behavioral disorder characterized by extreme expressions of anger, often to the point of uncontrollable rage, that are disproportionate to the situation at hand. In accordance with the criteria for diagnosing this condition identified in the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (DSM-IV), Dr. Eisenstein identified several discrete episodes where Hoskins was unable to resist aggressive impulses and resulted in serious acts, where his aggressiveness was grossly out of proportion

to any precipitating psycho social stressors and could not be better accounted for by another mental disorder other than I.E.D. (PC-ROA.V-II- p.308).

Dr. Krop was aware of several of the explosive incidents described by Dr. Eisenstein and his notes also indicated that Hoskins admitted drug abuse. However, he failed to reach this conclusion and this powerful mitigating evidence was never presented to Hoskins' jurors. The jury was unaware that in addition to frontal lobe brain damage, Hoskins suffers from an Axis I major mental illness, I.E.D., which was exacerbated by Hoskins illicit drug abuse. The jury was never informed that this combination of infirmities fueled Hoskins' conduct and affected his ability to engage in rational thinking over an extended period of time. Without this knowledge, jurors were unable to completely understand Hoskins' circumstances and actions in order to spare his life.

The lower court's ruling that this knowledge would not have affected their decision to impose death is an unreasonable application of the law to the facts. The lower court failed to acknowledge the significance of the additional mitigation evidence as presented through the testimony of mitigation expert, Shirley Furtick and experts Drs. Eisenstein and Morton at the postconviction evidentiary hearing. The lower court misapprehended the testimony regarding brain damage and its significance when exacerbated by his mental illness, I.E.D., and his drug use under

clearly established federal law and the law of this Court.

ARGUMENT II

THE LOWER COURT ERRED IN FINDING THAT TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY FAILING TO USE A MITIGATION EXPERT OR INVESTIGATOR TO OBTAIN A COMPREHENSIVE SOCIAL, BIOLOGICAL OR PSYCHOLOGICAL HISTORY.

Ms. Shirley Furtick testified regarding the role of a mitigation expert at Hoskins' evidentiary hearing and she identified generational issues that she found significant in this case. Following her review of the records and interviews with collateral witnesses she found evidence to corroborate Hoskins' reports of alcohol use. (PC-ROA. V-II. - p. 224). Mr. Furtick documented through interviews a long history of alcohol abuse in the Hoskins household. She found evidence in the history that Hoskins' half-sibling, Jessie May, died due to cirrhosis of the liver caused by her alcohol abuse and that Hoskins' brothers James, and Lonnie abused substances along with the Defendant. (PC-ROA. V-II. - p.225). Ms. Furtick documented the alcohol abuse by a young Hoskins with older peers that drank beer. Family members reported that alcohol was used by the family for relaxation purposes. (PC-ROA. V-II. - p.226). Her multi-generational investigation disclosed that Hoskins' family actually introduced him to the world of substance abuse.

This Court has held that trial counsel renders deficient performance when his

investigation involves limited contact with a few family members and he fails to provide his experts with background information. *See Sochor v. Florida*, 883 So.2d 766, 772; *see also Ragsdale v. State*, 798 So.2d 713, 718-719 (Fla. 2001).

(Inexperienced counsel rendered deficient performance when his entire investigation consisted of a few calls made to family members). The ABA Guidelines have been cited by the United States Supreme Court as “guides to determining what is reasonable.” *Wiggins*, 539 U.S. at 524 (citing *Strickland*, 466 U.S. at 690-688, and *Williams*, 529 U.S. 362, 396). The Guidelines in effect at the time of Hoskins’ trial were created in 1989. Guideline 11.4.1(A) directed counsel to begin conducting independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial immediately and expeditiously upon entry. Guideline 11.4.1(C) directed counsel to collect information as to medical history, mental and physical illness or injury, (alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior) special education needs (including cognitive limitations and learning disabilities); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record, and cultural influences. Guideline 11.4.1(D) instructed counsel to obtain the names of collateral persons or sources to verify corroborate, explain and expand upon the information obtained in (C) above.

By the time of Hoskins' last penalty phase proceeding in 2003, the National Guidelines were fully drafted as the prevailing norms for presentation of the penalty phase were outlined in Guideline 10.11. The Commentary to that Guideline notes that "it is critically important to construct a persuasive narrative [of mitigation], rather than to simply present a catalog of seemingly unrelated mitigating factors." Commentary to *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 10.11(2003). Further the Guidelines note that "[s]ince an understanding of the client's extended multigenerational history is often needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the client's complete social history from before conception to the present. Expert witnesses maybe useful for this purpose, and in any event, are almost always crucial to explain the significance of the observations." *Id.* With respect to investigation in the penalty phase, the guidelines stress that "[r]ecords should be requested concerning not only the client, but also his parents, grandparents, siblings, and children. A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment." Commentary to *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 10.7(2003).

The standard of proof for ineffective assistance of counsel claims is set out in *Strickland*. Also, because the right to effective assistance of counsel is so fundamental, the standard for proving prejudice is low:

An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, *even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.*

* * * *

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors...When a defendant challenges a death sentence...the question is whether there is *a reasonable probability* that, absent the errors, the sentencer – including an appellate court to the extent it independently reweighs the evidence – would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim, must consider the totality of the evidence before the judge and the jury.

See Strickland, 466 U.S. at 694-696 (emphasis added).

Ms. Furtick provided records to Dr. Eisenstein that he used to evaluate Hoskins. From a review of the historical data and trial records, Dr. Eisenstein was able to identify several discrete episodes where Hoskins was unable to resist aggressive impulses and resulted in serious acts, where his aggressiveness was grossly out of proportion to any precipitating psycho social stressors and that could

not be better accounted for by another mental disorder other than a diagnosis of I.E.D. (PC-ROA.V-II- pp. 308). Using the information provided to him by Ms. Furtick, Dr. Eisenstein was able to evaluate Hoskins and concluded, that he suffered from an Axis I mental illness, I.E.D. and found this illness to be exacerbated by his illicit drug abuse. Importantly, Dr. Eisenstein was able to take this information along with his testing and conclude that Hoskins' ability to engage in rational thinking was adversely affected over an extended period of time. Mitigation evidence collected by Ms. Furtick assisted Dr. Eisenstein in forming his opinion as to the extent of Hoskins' mental illness and to his conclusion that factors can support a finding of statutory mental mitigation.

In denying Hoskins relief the trial court found that Hoskins actions following the sexual battery were not affected by his brain damage and that "the same finding would have be applicable to any evidence that may be presented that the Defendant had Explosive Intermittent Disorder". (PC-ROA. V-VII, p.1207).

The court did not take into consideration that Dr. Eisenstein testified that the Defendant's actions were not compartmentalized but were instead of a continuing irrational nature over an extended period of time. Dr. Eisenstein did not agree with Dr. Krop's testimony that the actions of Hoskins following the sexual battery were ever rational acts. Dr. Eisenstein opined that the Defendant's actions were of a

continuing irrational nature over an extended period of time due to the frontal lobe impairment coupled with drug abuse and his mental illness diagnosed as I.E.D.

Contrary to the lower court's finding, there is a probability that a sentencing jury fully informed through expert testimony as provided at Hoskins' evidentiary hearing by Dr. Eisenstein and Dr. Morton, regarding Hoskins' I.E.D., on the adverse affects of the drug abuse on Hoskins' already damaged brain and with an explanation of the extreme nature of Hoskins' mental infirmities could have reached the conclusion that the mental mitigation tipped the scales in favor of a life sentence. Trial counsel was deficient for failing to investigate, and present this mitigating evidence at penalty phase and the post conviction court erred by failing to find and properly weigh this evidence.

ARGUMENT III

THE LOWER COURT ERRED BY FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE BY FAILING TO PRESENT MITIGATING EVIDENCE OF HOSKINS' SUBSTANCE ABUSE OR PROVIDING MENTAL HEALTH EXPERT TESTIMONY TO ESTABLISH STATUTORY OR NON STATUTORY MITIGATION. FAILURE TO FIND AND WEIGH SUCH TESTIMONY BY POSTCONVICTION COURT WAS ERROR.

The Eighth and Fourteenth Amendments of the United States Constitution prohibit in State capital proceedings the sentencer from being precluded or prohibited from considering any relevant mitigating circumstances, and prohibit the sentencer from refusing to consider any relevant mitigating evidence reasonably

established at trial. *See Eddings v. Okalahoma*, 455 U.S. 100, 102 S.Ct. 868 (1982). Such mitigating evidence must be considered and given effect if relevant to the Defendant's character or record, or to the circumstances of the offense. *See Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989).

Dr. Eisenstein, a clinical psychologist with a sub-specialty in Neuropsychology testified that in his opinion Hoskins was intoxicated at the time of the crime due to a combination of alcohol, marijuana and cocaine. (PC-ROA. - V-II, p.307). The state's expert, Dr. McClaren, agreed that ingestion of an 8 ball of cocaine on the date of the crime is about 3 ½ grams and considered a lot. (PC-ROA. - V-III, p.463). The postconviction court found that Hoskins failed to present sufficient evidence that he was, in fact, intoxicated at the time of the crime, but the court acknowledged in its' order denying relief that Hoskins had presented evidence that he had an alcohol and drug problem during the time period that the crimes were committed. (PC- ROA. V- VII. - p.1196).

This Honorable Court has held that failure to prepare and present evidence of chronic substance abuse can constitute ineffective assistance of counsel. *See Heiney v. State*, 620 So.2d 171 (Fla. 1993); *see also, People v. Wright*, 488 N.E. 2d 973 (Ill. 1986). Furthermore, this Court in *Campbell v. State*, 571 So.2d 415 (Fla. 1990), held that the court must find as a mitigating circumstance each factor reasonably

established by the evidence and mitigating in nature. The lower court erred in failing to find Counsel was ineffective for failing to present evidence of Hoskins drug abuse history. Hoskins never gave instructions to counsel not to investigate or present evidence of his drug abuse before the jury. In *Ross v. State*, 474 So.2d 1170, 1174 (Fla. 1985) this Court found that the defendant's past drinking problems, among other things to be "collectively as a significant mitigating factor" even though the defendant himself testified that he was "cold sober" on the night of the murder. *See also Penn v. State*, 574 So.2d 1079 (Fla. 1991).

Trial counsel possessed the Department of Corrections records that showed that Hoskins had been arrested on a prior drug charge. (PC-ROA. V - III. - p.389). The discrepancy between Dr. Krop's letter to counsel and interview notes reporting substance abuse should have been noticed by trial counsel. Trial counsel Moore acknowledged that Hoskins had admitted his drug abuse problem and recalled that his girlfriend had communicated this also. (PC-ROA. V - II. - p.373). Counsel Moore testified that he had not discussed the drug use with Dr. Krop. (PC-ROA. V - II. - p. 373). Trial counsel Chang also acknowledged that information that Hoskins snorted cocaine was known to him, that he made no independent effort to investigate abuse by Hoskins of drugs or alcohol, and did not discuss such mitigating evidence with any expert. (PC-ROA. V - II. - pp.388-389). The drug use

factor should have been investigated further and presented for Hoskins' sentencer to be fully aware of the impact of this mitigating factor upon his abnormal brain functioning. The post conviction court erred in failing to find counsel ineffective for not presenting evidence of Hoskins drug use for non-statutory mitigation purposes.

Dr. Eisenstein testified at the evidentiary hearing that Hoskins suffers from a mental and emotional impairment that is of an extreme nature. (PC- ROA. V- II. - p. 301) Due to the fact that Hoskins has frontal lobe brain damage, testimony that he also suffers from a major Axis I mental illness, I.E.D., as testified to by Dr. Eisenstein is significant. Perhaps no other mitigating circumstances carry more weight than expert mental health evidence. In Florida, evidence of serious mental or emotional disturbance or mental disorder is so important that two the legislature has created two categories for those mitigators. Based upon the testimony provided by Dr. Eisenstein at evidentiary hearing, the court had evidence to consider if Hoskins was under the influence of an extreme mental or emotional disorder at the time of the crime *Fla. Stat.* § 921.141(6)(b), and whether at the time of the crime Hoskins had the capacity to appreciate the criminality of his conduct or if the ability to conform his conduct to the requirements of the law was substantially impaired. *Fla. Stat.* § 921.141(6)(f). This Court has repeatedly given great weight to those statutory mental health mitigators when they are applicable and recognized that

statutory mental mitigators can outweigh a host of aggravating circumstances. *See Ferry v. State*, 507 So.2d 1373 (Fla. 1987); *see also Smalley v. State*, 546 So.2d 720 (Fla. 1989). Even in cases where the jury has recommended death, this Court has reversed the death penalty where this kind of mitigation exists. *See Santos v. State*, 591 So.2d 160 (Fla. 1991); *see also Nibert v. State*, 574 So.2d 1059 (Fla. 1990).

It was crucial that the jurors considering Hoskins' fate fully understood his actions and how the drugs, brain damage, and mental illness affected his ability to think rationally over an extended period of time. Trial counsel was ineffective due to his failure to present mitigating evidence at trial. The post conviction court erred also in finding that the mental mitigation and mitigating evidence as to Hoskins drug abuse presented at the post-conviction failed to outweigh the aggravators.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING HOSKINS CLAIM THAT, CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED HOSKINS OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Under Florida case law, the cumulative effect of these errors denied Mr. Hoskins his fundamental rights under the Constitution of the United States and the Florida Constitution. *See State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986); *see also*

Ray v. State, 403 So.2d 956 (Fla. 1981). Hoskins was denied a fundamentally fair trial pursuant to his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. *See Heath v. Jones*, 841 F.2d 1126 (11th Cir. 1991). The errors alleged in Hoskins Motion for Post-Conviction Relief considered together, entitle him to relief.

CONCLUSION

The lower court failed to follow clearly established precedent of the United States Supreme Court when, “it failed to evaluate the totality of available mitigation evidence - both that adduced at trial, and the evidence adduced in the [postconviction] proceeding in reweighing it against the evidence in aggravation. *See Clemons v. Mississippi*, 494 U.S. 738, 751-752, 110 S.Ct. 1441 (1990); *see also Williams v. Taylor*, 529 U.S. 362, 397. Dr. Eisenstein testified at Hoskins’ post conviction evidentiary hearing that based upon Hoskins’ background, neurological tests results, drug use and serious mental illness, I.E.D., it is his opinion that at the time of this offense Hoskins was under the influence of extreme mental or emotional disturbance and unable to conform his conduct to the requirements of the law. *See Fla. Stat.* § 921.141. Statutory mental health mitigation is weighty and can tip the scales in favor of life.

Based on the foregoing, the lower court improperly denied post-conviction

relief. This Court should vacate Hoskins' death sentence and grant relief deemed proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Kenneth Nunnelley, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118, and Thomas Brown, Assistant State Attorney, Office of the State Attorney, 2725 Judge Fran Jamison Way, Viera, Florida 32940, and to Johnny Hoskins a/k/a Jamile Alle, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 6th day of October, 2010.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to *Fla.R.App.P. 9.210*, that the foregoing was generated in Times New Roman 14-point font and in compliance with this Honorable Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, a copy of the Microsoft Word document of the foregoing brief has been transmitted in an electronic format to this Court's electronic mail at e-file@flcourts.org on this 6th day of October.

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