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IN THE SUPREME COURT OF FLORIDA

JAMES DANIEL TURNER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-2271

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR ST. JOHNS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Turner." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

STATEMENT OF THE CASE AND FACTS

The statement of the facts contained in Turner's is incomplete and argumentative. As authorized by *Florida Rule of Appellate Procedure* 9.210(c), the State submits its rendition of the case and facts.

The Facts of the Crime.

In its decision affirming Turner's conviction and sentence of death, this Court summarized the facts of the offense in the following way:

> James Daniel Turner appeals his conviction for first-degree murder of Renee Howard and his sentence of death. We have jurisdiction. *See* art. V, § 3(b)(1), *Fla. Const*. For the reasons that follow, we affirm Turner's convictions and sentences.
>
> FACTS AND PROCEDURAL HISTORY
>
> The record reflects that Turner had been sentenced to jail in Newberry County, South Carolina, for a violation of probation stemming from a felony battery charge. While incarcerated at that location he was primarily assigned to perform various duties at the local sheriff's office and was given special privileges because he was considered trustworthy. His position provided him unrestricted access to most of the sheriff's office, including the keys to vehicles parked adjacent to the office. Despite being scheduled to be released from the facility at the end of 2005, on September 28, 2005, Turner escaped from the

Newberry County Jail in a stolen Newberry County Office Sports Utility Vehicle (SUV). The SUV was discovered by local employees in the parking lot of a business located in St. Johns County, Florida the next day. Local law enforcement officials found Turner's identification card and multiple rocks of crack cocaine in the stolen vehicle.

On September 30, 2005, two hotel guests saw Turner lurking around the Comfort Inn located in St. Augustine. At approximately 9:30 a.m., one of the housekeepers employed at the Comfort Inn observed Turner obtaining ice. Another housekeeper also saw Turner that morning and said "good morning" to him, to which he responded "good morning." Later that morning, Turner approached one of the housekeepers and asked her for a towel. A third housekeeper also encountered Turner about an hour before the subject murder and greeted him, but he did not respond.

That morning, Renee Howard, her four children ages eighteen, fourteen, two, and ten months, Howard's eight-month-old granddaughter, and Stacia Raybon occupied room 210 of the motel, which was located on the second floor. Raybon testified that early that morning on the way to obtain breakfast, the defendant passed them, "almost pushing [them] off the sidewalk." Shortly thereafter, Howard drove her son to work and daughter to school, taking two of the other three children with her in a champagne colored Ford F-150 pick-up truck. Howard returned to the motel and Raybon was on the way downstairs to assist Howard in gathering the children when she noticed Turner outside room 210. Howard, Raybon, and the three remaining children returned to the room to prepare to check out of the motel.

The record reflects that while preparing bottles at the rear of the room for the children, Raybon saw a flash of light hit the mirror as the door of the room suddenly opened. She then saw Turner go toward Howard. Turner appeared to strike Howard in the midsection and then turned and proceeded to attack Raybon. Raybon crouched on the floor in the rear of the room and buried her face in her hands. Turner pulled Raybon up by the arm and stabbed her in the elbow. Immediately after stabbing Raybon, Turner noticed Howard move back toward the entry door of the room and Turner turned

and directed his attention to her for the second time. Turner's movement afforded Raybon time to grab her purse, rush into the bathroom, and lock herself inside.

While in the bathroom, Raybon heard "loud hitting noises" in the room and the children screaming. Raybon then heard water running in the sink, which was located immediately outside the bathroom door. Turner attempted to force his way into the bathroom, and after he failed multiple times, Raybon asked Turner to release one of the children to her. Turner demanded money, and, after searching her purse, Raybon slid $5 and several credit cards under the bathroom door. Turner slid the $5 back under the door to her and told Raybon to keep it. Turner then brought one of the children to the bathroom door and allowed the child to enter the area occupied by Raybon. After Raybon pleaded for Turner to leave her and the children alone, Turner ordered Raybon to wait ten minutes before exiting the room. Approximately one minute later Raybon heard the entry door of the room close. When Raybon finally exited the bathroom, she discovered Howard's motionless body on the floor.

After Turner left, Raybon tried to call 911 from the hotel room but was unable to connect. She then ran out of the room, screaming for help, and encountered one of the housekeepers, who gave her use of a cell phone. Shortly thereafter, the police arrived and Raybon provided a description of both Turner and Howard's truck, which was missing after the attack. The police secured the area and initially believed that one of the children was missing. However, after conducting a thorough search of the room, the missing child was located under blankets in the rear of the room.

The St. Johns County Sheriff's Office issued a "be on the lookout" for Howard's truck, warning officers that there might be a three-year-old child in the vehicle with a dangerous person. Approximately five miles away from the Comfort Inn, Deputy Graham T. Harris, driving a marked police car, spotted the truck. Deputy Harris eventually caught up to the vehicle and activated his overhead lights. Deputy Harris testified, "Next thing I see when I pull over to the side, I see the reverse lights coming straight at my patrol car, boom, hit it, rear-end hit my front end, eventually knocked out my

siren." The truck then moved in a forward direction, pulled away from the police car, and proceeded to move full speed at the driver side of the police vehicle. Deputy Harris accelerated to escape the collision, and then the truck accelerated behind the patrol car as if to ram the patrol car from behind. Deputy Harris drove away from the scene with the truck in pursuit. Eventually, after numerous attempts at ramming the patrol car, the truck collided with a guard rail and came to a complete stop. Turner exited the truck, looked at Deputy Harris, and then jumped off the Deep Creek Bridge into the creek below.

Subsequent to this roadway altercation, multiple deputies arrived at the Deep Creek Bridge. With canine assistance, Turner was located in the creek below. The deputies issued numerous commands for Turner to surrender, none of which were obeyed. After the canine was ordered to attack Turner, and Turner attempted to drown the animal, he eventually surrendered to the authorities. During the standoff and eventual arrest, Turner was heard saying, "I did not do it," "Shoot me, just shoot me," "I didn't do it, the other guy did," and he continuously identified himself as "Ricky." Stacia Raybon's two credit cards were found in Turner's possession when he was arrested.

On October 19, 2005, Turner was indicted for the following charges: (1) first-degree felony murder; (2) attempted first-degree murder; (3) grand theft of a motor vehicle; (4) home invasion robbery with a deadly weapon; and (5) aggravated assault on a police officer.

Turner v. State, 37 So. 3d 212, 215-217 (Fla. 2010).[1]

This Court described the trial proceedings as follows:

Second Trial-Guilt Phase

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[1] Turner's first trial ended in a mistrial. *Turner v. State,* 37 So. 3d at 218. No issues connected to the first trial are present in this proceeding, and discussion of that proceeding is omitted.

Prior to jury selection for the second trial, Turner filed a motion to dismiss the charges against him alleging that the Double Jeopardy Clauses in both the Florida and United States Constitutions precluded the State from retrying him. The motion stated in part:

> Defendant was placed in a position that he either had to waive his request for a mistrial or have an alternate juror seated to replace the juror who became ill after over four hours of deliberations. The twelve person jury who had been selected and sworn had reached an agreement on four of the five counts, leaving the Defendant with the only option of requesting a mistrial.

At the subsequent hearing, Turner asked the trial court to find that the mistrial had been "declared over defendant's objection" and to apply the standard of "manifest necessity." The trial court noted that Turner had never before suggested a double jeopardy violation. The trial court denied the motion to dismiss.

At trial, the State presented the testimony of multiple Florida Department of Law Enforcement crime lab analysts. Analyst Steven Platt testified with regard to the procedures for collecting the evidence from room 210. Analyst Gregory Brock established that there was a positive DNA match for James Turner for blood found on the bathroom door frame. He further testified that blood on a doorknob in the hotel room was a positive DNA match for Renee Howard, Stacia Raybon, and Turner. Evidence was presented that the shoes Turner was wearing at the time he was apprehended matched a bloody footprint found on a sheet of paper located in the hotel room. Finally, Dr. Terrence Steiner, the pathologist who performed the autopsy of Renee Howard, testified that the cause of death was shock and blood loss due to multiple stab wounds. Howard had sustained fifteen stab wounds.

The defense did not present any evidence. The jury returned a verdict of guilty on all five counts.

Penalty Phase

The State presented three witnesses during the penalty

phase. The pathologist testified that a cut he found on Howard's hand was a defensive wound. He was also of the opinion that Howard was alive when the stab wounds were inflicted, and he opined that a few of the wounds "should have caused some pain." The State also presented victim impact statements from the victim's grandmother and oldest son. Finally, copies of a judgment and sentence from Larens County, South Carolina, to establish that Turner was under a sentence of imprisonment at the time of the incident were placed in evidence.

The defense presented multiple witnesses during the penalty phase. Two of Turner's stepdaughters testified that he was a good stepfather. The grandmother of his stepchildren corroborated that he was a good stepfather. Turner's brother testified that the defendant began drinking with his uncles at a very young age and also helped them deal drugs.

The defense presented expert testimony with regard to the effect of crack cocaine use on the brain. An expert testified that Turner entered a drug rehabilitation facility in 1994 and, while undergoing treatment, attempted to commit suicide. During cross-examination, the expert admitted that Turner's cocaine use influenced his actions on the day of the murder, but did not necessarily cause those actions. He further was of the view that at the time of the murder, assuming Turner had gone at least twelve hours without crack cocaine, he would have been either depressed and subdued or anxious and hypervigilant.

Finally, a psychologist testified that although he did not find that Turner suffered from significant brain damage, he found many cognitive defects. He testified that Turner's biggest deficits involved decision making, judgment, planning, and impulse control. On cross-examination, the psychologist conceded that Turner clearly understood that the killing of Renee Howard was wrong.

The jury recommended a death sentence by a vote of ten to two. At the *Spencer* [FN1] hearing, Turner presented two witnesses. A mitigation specialist and a psychotherapist testified that Turner had a history of abandonment by his mother, became substance dependent at a very young age and therefore never had proper

cognitive development, and had a low intelligence level. A psychologist expressed the opinion that Turner had frontal lobe impairment, experienced difficulty with performance tests used to measure executive functions, and had an IQ of around 79. The State presented three additional victim impact statements, from Howard's granddaughter, aunt, and uncle.

> [FN1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

On April 24, 2008, the trial judge sentenced Turner to death for the murder of Renee Howard. In pronouncing Turner's sentence, the trial court determined that the State had proven beyond a reasonable doubt the existence of five statutory aggravators: (1) the crime was committed while he had previously been convicted of a felony and was under sentence of imprisonment (moderate weight); (2) the defendant had been previously or contemporaneously convicted of a felony involving the use or threat of violence to Stacia Raybon and a law enforcement officer (great weight); (3) the crime was committed while the defendant was engaged in the commission of, or an attempt to commit, the crime of burglary or robbery or both (great weight) (this aggravating factor was merged with another factor: that the crime was committed for financial gain.); (4) the crime was especially heinous, atrocious, or cruel (HAC) (great weight); and (5) the crime was committed in a cold, calculated, and premeditated manner and without any pretense of moral or legal justification (CCP) (significant weight).

The trial court found two statutory mitigating circumstances: (1) the crime was committed while under the influence of extreme mental or emotional disturbance (moderate weight); and (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (moderate weight).

The court also found nine nonstatutory mitigating circumstances: (1) Turner's ability to form loving relationships (some weight); (2) Turner's family problems and mental suffering (little weight); (3) Turner's uncles gave him drugs when he was young (some weight); (4) Turner's cognitive development was

> impaired due to substance abuse (some weight); (5) Turner's chronic alcohol and drug problem (moderate weight); (6) at the time of the murder, Turner was under the influence of crack cocaine (some weight); (7) Turner was a hard worker and skilled carpenter (little weight); (8) prior to escaping, Turner was a good worker in South Carolina (slight weight); and (9) Turner's appropriate courtroom behavior (some weight).

Turner v. State, 37 So. 3d at 218-220.

The Direct Appeal Issues.

On direct appeal to this Court, Turner raised a "double jeopardy" issue related to the mistrial; challenged the applicability of the cold, calculated and premeditated aggravating factor; challenged the proportionality of his death sentence; and raised a claim based on *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *Turner, supra*. This court also addressed the sufficiency of the evidence, and affirmed the convictions and sentence of death. *Id.* In finding the evidence sufficient, this Court said:

> The evidence is sufficient to affirm Turner's convictions for the premeditated murder of Renee Howard. In support of premeditation, the record reflects that Turner was lurking around the hotel for hours before the murder. Further, Turner burst into the room, ready to attack, and then proceeded to stab Howard fifteen times. With regard to placing Turner at the scene, the record reflects that four separate witnesses placed Turner at the hotel prior to the murders. During trial Stacia Raybon provided great detail with regard to Turner's entry into the hotel room and the stabbing of both women. Moreover, Turner was identified as the driver of the Renee Howard's stolen truck later that day. Finally, with regard to physical evidence, Turner's DNA was found in both the hotel room and Howard's truck. Turner's bloody shoeprint was also found in the hotel room. The

> evidence is more than sufficient to affirm the conviction of murder.

Turner v. State, 37 So. 3d at 229.

The Post-conviction Litigation.

On October 12, 2011, Turner filed a motion for post-conviction relief pursuant to *Florida Rule of Criminal Procedure* 3.851. (V2, R184-245). The State filed its Answer to the motion on November 28, 2011, and a Case Management Conference was conducted on February 29, 2012. (V2, R246-92; V16, R1-33). On March 23, 2012, the Circuit Court entered an order setting one of Turner's claims (claim 3) for an evidentiary hearing, and denying relief on all of the other grounds for relief contained in Turner's motion. (V7, R1138-73). The evidentiary hearing was conducted on May 8-9, 2012. (V17, R1-195; V18, R196-269). On October 4, 2012, the circuit court entered its order denying relief on claim 3. (V7, R1173). Turner filed notice of appeal on October 31, 2012. The record was transmitted on December 21, 2012, and Turner filed his *Initial Brief* on April 15, 2013.

The Evidentiary Hearing Facts.

Valli Braswell Sottile was Turner's trial counsel, and co-counsel with James Valerino. (V1, R8, 12).[2] Turner was Sottile's

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[2] Cites to the evidentiary hearing are by volume number followed by page number - - "V_, R_".

first capital case which she worked on from the time of Turner's arrest. (V1, R12). Turner was a cooperative client; she met with him frequently at the jail. (V1, R31, 42-43). Sottile's focus was only on Turner's case as she did not have any additional caseload. (V1, R14).

Sottile and Valerino worked together on both the guilt and penalty phases. (V1, R13). They met every week.[3] In preparation for the penalty phase, Sottile spoke with Turner's family members via phone. (V1, R23). She also located various experts.[4] (V1, R13). Sottile spoke with Turner's brother Jeffrey and his aunt, Betty McAlister. (V1, R23). Jeffrey was "nice and polite ... [but] he really did not want to be involved in this case." (V1, R25). Jeffrey and McAlister were not called as witnesses at the penalty phase or at the *Spencer*[5] hearing because they became "uncooperative." (V1, R24-25, 51). Jeffrey attended the trial but "refused to cooperate. He walked out, left the courthouse. We never saw him again." (V1, R24-25). Mitigation specialist

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[3] Valerino works out of the Deland, Florida, office. He frequently met with Sottile in the St. Johns County public defender's office. (V1, R30, 43).

[4] The defense hired the following experts: Dr. Bloomfield, psychologist; Dr. Susan Young, neuropsychologist; Dr. Krop, psychologist; Dr. Scott, mitigation specialist; Dr. Mandoki, psychiatrist; and Dr. Gama, M.D. Young, Mandoki, and Gama were not called as witnesses. (V1, R28-29, 44-45).

[5] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

William Scott travelled to South Carolina and spoke with Turner's family members in person. (V1, R14). In addition, the defense team's investigator, David Newsome, whom Sottile saw every day, attempted to speak with Turner's family. (V1, R14, 30).

Sottile had concerns about Turner's mental status. As a result, the defense filed "a good faith notice of insanity." (V1, R15, 26). Sottile said the trial court allowed the defense to present evidence of insanity as long as it was not connected to substance abuse. (V1, R15-16). Sottile deposed Dr. Steven Young, the State's mental health expert. (V1, R16, 19). However, in Young's opinion, Turner suffered from depression but was not insane at the time of the murder. (V1, R19).

Sottile recalled presenting evidence of child abuse at the penalty phase. (V1, R22). Testimony included statements that Turner's parents mistreated him as a child. In addition, witnesses testified that Turner's uncles introduced him to alcohol at a young age. Turner's uncles spiked his beer with ammonia "to help with getting high." (V1, R22).

Sottile and Valerino discussed all aspects of the penalty phase; however, Valerino "had the final say." (V1, R25). Their concern regarding Turner's mental health was only a portion of the penalty phase strategy. (V1, R26). Counsels' strategy in the penalty phase was to present experts as well as lay witnesses.

(V1, R27). Sottile and Valerino expressed their concerns to the experts regarding Turner's substance abuse, competency, and other areas as well. (V1, R27). The experts developed their own opinions through their interviews and testing. Sottile and Valerino made a joint decision as to which experts to use. (V1, R27, 28).

Sottile met with several experts that included Dr. Bloomfield, Dr. (Susan) Young, Dr. Mandoki and Dr. Gama. Bloomfield was called as a witness at the penalty phase. (V1, R28-29, 44). Young prepared a written report, and, as a result, counsel determined she would not be a good witness for Turner's defense. (V1, R29, 45). Dr. Mandoki also prepared a report. Based upon the report and talking to Mandoki, counsel made a strategic decision not to call Mandoki as a witness for Turner, either. (V1, 46-47). Dr. Gama prepared a report based upon results from an MRI conducted on Turner. (V1, R48). After talking to Gama and reviewing his report, counsel made a strategic decision not to call Gama as a witness. (V1, 44-45, 50). Dr. Krop was called at the *Spencer* hearing. (V1, R29).

Sottile also contacted a Jacksonville psychologist[6] who specialized in adolescent development. (V1, R50-51, 52). Sottile explained to the expert that Turner was a client who had been

[6] Sottile did not state this expert's name. (V1, R50-51).

exposed to illicit substances at an early age, and that she was looking for an expert to assist with his case. The expert declined and said "he didn't have anything that he could offer us." (V1, R51). Sottile and Valerino "were always looking for experts, relying on our mitigation specialist, on our own experts, if they knew of anybody else that might be able to provide helpful information." (V1, R51, 52).

Sottile recalled presenting evidence of Turner's good behavior during the time he was jailed in South Carolina prior to this murder. (V1, R32, 34). She wrote the sentencing memorandum. (V1, R21). Although she included non-statutory mitigating factors that included Turner's good behavior in the South Carolina jail, Sottile was concerned because Turner had stolen keys to a South Carolina sheriff's vehicle, escaped from the jail, drove to Florida, and then committed murder. (V1, R41-42).

Sottile said Turner agreed that counsel could argue he was guilty of second degree murder. However, he maintained that "Rick did it." (V1, R50).

James Valerino[7] was lead counsel for Turner and became involved in his case within a few days of Turner's arrest. (V1,

[7] Valerino has been involved with over 40 death penalty cases since 1975. Turner was his first client that was sentenced to death. (V1, R55-56, 89-90).

R55, 59). Turner was "very cooperative. He was an excellent client." Turner gave counsel addresses or telephone numbers of potential witnesses. (V1, R64).

Valerino and Sottile met on a weekly basis to discuss Turner's case and decide which experts to use. (V1, R60). Valerino and Sottile did not divide any of the duties. (V1, R61, 91). Both attorneys had complete knowledge of both phases of the trial. (V1, R92). However, as lead counsel, Valerino made all final decisions. (V1, R61). In compliance with ABA guidelines, Valerino had permission from the public defender to hire a mitigation specialist, William Scott. In addition, the defense team utilized investigator David Newsome. (V1, R61).

Valerino said Scott's duties included finding experts and contacting Turner's family members. (V1, R62). Valerino talked to family members before they testified at the penalty phase. (V1, R63). He and Sottile discussed any contact they had with family members. (V1, R63). Investigator Newsome attempted to talk to family members in South Carolina but was unsuccessful due to "a lack of cooperation on the part of Mr. Turner's family." However, some of Turner's family attended the penalty phase. (V1, R64, 83).

Valerino said William Scott spoke with Turner's aunt, Betty McAlister, on several occasions but she eventually stopped answering Scott's phone calls. (V1, R65, 84, 92-93). Turner's

mother, Ruby Turner, was "especially" uncooperative. (V1, R65, 84). Turner's brother Jeffrey attended the penalty phase but did not want to be a witness. Jeffrey eventually left the courthouse and did not return. (V1, R66, 93).

Valerino had serious concerns about Turner's mental health status. (V1, R66). Counsel hired several experts including Dr. Bloomfield, Dr. Edwards, Dr. Mandoki, and Dr. Susan Young. However, "some of the bad things that she might say about Mr. Turner would probably outweigh any positive things that she could possibly testify to." (V1, R66-67, 68). For example, Young told Valerino that Turner scored well on a problem solving test; he did not show impulsivity; and Turner did not accept responsibility for his actions. In addition, an MRI conducted on Turner yielded negative results -- "they found nothing wrong." Valerino used his judgment not to call Mandoki as a witness because his testimony would have hurt Turner rather than helped him. (V1, R95-96, 101-102).

Valerino said testimony presented at the penalty phase described beatings that Turner suffered from his father "at the encouragement of his mother." (V1, R69-70). In addition, Turner's uncles introduced Turner to alcohol at a young age -- beer spiked with ammonia. Counsel presented evidence of both physical and mental abuse. (V1, R70). Further, testimony regarding Turner's good behavior from the South Carolina jail

incarceration[8] was presented as well. (V1, R74-75). However, the sentencing memorandum did not include any suggestion that Turner was a "good model prisoner" because he stole a truck and escaped from the South Carolina jail. However, Valerino and Sottile both contributed to the sentencing memorandum. (V1, R77-78).

Valerino said any mitigation the defense had was presented at the penalty phase. Dr. Krop was hired to testify at the *Spencer* hearing in order to present additional mitigation before the trial judge, "hoping that she would consider overruling the jury death recommendation." (V1, R78, 79, 97). Krop conducted an evaluation and reviewed raw data that was completed by Drs. Bloomfield and (Susan) Young. (V1, R97). Mitigation specialist William Scott also testified at the *Spencer* hearing in order to show how Turner's family was dysfunctional and had only provided minimal cooperation in preparation for the penalty phase. (V1, R79, 80-81, 97).

Jeff Turner,[9] Turner's younger brother by six years, did not grow up in the same household as the defendant. (V1, R106). Turner was raised by his aunts and uncles, mostly by Betty McAlister. (V1, R107).

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[8] Turner was serving State prison time in the County jail for domestic violence offenses as well as violation of probation. (V1, R84-85, 86).

[9] For clarity, Jeff is referred to by his first name.

Jeff said Turner was impulsive and "always reckless ... always into something. He was not able to hold down a job on a regular basis. (V1, R107-108). Turner's anger would "always progress" when he had breakups or he got divorced. Turner was drinking alcohol during these times. Turner exhibited depression, and, one time, "blurt(ed) out" that he wanted to kill himself. (V1, R108, 110).

Jeff said he and his brothers were "whipped" by their mother. His older brothers were whipped to an excessive degree. (V1, R111-112).

Jeff spoke to investigators prior to trial and attended the trial. (V1, R112-113). If he had been called as a witness, he would have testified on Turner's behalf. However, Jeff's older brother and sister were closer to Turner. (V1, R113).

Betty McAlister, Turner's maternal aunt, said Turner's mother Ruby was 17 years old when Turner was born. (V1, R115). Turner and his parents lived with Ruby's parents, Betty, and their brothers, Pete, and Dale. (V1, R115-116). For a few months as a baby, Turner lived with his maternal grandparents. (V1, R117). Eventually he lived with Ruby and his father, Buck, on the same block as his grandparents. (V1, R118). McAlister said her mother suffered from mental illness. McAlister, along with her two children suffer from bipolar disorder. (V1, R119, 120).

McAlister had a close relationship with Turner. She saw him

every day when he was growing up. (V1, R117). After McAlister married, Turner visited her. When Turner was about 14, his mother called McAlister, told her that Turner was out of control, and asked McAlister to come get him. McAlister brought Turner back to Kentucky to live with her and her family.[10] He stayed for six months. (V1, R121, 123-124).

Turner had difficulty learning. He talked out in class, could not concentrate, and earned "D" and "F" grades. (V1, R125). Turner was an impulsive-type person. (V1, R125). He also had a tendency to lose things such as his clothes and wallet. (V1, R126). Turner eventually returned to live with his parents. However, he lived with McAlister again when he was about 16 years old. He stayed for about six months. Turner did not get into trouble when he lived with her in Fort Knox. (V1, R127, 139).

Turner had a close relationship with his maternal grandfather, Warren, and his maternal uncle, Dale. (V1, R127, 128). After Warren died, when Turner was 13-14 years old, he cut his wrists and had to have them bandaged. (V1, R129-130, 134). At some point, McAlister said Turner was prescribed Paxil for depression. (V1, R131).

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[10] McAlister said Turner lived with her "off and on his whole life" with the longest stretch being six months. (V1, R138).

After Turner married his first wife Karen at age 20, he cut his wrists a second time. During his marriage to Donna, he cut his wrists again. (V1, R130, 135). Both times he had to have stitches. (V1, R136).

McAlister spoke with an investigator and Turner's attorney prior to trial. She would have testified on Turner's behalf if she had been asked. (V1, R133).

Dr. Hyman Eisenstein is a clinical psychologist and specializing in clinical neuropsychology. (V1, R141). Eisenstein assessed the formative influences in Turner's life to determine any damaging factors that affected Turner. (V1, R146). In addition, Eisenstein determined risk assessment for potential future violence. (V1, R147). He looked at any possible additional mitigators that would assist in Turner's defense. (V1, R146).

Eisenstein reviewed Turner's schools records, Florida DOC records, other experts' testimony, and interviewed several family members. He spoke to Dr. Krop and interviewed Turner on four separate occasions.[11] (V1, R147-148). Turner self-reported a long history of alcohol and drug use. (V1, R161). Eisenstein

[11] June 1, 2011; July 26, 2011; January 31, 2012, and April 11, 2012. (V1, R148).

also administered several neuropsychological tests.[12] (V1, R148).

Eisenstein said Turner "was anxious and depressed ... throughout the evaluation ... (and) displayed feelings of sadness, feelings of anxiety, feelings of tension." (V1, R161). However, these emotions were not surprising given Turner's current circumstances. (V1, R178).

Eisenstein administered - - the WAIS-IV, which is the current version of the Wechsler. Dr. Susan Young administered the WAIS-III, which was the appropriate test to use at the time she administered it. (V1, R149, 150, 178). The test results were "similar." (V1, R150). The full scale IQ score reached by Dr. Young was a score of 79, which was the same full scale IQ score reached by Eisenstein. (V1, R179). Eisenstein said the scoring changed from the WAIS-III to the WAIS-IV from a two-factor model to a four factor model, respectively. (V1, R150, 180).

Eisenstein said Turner's verbal comprehension subtest score

[12] Benton Word Fluency; Boston Naming Test; Category Test; Expressive Vocabulary Test; Second Edition; Lafayette Pegboard; Paragraph Writing; the Peabody Picture Vocabulary Test, Fourth Edition; Projective Drawings; the Rey-Osterrieth Complex Figure, copy, and delayed recall; Stroop Color and Word Test; Test of Memory Malingering "TOMM"; Trail Making Test, Part A and B; Wechsler Adult Intelligence Scale, Fourth Edition "WAIS-IV"; Wechsler Memory Scale, Fourth Edition; Wide Range Achievement Test, Fourth Edition "WRAT-IV"; and Wisconsin Card Sorting Test. (V1, R149).

on the WAIS-IV was a 72 - - which places him in the "borderline range" and is indicative of "cognitive brain damage." (V1, R150). Turner's perceptual reasoning scores were significantly higher -- "in the average range." (V1, R151). Turner scored between a 69-79 on the WRAT-IV, which is a test of achievement ability. (V1, R151-152).

Eisenstein explained that executive functioning is the area of the brain that deals with decision-making skills. (V1, R152). In order to assess Turner's executive functioning, Eisenstein administered the Tactual Performance Test -- a test where Turner was blindfolded and asked to place blocks of different shapes on a board, first using his dominant hand, then his other hand, then both hands. (V1, R152). Initially Turner was "so anxious" that he could not keep the blindfold on. At a later date, he performed the test in a "mildly impaired" manner when using one hand, but "in the average range" when using both hands. He then was directed to draw the shapes of the blocks in which he performed in the "moderately impaired" range, indicative of "disorganization of mental processes." (V1, R153-54).

Eisenstein said the Categories Test measures nonverbal reasoning and problem solving abilities. (V1, R154). The Wisconsin Card Sorting Test measures abstract concepts. There was nothing significant in Turner's test results. (V1, R154). Turner scored in the "low average to moderately impaired" range

on the Trail Making Test, which measures attention and concentration. (V1, R155-156). Turner's score on the Wechsler Memory Test indicated his verbal or auditory memory was significantly lower than visual memory -- indicative of "inferior deficits in the left brain hemisphere." Language tests indicated Turner had a diminished capacity in word fluency - - in the "moderately impaired range." (V1, R156-157). Turner's scores on the TOMM indicated he was showing "sincere effort" but really only indicates malingering on the TOMM test itself. It did not mean Turner did not malinger at some point during the evaluation process. (V1, R159, 181).

In Eisenstein's opinion, based on Turner's scores on the tests, Turner is "in the average range" in certain areas of brain functioning and "demonstrated deficiencies in other areas." (V1, R160).

Eisenstein also administered the Violence Risk Appraisal Guide "VRAG" to Turner which measures the risk of future violence.[13] (V1, R160). This was the first time Eisenstein used the VRAG. (V1, R182). He had not attended any training on how to administer the test. (V1, R182). Turner's score indicated "a .35 percent of probability of recidivism within the next seven years which means Mr. Turner will be a good candidate for life in

[13] This test was administered on January 31, 2012.

imprisonment ... with relatively low future -- of future dangerousness." (V1, R160, 184). In Eisenstein's opinion, the VRAG is a proper test to administer in determining Turner's future risk of re-offending. (V1, R183, 184).

Eisenstein said Turner did not display any evidence of antisocial personality disorder prior to age 15 -- which is the first criteria to be met in order to make a diagnosis of adult antisocial personality disorder. (V1, R162).

Eisenstein agreed with the trial court's findings that Turner was under the influence of extreme mental or emotional disturbance at the time of the crime, as well as the trial court's finding that Turner's capacity to appreciate the criminality of his conduct was substantially impaired. (V1, R164-165).

However, in Eisenstein's opinion, based upon his four interviews with Turner, various records, family interviews, and other experts' findings, Turner also suffers from the following: attention deficit disorder; hyperactive disorder - predominately hyperreactive-impulse type; bipolar disorder; depression – severe with psychotic symptoms presently in remission; alcohol dependence currently in remission; substance dependence currently in remission; and borderline personality disorder. In addition, in Eisenstein's opinion, Turner also suffers from frontal lobe damage which affects Turner's judgment and ability

to concentrate. (V1, R165-175).

Eisenstein said that borderline personality disorder is most commonly diagnosed in females. (V1, R175). In reviewing Turner's Florida DOC records, Eisenstein did not see a diagnosis of bipolar disorder. (V1, R176). Turner had never previously been diagnosed with bipolar disorder, attention deficit hyperactivity disorder, or personality disorder. (V1, R177).

Dr. Jeffrey Danziger, psychiatrist, has testified in over 300 Florida cases during the last twenty-five years, with most of them relating to criminal matters. (V2, R199, 201).

Danziger evaluated Turner on April 26, 2012. (V2, R204). He reviewed various records which included pleadings, transcripts, and experts' reports, as well as the Florida Supreme Court's decision on direct appeal. He asked Turner about his medical and social history, current medications, medical problems, substance abuse history, and any history of mental illness for himself or his family. Danziger also inquired as to whether or not Turner recalled the offenses as well as his behavior in the days and weeks prior to the crimes. (V2, R204-207).

Danziger said Turner admitted stealing the victim's truck and fleeing the murder scene, but denied involvement as the perpetrator in the murder. (V2, R205). Turner said another person was involved, but he did not name "Rick" as the other person he claimed was involved. (V2, R206).

In Danziger's opinion, based upon his review of all of Turner's records, as well as his evaluation of Turner, Danziger said Turner suffered from polysubstance dependence which is in remission, and adjustment disorder with depressed mood, based upon Turner's current incarceration on Death Row. (V2, R208). In Danziger's opinion, Turner does not suffer from bipolar disorder because Turner has not exhibited manic episodes.[14] (V2, R209). Although Turner self-reported a history of drug abuse, Danziger said bipolar disorder is not "a substance induced condition." (V2, R210). Symptoms of mania occur spontaneously. Florida DOC records did not indicate any manic symptoms during Turner's 7 years of incarceration. Turner's "situational unhappiness (is) hardly unexpected." (V2, R210).

In Danziger's opinion, Turner does not have psychotic features. (V2, R211). Turner's self-reports that he "thought people were coming to get him" was due to Turner's heavy drug use where he developed "transient psychotic symptoms." (V2, R211).

Danziger noted that Drs. Bloomfield, Eisenstein, and Krop

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[14] Danziger defined a manic episode as "seven days or more of a mood that is persistently elated to euphoric or associated with persistent irritability." In addition, other associated symptoms include "pressured speech, a flow of thought that is disorganized or illogical, grandiose thinking, reckless behavior, markedly increase energy despite a decreased need for sleep." (V2, R209).

all found that Turner suffers from frontal lobe deficits. In Danziger's opinion, he categorized this as Cognitive Disorder Not Otherwise Specified. (V2, R212, 225). Turner does not suffer from full-blown dementia and is not mentally retarded or developmentally disabled. (V2, R212-213). In Danziger's opinion, Turner "maybe" suffers from Attention Deficit Hyperactive Disorder. (V2, R213, 227). Criteria for this diagnosis requires a finding prior to age seven. Turner's records did not include good data for Turner when he was in kindergarten or first grade. (V2, R213). Danziger opined that any symptoms Turner currently exhibits with regard to ADHD "could well be due to the years of substance abuse and some knocks on the head." (V2, R213). In addition, Turner self-reported that he started abusing drugs at age 13. (V2, R214). Nonetheless, Danziger said ADHD had very little to do with the events that occurred the day of the murder. (V2, R213, 233).

Danziger summarized, that, in his opinion, Turner suffers from Polysubstance Dependence with seven years of enforced sobriety; (V2, R208, 210, 214); Adjustment Disorder - chronic with depressive mood due to the situation response; (V2, R208, 214); Cognitive Disorder NOS; (V2, R212, 214); a "possibility" of ADHD; (V2, R213, 214); but Turner has neither Bipolar

Disorder nor Borderline Personality Disorder.[15] (V2, R214 Turner's relationship problems were not due to a personality disorder but rather, his pattern of substance abuse. (V2, R218).

Danziger said Turner self-reported a number of head injuries due to "hot-rodding, alcohol and drugs, wrecking cars" and at least one trip to the hospital. (V2, R219-220). Danziger concluded that, in his opinion, Turner suffers a "moderate impairment in functioning." (V2, R223).

Dr. Kimberly Brown, Ph.D., is a forensic psychologist and an assistant professor at Vanderbilt University. She is also the Director of the Forensic Evaluation team. Brown has administered about 1400 criminal forensic evaluations. (V2, R239).

Brown did not evaluate Turner. (V2, R241-242, 255). However, she reviewed various pleadings, depositions, trial transcripts, the Florida Supreme Court's opinion on direct appeal, jail records, South Carolina court records and jail records, medical records, school records, and other experts' reports. (V2, R242-243, 255).

Brown said the VRAG[16] is an actuarial instrument commonly

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[15] Danziger utilized the standard diagnostic criteria set out in the DSM-IV-TR. (V2, R224). *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

[16] Brown has administered about 20 VRAG tests. She has trained

used to assess the risk that someone who has committed a violent act will commit a violent act in the future. "It's not a way of predicting, but it's a way of estimating the risk that someone would pose to the community for future violence." (V2, R243-244). Brown said the PCL-R is an instrument that objectively measures someone's degree of psychopathy - - which is the number of personality traits that make a person manipulative. (V2, R244). The VRAG has 12 items to score -- the PCL-R is a subpart of the VRAG. (V2, R244, 264).

Brown said there are training programs for individuals that administer, score, and interpret the PCL-R. (V2, R245). The PCL-R manual indicates that an administrator of the test needs sufficient training in order to administer it appropriately and objectively and to be able to score it correctly and ethically. (V2, R245, 246). There are also training programs and continuing education workshops for the VRAG, as well. (V2, R245). However, the VRAG does not require evaluating the person face-to-face. It can be scored by "file review" if the records are sufficient. Although the PCL-R was originally designed to have a face-to-face interview, it can also be completed by file review. (V2, R246).

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more people to give them than she has administered herself. (V2, R252).

Brown said scoring on the PCL-R[17] is from 0 to 40, for 20 items (0-not present, 1-somewhat present, 2-very present) with 40 being "the worst psychopath you've ever seen." (V2, R248). Eisenstein obtained a score of 21 for Turner on the PCL-R. Brown said a score of 21, which is the mean score for the test, is "a moderate score of psychopathy." (V2, R248).

In reviewing Eisenstein's scoring on the VRAG for Turner, Brown found two errors. (V2, R248). Of the 12 items on the test, Brown said items 1 and 5 were scored incorrectly. (V2, R249). Item 1 was "separated from one or both of your parents for at least one-month period and it was not due to their death." As the testimony from Betty McAlister indicated, Turner lived with her for 2 six-month periods. Therefore, a "yes" to item 1 on the VRAG increases Turner's risk factor of re-offending. (V2, R249).

Brown said that on item 5 of the VRAG, "nonviolent offenses prior to the index offense," Eisenstein scored Turner with a 0, that he had no prior nonviolent offenses. Brown re-scored Turner with a 2 for this item, as having 2 prior nonviolent offenses, which also elevated his VRAG score. (V2, R249-250).

The risk categories on the VRAG are scored from a 1 to 9. (V2, R250). Eisenstein's overall score for Turner was a 0. After Brown made the corrections to items 1 and 5, she re-scored the

[17] The PCL-R and the VRAG tests are both normed instruments.

VRAG with a score of 7. (V2, R250). Eisenstein's score put Turner in a category 5, and Brown's score put Turner in a category 6, "not a huge difference." (V2, R251). Categories 5 and 6 are "moderate" categories, they are **not** low risk. In Brown's opinion, the degree of violence that Turner would pose for the future would be "moderate," a probability of re-offense violently of 44 percent in seven years, 58 percent in ten years." (V2, R251).

Brown said the VRAG was not designed to make a prediction of future in-prison violence. "It was designed to predict violence in the community when people are released." (V2, R252).

SUMMARY OF THE ARGUMENT

The collateral proceeding trial court correctly found that Turner's trial attorneys were not constitutionally ineffective in their representation of him during the penalty phase of his capital trial. This claim was the subject of an evidentiary hearing, and competent substantial evidence supports the finding of the trial court. Turner was evaluated pre-trial by several well-qualified mental state experts who were well-known to defense counsel. After receiving the results of the evaluations, counsel decided that certain witnesses would not be helpful because their opinions were not favorable. There is no constitutional entitlement to a favorable mental state opinion. Moreover, the mental state testimony presented by Turner at the

post-conviction hearing was not credible, and the trial court properly credited the testimony of the State witnesses after hearing all of the testimony.

The claims that are raised for "preservation" purposes are procedurally barred from review. Turner raised a claim based on *Ring v. Arizona* on direct appeal. He cannot relitigate that claim in this proceeding. The remaining claims contained in this issue are procedurally barred because they were not raised on direct appeal, with the exception of the "competency to be executed" claim, which is not ripe for review.

ARGUMENT

I. THE COLLATERAL PROCEEDING TRIAL COURT PROPERLY FOUND THAT TRIAL COUNSEL WERE NOT "INEFFECTIVE" AT THE PENALTY PHASE OF HIS CAPITAL TRIAL

On pages 59-77 of his brief, Turner says that the circuit court was wrong in finding that his trial attorneys were not constitutionally ineffective in their representation of him. Because this claim was decided after an evidentiary hearing, the standard of review is: "[a]s long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997), *quoting Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984),

quoting Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955); *Melendez v. State*, 718 So. 2d 746 (Fla. 1998). The circuit court properly denied relief.

INEFFECTIVE ASSISTANCE OF COUNSEL -- THE LEGAL STANDARD

Ineffectiveness of counsel claims are governed by the well-settled *Strickland v. Washington*, 466 U.S. 668 (1984), standard. This Court has described that standard in the following way:

> In *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Court established a two-pronged standard for determining whether counsel provided legally ineffective assistance. A defendant must point to specific acts or omissions of counsel that are "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. The defendant also must establish prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.; see Gaskin v. State*, 737 So. 2d 509, 516 n.14 (Fla. 1999) ("Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings.").

Reese v. State, 14 So. 3d 913, 917 (Fla. 2009). Or, stated somewhat differently:

> The yardstick by which we measure ineffective assistance of counsel claims is the seminal decision of the United States Supreme Court in *Strickland*. First, the defendant must establish that counsel's performance was deficient. Second, the defendant must establish that counsel's deficient performance prejudiced the defendant. To establish the deficiency

> prong under *Strickland*, the defendant must prove that counsel's performance was unreasonable under "prevailing professional norms." *Garcia v. State*, 949 So. 2d 980, 987 (Fla. 2006). To establish the prejudice prong under *Strickland*, the defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *White v. State*, 964 So. 2d 1278, 1285 (Fla. 2007) (*quoting Strickland*, 466 U.S. at 694).

Duest v. State, 12 So. 3d 734, 742 (Fla. 2009). In the context of a case similar to this one, where the claim concerned an "uncalled" mental state expert, this Court said:

> Following the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), this Court has held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied: First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied. *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986) (citations omitted). Because both prongs of the S*trickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence but reviewing the circuit court's legal conclusions *de novo*. *See Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

Bates v. State, 3 So. 3d 1091, 1100 (Fla. 2009).

A mental state evaluation is not constitutionally required in

every case, and a defendant certainly has no constitutional right to a **favorable** mental state evaluation. *Ake v. Oklahoma*, 470 U.S. 68 (1985). This Court has made that clear:

> While we do not require a mental health evaluation for mitigation purposes in every capital case, *Arbelaez v. State*, 898 So. 2d 25, 34 (Fla. 2005), and "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence . . . [or] present mitigating evidence at sentencing in every case," *Wiggins*, 539 U.S. at 533, "an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." *Riechmann*, 777 So. 2d at 350. Where available information indicates that the defendant could have mental health problems, "such an evaluation is 'fundamental in defending against the death penalty."' *Arbelaez*, 898 So. 2d at 34 (*quoting Bruno v. State*, 807 So. 2d 55, 74 (Fla. 2001) (Anstead, J., concurring in part and dissenting in part)).

Jones v. State, 998 So. 2d 573, 583 (Fla. 2008).[18] In the final

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[18] To the extent that Turner may argue that the "ABA Guidelines" are authority that is somehow binding, that is not the law. The Florida Supreme Court has held:

> The ABA Guidelines are not a set of rules constitutionally mandated under the Sixth Amendment and that govern the Court's *Strickland* analysis. Rather, the ABA Guidelines provide guidance, and have evolved over time as has this Court's own jurisprudence. [footnote omitted]. To hold otherwise would effectively revoke the presumption that trial counsel's actions, based upon strategic decisions, are reasonable, as well as eviscerate "prevailing" from "professional norms" to the extent those norms have advanced over time. *See Bobby v. Van Hook,* --- U.S. ----, 130 S.Ct. 13, 17, 175 L.Ed.2d 255 (2009) (reversing federal appellate decision which treated the 2003 ABA Guidelines, announced eighteen years after the defendant had been tried, "as inexorable

analysis, Turner's complaints about the mental state aspect of his penalty phase boil down to no more than a complaint about the result.

The testimony set out in detail above can be summarized as being that trial counsel obtained several mental state evaluations of Turner which were conducted by well-qualified experts who were known to them. The Constitution neither entitles Turner to a favorable mental state opinion nor requires defense counsel to shop for one. *Ake, supra; Valentine v. State/Tucker*, 98 So. 3d 44, 53 (Fla. 2012); *Card v. State*, 992 So. 2d 810, 818 (Fla. 2008) ("This Court has repeatedly held that counsel's entire investigation and presentation will not be rendered deficient simply because a defendant has now found a more favorable expert.") The testimony of Turner's trial attorneys was clear, direct and unequivocal, and there was no shortcoming of any sort in their penalty phase preparation. The testimony about their work on behalf of Turner is unrebutted. When that testimony is fairly considered, there is no doubt that trial counsel made well-informed tactical decisions, and that those decisions were made following a full and complete

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> commands with which all capital defense counsel must comply").

Mendoza v. State, 87 So. 3d 644, 653 (Fla. 2011).

investigation into the available mental state evidence. Those decisions were certainly reasonable, and Turner cannot demonstrate any deficiency on the part of counsel. Moreover, Turner cannot demonstrate prejudice, either. Even assuming for the sake of argument that Eisenstein's testimony should have been presented, the rebuttal testimony of Drs. Danziger and Brown demonstrates what the response to that testimony would have been. (V7, R1157-58, 1160, 1162, 1166). Simply put, Drs. Danziger and Brown contradicted Eisenstein's testimony, and identified various errors and deficiencies in it. Eisenstein's testimony is not credible, and cannot establish either prong of *Strickland*.

Turner's claim that "evidence of his probably future good conduct in prison" should have been presented through expert testimony fails completely. Turner's post-conviction expert, Dr. Eisenstein, administered the "violence risk appraisal guide" improperly, scored it incorrectly, and drew conclusions from it that the assessment instrument does not support. Likewise, Dr. Eisenstein's diagnoses are contradicted by the testimony of Dr. Danziger, whose testimony was clear, cogent, and concise. The testimony of Dr. Danziger is more credible than that of Dr. Eisenstein, whose testimony was inconsistent with the undisputed facts. Had testimony similar to that presented through Dr. Eisenstein been presented at the time of Turner's trial, it

would have insured rebuttal testimony such as that presented by Dr. Brown and Dr. Danziger. That would not have helped Turner at all, given the lack of credibility of Dr. Eisenstein's opinions and conclusions. Such testimony would not have helped, and would likely have only made an already bad case even worse. There was no deficiency with the mental health aspect of trial counsels' work, nor has Turner demonstrated any prejudice. Both showings are required under *Strickland*, and Turner has shown neither one.

In denying relief, the circuit court said:

> In addition to the facts surrounding Defendant's prior imprisonment, Defendant's argument regarding this issue focuses heavily on the failure to use properly prepared mental health experts who could focus on Defendant's lack of psychopathy, and the failure to use readily available and frequently used psychological tools, more specifically the Violence Risk Appraisal Guide and the Psychopathy Checklist Revised. Dr. Eisenstein testified regarding the VRAG, a particular actuarial instrument that he administered to the Defendant. Dr. Eisenstein's conclusion, based on the VRAG and the testimony of Newberry County law enforcement, was that Defendant demonstrates a low risk for future violence. However, Dr. Eisenstein's testimony was undermined by the testimony of State witness, Dr. Kimberly Brown. Through Dr. Brown's testimony it became clear that receiving some level of training on the use of the VRAG is typical for the field, and that use of the PCL-R, which is a subpart of the VRAG, requires sufficient training. Dr. Eisenstein had never administered the VRAG prior to administering it to the Defendant and he did not have any formal training prior to administration, Dr. Brown pointed out two items that were scored incorrectly on Dr. Eisenstein's administration of the VRAG, which errors caused a one category difference between the score Dr. Eisenstein obtained and the score Dr. Brown obtained. Regardless of any discrepancy, Dr. Brown, who is trained in administration of the VRAG and the PCL-R, testified that the score Dr. Eisenstein

> obtained and the score she obtained both put Defendant in the moderate risk range for future violence, rather than a low risk range as opined by Dr, Eisenstein. Additionally, Dr, Eisenstein testified that he was unsure whether the VRAG had been normed on individuals sentenced to life without parole, However, it became clear through the testimony of Dr. Brown that this instrument should not be used to predict future violence while incarcerated.
>
> The testimony and evidence show that Defendant's trial attorneys did not act unreasonably in not retaining an expert to administer tests relevant to Defendant's future conduct, and in failing to present testimony regarding same. Any testimony based on the use of the VRAG and the PCL-R, which instruments were the focus of this issue at the evidentiary hearing, could have been undermined by the State at trial just as it was at the evidentiary hearing. Additionally, it is clear that Defendant's trial attorneys acted reasonably under prevailing professional norms in their presentation of evidence regarding Defendant's prior prison conduct in relation to his probable future conduct. Defendant's attorneys presented what they believed was appropriate in light of the circumstances of Defendant's departure from the Newberry County Jail. Such evidence was presented to the jury at the guilt/innocence phase and at the penalty phase and was a focus of Defense Counsel's closing argument at the penalty phase. Therefore, Defendant has failed to meet the requirements of *Strickland* and the allegations raised in regard to this specific issue do not warrant the relief requested by the defendant.

(V7, R1165-67). Those findings are supported by competent substantial evidence, and should not be disturbed.

To the extent that Turner says that other experts should have been hired, the record shows, and the trial court found, that other experts were in fact consulted but not used at trial because their opinions would not help the defense case. (V7, R1168). The trial court said:

Dr. Krop testified as an expert witness for the defense at the *Spencer* hearing. Dr. Krop testified that he performed a battery of neuropsychological tests focusing on frontal lobe issues. See *Spencer* Hearing Transcript, pp. 46-47, attached hereto as Appendix E. He also reviewed school and medical records, transcripts of prior court proceedings, police reports and other various documents. *Id.* at 45-47, 50-51, Dr. Krop testified that Defendant has frontal lobe impairment, and that use of drugs and/or alcohol exacerbates the problems of a person with frontal lobe impairment. *Id*. at 48-51.

In addition to the expert testimony elicited at the penalty phase, the judge and the jury also heard lay witness testimony at the penalty phase that is relevant to Defendant's current postconviction claim. Defendant's cousin, Marie Hendrix, provided testimony about Defendant being physically and verbally abused by his parents and about Defendant's mother stealing from him. See Appendix C, pp. 80-81, 93-94. Further, the mitigation specialist, Dr. Scott, testified at the Spencer hearing and provided details about Defendant's background as well as testimony about the lack of cooperation by Defendant's family members. See Appendix E, pp. 5-40.

Based on the extensive mental health testimony elicited from Dr. Bloomfield, the testimony of Defendant's family members, and the argument of defense counsel at the penalty phase, the Court finds that the Defendant was not deprived of a reliable penalty phase proceeding, and Defense Counsel acted reasonably under prevailing professional standards in presenting mitigating evidence during the penalty phase. Further, the Court finds that Defendant's trial counsel sought the help of other experts, but made sound strategic decisions not to call these experts due to the negative impact their testimony might have on the Defendant. Additionally, though the testimony of Dr. Scott and Dr. Krop presented at the *Spencer* hearing did not have an impact on the jury's recommendation, such testimony was relevant to the Defendant's final sentence because it was a factor in the Court's sentencing determination, and is therefore relevant to Defendant's claim challenging his death sentence. Despite the sufficiency of the evidence elicited at the penalty phase, the Court will address

> the testimony and evidence presented at the evidentiary hearing to show further why Defendant's claims of deficient performance and prejudice do not warrant relief.

(V7, R1168-70).

With respect to the "new" (and presumably "better") mental state diagnoses, the circuit court rejected that testimony, saying:

> Even if trial counsel should have conducted further investigation into Defendant's background to include some of the information Dr. Eisenstein provided through testimony at the evidentiary hearing, Defendant has failed to demonstrate that absent such errors, there is a reasonably probability that the outcome of the proceeding would have been different or that the jury would have found that the balance of the aggravating and mitigating circumstances did not warrant death. Dr. Eisenstein diagnosed Defendant with Attention Deficit Hyperactive Disorder, Predominantly Hyperactive-Impulsive Type and Bipolar I Disorder. However, had this testimony been presented at the penalty phase, it could have been undermined by the clear and concise testimony of Dr. Danziger, as it was at the evidentiary hearing. While Dr. Eisenstein provided several facts about Defendant's history in relation to how he came to these diagnoses, Dr. Eisenstein did not provide any clear testimony relevant to the criteria necessary to diagnose such disorders.
>
> The only testimony from Dr. Eisenstein relative to the criteria necessary for a diagnosis of Bipolar I Disorder was that "it only can occur on one occasion, more occasions". This testimony is confusing, especially in comparison to the clear testimony of Dr. Danziger regarding the requirements for a diagnosis of Bipolar I Disorder and the definition of a manic episode. Dr. Danziger testified that Defendant has not had any manic symptoms during the time he has been incarcerated and it is his belief that any past manic-like symptoms were almost certainly the result of intoxication and dependence upon stimulant medications. Dr. Danziger testified that the symptoms

of Bipolar I Disorder cannot be due to a medical condition or to substances.

Regarding ADHD, while Dr. Danziger testified that this might be a possible diagnosis, he again undermined Dr. Eisenstein's diagnosis because there was no mention in Dr. Eisenstein's report that symptoms were present before the age of seven, which is one of the criteria for ADHD, Regardless, Dr. Eisenstein failed to demonstrate how Defendant's mental state as caused by his ADHD played any part in his committing the crimes that occurred on September 30, 2005. Further, Dr. Danziger testified that ADHD had very little to do with Defendant's behavior on September 30, 2005. Based on Dr. Danziger's clear testimony that any manic like symptoms were substance-induced and not a primary mental illness, e.g. Bipolar I Disorder, and the lack of evidence regarding how ADHD affected Defendant's mental state on September 30, 2005, there is not a reasonable probability that the outcome of the proceedings would have been different if the defense had conducted further investigation into Defendant's background because the information available would not have warranted a diagnosis of Bipolar I Disorder or ADHD.

As to Dr. Eisenstein's Axis II diagnosis of Borderline Personality Disorder, the Court again finds that testimony regarding a diagnosis of Borderline Personality Disorder could have been undermined had it been presented at the penalty phase. Dr. Danziger testified that if Defendant truly has Borderline Personality Disorder, the behaviors which formed Dr. Eisenstein's diagnosis of such disorder would have continued during the Defendant's incarceration. However, these behaviors have not continued and Dr. Danziger opined that it is because such behaviors were substance-induced rather than being the symptoms of a mental illness. Additionally, the Court finds it important to note that Defendant's own brother, Jeffrey Turner, testified at the evidentiary hearing that Defendant's demonstrations of anger occurred while Defendant was drinking and Jeffrey Turner never observed Defendant demonstrate anger while he was not drinking. This testimony gives credence to Dr. Danziger's expert opinion that the symptoms Defendant exhibited were substance-induced and not the result of a mental illness. Accordingly, the Court finds there

> is not a reasonable probability that the outcome of the proceedings would have been different if the defense had conducted further investigation into defendant's background because the information available would not have warranted a diagnosis of Borderline Personality Disorder.
>
> In conclusion, the Court notes that though Defendant was able to find a more favorable report at the postconviction stage of the proceeding, such report does not mean that Defendant's trial counsel was deficient in their performance in representing Defendant at trial. *Davis,* 875 So. 2d at 372.

(V7, R1171-73). Those findings are supported by competent substantial evidence, are legally correct, and should be affirmed in all respects.

II. THE CLAIMS RAISED FOR "PRESERVATION" PURPOSES

On pages 78-83 of his brief, Turner raises various claims that are purely legal claims, in a nominal attempt to "preserve" those claims for later review. The law supports the denial of each of these claims for relief. *See, Diaz v. Dugger,* 719 So. 2d 865, 868 (Fla. 1998).

Claim 5 from the post-conviction relief motion is set out on pages 78-79 of Turner's brief. The circuit court denied relief on this claim, citing to prior decisions of this Court on the identical issue. (V5, R666). That result is correct, but the circuit court did not need to go that far. **This claim**, which is based solely on *Caldwell v. Mississippi,* 472 U.S. 320 (1985), **is procedurally barred** because the issue was not raised on direct appeal. *See Stewart v. State,* 37 So. 3d 243, 263 (Fla. 2010);

Grim v. State, 971 So. 2d 85, 103 (Fla. 2007). In any event, this Court has repeatedly held that Florida's standard jury instructions do not violate *Caldwell. See, e.g., Stewart, supra; Lebron v. State*, 982 So. 2d 649, 666 (Fla. 2008); *Perez v. State*, 919 So. 2d 347, 368 (Fla.2005); *Globe v. State*, 877 So. 2d 663, 674 (Fla.2004); *Thomas v. State*, 838 So. 2d 535, 542 (Fla.2003); *Brown v. State*, 721 So. 2d 274, 283 (Fla.1998). **This Court should affirm the denial of relief on procedural bar grounds in order to insure that this Court's procedural rules, and rulings, are afforded the deference and respect to which they are entitled.**

With respect to Claim 6, the circuit court denied relief on procedural bar grounds because the claims contained therein could have been, but were not, raised on direct appeal. (V5, R666-68). Each of these claims is procedurally barred for failure to raise them on direct appeal. *See Troy v. State*, 57 So. 3d 828, 843 (Fla. 2011); *Evans v. State*, 946 So. 2d 1, 15-16 (Fla. 2006). The circuit court addressed the merits of the claim that the **jury instruction** on the coldness aggravator is "unconstitutional" -- it should have denied that claim on procedural bar grounds because the direct appeal claim said nothing about the jury instruction, but rather focused solely on the applicability *vel non* of the coldness aggravator. Regardless, the circuit court reached the correct result.

The only constitutional claim regarding the death penalty statute Turner raised on direct appeal was based on *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court held:

> Turner correctly acknowledges that this Court has consistently rejected the position that section 921.141, *Florida Statutes* (2005), is unconstitutional under the Sixth Amendment. *See generally Marshall v. Crosby*, 911 So. 2d 1129, 1134 n. 5 (Fla. 2005) (listing over fifty cases since *Ring*'s release where this Court has rejected similar *Ring* claims). Further, *Ring* does not apply to these facts because the "during-a-felony" and "prior violent felony" aggravating factors are present here. *See, e.g., Walker v. State*, 957 So. 2d 560, 576 (Fla. 2007) ("*Ring* does not apply to the facts of this case because the 'course of a felony' aggravator based on Walker's conviction of kidnapping, resting on a unanimous guilt-phase verdict, is present."). Turner has not established any basis on which this Court should reconsider the established points of law with regard to Florida's capital sentencing scheme. Accordingly, we deny relief on this issue.

Turner v. State, 37 So. 3d 212, 229 (Fla. 2010).

In addition to the procedural bar as to each non-*Ring* claim, each of the claims raised by Turner has no merit. In *Proffit v. Florida*, 428 U.S. 242 (1976), the United States Supreme Court specifically upheld the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel" on the express ground that a narrowing construction had been adopted by that Florida Supreme Court. *Proffitt*, 428 U.S. at 255.

The claim that execution by electrocution and lethal injection constitute cruel and unusual punishment is

procedurally barred. *Troy, supra; Evans, supra.* Further, this claim has been repeatedly rejected. *See, e.g., Valle v. State,* 70 So. 3d 530, 537 (Fla. 2011); *Wyatt v. State*, 71 So. 3d 86, 112 (Fla. 2011); *Tompkins v. State*, 994 So. 2d 1072, 1080–82 (Fla. 2008) (upholding the constitutionality of Florida's capital-sentencing scheme and lethal-injection protocol); *Suggs v. State*, 923 So. 2d 419, 441 (Fla. 2005) (denying defendant's claim that Florida's capital sentencing scheme violates due process and constitutes cruel and unusual punishment on its face and as applied because the United States Supreme Court has repeatedly reviewed and upheld Florida's death penalty statute).

Turner's claim that Florida's death penalty statute does not sufficiently define aggravating circumstances is facially insufficient because it does not identify any aggravating circumstance which is subject to challenge -- that pleading deficiency is a procedural bar to consideration of this claim. Florida's death penalty statute is applied in a vague and inconsistent manner. This and other claims were rejected in *Troy v. State*, 57 So. 3d 828, 844 (Fla. 2011), *citing Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006) (rejecting as meritless a claim that aggravators have been applied in a vague and inconsistent manner); *Elledge v. State*, 911 So. 2d 57, 79 n. 28 (Fla. 2005) (rejecting claim that the death penalty statute fails to provide a standard for determining that aggravators

outweigh mitigators, does not define "sufficient aggravating circumstances," and does not sufficiently define each of the aggravators); *Sochor v. State/Crosby*, 883 So. 2d 766, 789 (holding that defendant's claim that execution by electrocution or lethal injection constitutes cruel and unusual punishment is meritless); *Fotopoulos v. State*, 608 So. 2d 784, 794 n. 7 (Fla. 1992) (rejecting as meritless a claim concerning the lack of an independent reweighing of aggravators and mitigators and claim that Florida law unconstitutionally creates a presumption of death).

Turner's argument that Florida's death penalty statute creates a presumption of death in violation of *Furman v. Georgia*, 408 U.S. 238 (1972), is procedurally barred. *Troy, supra; Evans, supra.* moreover, this claim was rejected in *Wade v. State,* 41 So. 3d 857, 872 (Fla. 2010). The jury instruction on the cold, calculated and premeditated aggravating circumstance has been upheld against a challenge of vagueness. *See Hunter v. State,* 660 So. 2d 244, 253 (Fla. 1995).

With respect to Claims 7, 9, and 10 on page 81 of Turner's brief, his characterization of the circuit court's denial on ripeness grounds is not entirely accurate. The unanimous-jury-recommendation issue is procedurally barred because Turner raised a *Ring* claim on direct appeal. *Turner v. State*, 37 So. 3d 212, 229 (Fla. 2010). Every variation of a *Ring* claim could have

been raised at that time. Further, this Court has consistently rejected the unanimous-jury-recommendation issue. *McWatters v. State*, 36 So. 3d 613, 644 (Fla. 2010); *Frances v. State*, 970 So. 2d 806, 822 (Fla. 2007) (rejecting argument that Florida's capital sentencing scheme is unconstitutional because it does not require a unanimous jury recommendation).

Claim 9, concerning the "identity of the executioner," is both meritless and untimely, as the circuit court found. (V5, R670). *See Troy v. State*, 57 So. 3d 828, 841 (Fla. 2011); *Darling v. State*, 45 So. 3d 444, 448 (Fla. 2010); *Henyard v. State*, 992 So. d 120, 130 (Fla. 2008). In addition, this claim is procedurally barred for failure to raise the issue on direct appeal.

Claim 10, which alleges "incompetency at the time of execution," is untimely, as Turner conceded in his postconviction motion (V2, R229), and as the circuit court found. (V5, R670). *See Nelson v. State*, 43 So. 3d 20, 34 (Fla. 2010); *State v. Coney*, 845 So. 2d 120, 137 n. 19 (Fla. 2003) (rejecting a claim that defendant was incompetent to be executed where he acknowledged that the claim was not yet ripe and was being raised only for preservation purposes).

With respect to Claim 8, which is a "cumulative error" claim, it is true that the circuit court did not explicitly rule on that claim. However, it is also true that the circuit court

rejected each claim individually, and found that there was no error of any sort. Because there is no error in the first place, there can be no "error" to "cumulate." *Hoskins v. State*, 75 So. 3d 250, 258 (Fla. 2011); *Schoenwetter v. State*, 46 So. 3d 535, 553, 562 (Fla. 2010). There is no basis for relief.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court to affirm the denial of post-conviction relief.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on June 20th, 2013: **Raheela Ahmed and Maria Christine Perinetti**, Capital Collateral Regional Counsel, CCRC - Middle, ahmed@ccmr.state.fl.us, Perinetti@ccmr.state.fl.us and support@ccmr.state.fl.us.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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