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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12 - 2271

JAMES DANIEL TURNER,

Appellant

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR ST. JOHNS COUNTY, STATE OF FLORIDA
Lower Tribunal No. 2005-001954CF

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of a final order by the Circuit Court of the Seventh Judicial Circuit, in and for St. Johns County denying relief to the Appellant, James Daniel Turner (hereinafter referred to as "Mr. Turner"), upon his Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851. The record on appeal for the trial proceedings consists of twenty five [25] volumes, one [1] volume of exhibits to the record on appeal, and five [5] volumes of the supplements to the record on appeal. The record on appeal for the post-conviction proceedings consists of nineteen [19] volumes. The record on appeal for the trial proceedings will be referred to as "(ROA __)" followed by the appropriate volume number and then page number(s). The post-conviction record on appeal will be referred to as "(PCROA____)" followed by the appropriate volume number and then page number(s). All other references will be self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Turner is incarcerated at Union Correctional Institution in Raiford, Florida, under a sentence of death. The resolution of these appellate issues will determine whether Mr. Turner lives or dies. This Court has allowed oral argument in other capital cases. A full opportunity to air the issues would be appropriate given the seriousness of the claims involved and the fact that a life is at stake. Mr. Turner accordingly requests that this Honorable Court permit oral argument.

STATEMENT OF THE CASE

(A) Statement of the case pertaining to the trial proceedings.

(I) Procedural history of the Trial Proceedings

A grand jury returned an indictment for Mr. Turner on October 19, 2005, for one [1] count of First Degree Murder in violation of Fla.Stat. §782.04(1)(a)1 of Renee Boling Howard, one [1] count of Attempted First Degree Murder in violation of Fla.Stat. 777.04 and Fla.Stat. 782.04(1)(a)(1) of Stacia Raybon, one [1] count of Grand Theft of a motor vehicle in violation of Fla.Stat. 812.014(1)(2)(c), one [1] count of Home Invasion Robbery with Deadly Weapon in violation of Fla.Stat. 812.135(2)(a), and one [1] count of Aggravated Assault on a Police Officer in violation of Fla.Stat. 784.07(2)(c). (ROA Vol.17, p.34-35). Thereafter, Mr. Turner was tried before the Circuit Court of the Seventh Judicial Circuit in and for St. Johns County. Mr. Turner was represented by Attorneys Valli Braswell Sottile (previously known as Valli B. Quetti) and James R. Valerino of the Office of the Public Defender for the Seventh Judicial Circuit in and for St. Johns County (hereinafter referred to separately as "trial counsel Sottile" and "trial counsel Valerino" and referred to collectively as "trial counsel"). (ROA Vol.17, p.28-31). The State of Florida was represented by Assistant State Attorneys Christopher A. France and Angela B. Corey (hereinafter referred to as "the prosecution").

On or about July 25, 2007, the jury retired to deliberate at the conclusion of the presentation of the evidence in the first jury trial in this case. (ROA Vol. 3, p.473). While the jury was deliberating, one of the jurors, Mr. Gard, suffered a seizure and had to be taken to the hospital. (ROA Vol. 3, p.511). At the time of the seizure, the jury had decided four [4] of the five [5] counts and two [2] alternate jurors were sequestered. (ROA Vol. 3, p.526-527). The trial court relying on *Williams v. State*, 792 So.2d 1207 (Fla. 2001), noted that a new trial had been ordered when a trial court substituted an alternate juror after the deliberations had begun. (ROA Vol. 3, p.532-533). The trial court advised Mr. Turner that he could opt to waive and have an alternate seated to replace Mr. Gard and continue deliberations or not do so. (ROA Vol. 3, p.535). Trial counsels requested a brief recess to speak with Mr. Turner privately and returned to advise the trial court that a mistrial was still being requested. (ROA Vol. 3, p.535). The prosecution did not object. (ROA Vol. 3, p.53-536). Thereby, the trial court declared a mistrial, released the jury and the parties agreed to seal the verdicts. (ROA Vol.3, p.537-544).

On November 19, 2007, prior to jury selection for the second trial, Mr. Turner filed a motion to dismiss the charges and alleging a violation of Double Jeopardy Clauses of both the Florida and United States Constitutions. (ROA Vol.3, p.434-436). Mr. Turner argued that he was in a position where he had to waive his

request for mistrial or have an alternate juror seated when agreement had been reached by the sworn panel on four [4] of the five [5] counts. (ROA Vol.14, p.284-287). Mr. Turner acknowledged requesting the mistrial but asked the trial court to treat the matter as if the mistrial had been declared over Mr. Turner's objection and to apply the standard of manifest necessity. (ROA Vol.14, p.278 & p.283-284). Trial counsel argued that the mistrial request was based upon inaccurate information due to reliance on the *Williams* case and action postponed until a determination made the following day as to whether Juror Gard could continue deliberating. (ROA Vol.14, p.278-284). The trial court noted that trial counsel had not suggested this course previously and that no double jeopardy violation had previously been asserted. (ROA Vol.14, p.285). The trial judge denied the Motion to Dismiss. (ROA Vol.14, p.291-294).

The voir dire proceedings for the second trial were conducted from November 25, 2007, to November 27, 2007. (ROA Vol.12, p.1-126; Vol.13. p.127-265; Vol.14, p.305-417; & Vol.15, p.424-572). The guilt phase proceedings of the trial were conducted from November 28, 2007, to November 29, 2007. (ROA Vol.16, p.611-786; Vol.17, p.790-954; Vol.18, p.959-3134; & Vol.19, p.1138-1274). On November 29, 2007, Mr. Turner was found guilty of all five [5] counts as charged in the indictment. (ROA Vol.179, pp.1267-1268) Thereafter, the penalty phase of the trial proceedings was conducted from December 4, 2007 to

December 5, 2007. (ROA Vol.20, p.4-105; Vol.21, p.109-217; Vol.22, p.221-262 & Vol.23, p.266-430). On December 5, 2007, the jury recommended a death sentence by a majority vote of ten [10] to two [2]. (ROA Vol.23, p.421-422). Thereafter, the trial court conducted a *Spencer* hearing on March 5, 2008. (ROA Vol.24, p.1-82).

The trial court filed a written Sentencing Order that was also orally pronounced at the sentencing hearing on or about April 24, 2008. (ROA Vol.5, p.830-854). In its Sentencing Order, the trial court found the following statutory aggravators and assigned the following weights:

> (1) Florida Statutes, Section 921.141(5)(a): The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment – moderate weight;
>
> (2) Florida Statutes, Section 921.141(5)(d): The capital felony was committed while the defendant was engaged in the commission of, or an attempt to commit attempted first degree murder and aggravated assault on a law enforcement officer - great weight;
>
> (3) Florida Statutes, Section 921.141(5)(d): The capital felony was committed while the defendant was engaged in the commission of a robbery merged with pecuniary gain 921.141(5)(f) – great weight;
>
> (4) Florida Statutes, Section 921.141(5)(h): The capital felony was especially heinous, atrocious and cruel (HAC) - great weight; and
>
> (5) Florida Statutes, Section 921.141(5)(i): The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (CCP) - significant weight.

(ROA Vol.5, p.823-843). The trial court further found statutory mitigating circumstances and assigned the following weights:

> (1) Florida Statutes, Section 921.141(6)(b): The Defendant was under the influence of extreme mental or emotional disturbance - moderate weight and
>
> (2) Florida Statutes, Section 921.141(6)(f): The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired - moderate weight.

(ROA Vol.5, p.844-846). The trial court also found the following non-statutory mitigators and assigned the following weights:

> (1) Chronic alcohol and drug problem - **moderate weight**,
> (2) Loving and caring brother - **some weight**,
> (3) Loving and caring step-father - **some weight**,
> (4) Loving and caring husband - **some weight**,
> (5) Uncles gave Mr. Turner drugs and alcohol at an early age - **some weight**,
> (6) Cognitive development impaired due to alcohol and drug use - **some weight**,
> (7) Murder was committed while Defendant was under the influence of crack cocaine - **some weight,**
> (8) Appropriate courtroom behavior - **some weight**,
> (9) Abandonment by mother - **little weight**,
> (10) Verbally abused by mother - **little weight**,
> (11) Physically abused by father- **little weight**,
> (12) Hard worker and skilled carpenter - **little weight**, and
> (13) Good trustee at out of state jail until he absconded - **slight weight**.

(ROA Vol.5, pp.845-852).

On April 24, 2008, the trial court entered a judgment and sentence that

sentenced Mr. Turner to death as to count one [1] of the indictment. (ROA Vol. 5, p.819 & p.821). Mr. Turner was also sentenced to a term of thirty [30] years imprisonment for the attempted murder of Stacia Raybon, five [5] years for the grand theft, life imprisonment for the home invasion robbery with a deadly weapon, and fifteen [15] years for the aggravated assault on Deputy Harris. (ROA Vol.5, p.819 & p.822-827). This is the judgment and sentence by the trial court that is under attack pursuant to Fla.R.Crim.P. 3.851(e)(a)(A). (ROA Vol. 5, p.819-827).

(B) Statement of the case pertaining to the direct appeal proceedings

Mr. Turner timely filed a notice of appeal on April 6, 2009, to the Supreme Court of Florida. The issues raised by Mr. Turner in his direct appeal are as follows:

I. THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT COMMITTED THE MURDER IN A COLD, CALCULATED AND PREMEDITATED [MANNER].

II. THE DEATH SENTENCE IS DISPROPORTIONATE WHEN COMPARED WITH SIMILAR CASES WHERE THE AGGRAVATING CIRCUMSTANCES ARE FEW AND THE MITIGATION, ESPECIALLY THE MENTAL MITIGATION, IS SUBSTANTIAL.

III. THE APPELLANT'S RETRIAL VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES AND FLORIDA CONSTITUTION.

IV. FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH

AMENDMENT PURSUANT TO *RING V. ARIZONA.*

The Supreme Court of Florida denied all of the above claims on September 24, 2009. *See State v. Turner*, 37 So.3d 212 (Fla. 2010). Thereafter, Mr. Turner filed a petition for writ of certiorari to the Supreme Court of the United States on August 20, 2010, which was denied on October 18, 2010. *See Turner v. Florida*, 131 S.Ct. 426, 178 L.Ed.2d 332 (2010).

(C) Statement of the case pertaining to the post-conviction proceedings

The Law Office of the Capital Collateral Regional Counsel for the Middle Region of Florida was appointed by the Supreme Court of Florida to represent Mr. Turner in his post-conviction proceedings in an order dated June 10, 2010. Mr. Turner filed his Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851, on October 12, 2011, putting forth ten [10] grounds. (PCROA Vol.2, p.184-245). The State filed a Response on November 28, 2011. (PCROA Vol.2, p.246-292). The post-conviction court conducted a case management conference on February 29, 2012. (PCROA Vol.16, p.1-33). After the case management conference, the post-conviction court issued a written order dated March 23, 2012, summarily denying grounds one [1], two [2], four [4], five [5], six [6], seven [7], nine [9], and ten [10]. (PCROA Vol.5, p.662-671). The post-conviction court scheduled ground three [3] for an evidentiary hearing and deferred ruling on ground eight [8]. (PCROA Vol.5,

p.669-670).

The evidentiary was conducted from May 8, 2012, to May 9, 2012. (PCROA Vol.17, p.1-195 & Vol.18, p.196-269). After the evidentiary hearing, written closing arguments were filed by Mr. Turner and the State of Florida. (PCROA Vol.7, P.1036-1173). The post-conviction court issued a written final order denying relief on all grounds. (PCROA Vol.7, p.1138-1173; Vol.8, p.1174-1373; & Vol.9, p.1374-1436). Mr. Turner filed his Notice of Appeal on October 31, 2012, appealing this final order and this appeal follows. (PCROA Vol.9, p.1439-1491).

STATEMENT OF THE FACTS

(A) Statement of the facts of the trial proceedings

The facts presented at the guilt phase proceedings were summarized by this Court in its direct appeal opinion and are as follows:

> 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.

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

The facts presented at the penalty phase proceedings were also summarized by this Court in its direct appeal opinion and are as follows:

> 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*[1] 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.

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, 37 So.3d at 219-220.

(B) <u>Statement of the facts of the evidentiary hearing conducted during the post-conviction proceedings</u>

Mr. Turner presents the following relevant statement of facts as to the evidence presented at the evidentiary hearing as to ground three [3] and related to only the issues raised in this appeal:

Ground three [3] of the Defendant's Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851, argued that "Mr. Turner was deprived of his right to a reliable adversarial testing due to the ineffective assistance of counsel at the penalty phase of his capital trial, in violation of Mr. Turner's rights afforded by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and of his corresponding rights pursuant to the Declaration of Rights under the Constitution of the State of Florida." (PCROA Vol.2, p.193-209). In support of claim three [3], Mr. Turner presented the testimony of trial counsel Valli Braswell Sottile (hereinafter referred to as "trial counsel Sottile"), trial counsel James Valerino (hereinafter referred to as "trial counsel Valerino"), Mr. Turner's brother, Mr. Jeffrey Turner (hereinafter referred to as "Jeffrey Turner"), Mr. Turner's aunt,

Ms. Betty McAlister (hereinafter referred to as "Aunt McAlister"), and Dr. Hyman Eisenstein (hereinafter referred to as "Dr. Eisenstein") at the evidentiary hearing.

(i) Testimony of Trial Counsel Valli Braswell Sottile.

Trial counsel Sottile testified that she was appointed to Mr. Turner's case when she was employed as an Assistant Public Defender at the Office of the Public Defender in St. Augustine. (PCROA Vol.17, p.8). She was co-counsel in Mr. Turner's case. (PCROA Vol.17, p.12). Mr. Turner's case was her first death penalty case. (PCROA Vol.17, p.9). Trial counsel Sottile had never served as lead counsel in a death penalty case. (PCROA Vol.17, p.10) She acknowledged that she has read the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty cases, but she does not know that she necessarily reviews them before a trial. (PCROA Vol.17, p.11). She could not recall reviewing the guidelines in preparing for Mr. Turner's case. (PCROA Vol.17, p.11).

She testified that she was co-counsel with the Division Chief, trial counsel Valerino. (PCROA Vol.17, p.12). The trial counsels both worked on the guilt and penalty phases of the trial proceedings. (PCROA Vol.17, p.13). With regard to the penalty phase, she helped talk to experts, locate materials for the experts and she interviewed many of the witnesses on the telephone. (PCROA Vol.17, p.13). She believed that she met with some of the witnesses in person. (PCROA Vol.17, p.13).

She did not travel to South Carolina to meet with Mr. Turner's family. (PCROA Vol.17, p.14). Instead mitigation specialist, Ms. William Scott, and perhaps investigator, Mr. David Newsome went to South Carolina. (PCROA Vol.17, p.14).

Trial Counsel Sottile recalled Turner's aunt, Ms. Betty McAlister's (hereinafter referred to as "Aunt McAlister") name, and she testified that she *probably* had spoken with her over the telephone because she talked to several family members. (PCROA Vol.17, p.23). She testified that she did not believe that Aunt McAlister testified at the penalty phase proceedings and she *believed* it was because she became uncooperative. (PCROA Vol.17, p.23-24). However, she was unable to recall when Aunt McAlister became cooperative or why she became uncooperative. (PCROA Vol.17, p.24). She also testified that Jeffrey Turner had travelled down for the trial and he was present in the courthouse early in the trial. (PCROA Vol.17, p.25). She testified that Jeffrey Turner did not testify because he refused to cooperate and he walked out and left the courthouse. (PCROA Vol.17, p.24-25 & p.51).

Trial counsel Sottile testified that they had concerns about Mr. Turner's mental health. (PCROA Vol.17, p.15). She testified that there were initial concerns about whether Mr. Turner was competent to proceed. (PCROA Vol.17, p.27-28). She testified that Dr. Bloomfield was retained to testify as to Mr. Turner's mental health status, that Dr. Susan Young (who did not testify) was retained to conduct

neuropsychological testing on Mr. Turner, and that Dr. Krop was retained for additional information that could be presented at the *Spencer* hearing. (PCROA Vol.17, p.29-30). She did not recall meeting with Dr. Krop before his evaluation of Mr. Turner. (PCROA Vol.17, p.29). Trial counsel Sottile testified that a strategic decision was made not to present the testimony of Drs. Mandoki, Young and Gama at trial. (PCROA Vol.17, p.50).

(ii) Testimony of Trial Counsel James Valerino.

Trial counsel Valerino also testified at the post-conviction evidentiary hearing. He was the Division Chief for the High Crimes Homicide Unit, and assumed this position with the Public Defender's Office in 2005. (PCROA Vol.17, p.55). He handled his first death penalty case in 1975, during his tenure with the Orange County Public Defender's Office and he had handled over 50 cases before assignment to Mr. Turner's case. (PCROA Vol.17, p.56). He testified that he was familiar with the ABA guidelines that recommended two attorneys and one investigator work on a death penalty case. He testified that he knew them to strongly recommend the use of a mitigation specialist. (PCROA Vol.17, p.57). He testified that he used that rationale to seek approval from his boss, Mr. Purdy, to retain a mitigation expert in Mr. Turner's case, in order to comply with that portion of the ABA guidelines. (PCROA Vol.17, p.57). Trial counsel Valerino acknowledged that he had read the guidelines before and the supplements

subsequently published. (PCROA Vol.17, p.58). He and trial counsel Sottile were the only two attorneys assigned to Mr. Turner's case. (PCROA Vol.17, p.61). Trial counsel Valerino testified that he was the designated lead counsel in Mr. Turner's case, that all final decisions were his to make and that the ultimate responsibility was his in this case. (PCROA Vol.17, p.60-61). He testified that the phases were not divided and that both attorneys worked the guilt and penalty phases. (PCROA Vol.17, p.60-61). He also testified that decisions regarding which experts would be retained were made by him following consultation with his co-counsel and mitigation specialist, Mr. William Scott (hereinafter referred to as "mitigation specialist Scott"). (PCROA Vol.17, p.62).

Trial counsel Valerino testified that mitigation specialist Scott traveled to South Carolina in June 2006, and spoke with some of Mr. Turner's family members. (PCROA Vol.17, p.62-63). A second trip to South Carolina was scheduled in October 2006, but mitigation specialist Scott had reported that during his two to three day visit, that he had gotten no cooperation from any of the relatives and had returned having been unable to speak to anyone. (PCROA Vol.1, p.63). However, trial counsel Valerino had never accompanied mitigation specialist Scott on any trip to interview family members in South Carolina and he could not recall whether he personally spoke with any of Mr. Turner's relatives. (PCROA Vol.17, p.63). He testified that he was aware that trial counsel Sottile and

mitigation specialist Scott spoke with Mr. Turner's relatives by phone. Trial counsel Sottile had informed him via phone or during his visits to her office regarding these contacts. (PCROA Vol.17, p.63).

Trial counsel Valerino testified that mitigation expert William Scott had difficulties in getting Mr. Turner's relatives to cooperate to the full extent trial counsel felt was necessary and these problems were discussed with Mr. Turner. (PCROA Vol.17, p.81). He felt he had nothing to lose by calling mitigation specialist William Scott to testify about the dysfunctional nature of Mr. Turner's family and the complete lack or limited cooperation they were getting from them. (PCROA Vol.17, p.81).

Trial counsel Valerino testified that Mr. Turner was a very cooperative client who provided as much information as he had to their investigator Mr. David Newsome. (PCROA Vol.17, p.64). Following mitigation specialist Scott's unsuccessful trip in late 2006, trial counsel Valerino sent investigator Newsome in March 2007, to South Carolina to obtain records and conduct interviews. (PCROA Vol.17, p.64). Some of the family members came to the penalty phase proceedings in December 2007. (PCROA Vol.17, p.64).

Trial counsel Valerino acknowledged familiarity with Aunt McAlister's name, but *was unable to specifically recall speaking with her*. (PCROA Vol.17, p.65). He testified that he was aware that mitigation specialist Scott had spoken to

Aunt McAlister on a couple of occasions until, as reported by mitigation specialist Scott, Aunt McAlister would not answer any of his telephone calls. (PCROA Vol.17, p.65). He was never able to determine why there appeared to be a lack of cooperation on the part of family members, especially Mr. Turner's mother, Ruby Turner. (PCROA Vol.17, p.65).

Trial counsel Valerino recalled Jeffrey Turner arriving prior to the commencement of Mr. Turner's penalty phase proceedings, but was unable to recall whether he personally spoke to him. (PCROA Vol.17, p.65-66). He testified that Jeffrey Turner really did not want to participate in being a witness for his brother and at some point in proceedings had left the courtroom. (PCROA Vol.17, p.66). He *did not know* the circumstances surrounding Jeffrey Turner's departure. (PCROA Vol.17, p.66).

Trial counsel Valerino testified that he had retained the services of Dr. Stephen Bloomfield to conduct a mental health evaluation on Mr. Turner, the services of Dr. Drew Edwards an expert on drug addiction, the services of Drs. Mandoki and Susan Young to conduct a neurological examination. (PCROA Vol.17, p.66-67). He testified that based upon his conversations with Dr. Susan Young, that he had an MRI done of Mr. Turner's brain on February 22, 2007, which was negative according to a report from Dr. Edward Franko. (PCROA Vol.17, p.68). After further consultation with Dr. Young, trial counsel Valerino

determined that some of the bad things Dr. Young might say about Mr. Turner would probably outweigh any positive testimony she could offer in his behalf, thus he decided not to call her to testify. (PCROA Vol.17, p.67-68). He testified that Dr. Harry Krop did not testify before Mr. Turner's *sentencing jury* and was retained after the jury's recommendation for the purpose of presenting additional testimony to the court for sentencing. (PCROA Vol.17, p.80-81).

Trial counsel Valerino acknowledged that only trial counsel Sottile had signed off on the sentencing memorandum. (PCROA Vol.17, p.71). He could not recall the extent of his participation in the actual writing of the sentencing memorandum, but he stated that he would have reviewed it prior to filing. (PCROA Vol.17, p.73-74). Trial counsel Valerino testified that in the sentencing memorandum, the defense had asked the court to consider that Mr. Turner was verbally abused by his mother and physically abused by his father. (PCROA Vol.17, p.73). He testified that the defense presented evidence of child abuse through the testimony of Mr. Turner's cousin, Marie Hendrix. (PCROA Vol.17, p.71 & p.73-74). He acknowledged other kinds of abuse could have been argued based on the presentation of evidence that Mr. Turner's uncles gave spiked Mr. Turner's beer with ammonia. (PCROA Vol.17, p.70). These uncles also exposed Mr. Turner to drugs and alcohol at an early age. (PCROA Vol.17, p.73). Trial counsel Valerino testified that *within the body* of the sentencing memorandum, the

defense brought to the court's attention the fact that Mr. Turner's uncles gave him drugs and alcohol at an early age and that could be extended as further types of child abuse. (PCROA Vol.17, p.73).

Trial counsel Valerino testified that during his closing arguments, he had referenced the compassion that Mr. Turner had demonstrated toward the victims as shown in a videotaped interview of a crying Mr. Turner. (PCROA Vol.17, p.82). However, trial counsel Valerino *had not requested remorse* to be considered as a mitigating factor in this case. (PCROA Vol.17, p.72).

(iii) Testimony of Jeffrey Turner.

Mr. Turner's brother, Jeffrey Turner, also testified at the post-conviction evidentiary hearing. (PCROA Vol.17, 106-113). Jeffrey Turner testified that he was thirty-four [34] years old and he resided in Liberty, South Carolina. (PCROA Vol.17, p.106). He was six years younger than Mr. Turner. (PCROA Vol.17, p.105-106). Jeffrey Turner testified that he drove seven [7] hours from his residence to St. Augustine for his court appearance. (PCROA Vol.177, p.106).

Jeffrey Turner testified that his brother primarily lived outside the immediate household. He often lived with other family members described as aunts, and uncles. (PCROA Vol.17, p.106-107). When he was not living in the Turner household, Mr. Turner either lived with his uncles, Dale, Pete, or Sherman (also known as "Slick") Landers, or with Aunt McAlister. (PCROA Vol.17, p.107). For

the most part, Mr. Turner lived with their Aunt McAlister. (PCROA Vol.17, p.107). All of these aunts and uncles are siblings of Mr. Turner's mother, Mrs. Ruby Turner. (PCROA Vol.17, p.107).

Jeffrey Turner described his brother as impulsive, always reckless, on the go and into something. (PCROA Vol.17, p.107). He testified that Mr. Turner was unstable, that he could not hold a regular job and that he would go through his money as quickly as he got it. (PCROA Vol.17, p.107). He testified that demonstrations of anger by Mr. Turner that he observed had occurred when he had been drinking. (PCROA Vol.17, p.108). He further testified that he observed his brother's mental health and that it "just wasn't right." (PCROA Vol.17, p.109). He described his brother as depressed. (PCROA Vol.17, pp.109-110). His brother "would be down on himself during relationship breakups" and "his children." (PCROA Vol.17, p.110). He would see sadness in his brother. (PCROA Vol.17, p.110). He testified that he knew Mr. Turner had threatened suicide in his presence on more than one occasion. (PCROA Vol.17, p.110-111). Jeffrey Turner was aware of a suicide attempt made by his brother just prior to his incarceration in 2005. (PCROA Vol.17, p.110-111). He testified that his brother was taken to the hospital and released the same day. (PCROA Vol.17, p.110-111). He testified that his brother had cut his wrists. (PCROA Vol.17, p.110). He testified that he then followed his brother that same afternoon to a scheduled court appearance. (PCROA

Vol.17, p.111)

Jeffrey Turner testified that there was excessive corporal punishment inflicted upon his two older brothers. (PCROA Vol.17, p.112). The physical punishment he observed was inflicted by their mother, who he described would use "whatever she could get her hands on." (PCROA Vol.17, p.112). Jeffrey Turner recalled "welt marks and things like that" from the punishments. (PCROA Vol.17, p.112). The punishment he described left visible welt marks following these episodes. (PCROA Vol.17, p.112).

Jeffrey Turner testified that he cooperated with Mr. Turner's attorneys and that he had travelled to St. Augustine in 2005. (PCROA Vol.17, p.112). He was prepared to testify in the penalty phase proceedings. (PCROA Vol.17, p.112). He testified that he provided contact information to Mr. Turner's attorneys and he would have testified if called to do so at his trial. (PCROA Vol.17, p.112-113). *Jeffrey Turner testified that to his knowledge he was not called because of the age difference between himself and Mr. Tuner along with the fact that his other brother and sister were much closer to Mr. Turner*. (PCROA Vol.17, p.113).

(iv) Testimony of Betty McAlister.

Aunt McAlister also testified at the post-conviction evidentiary hearing. (PCROA Vol.17, p.114-140). She testified that Mr. Tuner is the first born son of her sister, Mrs. Ruby Turner. (PCROA Vol.17, p.115). She testified that she is

approximately six to seven years younger than her sister. (PCROA Vol.17, p.116). She currently resides in Hodges, South Carolina, which is six to seven hours from St. Augustine, Florida. (PCROA Vol.17, p.115). Aunt McAlister testified that shortly after Mr. Turner's birth, Mr. Turner, his mother and his father moved into her parents' Warren and Sally Landers' home. (PCROA Vol.17, p.116). Mrs. Ruby Turner was seventeen years old when she gave birth. (PCROA Vol.17, p.115). At the time they moved in, she was ten or eleven years old. (PCROA Vol.17, p.115-116). Along with her and her parents, Mr. Turner's uncles Pete and Dale Landers also resided in the household. (PCROA Vol.17, p.115-116).

A few months later, Mrs. Ruby Turner and her husband, Buck, moved out and took up residence just down the road. (PCROA Vol.17, p.116-117). According to Aunt McAlister an incident occurred in the Landers' household which precipitated the move. (PCROA Vol.17, p.117). Aunt McAlister testified that Mrs. Ruby Turner spanked Mr. Turner when he was about six months old, when she was trying to get him to sleep or something. (PCROA Vol.17, p.117). Their father, Mr. Warren Landers, went in and took him away from his mother to keep him from being hurt. (PCROA Vol.17, p.117). The Landers returned the baby after a couple of months to his parents. (PCROA Vol.17, p.118). Aunt McAlister continued to have daily contact with Mr. Turner and his parents, who lived down the road. (PCROA Vol.17, p.118). She saw them every day. (PCROA Vol.17, p.118).

Aunt McAlister testified that her mother and Mr. Turner's grandmother, Mrs. Sally Landers, suffered from mental illness. (PCROA Vol.17, p.119). She stated that when her mother was approximately twenty years old, she was diagnosed with bipolar mental illness. (PCROA Vol.17, p.119). Mr. Turner's grandmother had dementia and she could not read nor write. (PCROA Vol.17, p.119). Aunt McAlister testified that her mother was prescribed Zoloft and Ativan for her mental illness. (PCROA Vol.17, p.119). Mrs. Sally Landers' mental health illness required her to be hospitalized at the age of twenty and then at the age of sixty, in the psychiatric ward at Greenwood. (PCROA Vol.17, p.119).

Aunt McAlister testified that she has been diagnosed as Bipolar and so has her son. (PCROA Vol.17, p.119-120). She testified that her daughter has "HDA." (PCROA Vol.17, p.120). She testified that she and her children have all been formally diagnosed with these mental health problems. (PCROA Vol.17, p.120). Aunt McAlister has been prescribed Ativan and Zoloft. (PCROA Vol.17, p.120). Aunt McAlister testified that her mental health problems have never required her to be hospitalized. (PCROA Vol.17, p.120). Aunt McAlister believed that when Mr. Turner was younger he was prescribed Paxil by a family practice doctor named Dr. Atkinson. (PCROA Vol.17, p.131-132).

Aunt McAlister testified that she subsequently married and relocated to live with her husband who was in the military. (PCROA Vol.17, p.121). She testified

that Mr. Turner at the age of seven came to live with her in Ft. Knox, Kentucky. (PCROA Vol.17, p.120-121). Aunt McAlister testified that he was brought to her home by his mother after he had gotten into some trouble. (PCROA Vol.17, p.121). She described Mr. Turner's conduct as "fine sometimes and then sometimes he was down." (PCROA Vol.17, p.121). She testified that he was high energy and described an incident where he impulsively threw her daughter while fully dressed in new clothing into a swimming pool. (PCROA Vol.17, p.121-122). Aunt McAlister was sufficiently concerned about Mr. Turner's circumstances to ask her sister to let him stay with her permanently and attend school but her sister refused and took him back before she left for Germany. (PCROA Vol.17, p.121). After leaving the country for Germany, Aunt McAlister remained in contact with her family. (PCROA Vol.17, p.122). She was aware that Mr. Turner lived "with his mom and dad some, but he stayed with (her) older brother." (PCROA Vol.17, p.122).

Upon her return to Ft. Knox, Kentucky, Aunt McAlister testified that she received a call from her sister one night for her to come and pick up Mr. Turner. (PCROA Vol.17, p.122). She recalled that her sister must have "hit him or something". (PCROA Vol.17, p.123). Mr. Turner was about thirteen or fourteen years old at this time. (PCROA Vol.17, p.123). She was so concerned that she travelled all night for approximately eight hours from Kentucky to South Carolina,

to pick up Mr. Turner. (PCROA Vol.17, p.123). Aunt McAlister testified that she arrived at the Turner home in the early cold morning hours. (PCROA Vol.17, p.123-124). She found Mr. Turner in the woods behind the residence dressed in only shorts. (PCROA Vol.17, p.124). She testified that Mr. Turner had run into the woods after the confrontation with his mother. (PCROA Vol.17, p.124). Aunt McAlister also saw marks on his body. (PCROA Vol.17, p.124). Aunt McAlister's daughter opened the car door and Mr. Turner got in and they returned to Kentucky with the fourteen year old boy. (PCROA Vol.17, p.124). Mr. Turner had stayed with the McAlister family for approximately six months and then later another six months when he was approximately sixteen years old. (PCROA Vol.17, p.134).

Aunt McAlister testified that when they returned to Kentucky from South Carolina, she enrolled Mr. Turner into school. (PCROA Vol.17, p.124-125). She testified that Mr. Turner had "real bad problems with learning" and that "he just didn't want to go to school." (PCROA Vol.17, p.125). She received reports from the school regarding his problems. (PCROA Vol.17, p.125). Aunt McAlister reported that his grades were D's and F's and that he was talking out in class. (PCROA Vol.17, p.125). She reported that Mr. Turner was trying but did not seem to comprehend the work and he had trouble concentrating. (PCROA Vol.17, p.125). Aunt McAlister testified that Mr. Turner could not sit still for long and that "he moved a lot around" and that" his attention span was not very long." (PCROA

Vol.17, p.125-126). Aunt McAlister testified that this behavior continued into adulthood. (PCROA Vol.17, p.126). She stated that he was always losing things such as his wallet, his belt and his clothing. (PCROA Vol.17, p.126). Aunt McAlister described Mr. Turner as "I'm trying but I'm not getting anywhere." (PCROA Vol.17, p.126). She testified that Mr. Turner did not appear to be a confident young man who sometimes got along with other people. (PCROA Vol.17, p.127) She further testified that Mr. Turner did not sleep for long periods of times and had nightmares. (PCROA Vol.17, p.127). Aunt McAlister testified that she believed that Dr. Atkinson, a Family Practice Physician in Laurens had prescribed Paxil for Mr. Turner's depression when he was younger. (PCROA Vol.17, p.131-132). Aunt McAlister testified that Mr. Turner was not very good at handling money. (PCROA Vol.17, p.132). She stated that when Mr. Turner was eighteen years old, that he received a $25,000 settlement for chemicals that had infiltrated the water supply where he was living. (PCROA Vol.17, p.132). She testified that he went "wild with" the money and all of it was gone within a week. (PCROA Vol.17, p.132). Mr. Turner "just went wild" and purchased two cars, clothing, and jewelry in that week. (PCROA Vol.17, p.132-133).

She testified that she discussed Mr. Turner's problems with his mother and she recommended that he be tested. (PCROA Vol.17, p.126-127). She suggested to her sister that they needed to look into his inability to sit still in school and into his

inability to comprehend school work. (PCROA Vol.17, p.126). Her sister refused to allow Mr. Turner to remain in her custody because she wanted her son. (PCROA Vol.17, p.127). Mr. Turner was disappointed to leave her household but Mr. Turner knew he had to go with his mother and father. (PCROA Vol.17, p.127).

Aunt McAlister testified that Mr. Turner had developed a close relationship with his uncle Mr. Dale Landers and his grandfather Mr. Warren Landers. (PCROA Vol.17, p.127-128). Aunt McAlister reported that her brother Mr. Dale Landers had died of cirrhosis of the liver in 2005. (PCROA Vol.17, p.128). She testified that the death of his grandfather was especially difficult for Mr. Turner because he had lived most of his life in the Landers household with his grandfather. (PCROA Vol.17, p.128). After his grandfather's death, Mr. Turner "really went downhill." (PCROA Vol.17, p.128). His death "was something he just could not take." (PCROA Vol.17, p.128). Mr. Turner would cry all of the time and it was during this period that he first tried to cut his wrists. (PCROA Vol.17, p.128). Mr. Turner was between thirteen and fourteen years old when his grandfather died. (PCROA Vol.17, p.128). She testified that she saw what appeared to be scratch marks on Mr. Turner's arms, and when she asked him about them, she received no reply. (PCROA Vol.17, p.129). Shortly thereafter, she testified that his grandmother Mrs. Sally Landers informed her that Mr. Turner had been taken to the hospital by her and Uncle Pete because he had cut his wrists. (PCROA Vol.17,

p.129). Aunt McAlister testified that Mr. Turner's wrists were bandaged. (PCROA Vol.17, p.130).

Aunt McAlister testified that she is aware of another incident where Mr. Turner cut his wrists which occurred when he was approximately twenty years old and married to wife, Karen. (PCROA Vol.17, p.130 & p.135). Mr. Turner was staying with her, but the incident happened at his mother's home, who notified Aunt McAlister of the incident. (PCROA Vol.17, p.135). Mr. Turner was transported to Laurens Hospital by EMS. (PCROA Vol.17, p.135). Aunt McAlister testified that she went immediately to the hospital when informed of the incident. (PCROA Vol.17, p.135). Mr. Turner's mother told Aunt McAlister that follow-up mental health treatment had been recommended. (PCROA Vol.17, p.136). Aunt McAlister testified that the cuts to Mr. Turner's wrists needed stitches. (PCROA Vol.17, p.136).

Aunt McAlister testified that there was a third wrist-cutting incident during the time Mr. Turner was married to his wife, Mrs. Donna Turner. (PCROA Vol.17, p.130). Aunt McAlister had received a call from Mr. Turner earlier that day to come and pick him up but was unable to leave her employer early. (PCROA Vol.17, p.130-131). She testified that at the time of this incident Mr. Turner was on probation. (PCROA Vol.17, p.137). Aunt McAlister stated that when she arrived to pick up Mr. Turner she found that he had cut both of his wrists. (PCROA

Vol.17, p.136-137). Aunt McAlister reported that she transported Mr. Turner to the emergency room at Laurens Hospital, where he received stitches. (PCROA Vol.17, p.136-137). She testified that it was recommended by physicians at the hospital that Mr. Turner get follow-up mental health care. (PCROA Vol.17, p.131). She testified that that Mr. Turner did not get follow up mental health treatment because he went back to jail. (PCROA Vol.17, p.131).

Aunt McAlister testified that in 2005, she was living in Ware Shoals, South Carolina. (PCROA Vol.17, p.133). She recalled meeting with an investigator named "Dr. Scott" and an attorney. (PCROA Vol.17, p.133). She answered questions and provided them with information. (PCROA Vol.17, p.133). She testified that she had provided contact telephone numbers to them, but she was not contacted to testify at the trial. (PCROA Vol.17, p.133-134). Aunt McAlister was willing to come and testify if called upon. (PCROA Vol.17, p.133).

(v) Testimony of Dr. Hyman Eisenstein.

Dr. Eisenstein, a clinical psychologist with a subspecialty in neuropsychology, also testified at the post-conviction evidentiary hearing. (PCROA Vol.17, p.141). Dr. Eisenstein has been licensed for twenty-five years to practice in the State of Florida. (PCROA Vol.17, p.141). Dr. Eisenstein testified that he obtained his doctoral degree from the University of Health Sciences Chicago Medical School in 1982. (PCROA Vol.17, p.141). He completed a

doctoral internship at Fairfield Hills Hospital and a postdoctoral internship at the Yale-West Haven VA Hospital in the epilepsy neurosurgery program. (PCROA Vol.17, p.141-142). In 1986, he moved to Florida and worked at Sunrise Rehabilitation Hospital as a neuropsychologist heading up the head trauma program for one year and began a private practice the following year. (PCROA Vol.17, p.142). He testified that ten years ago he obtained his diplomate with the American Board of Professional Neuropsychology. (PCROA Vol.17, p.142). He testified that he is one of five hundred psychologists certified by the American Board of Professional Neuropsychology and he is an adjunct professor at Touro College teaching neuropsychology. (PCROA Vol.17, p.142-143). He has been on staff at several hospitals and is currently on staff at Mount Sinai Medical Center in Miami, Florida. (PCROA Vol.17, p.143). Dr. Eisenstein testified that he has worked as a consultant to neurology practices and is currently working full-time providing assessment and treatment. (PCROA Vol.17, p.143). He has been qualified to testify previously in approximately sixty cases. (PCROA Vol.17, p.143-144). He has handled about eighty cases during the last five years, of which seventy were criminal cases and about thirty-five of them were capital cases in which he testified. (PCROA Vol.17, p.143-144). Dr. Eisenstein testified that he has been retained by defense in approximately twenty cases, has been court- appointed in ten cases and has never testified for the State. (PCROA Vol.17, p.144). Dr.

Eisenstein testified that he has completed the forty hours of continuing education courses required in his profession. (PCROA Vol.17, p.144).

Dr. Eisenstein testified that a neuropsychologist is a licensed psychologist who is interested "in both the normal and abnormal brain functioning, not only the structural and anatomical and chemical abnormalities of the brain, but also the effects of cognitive mental functioning and one's thinking and behavior." (PCROA Vol.17, p.146). Furthermore, "the evaluation process includes standardized tests that have normative data." (PCROA Vol.17, p.146). Dr. Eisenstein testified that he was retained by CCRC in this case to look at the developmental factors, the formative influences on Mr. Turner's life, and "to look at various different possible mitigators that would add an additional perspective on Mr. Turner regarding potential defense in raising issues for the Court." (PCROA Vol.17, p.146). He testified that "[d]evelopmental ages of children are extremely important in terms of the - - the formative years when there's still the ability to adapt and to change. And, of course, those years leave an indelible impression on one's life and the changes and shape of the individual that they'll become." (PCROA Vol.17, p.146-147). He testified that the focus of his investigation and analysis was "really several fold." (PCROA Vol.17, p.147). Dr. Eisenstein testified that "[f]irst we're looking for potential issues that were damaging or impairing factors on Mr. Turner's life that dealt with the offense of his - - both his moral culpability as well as risk assessment

for potential for future violence; the moral culpability that is in - - in individuals that have been damaged in one way or the other in dealing what those impairments may have on his capabilities, as well as risk assessment and likelihood of a positive adjustment to prison life." (PCROA Vol.17, p.147).

In preparing to testify, Dr. Eisenstein reviewed Mr. Turner's school records from the Laurens County School district, documents that included background material and the testimony of other experts. (PCROA Vol.17, p.147). He testified that he also conducted witness interviews of Mr. Turner's brothers, Jeffrey Turner and Mr. Michael Turner; Mr. Turner's mother, Mrs. Ruby Turner; Mr. Turner's sister, Ms. Hope Turner; and Aunt McAlister and her daughter, Natasha. (PCROA Vol.17, p.147-148). He also reviewed the testimony of other experts who had rendered opinions in this case. (PCROA Vol.17, p.148). He also had spoken to Dr. Krop. (PCROA Vol.17, p.148). He had also met with Mr. Turner on four different days for a total of nineteen hours. (PCROA Vol.17, p.148).

Dr. Eisenstein identified the series of neuropsychological tests he administered on Mr. Turner. (PCROA Vol.17, p.148-149). On the Wechsler Adult Intelligence Fourth Edition test, Dr. Eisenstein noted that Mr. Turner received a score of 72 placing him in the third percentile *borderline range*. (PCROA Vol.17, p.150). He testified that Turner's "verbal comprehension, most probably his left brain functioning, is significantly impaired and lower than any other subtest. . . on

the Wechsler Adult Intelligence Scale," which is indicative of cognitive brain damage. (PCROA Vol.17, p.150). Dr. Eisenstein testified that when there are "significant deviations, almost two standard deviations below the mean on this particular area of verbal skills, the discrepancy is so great that it's beyond the statistical norm, beyond the clinical norm of significance, and, again, indicative of cognitive disregulation." (PCROA Vol.17, pp.150-151).

Part of Dr. Eisenstein's battery of tests required testing of "Mr. Turner's perceptual reasoning, working memory, and processing speed." (PCROA Vol.17, p.151). Dr. Eisenstein testified when administering the Tactical Performance Test, to test his executive brain function, Mr. Turner was so anxious that he could not keep the blind-fold on during the first attempt, but did so at a later date after being reassured and alleviated of his anxiety. (PCROA Vol.17, p.152-153). Dr. Eisenstein also administered the Category Test and the Wisconsin Sorting Test, which had no significant findings. (PCROA Vol.17, p.154). The various tests regarding sensory perceptual were also administered and indicated he was in a "moderately impaired range." (PCROA Vol.17, p.155-156). The "greatest area of deficit" that Mr. Turner showed was during a task that tested attention sequencing and mental flexibility with a verbal component. (PCROA Vol.17, p.156). Dr. Eisenstein testified that he administered a Wechsler Memory Scale 4th Edition to test Mr. Turner's immediate and delayed, verbal and visual memory and learning

skills. (PCROA Vol.17, p.156). He testified that the same discrepancy noted in the I.Q. [33 points] was noted in the Wechsler memory scale [31 points]. (PCROA Vol.17, p.156-157). He testified that these results are indicative of inferior deficits in the left hemisphere of Mr. Turner's brain. (PCROA Vol.17, p.156). Dr. Eisenstein administered some language tests to Mr. Turner which revealed functioning in word naming in a *moderately impaired range and mild impairment* in word fluency. (PCROA Vol.17, p.157-158). He opined that Mr. Turner demonstrated low average range functioning in both receptive and expressive language. (PCROA Vol.17, p.157-158). As a result, he reported there was a diminished capacity in Mr. Turner's language skill functioning. (PCROA Vol.17, p.157). Dr. Eisenstein also administered Test of Memory and Malingering to see whether or not Mr. Turner's testing reflected his best effort. (PCROA Vol.17, p.158-159). Based upon Mr. Turner's score, Dr. Eisenstein opined that the neurological test results were valid and Mr. Turner's test scores ruled against malingering and showed sincere effort. (PCROA Vol.1, p.159). Dr. Eisenstein testified that the consistency of performance of measures over the various different tests supported the validity of his findings. (PCROA Vol.17, p.160).

Dr. Eisenstein described Mr. Turner's personality and mood during his visits as anxious and depressed. (PCROA Vol.17, p.161). He testified that Turner "displayed feelings of sadness, feelings of anxiety, feelings of tension." (PCROA

Vol.17, p.161). Dr. Eisenstein testified that in his best clinical judgment, Mr. Turner's long history of alcohol and drug use was meant to self-medicate his anxiety, depression, and feelings of worthlessness and low self-esteem. (PCROA Vol.17, p.161).

Dr. Eisenstein testified that Mr. Turner has never been diagnosed as antisocial. (PCROA Vol.17, p.162). He explained that for such a diagnosis to be made there has to be onset prior to age of fifteen and that there is insufficient evidence regarding Mr. Turner's thoughts and behavior to support such a diagnosis. (PCROA Vol.17, p.162). Dr. Eisenstein stated that he authored a report and reached a diagnosis as to Mr. Turner's mental health. (PCROA Vol.17, p.162). He explained that he used the standard Axis I, II, III, IV, and V in rendering a diagnosis. (PCROA Vol.17, p.162). Dr. Eisenstein opined that Mr. Turner suffered from the following mental health diagnoses:

> "Axis I, which if the primary Axis, had several diagnoses. The first diagnosis was *Attention Deficit Disorder, Hyperactivity Disorder, Predominantly Hyperactive- Impulsive Type.*
> . . .
> The second diagnosis was *Bipolar I Disorder.*
> . . .
> Third diagnosis was *alcohol dependence,* currently in remission due to controlled environment. And *substance dependence* currently in remission due to controlled environment.
> Axis II was *Borderline Personality Disorder.*
> Axis III was deferred. That was medical issues.
> Axis IV was stressors, and one is obviously problems related to the interaction with the legal system and the incarceration.
> And Axis V is the global assessment. And I gave him a score of 60,

which puts him at the moderate level."

(PCROA Vol.17, p.162-163).

In order to make the aforementioned diagnoses, Dr. Eisenstein testified that he considered various factors. (PCROA Vol.17, p.163). The first factor being the clinical interviews that he conducted with Mr. Turner on four different occasions for almost twenty hours. (PCROA Vol.17, pp.163-164). He testified that he also conducted concurrent interviews with family members to obtain background information for use in assessing his mental health state, both in development and Mr. Turner's current psychological condition. (PCROA Vol.17, p.164). Furthermore, he relied upon the work done by the other experts, their findings and the records in the case. (PCROA Vol.17, p.164).

Dr. Eisenstein testified that he was aware of the testimony provided by Dr. Stephen Bloomfield and the court's finding that Mr. Turner was under the influence of extreme mental or emotional disturbance at the time the offense was committed and had no disagreement with Dr. Bloomfield's testimony. (PCROA Vol.17, p.164). Similarly, Dr. Eisenstein testified that he had no disagreement with the testimony presented by Dr. Drew Edwards or by the two forensic pathologists [Drs. Bloomfield and Krop] or the Court's findings that Mr. Turner's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was substantially impaired. (PCROA Vol.17, p.164-165).

However, Dr. Eisenstein testified that he had found mental health disorders that were not presented at sentencing and that would have affected Mr. Turner's behavior. (PCROA Vol.17, p.165).

Dr. Eisenstein testified that the first disorder was Attention Deficit Disorder, Hyperactive Disorder, Predominantly Hyperactive – Impulsive Type, 314.01. (PCROA Vol.17, p.165). He explained that in order to establish that an individual suffers this disorder the onset has to occur before the age of seven. (PCROA Vol.17, p.165). Dr. Eisenstein testified that Attention Deficit Hyperactivity Disorder is listed in the section of disorders usually diagnosed in infancy, childhood and adolescence. (PCROA Vol.17, p.176). Following clinical interviews with Mr. Turner, clinical interviews with his family members, a review of information from other psychologists, and a review of Mr. Turner's school records, he found that all of the information clearly corroborated this diagnosis. (PCROA Vol.17, p.165). The school records established that Mr. Turner had academic failure at an early age. (PCROA Vol.17, p.165) Although he repeated the first grade due to sickness [pneumonia], he also had to repeat both fifth and sixth grades due to academic failure. (PCROA Vol.17, p.166). Dr. Eisenstein testified that his interviews further corroborated difficulties with reading comprehension, and a lack of understanding of school work that resulted in academic failures. (PCROA Vol.17, p.166). Mr. Turner was described as having a tremendous amount of

energy, being hyperactive, with relentless restlessness, always being on the go, not sitting still, fidgety and with an inability to concentrate. (PCROA Vol.17, p.166). Dr. Eisenstein explained that Dr. Susan Young had administered the Conner's Continuance Performance Test to Mr. Turner in 2006, near the time of his trial, and its results demonstrated his inability to attend and to concentrate. (PCROA Vol.17, p.166).

Dr. Eisenstein further explained reactive impulsivity, which are spontaneous acts with little planning or preparation and based on reaction to a situation. (PCROA Vol.17, p.167). He also testified about judgment impulsivity which occurs in older children. (PCROA Vol.17, p.167). In this situation there can be no planning but where some planning is involved it is described as stupid planning. (PCROA Vol.17, p.167). He explained that Mr. Turner had displayed both reactive and impulsive types. (PCROA Vol.17, p.167). Dr. Eisenstein testified that there is a long history of impaired judgment and impulsive behavior as described by every individual that knew him based on his interviews. (PCROA Vol.17, p.168). Dr. Eisenstein agreed with the findings presented through Dr. Bloomfield and testified that those findings are supported by his test results. (PCROA Vol.17, p.168). Dr. Eisenstein explained that Mr. Turner's frontal lobe damage affects his judgment as evidenced by his lack of ability to concentrate, attend and his subsequent academic failures. (PCROA Vol.17, p.168).

Dr. Eisenstein reported that in Turner's case there was a predisposition to use drugs and the onset of addiction came at an early age [13 or 14] at the conclusion of a truncated education led to Mr. Turner self-medicating. (PCROA Vol.17, p.168-169). He described Mr. Turner's life as one surrounded by bad influences (such as his uncles that encouraged drinking at a young age), a wild life, reckless, without thought, spending money without consideration, and lacking stability at home. (PCROA Vol.17, p.168-169). Due to the combination of these factors, Dr. Eisenstein opined that Mr. Turner's thinking processes just totally failed and fell apart in his life. (PCROA Vol.17, p.169).

Dr. Eisenstein also found Mr. Turner to meet the criteria for a diagnosis of Bipolar I Disorder, most recent episode depressed with severe psychotic features. (PCROA Vol.17, p.169) Dr. Eisenstein testified that Bipolar I is listed in the mood disorder section in the DSM-IV-TR. (PCROA Vol.17, p.176). Dr. Eisenstein testified that Mr. Turner's Bipolar diagnosis was based upon Mr. Turner's own behavior and corroborated by information that he received through interviews with Mr. Turner family members. (PCROA Vol.17, p.169). Dr. Eisenstein testified that there is a high incidence of Bipolar illness that exists in the family, from maternal grandmother, maternal aunt, and cousins, showing a propensity for the disorder. (PCROA Vol.17, p.169). While other members of his family have acknowledged that they suffer from Bipolar disorder, Dr. Eisenstein testified that Mr. Turner

failed to admit having such problems and suspects that the reason is because Mr. Turner does not want to look abnormal. (PCROA Vol.17, p.169).

Dr. Eisenstein opined that Mr. Turner suffered an Axis II mental illness identified as Borderline Personality Disorder. (PCROA Vol.17, p.170). According to Dr. Eisenstein the characteristics for this diagnosis overlap with the Bipolar diagnosis. (PCROA Vol.17, p.170). He found Mr. Turner to demonstrate characteristics which corroborate his clinical diagnosis, specifically, impulsivity, reckless spending of money, volatility of emotional mood swings, self-mutilation, suicidal behavior, and feelings of stress related paranoia. (PCROA Vol.17, p.170). Dr. Eisenstein testified that there can be concurrent multiple diagnoses. (PCROA Vol.17, p.170). He testified that the Borderline Personality Disorder is very difficult to treat and Mr. Turner had never received any treatment. (PCROA Vol.17, p.170-171). Dr. Eisenstein testified that Borderline Personality Disorder is listed in the DSM-IV-TR in the personality disorder section. (PCROA Vol.17, p.175).

Dr. Eisenstein testified that his findings in Mr. Turner's case assisted in providing a better understanding of who Mr. Turner is prior to the commission of the crime how he got to that point. (PCROA Vol.17, p.171). Mr. Turner's early childhood development demonstrated issues of Attention Deficit Disorder, Hyperactivity. (PCROA Vol.17, p.171). He testified that Mr. Turner lacked

consistency in his education, he self- medicated with alcohol and drugs, and he ran away for periods of time to escape from reality or responsibility in terms of lifestyle. (PCROA Vol.17, p.171). Dr. Eisenstein learned through collateral sources that Mr. Turner spent whatever money earned as quickly as possible on drugs, alcohol, womanizing, and partying. (PCROA Vol.17, p.172). He testified that Turner's own lack of stability while growing up resulted in Mr. Turner's having continued relationship problems with women. Dr. Eisenstein described Mr. Turner's relationships as not long standing and ones that always fell apart. When the relationship deteriorated, he described Mr. Turner as devastated and testified that those stressors caused Mr. Turner to spiral again into reckless behavior. (PCROA Vol.17, p.172). Dr. Eisenstein learned through interviews that both suicide attempts occurred as his relationship deteriorated with each wife; that Mr. Turner drove recklessly, whereby he would drive at 100 miles an hour, and also drive into brick walls, and that he was involved in several crashes; and that Mr. Turner had near death experiences on several occasions. (PCROA Vol.17, p.172). Dr. Eisenstein described evidence of a euphoric manic phase that occurred when Mr. Turner spent $25,000 in the course of one week on two cars and clothing. (PCROA Vol.17, p.172). He testified that the behavior of spending a tremendous sum of money without judgment or consideration in one week is evidence of Mr. Turner's mindset and supportive of the Bipolar diagnosis. (PCROA Vol.17, p.172).

Dr. Eisenstein testified that Mr. Turner has underlying depression and anxiety. (PCROA Vol.17, p.172). He explained that hyperactivity at times forces Mr. Turner to take it to the next level and as an example pointed to the suicide attempts which required a certain amount of his energy to undertake. (PCROA Vol.17, p.172). Dr. Eisenstein testified that his behavior as a whole is not out of touch with reality, he is not hallucinating or delusional but at times he opined Turner has had an episodic psychotic disorder. (PCROA Vol.17, p.173). Dr. Eisenstein testified that due to the fact that Mr. Turner exists in his current controlled environment it is not unusual not to see a psychotic episode. (PCROA Vol.17, p.174). Dr. Eisenstein testified that if psychological experts working with Mr. Turner at trial had conducted the interviews with family members and pulled all their resources together, they would have arrived at the same conclusions regarding the presence of the serious aforementioned Axis I and II mental illnesses to present to the jury and the Court, to give an understanding of the totality of Mr. Turner's severe mental illnesses. (PCROA Vol.17, p.175).

(vi) Testimony of Dr. Jeffrey Danziger.

The State of Florida presented two witnesses at the post-conviction evidentiary hearing. The State first called Dr. Jeffrey A. Danziger (hereinafter referred to as "Dr. Danziger") to testify as an expert witness. (PCROA Vol.18, p.199-238). Dr. Danziger is Board Certified in general psychiatry, addiction,

geriatric, and forensic psychiatry. (PCROA Vol.18, p.200). He stated that he has testified as an expert over three hundred odd times over the past quarter century with three fourths or four fifths of them being in criminal matters and the bulk regarding competency to stand trial, sanity at time of offense or sentencing matters. (PCROA Vol.18, p.201). He testified that he appeared approximately four or five times in the Seventh Circuit and that he has testified evenly between State and Defense. (PCROA Vol.18, p.202).

Dr. Danziger testified that he was hired by the State and that he met Mr. Turner on April 26, 2012 at Union Correctional Institution for the purpose of conducting an evaluation. (PCROA Vol.18, p.204). Dr. Danziger reviewed some records and documents prior to his meeting with Mr. Turner and proceeded to conduct a standard psychiatric assessment. (PCROA Vol.18, p.205). He testified that he reviewed the Defense Motion to Vacate the Conviction and Sentence of Death, the State's Response to the Defense Motion, the Defense Motion setting hearing, the Indictment, the May 20, 2010, decision by the Florida Supreme Court following direct appeal, the penalty phase testimony of Drs. Drew Edwards and Stephen Bloomfield, the Spencer Hearing testimony of Dr. Harry Krop and the report and testing data of Dr. Eisenstein. (PCROA Vol.18, p.207). Dr. Danziger asked Mr. Turner about his social history, background, medical history, current medications, allergies, medical problems, surgeries, substance abuse history,

family history of mental illness, past psychiatric mental health history, current psychiatric and mental health history, and recollections of the alleged offense and behavior in the days and weeks prior. (PCROA Vol.18, p.205). Mr. Turner admitted taking the truck and fleeing the scene out of fear, but denied being the perpetrator of the murder. (PCROA Vol.18, p.206).

Following his interview with Mr. Turner, review of the aforementioned records and based upon his training and experience, Dr. Danziger testified that he had reached opinions and conclusions to a reasonable degree of medical certainty. (PCROA Vol.18, p.207). Constructing a diagnosis in psychiatry on five axes he reported his findings as follows:

> "Axis I refers to Major Psychiatric Syndromes. The first diagnosis I reached is that of Polysubstance Dependence, in remission in the controlled environment of the jail. The history that I obtained is that Mr. Turner prior to September 2005 when he was incarcerated had a history of dependence upon alcohol, powder cocaine, methamphetamine, and op- - - prescription opiates. In addition, there were other substances that he used periodically.
> There was no one substance that predominated; and given the multiple substances in different classes, I opined that he had a Polysubstance Dependence, but it was now in remission because of seven years of enforced sobriety in the jail setting.
> . . .
> The second opinion that I had is that - - also on Axis I, Major Psychiatric Syndromes, is that he's suffering from an Adjustment Disorder with Depressed Mood. . . The symptoms were not severe enough to meet the criteria for a major depressive disorder.
> . . .
> It is my opinion the symptoms are not severe enough to meet a major depressive disorder, rather, he has a situational unhappiness due to his current predicament."

(PCROA Vol.18, p.209).

Dr. Danziger opined that Mr. Turner does not suffer from Bipolar Disorder because this mood disorder requires that individuals must have a manic episode which is seven or more days of a mood persistently elated or euphoric or associated with persistent irritability. (PCROA Vol.18, p.209). Furthermore, he stated that there are other associated symptoms such as pressured speech, disorganized or illogical flow of thought, grandiose thinking, reckless behavior, and increased energy despite a decreased need for sleep. (PCROA Vol.18, p.209). Dr. Danziger testified that the symptoms of mania occur spontaneously for Bipolar disorder and cannot be due to a medical condition or to substances. (PCROA Vol.18, p.210). He testified that he is not aware of any manic type symptoms during his seven years of incarceration and that Mr. Turner's manic like symptoms were most certainly the result of intoxication and dependence upon stimulant medications. (PCROA Vol.18, p.210). Based upon Mr. Turner's history of the abusing stimulants, and the episodes described while he was heavily using cocaine or methamphetamines, Dr. Danziger opined that the transient psychotic symptoms developed following drug binges. (PCROA Vol.18, p.210). Dr. Danziger testified that large amounts of methamphetamine and cocaine can trigger a drug induced paranoid state that is the effect of the substance and not a primary mental illness. Therefore, he disagreed

with Dr. Eisenstein that Mr. Turner has a Bipolar I diagnosis or a psychotic disorder. (PCROA Vol.18, p.211-212).

Dr. Danziger does not disagree with the findings of all of the psychologists (Drs. Bloomfield, Krop and Eisenstein) that Mr. Turner has frontal lobe deficits that impair his emotional control, planning, judgment, and reasoning. (PCROA Vol.18, p.212). Dr. Danziger opined that Mr. Turner suffered from Cognitive Disorder Not Otherwise Specified. (PCROA Vol.18, p.212). In addressing the question as to whether Mr. Turner suffered from Axis I - Attention Deficit Hyperactivity Disorder (ADHD), Dr. Danziger testified that the symptoms have to be present before the age of seven or in retrospect found to have existed. (PCROA Vol.18, p.212). He testified that it is possible that Mr. Turner has ADHD, but he had no good data on what he was like as a kindergarten student or first grader. (PCROA Vol.18, p.213). He opined that Mr. Turner's early use of substance abuse obscures any psychiatric diagnosis. Data would be required from when he was a very young child and before he discovered alcohol, methamphetamine, and cocaine. (PCROA Vol.18, p.214).

Dr. Danziger also disagreed with Dr. Eisenstein's Axis II diagnosis of Borderline Personality disorder. (PCROA Vol.18, p.214). He testified that in his opinion, Mr. Turner does not meet any of the characteristics. (PCROA Vol.18, p.215). He explained that a personality disorder is defined as a persistent

maladaptive set of personality traits beginning in adolescence or early childhood that persist throughout life and cause distress or impairment either to the person or those around him. (PCROA Vol.18, p.215). It is essentially defined as a pervasive pattern of unstable interpersonal relationships, self-image, mood and impulsivity beginning in early adulthood and there are a number of characteristics seen. (PCROA Vol.18, p.216). Dr. Danziger testified that the first is transient stress related paranoia, and when people are under stress they may become paranoid if they are a borderline personality. (PCROA Vol.18, p.216). He stated further, that those that suffer from Borderline personality disorder have difficulty controlling anger, experience chronic feelings of emptiness, show instability of mood, display recurrent suicidal behavior, gestures or threats which are often manifested by self-injury. He testified that these are people who are the cutters or the head bangers and have this type of impulsivity. (PCROA Vol.18, p.216). He testified that in looking at unstable relationships, they are defined by a pattern of extremes. (PCROA Vol.18, p.216-217). The person they are with is at one point the most wonderful person in the world, but as soon as there is disappointment, they are the most evil person in the world. (PCROA Vol.18, p.216-217). Dr. Danziger testified that these tremendous and sudden shifts occur as the individual makes frantic efforts to avoid abandonment and a disturbance of identity. (PCROA Vol.18, p.217).

Dr. Danziger testified that Mr. Turner's impulsive acts occurred while he was intoxicated and no recurrent suicide attempts, threats or gestures occurred during his periods of sobriety. (PCROA Vol.18, p.217). Dr. Danziger testified that transient paranoid ideas did not occur due to stress but due to the use of substances. (PCROA Vol.18, p.217). In his opinion, instability in Mr. Turner's relationships (married three times) were caused by his intoxication and reckless behavior due to various drugs. (PCROA Vol.18, p.218). Dr. Danziger testified that a person with Borderline Personality Disorder would exhibit impulsive behavior to draw the attention of jail or prison mental health staff. (PCROA Vol.18, p.218). Dr. Danziger testified that Mr. Turner has made no attempts to hang himself, cut himself threaten suicide or demonstrate transient paranoid ideas and has not been admitted to a psychiatric unit during his seven years of incarcerations. (PCROA Vol.18, p.218). Dr. Danziger testified that the absence of these behaviors is inconsistent with a personality disorder. (PCROA Vol.18, p.219). Dr. Danziger testified that problems that Mr. Turner had before his incarceration are not Borderline Personality Disorder but relate to his substance abuse directly and indirectly. When intoxicated on substances, Mr. Turner's behavior may be impulsive, reckless and foolhardy and erratic. (PCROA Vol.18, p.219).

As far as any Axis III diagnosis, Dr. Danziger testified that Mr. Turner reported suffering a mild case of untreated high blood pressure, untreated diabetes,

a number of head injuries suffered while hot-rodding, wrecking cars, and a loss of consciousness on a number of occasions. (PCROA Vol.18, p.220). Dr. Danziger testified that Axis IV measures stressful things in one's life, which could be health, financial, job, criminal proceedings, divorce, foreclosures and whatever may happen in one's life and cause some measure of distress that may influence mental state. (PCROA Vol.18, p.221). He testified that Mr. Turner's sentence of death is a severe stressor and upcoming hearings are stressful events. (PCROA Vol.18, p.222). Dr. Danziger concurred with Dr. Eisenstein that his Axis V is a Global Assessment scoring of Mr. Turner's functioning and stated that he had scored Turner at 60, a moderate level of symptoms suggesting some distress but not severe. (PCROA Vol.18, p.223).

Dr. Danziger testified that he saw no reason to disagree with neuropsychologist findings that Mr. Turner has frontal lobe brain deficits. (PCROA Vol.18, p.225). He testified that he performed no tests of any types. (PCROA Vol.18, p.226). He testified that he based his conclusion that Mr. Turner lacked psychiatric problems on Turner's self-report that he did not feel the need to see mental health professionals at Union Correctional Institution, that Mr. Turner is not on any psychiatric medications, he has not attempted suicide or tried to cut or harm himself and that no mental health treatment or significant problems have occurred during his stay at Union Correctional Institution. (PCROA Vol.18, p.226).

Dr. Danziger testified that when adults come to his clinical practice seeking determination of whether or not they may have ADHD he uses the DSM-TR-IV to make the diagnosis. (PCROA Vol.18, p.227-228). He testified that he may get information from old elementary school report cards and teacher comments. (PCROA Vol.18, p.227-228). He testified further that he may be able to speak to an individual's mother or other reliable informant who can describe the individual during his or her youth. (PCROA Vol.18, p.227-228). He stated that a reasonable inference can be made that ADHD symptoms are present when he observes an adult who appears obviously distractible and fidgety when drug free, possesses high IQ but underperforms in school or work history and does not appear to be meeting his potential. (PCROA Vol.18, p.228). In the instant case, Dr. Danziger testified that he was aware that Dr. Eisenstein had diagnosed Mr. Turner as suffering from ADHD. (PCROA Vol.18, p.213). He testified that he was aware of it as an Axis V diagnosis but did not see documentation in the body of Dr. Eisenstein's report to support its presence prior to age seven [7]. (PCROA Vol.18, p.228). He testified that there was a reference to school records from the Laurens County School District but testified that he did not have those school records. (PCROA Vol.18, p.230).

Dr. Danziger testified that the documents for his review had been furnished to him by the State and he did not request the State to furnish him with the Laurens

County School District records referred to by Dr. Eisenstein. (PCROA Vol.18, p.230). Dr. Danziger acknowledged that he reviewed the Defendants' Motion and referred to page 13 of that motion. (PCROA Vol.18, p.232) In claim three [3], the Defendant's motion specifically named several collateral witnesses that were interviewed by Dr. Eisenstein in the course of evaluating Mr. Turner. (PCROA Vol.18, p.232). Dr. Danziger testified that he did not speak to the various aunts or Mr. Turner's mother. (PCROA Vol.18, p.232). He testified that contacting Mr. Turner's mother could have been potentially helpful with regard to diagnosing ADHD. (PCROA Vol.18, p.233). Dr. Danziger testified that he *did not exclude* the ADHD as a possible diagnosis but testified that whether Mr. Turner had ADHD or not had very little to do with his behavior on September 30, 2005. (PCROA Vol.18, p.233). Dr. Danziger agreed that Mr. Turner's had a pervasive pattern of instability in his relationships a circumstance exhibited by individuals with Axis II borderline personality disorders. (PCROA Vol.18, p.234). Dr. Danziger testified that *he did not contact* any of Mr. Turner's three wives to inquire further regarding his behavior. (PCROA Vol.18, p.234). Dr. Danziger stated that Mr. Turner had reported two suicide attempts that had occurred while he was highly intoxicated and cut himself. (PCROA Vol.18, p.234). Dr. Danziger testified that if he had received information from a collateral source that Mr. Turner had attempted suicide as a sober young man it still would have had no bearing on his opinion that

Mr. Turner does not suffer a borderline personality disorder. (PCROA Vol.18, p.234). Dr. Danziger described individuals with borderline personality disorder as challenging patients, who display quite a bit of drama, problems and quite a bit of self-injury. (PCROA Vol.18, p.234). He testified that sometimes his patients are in denial and minimize their symptoms. (PCROA Vol.18, p.234). Dr. Danziger testified that collaborative information is valuable in determining whether a patient is being less than truthful in their communications or less forthcoming than needed. (PCROA Vol.18, p.234). He stated that information regarding whether Mr. Turner did or did not have any manic episodes during a sober stage would come from Mr. Turner or someone who observed this behavior then his opinion would change. (PCROA Vol.18, p.234). If Mr. Turner acted very aggressively over a one week period and spent $25,000 during that same week while stone cold sober, Dr. Danziger *agreed it would be more applicable to a Bipolar diagnosis than a binge of methamphetamine or cocaine*. (PCROA Vol.18, p.236). He testified that all of his opinions are *based upon self -reported information that he obtained from Mr. Turner at UCI during a visit of two hours on April 26, 2012*, and a few records. (PCROA Vol.18, p.237).

SUMMARY OF THE ARGUMENTS

ARGUMENT I: The post-conviction court erroneously denied penalty phase claim three [3] raised in Mr. Turner's Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851. Trial counsel failed to provide effective assistance of counsel in accordance with *Strickland v. Washington*, 466 So.2d 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), whereby trial counsel failed to ensure a reasonably competent mental health evaluation was conducted. A competent mental health evaluation would have shown that Mr. Turner suffers from Axis I mental illnesses, namely Attention Deficit – Hyperactivity Disorder (ADHD) and Bipolar I Disorder. In addition, Mr. Turner suffered from Axis II, Borderline Personality Disorder. The presence of this weighty mental health mitigation undermines the confidence in the outcome of this case. The court's denials should be reversed and Mr. Turner should be granted a new penalty phase.

ARGUMENT II: Claims five [5] and six [6] are legal claims attacking the constitutionality of the imposition of the death penalty and Florida's sentencing statute and sentencing scheme as a violation of Mr. Turner's rights pursuant to the Eighth and Fourteenth Amendments to the United States Constitution. Claim eight [8] argues that a proper cumulative error analysis is required in Mr. Turner's case

and the court's failure to consider the effects of these errors on the jury deprived Mr. Turner of his due process rights and a meaningful review of his post-conviction issues. Claims seven [7], nine [9], and ten [10] are also raised as constitutional legal issues that are not ripe but are preserved for further appeals.

ARGUMENT AND CITATIONS OF AUTHORITY
ARGUMENT I

THE POST-CONVICTION COURT ERRED IN DENYING MR. TURNER'S MOTION TO VACATE JUDGMENT AND SENTENCE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 AFTER CONDUCTING AN EVIDENTIARY HEARING ON CLAIM THREE

(A) Introduction

The United States Supreme Court has held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *See Strickland*, *Strickland v. Washington,* 466 So.2d 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Specifically, that counsel has a ***duty to investigate*** in order to make the adversarial testing process work in the particular case. *See id.* at 690. The *Strickland* two-prong analysis to show ineffective assistance of counsel is as follows:

> 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 6th 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 unreliable.

Id. at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id*. at 688. To show prejudice "[t]he defendant must show that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 693-694.

The "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id*, at 688. Counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* An attorney's performance is reviewed as follows:

> [j]udicial scrutiny of counsel's performance must be highly deferential and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective, the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 689. A reviewing court must consider the reasonableness of the investigation said to support that strategy." *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 2538 (2003). Whereby,

> [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.

Id. at 2535. In its 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." *Id.* at 2538. In finding that counsel's investigation and presentation "fell short of the standards for capital defense work articulated by the American Bar Association guidelines to which we have long referred as 'guides to determining what is reasonable,'" the Court held that these guidelines set the standards for counsel in investigations. *Id.* at 2537 (internal citations omitted).

(B) Standard of Review

To uphold a court's decision on a *Strickland* claim pursuant to the Fla.R.Crim.P. 3.851, the following standard of review is laid out in *Sochor v. State*, 883 So.2d 766 (Fla. 2004):

> When we review a circuit court's resolution of a *Strickland* claim, as we do here, we apply a mixed standard of review because both the performance and the prejudice prongs of the *Strickland* test present mixed questions of law and fact.

Id. at 771-772 *citing Strickland,* 466 U.S. at 698 *citing Stephens v. State,* 748 So.2d 1028, 1033 (Fla. 1999); *see Schoenwetter v. State*, 46 So.3d 535, 546 (Fla. 2010) & *see State v. Larzelere*, 979 So.2d 195 (Fla.2008). Moreover, "(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).

(C) The post-conviction court erred in denying Claim Three.

Claim three [3] of Mr. Turner's Motion to Vacate Judgment of Conviction and Sentence of Death pursuant to Florida Rule of Criminal Procedure 3.851 in part argued that trial counsel was ineffective during the penalty phase of Mr. Turner's trial proceeding because they failed to ensure a reasonably competent mental health evaluation was conducted. (PCROA Vol.2, p.198-209). Dr. Eisenstein was able to render a professionally competent diagnosis that Mr. Turner suffers from Attention-Deficit-Hyperactivity Disorder, Predominantly Hyperactive-Impulsive Type (314.01), Bipolar I Disorder, Most Recent Episode Depressed, Severe With Psychotic Features, Presently in Partial Remission (296.54), Alcohol Dependence, currently in Remission Due to Controlled Environment, (303.90) Substance Dependence, Currently In remission Due to Controlled Environment and Axis II, Borderline Personality Disorder (301.83). This failure violated *Strickland* and deprived Mr. Turner of a reliable adversarial testing in violation of his rights pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (PCROA Vol.2, p.198-209). (PV8, 1045-1046 & 1058-1060). The post-conviction court erred in

denying Mr. Turner relief and granting him a new penalty phase for the reasons stated below.

The post-conviction court denied Mr. Turner relief as to claim three [3] and made the following findings in its Order with regard to the failure of trial counsel to ensure a reasonably competent mental health evaluation was conducted:

> "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 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 experts, but made sound strategic decisions not to call these experts due to the negative impact their testimony might have on the Defendant. Additionally although 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."

Although trial counsel presented some evidence at trial that Mr. Turner suffered from cocaine and alcohol dependence at the time of the murders, his genetic predisposition to substance abuse and how the alcohol and cocaine interacted with his mental illnesses were not fully presented and explained to the jury or judge. At the penalty phase trial counsel provided the testimony of Dr. Bloomfield who only prepared a psychological screening as opposed to a full neuropsychological evaluation. Dr. Krop, a forensic neuropsychologist who

provided expert testimony regarding Mr. Turner's frontal lobe deficits referred to the partial exam during Mr. Turner's *Spencer* hearing. (ROA Vol.14, p.46). As a result, Dr. Bloomfield's testimony minimized Mr. Turner's deficits as minor frontal lobe impairment, depression and cognitive problems.

Furthermore, Dr. Bloomfield testified that he reached his conclusions without conducting independent interviews with any of Mr. Turner's siblings and that trial counsel never provided such interviews to him. (ROA Vol. 23, p. 297-298). Aunt McAlister testified that she spoke to an investigator and attorney for the defense and they could have contacted her to come to court, as she was available. However, she was never called to testify. Also, Jeffrey Turner testified that he came all the way to Florida for the trial and he was told that his testimony was not needed because of the age difference between himself and Mr. Tuner along with the fact that his other brother and sister were much closer to Mr. Turner. (PCROA Vol.17, p.113 & p.25). Trial counsel could not give detail as to why Jeffrey Turner would come all the way and then not cooperate with trial counsel. (PCROA Vol.17, p.66). They both drove all the way to Florida for the post-conviction hearing and testified and they would have done so at the trial. Their testimony was vital in supporting for Dr. Eisenstein's mental health diagnoses of Mr. Turner.

As to the development and presentation of non-statutory mitigation, the

Florida Supreme Court has stated that:

> . . . this Court [has] noted ... "[T]he defense must share the burden and identify for the court the specific non-statutory mitigating circumstances it is attempting to establish (quoting from *Lucas v. State* , 568 So.2d 18 (Fla. 1990). Unlike statutory mitigation that has been clearly defined by the legislature, non-statutory mitigation may consist of any factor that could reasonably bear on the sentence. The parameters of non-statutory mitigation are largely undefined. This is one of the reasons that we impose some burden on a party to identify the non-statutory mitigation relied upon.

See Israel v. State, 837 So.2d 381, 392 (Fla. 2002). In deciding this claim, this Court must also consider the standards for counsel's performance recognized as guides by the United States Supreme Court in cases such as *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 and *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). The ABA Standards for the Appointment and Performance of Counsel in Death Penalty Cases provided the following standards, among others:

> The objective of these Guidelines is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.

2003 American Bar Association Guidelines for the Appointment and Performance of Counsel in Capital Cases Guideline 1.1(A) at 919. Moreover,

> [D]eath penalty cases have become so specialized that defense counsel has duties and functions definably different from those of counsel in ordinary criminal cases.

2003 American Bar Association Guidelines for the Appointment and Performance of Counsel in Capital Cases Guideline 1.1 commentary at 923. It establishes that "[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." 2003 American Bar Association Guidelines for the Appointment and Performance of Counsel in Capital Cases Guideline 10.7(A). Also, "[t]he investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented." 2003 American Bar Association Guidelines for the Appointment and Performance of Counsel in Capital Cases Guideline 10.7(A)(2).

The Sixth Amendment to the Constitution of the United States requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. *See Ragsdale v. State*, 798 So.2d 713 (Fla. 2001). Meaningful assistance of counsel in capital cases requires counsel pursue and investigate all reasonably available mitigating evidence, including brain damage and mental illness. *See Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003). A new sentencing hearing is mandated in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indicators of serious mental illness, mental retardation or brain damage. Counsel renders deficient performance when he fails to ensure an adequate and meaningful mental health examination. *See*

Ponticelli v. State, 941 So.2d 1073, 1095 (Fla. 2006); and *see Sochor v. Florida*, 833 So.2d 766, 722 (Fla. 2004). Prejudice is established when counsel fails to investigate and present evidence of brain damage and mental illness. *See Ragsdale v. State*, 798 So.2d 713, 718-19 (Fla. 2001); *see also Rose v. State*, 675 So.2d 567, 571 (Fla. 1996) *citing Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994).

Trial counsel failed to ensure that Mr. Turner received a reasonably competent mental health evaluation by failing to retain reasonably qualified experts to determine that Mr. Turner suffered from Attention-Deficit/Hyperactivity Disorder, Predominantly Hyperactive impulsive type, which is a serious Axis I mental illness. Furthermore, Mr. Turner suffers from Bipolar I disorder, which is characterized as severe with psychotic features and aggravated by his alcohol and substance dependency. Mr. Turner also meets all of the criteria for an Axis II diagnosis of Borderline Personality Disorder. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare. *See Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991); *see Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991); *see Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), held that counsel rendered deficient performance because of a failure to review Rompilla's prior conviction, a failure to obtain school records, a failure to obtain records of Rompilla's prior incarcerations,

and a failure to gather evidence of a history of substance abuse. *See Parker v. State*, 643 So.2d 1032, 1035 (Fla. 1994); *see Clark* v. *State*, 609 So.2d 513 (Fla. 1992); *see Ragsdale*, 798 So.2d 713 (Fla. 2001) & *see Mahn v. State,* 714 So.2d 391 (Fla. 1998). This is especially prejudicial where Dr. Bloomfield reached his conclusions without conducting independent interviews with any of Mr. Turner's siblings because trial counsel never provided such available interviews to him. (ROA Vol.23, p. 297-298).

The post-conviction court recognized that "Dr. Eisenstein provided several facts about Defendant's history in relation to how he came to these diagnoses" yet the post-conviction court found that "Dr. Eisenstein did not provide any clear testimony relevant to the criteria necessary to diagnose such disorders." This finding is not supported by competent and substantial evidence as Dr. Eisenstein's testimony provided a roadmap of the evidence he found that led him to his opinion as to the neuropsychological disorders that Mr. Turner suffered from.

Unlike Dr. Eisenstein, Dr. Danziger did not seek any collateral sources such as Mr. Turner's family or school records to make his opinion. Dr. Danziger testified that the work he did was to read "some records and documents" that he was supplied with in order to have background information and knowledge about the case. (PCROA Vol.18, p.204). Then, he met with Mr. Turner at Union Correctional Institution where he conducted a "fairly standard psychiatric

assessment." (PCROA Vol.18, p.205). Dr. Danziger's assessment consisted of an interview only with Mr. Turner about his social history and background, his medical history, his current medications, allergies, his medical problems, his surgeries, his substance abuse history, his family history of mental illness, his past psychiatric and mental health symptoms, and his recollections of the alleged offense and his behavior in the days or weeks before the event. (PCROA Vol.18, p.205). Dr. Danziger did not perform any testing on Mr. Turner but based his opinion on his interview of Mr. Turner and the limited records he received from the State, which included the Defense Motion to Vacate the Conviction and Sentence of Death, the State's response to the Defense Motion, the Court's Order on the Defense Motion, the Indictment, the Supreme Court of Florida's direct appeal decision, the penalty phase testimony of Dr. Drew Edwards, the penalty phase testimony of Dr. Stephen Bloomfield, the *Spencer* hearing testimony of Dr. Harry Krop, and Dr. Eisenstein's report and testing data. (PCROA Vol.18, p.206-207).

Dr. Eisenstein was in the better position to make a fully informed opinion regarding Mr. Turner's mental illness diagnoses versus Dr. Danziger. Dr. Danziger's opinion predominantly relied on a very brief two hour interview of Mr. Turner, some of the trial records, and other experts' testimonies and opinions. Dr. Danziger did not request additional materials or additional information before

coming to his opinion. Dr. Danziger simply criticized Dr. Eisenstein's opinions without first doing a complete analysis of Mr. Turner's history through records and family interviews. Dr. Danziger acknowledged that patients sometimes are in denial and they minimize their symptoms and that corroborative information could be helpful. PCROA Vol.18, p.235). Even the post-conviction court partly noted that the "Defendant was able to find a more favorable report at the post-conviction stage." (PCROA Vol.7, p.1173). The expert witness diagnosis and testimony presented at trial was not competent because counsel failed to conduct a reasonably competent investigation of Mr. Turner=s biological, social and psychological history and thereby failed to provide the experts with relevant mitigating background information through the statements of friends and family members relevant to mitigation. Had trial counsel fully investigated Mr. Turner=s background, they would have found testimonial evidence to support findings of his serious mental illness, and neurological impairments beyond his drug and alcohol use.

In comparison, Dr. Eisenstein took great efforts prior to rendering his opinion. Dr. Eisenstein met with Mr. Turner on four different days; he conducted interviews of Mr. Turner's brothers, Mr. Turner's mother, Mr. Turner's sister, Mr. Turner's Aunt McAlister and Mr. Turner's niece, Natasha; he reviewed the trial experts' opinions and testimony; and he spoke to Dr. Krop. (PCROA Vol.17,

p.147-148 & p.163-164). Dr. Eisenstein conducted a comprehensive neuropsychological battery of tests that Mr. Turner completed without evidence of malingering. (PCROA Vol.17, p.158-160). These tests were done to determine if Mr. Turner met the criteria for diagnoses as listed by the DSM-IV TR. It should be noted that Dr. Danziger admittedly is not a neuropsychologist like Dr. Eisenstein. (PCROA Vol.18, p.212).

The post-conviction court in its order found that the diagnoses opined by Dr. Eisenstein that Mr. Turner suffered from Attention Deficit Hyperactive Disorder, Predominantly Hyperactive-Impulsive Type and Bipolar I Disorder would have been undermined by the clear and concise testimony of Dr. Danziger. (PCROA Vol.7, p.1171). The post-conviction court further found that Dr. Eisenstein did not provide any clear testimony relevant to the criteria necessary to diagnose such disorders. (PCROA Vol.7, p.1171). The post-conviction court's findings are not supported by substantial and competent evidence because Dr. Eisenstein's testimony provided in great detail how he came to his diagnoses after a comprehensive battery of tests, review of the records and interviews of Mr. Turner's family. Mr. Turner's problems in his behavior started at an early age and consistently continued into his adulthood, in particular in response to stressors. (PCROA Vol.17, p.171-174). They were not always related to his substance abuse that was related to his self-medication, which began in his early teens. (PCROA

Vol.17, p.168-169).

Dr. Eisenstein testified that Mr. Turner suffered from ADHD, which is weighty non statutory mitigating evidence couple with the other mental illness diagnosed. Dr. Eisenstein supported his findings with the records and from the interviews he conducted. Dr. Eisenstein clearly testified as follows in coming to his diagnosis:

> "The onset has to be before age seven. After conducting the - - clinical interviews with Mr. Turner and talking to his family members and looking at other psychologists and their performance, and, of course, the family members and school records, all – all told, clearly corroborated the diagnosis of Attention Deficit Disorder, Hyperactive.
> . . .
> [L]ooking first at the school records[1], there was academic failure at a very early age.
> Now, the first grade he had to repeat because of sickness, pneumonia. But then he had to repeat the fifth grade and sixth grade. And one looking at the record closely, there was basically academic failure.
> There's been testimony as well as corroboration, and from my own interviews, for difficulty in school, academics, difficulty with reading comprehension, difficulty with reading comprehension, difficulty with understanding the work, and academic and school failure.[2]
> Besides that, there was the tremendous amount of energy and hyperactivity as described, relentless, restlessness, always the - - on the go, not sitting still, fidgety, and the inability to - - to basically concentrate and to attend.[3] [4]

1 Laurens School District School Records.

2 Aunt McAlister described that Mr. Turner had difficulties learning in school, had trouble concentrating, had trouble understanding the work. (PCROA Vol.17, p.125-126).

3 Jeffrey Turner's testimony supported this behavior where he described his brother as reckless and impulsive. He testified that his brother could not hold a job and was reckless with his money. (PCROA Vol.17, p.107).

4 Aunt McAlister provided evidence that Mr. Turner was impulsive and that he could not sit for long, he had a short attention span, he would lose things, and he did not sleep for long periods of time. (PCROA Vol.17, p.121-122 & p.125-127).

> Dr. Susan Young conducted some neuropsychological test that also - - the Conner's Continuance Performance Test demonstrates the inability to attend and to concentrate.
> . . .
> So all told, he definitely meets the criteria for Attention Deficit Disorder, Hyperactive."

(PCROA Vol.17, p.165-166). Dr. Danziger did not refute Dr. Eisenstein's finding that Mr. Turner suffered from Axis I diagnosis of ADHD. Dr. Danziger testified that the diagnosis could be a possibility because he did not have good data. (PCROA Vol.18, p.212-213, p.227 & p.233). This data regarding Mr. Turner's childhood was available in the school records and through the family interviews regarding Mr. Turner's difficulties concentrating, impulsivity, and poor concentration. The school records were reviewed and the interviews were conducted by Dr. Eisenstein. Dr. Danziger admitted that he did not have the school records and he had not conducted any collateral family interviews. (PCROA Vol.18, p.227-233). Dr. Danziger admitted that an interview with collateral references "could have been potentially helpful." (PCROA Vol.18, p.233).

Therefore, the post-conviction court's finding that the diagnosis was not supported by clear testimony is in error and Dr. Eisenstein demonstrated the evidence that supported his diagnosis for ADHD. (PCROA Vol.7, P.1171-1172). Furthermore, Dr. Eisenstein's testimony that Mr. Turner suffered from this Axis I mental illness is weighty mitigating evidence and would serve as to explain and

give a full picture of Mr. Turner's mental health status throughout his life and not just on the date of the offense. (PCROA Vol.7, p.1172). There is clear evidence that Mr. Turner's behavior was not simply substance-induced, as his impulsive behavior and difficulties with attention have been consistent from a young child into adulthood and are not accompanied by substance abuse. The post-conviction court erred also in finding that Dr. Eisenstein's testimony regarding his diagnosis of Bipolar I disorder was confusing and was limited to the criteria that "it only can occur on one occasion, more occasions." (PCROA Vol.17, p.1171). Dr. Eisenstein testified that he came to his opinion after his numerous interviews with Mr. Turner and his family. (PCROA Vol.17, p.169). Dr. Eisenstein testified that there were "high incidents" of the disorder that existed in the family, "from the maternal grandmother, to a maternal aunt, to cousins," and thus there was a propensity for the disorder. (PCROA Vol.17, p.169). Unlike his family, Mr. Turner had a difficult time coming to terms with his Bipolar Disorder as it would label him as "being abnormal." (PCROA Vol.17, p.170). Dr. Danziger agreed that if it was reported that Mr. Turner had at one point acted very aggressively and spent $25,000 in the span of a week that it could be consistent with a bipolar diagnosis or a binge of methamphetamine or cocaine. (PCROA Vol.18, P.236). It is clear from Aunt McAlister's testimony that Mr. Turner did aggressively and recklessly spend $25,000 in one week on cars, clothing and jewelry. (PCROA Vol.17, 132-133).

There is no evidence other than that Mr. Turner was stone cold sober during this manic episode. (PCROA Vol.17, p.132-133 & Vol.18, p.236). Dr. Eisenstein in interviewing the family had this information that lent to his Bipolar I Disorder diagnosis, which is again weighty mitigation evidence that would have given the judge and jury a complete picture of Mr. Turner's mental health status.

The post-conviction court also erred in finding that Dr. Eisenstein's Axis II diagnosis of Borderline Personality Disorder could have been undermined at penalty phase because Dr. Danziger did not find that the behavior did not continue into incarceration and were related to substance abuse. (PCROA Vol.17, p.1172). Dr. Danziger agreed that Mr. Turner's numerous marriages exhibited a pervasive pattern of instability in his interpersonal relationships. (PCROA Vol.18, p.233-234). However, Dr. Danziger did not attempt to speak to any of Mr. Turner's former wives. (PCROA Vol.18, p.234). Dr. Danziger agreed that patients can be in denial and minimize their symptoms and that collateral information would be helpful. (PCROA Vol.18, p.235). Dr. Danziger testified that Mr. Turner self-reported that he was intoxicated when he cut himself during two suicide events. However, Dr. Danziger did not speak to Mr. Turner's family who were present at the time of the three suicide events. Aunt McAlister testified that Mr. Turner's first suicide attempt was after his grandfather passed away, which was really hard on Mr. Turner. (PCROA Vol.17, p.128-129). The second self-injurious

event was when Mr. Turner was married to Karen and the third self-injurious event was when Mr. Turner was married to Donna. On both occasions, Mr. Turner was taken to the hospital and a mental health evaluation was ordered. (PCROA Vol.17, p.130-131). There was no evidence from the family that Mr. Turner's suicide attempts were substance abuse related and the fact that mental health treatment was recommended is telling as to the serious nature of the suicide attempts. Dr. Eisenstein again explained that the Borderline Personality Disorder is marked by symptoms that overlap with the symptoms of Bipolar I Disorder. (PCROA Vol.17, p.170). Dr. Eisenstein again found evidence of reckless spending, volatile emotional mood swings, self-mutilation, and stress-related paranoia. (PCROA Vol.17, p.170).

Trial counsel was ineffective for failure to present available and known non-statutory mitigation evidence to the jury and judge through Dr. Bloomfield or another expert such as Dr. Eisenstein, in violation of *Strickland*. Trial counsel failed without strategic justification, to present the available and known non-statutory mitigation evidence through a reasonable and competent mental health evaluation. *See Porter v. McCollum*, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). These failures severely prejudiced Mr. Turner as the jury and the judge were unaware of the extent of Mr. Turner's mental illness, which is weighty mitigating evidence. There is a reasonable probability that, but for counsel's errors, the result

of the proceedings would have been different; Mr. Turner could have been sentenced to life in prison. *See Hurst v. State*, 18 So.3d 975, 1014 (Fla. 2009). There is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Mr. Turner would have been sentenced to life in prison. It would have "struck a different balance" between the aggravators and mitigators. *Wiggins*, 539 U.S. at 537. The hearing demonstrated that Mr. Turner suffered from a severe mental illnesses, which should have been presented to the jury and the judge. The court's ruling should be reversed and the case remanded for a new penalty.

ARGUMENT II

THE POST-CONVICTION COURT ERRED IN DENYING MR. TURNER'S GUILT AND PENALTY PHASE LEGAL CLAIMS THAT WERE RAISED IN HIS MOTION TO VACATE JUDGMENTS AND SENTENCE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851.

(A) Introduction and Standard of Review

The introduction and standard of review is the same as in Argument I.

(B) Argument

Mr. Turner reiterates his arguments as to claims 5, 6, 7, 8, 9, and 10 as presented in his Motion to Vacate. The court denied all these claims.

Claims Five [5] and Six [6] are legal claims attacking the constitutionality of the imposition of the death penalty in Mr. Turner's case. The post-conviction court denied both these legal claims. (PCROA Vol.5, p.666-667).

Pursuant to claim five [5], Mr. Turner continues to argue that Florida Statute 921.141 is facially vague and overbroad in violation of the Eight and Fourteenth Amendments and the unconstitutionality was not cured because the jury did not receive adequate guidance in violation of the Eighth and Fourteenth Amendments. Mr. Turner's jury was unconstitutionally instructed by the Court that its role was merely an advisory one. (ROA Vol.4, pp.409, 415 & 416). Since great weight is given the jury's recommendation, the jury is a sentencer in Florida. In this case the trial court repeatedly instructed and the state persistently pointed out that the final

decision as to punishment was the sole responsibility of the trial judge. Therefore, the jury's Sixth Amendment role was diminished by these comments and instructions from the court regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. *See Caldwell v. Mississippi* , 472 U.S. 320 (1985). Pursuant to claim six [6], Mr. Turner continues to argue that Florida's capital sentencing statute is unconstitutional on its face and as applied for failing to prevent the arbitrary and capricious imposition of the death penalty and for violating the guarantee against cruel and unusual punishment in violation of the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. Florida's capital sentencing scheme denies Mr. Turner his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. *See Profitt v. Florida*, 428 U.S. 242 (1976). Florida's death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution. *See Richmond v. Lewis,* 596 U.S. 40, 113 S.Ct. 528 (1992).

Pursuant to claim six [6], Mr. Turner continues to argue that Florida's capital sentencing scheme denies Mr. Turner his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied. Florida's death

penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. *See Profitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960 (1976). Florida's death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution. *See Richmond v. Lewis,* 596 U.S. 40. Execution by both electrocution and lethal injection impose unnecessary physical and psychological torture without commensurate justification, and therefore constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

Furthermore, Mr. Turner continues to argue that Florida's death penalty statute fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors and does not define "sufficient aggravating circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 (1975), Further, the statute does not sufficiently define for the judge's consideration each of the aggravating circumstances listed in the statute. *See Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759 (1980). Florida's capital sentencing procedure does not utilize the independent reweighing of aggravating and mitigating circumstances envisioned in *Profitt v. Florida,* 428 U.S. 242. The aggravating circumstances in the Florida capital sentencing statute have been

applied in a vague and inconsistent manner. *See Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759 (1980)*;* & *see also Espinosa v. Florida,* 505 U.S. 1079, 112 S. Ct. 2926 (1992).

Claims Seven [7], Nine [9], and Ten [10] were denied by the court because they were not ripe. (PCROA Vol.5, p.669-670). These claims are raised in this appeal to continue to preserve them for further possible appeals in the state and federal courts. (PCROA Vol.5, p.669-670). Claim seven [7] argued that Mr. Turner continues to maintain that the Florida death penalty sentencing scheme is unconstitutional as applied in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and corresponding Florida law. Claim nine [9] argued that Fla.Stat. §945.10 deprived Mr. Turner of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to ensure his punishment is not cruel and unusual because it exempts from disclosure the identity of the executioner. Claim ten [10] argued that argued that per Fla.R.Crim.P. 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." *See* Fla.Stat. §922.07 & *Martin v. Wainwright,* 497 So.2d 872 (1986).

Claim Eight [8] argued that Mr. Turner did not receive the fundamentally fair trial to which he was entitled under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution because of the number of errors in

his guilt and penalty phases. *See Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991) & *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991). The post-conviction court deferred ruling on this claim after the Case Management Conference until after the evidentiary hearing on claim three [3]. (PCROA Vol.5, p.670). However, the post-conviction court did not make a specific final ruling as to this claim in its Final Order denying relief. (PCROA Vol.7, p.1138-1173). The sheer number and types of errors in Mr. Turner's guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. Mr. Turner argued that while there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel significantly tainted Mr. Turner's guilt and penalty phases. These errors cannot be harmless. The cumulative effect of these errors denied Mr. Turner of his fundamental rights under the Constitution of the United States and of the State of Florida. *See State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986); *Ray v. State* , 403 So.2d 956 (Fla. 1981); *Taylor v. State*, 640 So.2d 1127 (Fla. 1st DCA 1994); *Stewart v. State*, 622 So.2d 51 (Fla. 5th DCA 1993); *Landry v. State*, 620 So.2d 1099 (Fla. 4th DCA 1993). Furthermore, the sheer number and types of errors involved in Mr. Turner's trial due to counsel's prejudicially deficient performance, when considered as a whole, resulted in an unreliable conviction and sentence. *See*

State v. Gunsby, 670 So.2d 920 (Fla. 1996) & *see also Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995). Even if each individual claim is not sufficient to set aside Mr. Turner's death sentence, cumulative error in trial counsel's performance rendered the sentence of death unreliable. In considering all aspects of defense counsel's deficient performance as part of a cumulative analysis, Mr. Turner respectfully requests that this Honorable Court grant Mr. Turner a new trial.

CONCLUSION

Based on the arguments in this brief and the records on appeal, the post-conviction court improperly denied Mr. Turner post-conviction relief by improperly denying his Motion to Vacate. Mr. Turner respectfully requests that this Honorable Court reverse the post-conviction court's order denying relief, vacate his conviction and sentence of death and grant him a new trial; or grant such other relief as this Honorable Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by United States Mail to **James Daniel Turner**, DOC # V29754, Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this 15th day of April, 2013.

I HEREBY CERTIFY that a PDF copy of the foregoing was served via electronic mail to **Kenneth Sloan Nunnelley**, Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, at ken.nunnelley@myfloridalegal.com and at CapApp@myfloridalegal.com on this 15th day of April, 2013.

I HEREBY CERTIFY that, in compliance with this Honorable Court's Administrative Order *In re: Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal*, dated February 18, 2013, a copy of the Microsoft Word document of the foregoing brief has been transmitted to this Court through the Florida Courts E-Filing Portal on this 15th day of April, 2013.

Respectfully submitted,
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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.

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