ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-986

LOWER TRIBUNAL NUMBER.: 2006-01864-CF

NORMAN BLAKE MCKENZIE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. McKenzie lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. McKenzie.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of the trial, judgment and sentence in this case are of the form, e.g. (Vol. I R. 123). References to the postconviction record on appeal are in the form, e.g. (Vol. I PCR. 123). Generally, Norman Blake McKenzie is referred to as Mr. McKenzie throughout this motion except for in quotations of Dr. Cunningham's report where Mr. McKenzie is referred to as "Blake." The Office of the Capital Collateral Regional Counsel-Middle Region, representing the Appellant, is shortened to "CCRC." The record was supplemented to include two DVDs. The DVDs are referenced as Supp. R. I. The first DVD should be marked #140. This is the interrogation that took place after Mr. McKenzie was arrested on October 5, 2006. The second DVD should be marked #149. This is the video of the interrogation that took place on February 6, 2007.

STATEMENT OF THE CASE AND FACTS

Mr. McKenzie left the scene of the homicides in question in one of the victim's cars and left his own registered vehicle at the scene. Law enforcement traced the car to Mr. McKenzie. Mr. McKenzie quickly became a suspect in the instant homicide case and a BOLO was issued for him. Mr. McKenzie went to Georgia, possibly more than once. Each trip was fueled by his Cocaine-Induced-Paranoia which existed apart from his actual cocaine use. Mr. McKenzie's cocaine use was extreme, as were his ongoing efforts to obtain more of the drug. While it would be reasonable for someone in Mr. McKenzie's position to believe that law enforcement would be looking for him, Mr. McKenzie's mental illness and drug abuse led him to believe that there was a variety of people following him that did not correspond in any way to reality.

After a series of car changes and drug buys, Mr. McKenzie found himself in Citrus County in a strange car with law enforcement in pursuit of him. A number of law enforcement officers chased him. Mr. McKenzie eventually surrendered. After he was taken into custody, law enforcement placed him in a small room and began to interrogate Mr. McKenzie about the instant homicides and multiple other crimes. This occurred on October 5, 2006, and was recorded by secret camera. At the close of the interrogation, law enforcement led Mr. McKenzie to believe that law enforcement was not videotaping the previous interrogation. The video was

not viewed by the trial court or the jury. The video is contained in Supplemental Record Volume I and can be reviewed by this Court.

The video revealed much more about Mr. McKenzie, his background and the crimes in question than law enforcement's testimony at Mr. McKenzie's trial did. At trial, the State and law enforcement selectively summarized Mr. McKenzie's statements to provide what was needed for the jury to return a verdict of guilty as charged and to obtain a death sentence.

The actual video recording of Mr. McKenzie showed compelling mitigation in its own right. In the video Mr. McKenzie is seen as delusional and a disturbed mentally ill drug abuser. The trial court never heard or saw any of this. After law enforcement had obtained enough evidence for a conviction and death sentence, they let Mr. McKenzie use the phone.

Mr. McKenzie was housed in the Citrus County Jail for approximately two weeks. He was transferred to the Marion County Jail for 4 months then sent to St. Johns County Jail in February. He went back to Marion County, then to Alachua County. From Alachua County, he went to the Department of Corrections for approximately one week before he returned to St. Johns County and remained there until after he was sentenced to death. On February 6, 2007, while Mr. McKenzie was temporarily housed in the St. Johns County Jail, law enforcement interrogated him again before Mr. McKenzie went to first appearance on February 7, 2007.

This interrogation was also videotaped and can be viewed in Supplemental Record I.

On October 17, 2006, the grand jury, in and for St. Johns County, Florida, returned an indictment charging Mr. McKenzie with two counts of first-degree murder. (Vol. I R. 3-4). The indictment alleged that Mr. McKenzie killed Randy Wayne Peacock and Charles Frank Johnston by striking each with a hatchet and also by stabbing Mr. Peacock with a knife.

On January 31, 2007, the trial court ordered Mr. McKenzie transported from the Marion County Jail for arraignment. (Vol. I R. 5). Mr. McKenzie initially indicated that he would try to hire a private attorney, but on February 15, 2007 Mr. McKenzie went to arraignment and was appointed counsel from the Public Defender's Office (Vol. I R. 9). The trial court set a pretrial conference for March 15, 2007. (Vol. I R. 9). On February 21, 2007, the trial court ordered Mr. McKenzie transported from Marion County by the St. Johns County Sheriff for a pretrial conference on March 15, 2007. (Vol. I R. 11). Mr. McKenzie was not transported and the trial court reset the pretrial for May 15, 2007. (Vol. I R. 15).

On March 22, 2007, counsel filed a motion to continue the previously set pretrial and, in the process purported to waive Mr. McKenzie's right to a speedy trial. (Vol. I R. 20-21). The motion stated that Mr. McKenzie had been transported to another county jail and counsel had not had any contact with Mr. McKenzie. On

March 29, 2007, the trial court issued a transport order to have Mr. McKenzie transported for the pretrial hearing on May 15, 2007. (Vol. I R. 18). At the May 15, 2007 pretrial hearing, Mr. McKenzie was not present and the trial court set another pretrial hearing for July 11, 2007. (Vol. I R. 30). Mr. McKenzie was returned from the Florida Department of Corrections to the St. Johns County Jail on May 21, 2007. (Vol. I R. 32). Unlike law enforcement, the Public Defender's Office never traveled anywhere to consult with Mr. McKenzie before he was housed at the St. Johns County Jail. Without consulting Mr. McKenzie, trial counsel waived Mr. McKenzie's right to speedy trial.

On July 11, 2007, the trial court held a pretrial hearing and ordered Mr. McKenzie to be held for the duration of the case in the St. Johns County Jail. (Vol. I R. 35). At this hearing, the trial court set the case for trial. On August 10, 2007, appointed counsel orally moved to continue the case. Mr. McKenzie personally objected and refused to waive his speedy trial rights again. (Vol. I R. 39-40). Mr. McKenzie, in the throes of mental illness and impulsivity, informed the trial court that he did not want the counsel assigned to him. A *Farretta* inquiry followed and the trial court permitted Mr. McKenzie to discharge counsel and represent himself.

Mr. McKenzie proceeded to trial without counsel. The jury found Mr. McKenzie guilty as charged. Mr. McKenzie proceeded to a penalty phase. Before proceeding to the penalty phase, Mr. McKenzie elected to have counsel appointed.

Mr. McKenzie discharged counsel the next morning. The jury recommended death by a vote of 10-2 for each murder charge.

Following a *Spencer* hearing, the Circuit Court of the Seventh Judicial Circuit, in and for St. Johns County, Florida, imposed a death sentence for each first degree murder charge.

The Trial Court's Sentencing Order

The trial court found that:

> (1) Mr. McKenzie had previously been convicted of another capital offense or of a felony involving the use of violence to some person [assigned great weight];
>
> (2) The crime was committed while Mr. McKenzie was engaged in the commission of the crime of robbery [assigned great weight];
>
> (3) The crime was committed for financial gain (the trial court concluded that this factor merged with the prior aggravating factor) [assigned no added weight];
>
> (4) The crime was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification [assigned great weight].

(Vol. I R. 185-190).

This trial court rejected Mr. McKenzie's contention that he committed the murders while under the influence of extreme mental or emotional disturbance, specifically that he was high on cocaine at the time. (Vol. I R.190-91). The trial court considered seven nonstatutory mitigating circumstances. The court found that the evidence reasonably established the following circumstances:

(1) Mr. McKenzie suffers from cocaine addiction [little weight];

(2) Mr. McKenzie suffered abuse as a child [little weight];

(3) Mr. McKenzie displayed good behavior during the course of all court proceedings [some weight];

(4) Mr. McKenzie expressed remorse [some weight];

(5) Mr. McKenzie cooperated with police and was instrumental during his own conviction [some weight];

(6) Mr. McKenzie was gainfully employed and earned substantial income at the time of the crimes [very little weight];

(7) Mr. McKenzie is currently serving a sentence of life in prison and will never be paroled [little weight].

(Vol. I R. 191-194)

This Court affirmed the conviction and death sentence on appeal. *McKenzie v. State*, 29 So.3d 272 (Fla. 2010). Mr. McKenzie filed a Petition for a Writ of Certiorari to the Supreme Court of Florida. The United States Supreme Court denied the petition on October 4, 2010.

While preparing to file a postconviction motion, CCRC-M filed a Motion to Compel Production of Records because certain agencies had not complied with their obligations under Florida Rule of Criminal Procedure 3.852. (Vol. I PCR. 61). The trial court found that the motion to compel was moot because the records had been sent to the Florida State Repository. (Vol. I PCR. 66). At the status hearing on this matter, the trial court ordered the records claimed exempt by the agencies to

be shipped to the court for *in camera* inspection. (Vol. I PCR. 67). The court reviewed the records and ordered some of the records released and denied disclosure on a large portion. (Vol. I PCR. 106-108).

Mr. McKenzie filed a Motion to Vacate Judgment of Conviction and Sentence under Florida Rule of Criminal Procedure. (Vol. I PCR. 109-199) The State filed a response. (Vol. I PCR. 109-199). The trial court held a Case Management Conference on January 13, 2012. (Vol. X PCR. 1-45). At the Case Management Conference Mr. McKenzie submitted two important documents for the trial court to consider in determining whether it should grant an evidentiary hearing: the affidavit of psychologist Mark D. Cunningham, Ph.D ABPP, and two DVDs containing law enforcement's two interrogations of Mr. McKenzie. *See* (Vol. II PCR. 257, 258).(Supp. R. I).

The trial court denied Mr. McKenzie an evidentiary hearing and his Motion to Vacate Judgment of Conviction and Sentence. (Vol. III PCR. 322-Vol. IV 565). Mr. McKenzie filed a motion for rehearing and supplemented the motion with an affidavit from Dr. Cunningham. (Vol. IV PCR. 588). The trial court denied the motion for rehearing. (Vol. IV PCR. 612). This appeal follows.

SUMMARY OF THE ARGUMENTS

The question before the Court is whether the State can execute Mr. McKenzie without any meaningful consideration of his mitigation. Postconviction can still provide an opportunity for some consideration of Mr. McKenzie's mitigation. It is not too late.

This brief offers a number of arguments that would allow Mr. McKenzie's mitigation to be heard. The brief then presents what the mitigation should have been considered by the jury and the trial court in determining whether Mr. McKenzie should be executed.

STANDARD OF REVIEW

This Court stated in *Franqui v. State*, 59 So.3d 82 (Fla. 2011):

> A postconviction court's decision whether to grant an evidentiary hearing on a rule 3.850 motion is ultimately based on written materials before the court. Thus, its ruling is tantamount to a pure question of law, subject to de novo review. When reviewing a court's summary denial of a rule 3.850 motion or claim, the court must accept the movant's factual allegations as true to the extent they are not refuted by the record. Generally, a defendant is entitled to an evidentiary hearing on a rule 3.850 motion unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient. (Fla.2000). The defendant bears the burden to establish a prima facie case based on a legally valid claim; mere conclusory allegations are insufficient. *Id.*

Id. at 95-96. (Citations omitted). Accordingly, this Court should apply *de novo* review.

ARGUMENTS

Norman Blake McKenzie was sentenced to die by a court and a jury that heard the worst about Mr. McKenzie's crimes and never considered any real information that weighed against Mr. McKenzie's crimes. The relevant sentencers in this case, the courts and the jury, knew very little about the man sentenced to die. A decision on life and death should not be made without knowing all of the information that concerns this decision.

In postconviction, Mr. McKenzie simply sought to present evidence that explained his actions and offered an alternative to his execution. Had the mitigation Mr. McKenzie sought to present been heard below, Mr. McKenzie certainly would have argued that the evidence showed that he should not be executed. Mr. McKenzie never had the opportunity to present his compelling case for life. This Court should reverse the trial court's decision and allow Mr. McKenzie's mitigation to be heard.

In the first section, Mr. McKenzie argues that the reasons offered in his postconviction motion justified the trial court granting an evidentiary hearing. In the second section, Mr. McKenzie offers some of the mitigation that would have been presented had the court held the evidentiary hearing. To the extent that the claims in Section I require proof of prejudice, Section II clearly shows that Mr. McKenzie was prejudiced by all of the constitutional error that occurred and was

denied a fair determination of whether death should be imposed.

I. THE TRIAL COURT SHOULD HAVE HEARD THE MITIGATION MR. MCKENZIE DEVELOPED DURING POSTCONVICTION AND PRESENTED IN HIS MOTION BECAUSE MR. MCKENZIE WAS DENIED HIS RIGHT TO PRESENT MITIGATION AT TRIAL BASED ON CONSTITUTIONAL VIOLATIONS AND ERRORS THAT OCCURRED IN HIS CASE AND WHICH DENIED MR. MCKENZIE HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. McKenzie offered a number of reasons for the trial court to hold an evidentiary hearing so that Mr. McKenzie could present his mitigation. The trial court should have granted an evidentiary hearing that allowed Mr. McKenzie to present mitigation. Moreover, the reasons that Mr. McKenzie presented for a hearing were constitutional questions that required factual determinations and an opportunity for Mr. McKenzie to present evidence to prove these claims. Mr. McKenzie's death sentence violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This Court should reverse. Mr. McKenzie argues as follows:

1. Counsel was ineffective during the period in which they represented Mr. McKenzie

Violating the Fifth, Sixth, Eighth and Fourteenth Amendments, Mr. McKenzie's appointed counsel were ineffective during the period of time that they actually represented Mr. McKenzie. Counsel acted deficiently when counsel failed

to see Mr. McKenzie at the location he was held in custody before waiving Mr. McKenzie's speedy trial rights. Reasonable counsel would have seen Mr. McKenzie immediately upon the court appointing counsel, if not upon hearing that Mr. McKenzie was arrested. Indeed, ABA Guideline 10.5 "RELATIONSHIP WITH THE CLIENT" states in relevant part:

> A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.
>
> B. 1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel's entry into the case.

There was media coverage that should have alerted the Public Defender's Office that Mr. McKenzie was arrested for a double homicide occurring in St. Johns County. Reasonable counsel understands the need to establish trust between attorney and client in a death case. In Mr. McKenzie's case, this was of the utmost importance because Mr. McKenzie was prone to distrust, abandonment issues and impulsivity. Counsel's ineffectiveness went further when counsel waived Mr. McKenzie's right to speedy trial without consulting with Mr. McKenzie to adequately explain the right, statutorily and constitutionally, to speedy trial. Moreover, counsel should have adequately explained the capital sentencing process to Mr. McKenzie.

Counsel's deficiency in failing to meet with Mr. McKenzie led him to act impulsively and waive his right to counsel. As a result of his waiver of counsel induced by counsel's deficiency, Mr. McKenzie was denied the effective assistance of counsel to present mitigation that would have supported a life sentence, thus prejudicing him and denying him a full and fair determination of whether he lives or dies.

Counsel's deficiency in failing to meet with their client compelled Mr. McKenzie, who was mentally ill, traumatized and impulsive, to involuntarily waive his Sixth Amendment right to counsel. Faced with the choice between proceeding with the counsel that violated his trust by waiving speedy trial or no Sixth Amendment guaranteed counsel, Mr. McKenzie chose a course of events that utterly denied him a fair penalty phase. This false choice rendered his decision to represent himself unknowing, unintelligent and involuntary.

Ineffective assistance of counsel is comprised of two components: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove deficient performance the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. To prove the deficient performance caused prejudice to the defendant, the defendant must show

"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

The defendant must show both deficient performance and prejudice to prove that a "conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant had the assistance necessary to justify reliance on the outcome of the proceeding." *Id.* at 691.

A defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

"In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* at 695. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

In the instant case, counsel was deficient in not consulting with Mr. McKenzie before waiving speedy trial and in not adequately explaining the capital sentencing process. This led to Mr. McKenzie waiving counsel which was prejudicial because because it deprived him of the opportunity to develop and present mitigation in support of his case for life and directly resulted in his death sentence. The trial court found that this claim has no merit. The court made the following findings of fact:

> Defendant's claim that he was prejudiced by counsel's alleged deficient performance is refuted by the record. First, Defendant's claim that counsel's alleged deficient performance caused him to act impulsively in waiving his right to counsel is refuted by the fact that Defendant's waiver was clearly based on his desire to proceed to trial in an expeditious manner, without a continuance. Additionally, Defendant did not agree with counsel's trial strategies. Defendant felt it was a cut and dry case, and that there should not be much discovery completed, or any mitigation.
>
> Second, Defendant's claim that counsel's alleged deficient performance deprived him of the opportunity to develop and present mitigation in support of his case for life is refuted by Defendant's actions before and after the guilt phase of the trial. As stated above, Defendant's waiver of counsel was based on his desire to proceed to trial expeditiously and on his disagreement with counsel regarding trial strategy. Further, after the initial waiver of counsel, i.e. the alleged impulsive waiver, Defendant had ample opportunity to reflect on his decision before the penalty phase of the trial. In fact, after the guilty verdict, Defendant requested appointed counsel for the penalty phase, but after further reflection, he again expressed his desire to represent himself and proceed to the penalty phase immediately.
>
> It is clear Defendant knowingly, intelligently, and voluntarily waived his right to counsel before the guilt phase and before the penalty phase, and that these waivers of counsel were not due to deficient acts

> by his attorneys, but rather, were due to his desire to go to trial immediately rather than follow his attorneys' plan to obtain a continuance in order to investigate the case further. The Court finds that there is not a reasonable probability that, but for counsel waiving Defendant's right to a speedy trial and not meeting with Defendant immediately after appointment, the result in the case would have been different. Based on Defendant's stalled wishes, his attorneys' need for additional time to prepare this death penalty case, and Defendant's desire to direct the course of his attorneys' investigation and the trial, there is not a reasonable probability Defendant would have proceeded to trial under the representation of appointed counsel rather than waiving his right to counsel. Therefore, this claim will be denied.

(Vol. III PCR. 325-328)

The trial court also stated:

> Defendant's claim of deficient performance based on his counsel's waiver of his right to a speedy trial was addressed on appeal wherein the Supreme Court recognized the trial court's statement to the defendant that such action was not incompetent. *McKenzie*. 29 So. 3d at 282 (*citing State v. Kruger*, 615 So. 2d 757,759 (Fla. 4th DCA), *review denied*, 624 So. 2d 266 (Fla. 1993).

(Vol. III PCR. 326-27). On direct appeal, however, this Court merely dealt with the waiver itself - - not the performance of counsel in violating Mr. McKenzie's trust by waiving his right to a speedy trial without having taken the time to meet with him. On direct appeal, this Court addressed the speedy trial issue as follows:

> McKenzie contends that the trial court never adequately addressed his main complaint concerning his counsel which was centered on the waiver of his right to a speedy trial prematurely and without his consent. However, the trial court advised McKenzie that although the waiver without his consent may have angered him, the conduct, in itself, was not incompetent. McKenzie acknowledged to the trial court that he understood this legal principle. *See generally State v. Kruger*,

> 615 So.2d 757, 759 (Fla. 4th DCA) ("The principle is well established that the right to a speedy trial is waived when the defendant or his attorney request a continuance. The acts of an attorney on behalf of a client will be binding on the client even though done without consulting him and even against the client's wishes."), *review denied*, 624 So. 2d 266 (Fla. 1993).

Id. at 282. Whether counsel was so incompetent as to be removed and new counsel appointed for waiving speedy trial is a far different issue than whether counsel was ineffective under *Strickland* for doing so for a mentally ill client whom counsel had not met. While counsel may even have a duty to waive speedy trial under some circumstances, this duty exists apart from the duty to keep the client informed and to at least meet the client.

Mr. McKenzie was clearly prejudiced by counsel's deficiency. After the initial problems that led Mr. McKenzie to proceed without counsel, Mr. McKenzie fell deeper into self-representation, which he was legally permitted to do, but hardly qualified to conduct. Once Mr. McKenzie had committed to self-representation it became harder and harder for him to abandon this decision and seek the help of counsel, but the initial cause was still trial counsel's ineffectiveness. Mr. McKenzie was clearly precluded from presenting important mitigation that should have been presented had Mr. McKenzie had effective counsel.

As detailed in Section II, Mr. McKenzie suffers from a number of mental impairments that detrimentally impacted his decision to proceed without counsel

and the mitigation that counsel would have developed. *See also* Vol. IV PCR. 590-95(Affidavit of Dr. Mark Cunningham reiterating and explaining how Mr. McKenzie's mental illness, trauma, impulsivity and fatalism affected Mr. McKenzie's decision making). Mr. McKenzie's counsel was qualified to handle death cases in the State of Florida. Inherent in this qualification is the understanding that the individuals facing a capital trial often present greater challenges for counsel because of mental illness and their life experiences. Trial counsel should have seen Mr. McKenzie before waiving something as important as speedy trial and to form an early relationship with Mr. McKenzie. Had this occurred, there was a reasonable probability that the outcome would have been different because more mitigation could have properly been presented to the jury. This Court should reverse.

2. Mr. McKenzie was entitled to the assistance of an expert and to compel witnesses in his favor

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Mr. McKenzie's right to counsel is a distinct right from the right to

compulsory process for obtaining witnesses in his favor; one does not depend on the exercise of the other. The right to due process as addressed in *Ake*, *infra*, is also not dependent on the right to counsel. While effective counsel may have aided Mr. McKenzie in exercising his right to compel witnesses and ensured that Mr. McKenzie received due process, even if Mr. McKenzie waived the right to counsel he did not waive any other right guaranteed by the United States Constitution.

Mr. McKenzie had the right to have an expert appointed to assist him in presenting mitigation. Mr. McKenzie was not offered the assistance of a mental health expert through whom he could have presented mitigation concerning his mental health, drug abuse and life history. Additionally, reasonably effective counsel would have asked the court for an expert to assist Mr. McKenzie even if counsel knew they were going to be removed from the case. Had Mr. McKenzie had a mental health expert appointed to assist him in his defense, the jury would have been informed of the extent of his drug abuse, his mental illness and mitigating life history. Moreover, the trial court, having heard the complete explanation of Mr. McKenzie's drug abuse and mental illness at the time of offense and throughout his life, would have instructed the jury on the two mental mitigating factors. With or without a more favorable jury recommendation, the trial court would have given more weight to Mr. McKenzie's drug abuse mitigation

and would have found the very weighty mental health mitigating factors.

The United States Supreme Court has recognized:

> [T]hat when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

Ake v. Oklahoma, 470 U.S. 68, 76 (1985). The Court held: "that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 83. The Court concluded that; "due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase." *Id.* at 83.

The Court also made clear that psychiatric assistance is not limited to an insanity defense and also applies when mental state is an issue at sentencing like in Mr. McKenzie's case. The Court stated:

> We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case. The State, too, has a profound interest in assuring that its ultimate sanction is not erroneously imposed, and we do not see why monetary considerations should be more persuasive in this context than at trial. The variable

> on which we must focus is, therefore, the probable value that the assistance of a psychiatrist will have in this area, and the risk attendant on its absence.
>
> . . .
>
> Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.

Id. at 83-84. In Florida, the determination of whether to impose death necessarily requires consideration of the defendant's mental state at the time of offense in determining whether at least some of the aggravating factors are proven, and mental state is implicit in any sort of culpability determination. Available mitigating factors require consideration of the psychological condition of the defendant at the time of offense with reference to historical psychological condition and effects.

Even without reference to the conduct in question itself, a defendant's overall mental health and condition, seen through the lens of trauma, social history, deprivation and life experience must be considered by the relevant sentencers. A failure in this regard is a failure in meeting the high standards the United States Constitution requires to be met before the State may take a life. Mr. McKenzie had a right to have his entire life considered; that which was positive, that which was

negative, and all that was mitigating.

Under the Sixth Amendment, Mr. McKenzie had the right to compel witnesses to testify on his behalf. Apart from the last minute evidence of Mr. McKenzie's bank records, Mr. McKenzie was denied the right to compel witnesses to testify on his behalf. *See* (Vol. VII R. 485).

In *Washington v. Texas*, 388 U.S.14 (1967), the United States Supreme Court made clear that the Compulsory Process clause of the Sixth Amendment was applicable to States through the Due Process Clause of the Fourteenth Amendment. *Id.* at 19. The Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 19.

Despite Texas' claim of a need to limit the accused's right to call witnesses, the Court held:

> that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to

secure the attendance of witnesses whose testimony he had no right to use.

Id. at 23. Failing to offer Mr. McKenzie the opportunity to compel witnesses on his behalf nullified his right to compulsory process. Had Mr. McKenzie been afforded this right, the trial court and this Court would have been able to consider the testimony of an expert or the individuals that Mr. McKenzie spoke of during trial. *See* (Vol. VII R. 485). Either alone, or as a means to opening the gateway to full consideration of the mitigation required under the Eighth Amendment, Mr. McKenzie was prejudiced because this Court and the trial court did not consider all of the readily available mitigation.

The trial court denied this subclaim and stated: "Defendant relies on *Ake v. Oklahoma*, 470 U.S. 68 (1985), in support of this claim. Any *Ake* claim should have been raised on direct appeal, and therefore, this claim is procedurally barred. *Whitfield v. State*, 923 So. 2d 375, 378-79 (Fla. 2005)." (Vol. III PCR. 328).

The trial court erred in denying this basis for a hearing. This was not "[a]ny *Ake* claim," this was reliance on *Ake* to justify presenting Mr. McKenzie presenting mitigation at an evidentiary hearing. The right to the assistance of an expert is separate from the right to counsel. In *Whitfield*, the appellant had trial counsel that was able to consult with experts. Indeed, counsel presented the testimony of an expert named Dr. Regnier. *See Id.* at 380-381. In *Whitfield* this Court found that:

As to issue six, we also affirm because, insofar as it states a proper

> *Ake* claim, it should have been raised on direct appeal. *See Marshall v. State,* 854 So.2d 1235, 1248 (Fla.2003) (holding an *Ake* claim contained within an ineffective assistance of counsel claim "procedurally barred because it could have been raised on direct appeal"); *Moore v. State,* 820 So.2d 199, 203 n. 4 (finding *Ake* claim procedurally barred because it could have been raised on direct appeal); *Cherry v. State,* 781 So.2d 1040, 1047 (Fla.2000) ("[T]he claim of incompetent mental health evaluation is procedurally barred for failure to raise it on direct appeal."). Insofar as it alleges ineffective assistance of counsel for failing to pursue an *Ake* claim, Whitfield has failed to show either deficient performance or prejudice.

Id. at 378-79.

Mr. McKenzie's claim differs from the claim in *Whitfield* because Mr. McKenzie argues that his right to the assistance of an expert was unrelated to his right to counsel. Mr. McKenzie did not have counsel for most of the time following his arrest. In *Whitfield*, the appellant did have counsel; the argument was that counsel should have obtained an additional or more competent expert. If counsel moved for the appointment of an additional expert and the trial court denied the request, Mr. Whitfield could have appealed the decision because the issue was preserved. *Whitfield* however differs materially from the instant case because Mr. McKenzie was totally denied any assistance of an expert even though he clearly had a right to one.

To find that Mr. McKenzie could have raised the denial of expert on direct appeal was grossly unfair. To prevail on appeal, Mr. McKenzie would have had to show that the error was harmful and that he was prejudiced. While a lack of legal

knowledge can in some circumstances be held against a *pro se* defendant, there is no such provision that a lack of psychological knowledge can be held against a mentally ill defendant. In order to state a case for the denial of the assistance of a mental health expert on direct appeal, Mr. McKenzie needed to articulate the mental health evidence that would have been presented by the expert. Appellate counsel, bound to the record, could not provide this because there was no record of what an expert would have presented because there was no expert.

Mr. McKenzie did not give up the right to the assistance of an expert or compulsory process. Had Mr. McKenzie had been afforded these rights he could have presented the compelling mitigation that is detailed below and further developed the mitigation that he attempted to put forward. Accordingly, this Court should reverse.

3. Mr. McKenzie was denied meaningful access to the courts because he was not given access to a law library before or after he obtained pro se status.

The United States Supreme Court held in *Bounds v. Smith*, 480 U.S. 817 (1977), that: "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828. Mr. McKenzie's *pro se* status did not absolve the State from providing him adequate access to a law library.

During the *Faretta* inquiry it became clear that Mr. McKenzie was being

denied meaningful access to the courts and that this denial would remain unremedied throughout the course of the proceedings against him:

> THE COURT: You'll be limited to the legal resources that are available to you while you're in custody. Do you understand that?
> THE DEFENDANT: Yes, I am.
> THE COURT: You will not be entitled to any additional library privileges just because you're representing yourself. Do you understand that?
> THE DEFENDANT: **I have no library privileges**.
> THE COURT: A lawyer would have fewer restrictions in researching your defense or investigating your case. Do you understand that?
> THE DEFENDANT: Yes, ma'am.

(Vol. III R. 427)(emphasis added). The record contains no indication that Mr. McKenzie was ever given access to the law library in the county jail. While the trial court very graciously lent Mr. McKenzie the court's rule book, this was not the same as Mr. McKenzie having access to United States Supreme Court opinions, from *Furman* and *Proffitt* to *Rompilla*, *Roper*, *Atkins*, *Lockart* and *Eddings*, as well as the relevant decisions of this Court. This would all have aided Mr. McKenzie in understanding the proceedings against him, the role of mitigation and the very rights that he was guaranteed. Had Mr. McKenzie had even limited access to the law library, the understanding that he gained would have changed how he approached his *pro se* representation.

The trial court denied this subclaim stating:

> Defendant cites *Bounds v. Smith*, 430 U.S. 817 (1977), in support of this claim. In *Bounds*, the Court notes that "while adequate law libraries are one constitutionally acceptable method to assure

> meaningful access to the courts...[the decision] does not foreclose alternative means to achieve that goal." *Id.* at 830. In this case, Defendant was provided meaningful access to the courts, through the assistance of competent counsel. Defendant chose to waive that right, and Defendant was appropriately informed of the limited access he would have to legal materials . . ..

(Vol. III PCR. 329). The trial court also noted that it allowed Mr. McKenzie to use the court's rule book. (Vol. III PCR. 329).

The right to proceed *pro se* does not nullify the right to meaningful access to the courts through access to law libraries. Although he was *pro se*, Mr. McKenzie still had the right to meaningful access to the courts through access to legal material. In *Simmons v. United States*, 390 U.S. 377 (1968) a defendant was forced to chose between his privilege against self-incrimination and pursuing a claim under the Fourth Amendment to the United States Constitution. The Court found that:

> In these circumstances. . . it [was] intolerable that one constitutional right should have to be surrendered in order to assert another." The held "that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.* In other words, forcing to waive one constitutional right to asset another is not constitutional at all.

Id. at 394.

Because Mr. McKenzie was denied meaningful access to the court in preparation of his defense, this Court should reverse.

4. The State's misconduct violated due process under the Fourteenth Amendment and the Sixth Amendment's Confrontation Clause denied Mr. McKenzie his right to present mitigation when he innocently attempted to model his court performance after the State's misconduct and the State objected to prevent Mr. McKenzie's mitigation from being heard

As the *pro se* defendant in this cause, to the extent that he participated in the case, Mr. McKenzie followed the State. The State made an opening statement and then Mr. McKenzie made an opening statement. The State presented its case before Mr. McKenzie had the chance to present his case. Being unlearned in the law, Mr. McKenzie observed the State's performance and inevitably modeled his behavior from the performance of the prosecution.

During closing argument the State argued to the jury that what Mr. McKenzie stated in opening statement proved that he was guilty, which in turn was considered in the jury's decision to recommend death. For example:

> All of those injuries and all of that blood and all of that viciousness because Norman Blake McKenzie, as he told you in his own words in his opening statement, wanted these items and wanted a car to get away for his own purposes.
>
> Ladies and gentlemen, the evidence has clearly shown you, beyond any doubt, that this defendant is guilty of both counts of murder in the first degree. It's a rare case, it's a unique case where you hear from the defendant, right off the beginning of the case, that's represented himself here, but still, the State has to prove every element of each of those counts beyond and to the exclusion of every reasonable doubt.
>
> Norman McKenzie stood up, and in his own words in his opening statement, told you what that evidence would show, but the most compelling thing he told you was that not one single witness that would take the stand could know the horror of that day, that he was

> the only one that knew the horror of that day, and the truth of his own words to you has been the truth of this entire case throughout yesterday and today.

(Vol. VI R. 317-318)

And also:

> And Mr. McKenzie told you himself in his opening that the evidence would show that he was there for just a little while, he was sort of balanced there in that position. So forethought about why -- why was he still there, and then more injuries to that man with a different instrument. And those are the circumstances, ladies and gentlemen, you must consider based on Florida's law.

(Vol. VI R. 322-23).

Of course any defense attorney would have argued that it was improper and unconstitutional for the State to argue what was said in opening argument was substantive evidence. The jury is instructed that what the attorneys say is not evidence and that the jury should decide the case solely based on the evidence that is presented from the witness stand. When facts that are not in evidence are argued, not only is this rule for conducting trials violated, the defendant's right to confront his or her accusers is violated. Here, the State used Mr. McKenzie's undeveloped and unsworn opening statements against him. Beyond a case in which hearsay is admitted as an admission, here there was no person putting forward the testimony for Mr. McKenzie to cross-examine as there is when the hearsay offered is the admission of a party.

The State's use of Mr. McKenzie's opening statement against him as

substantive evidence was objectionable and a violation of the Confrontation Clause of the United States Constitution for which the trial court should have granted a new trial. This violation of the Constitution also serves as a gateway to Mr. McKenzie presenting mitigation to show the probability of a different outcome had he not been lulled into a false sense of acceptable argument of his own statements that Mr. McKenzie wanted to put before the jury in the penalty phase regarding his drug abuse.

It is apparent in the record that Mr. McKenzie intended to present evidence of his drug abuse before and after the time of offense. Being unlearned in the law, and having no reason to assume that the State would violate the Confrontation Clause, Mr. McKenzie saw that the State used his opening statements to argue its case despite a lack of confrontation of those statements. Mr. McKenzie then sought to do likewise and tell the jury about his drug abuse and life history, only when he attempted to mirror the State's conduct, the State objected and prevented Mr. McKenzie from presenting his case in the same manner that the State presented its case. *See* for example, (Vol. VI R. 338-39, Vol. VIII R. 573). The State's constitutional violation denied Mr. McKenzie his right to present mitigation in support of his life. Indeed, the jury recommended, and the trial court imposed, death without even a basic understanding of who Mr. McKenzie was, how he became that person and what he was mentally and physically experiencing at the

time of offense, all of which the constitutionality of the death penalty requires consideration.

The State's committing the very same breach of trial rules that it accused Mr. McKenzie of violating was a violation of due process because Mr. McKenzie innocently modeled his presentation after the State.

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. U.S., 295 U.S. 78, 88 (1935). Here, the State struck the foulest of blows without Mr. McKenzie knowing he had been struck.

In *Pointer v. Texas*, 380 U.S. 400 (1965), the United States Supreme Court held "that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment." *Id.* at 403. "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of

cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965).

The *Farretta* inquiry does not ask if the potential *pro se* defendant understands that without counsel the State can violate the Constitution with impunity and if you do not come to that realization and innocently try to model your performance after the State, you will be stopped from making any defense. Following the State's misconduct, Mr. McKenzie thought that he could tell the jury what he wanted to tell the jury in closing argument and have this considered evidence in penalty phase because the State had used what Mr. McKenzie said in opening statement as evidence in the State's guilt phase closing argument.

The violation of Mr. McKenzie's due process rights under the Fourteenth Amendment was compounded by the prosecution's going to the jail and speaking with Mr. McKenzie without a court reporter present. The prosecution informed Mr. McKenzie that he could not present the statements from his first interrogation by law enforcement, which took place on October 5, 2006, because Mr. McKenzie was on drugs at the time of the statement. This was improper and misleading legal advice. Mr. McKenzie's statements were not inadmissible during the guilt phase because he was intoxicated. The statements of intoxicated defendants are used daily in Florida prosecutions, as is the case in almost every Driving Under the Influence prosecution.

The State was aware that a defendant may challenge a statement made while under the influence of narcotics as being involuntary. The State would have known this after reviewing the first videotaped interrogation shortly after Mr. McKenzie was taken into custody and before the case was presented to the Grand Jury. Either the prosecution or the law enforcement officers expecting a challenge of this sort led to Mr. McKenzie again being interrogated by law enforcement. Mr. McKenzie was not served with the arrest warrant until law enforcement obtained a confession that would withstand a voluntariness challenge. (Vol. I R. 6)

When the State simply asked the law enforcement officers at trial to recount what Mr. McKenzie said, the State was able to place into evidence isolated statements of Mr. McKenzie. These statements, taken from both interrogations, led the jury, and later the trial court at sentencing, to consider Mr. McKenzie's statements in isolation. These statements were without context for the relevant fact-finder and showed Mr. McKenzie in the coldest of lights. The State knowingly chose to admit Mr. McKenzie's statements in this fashion to obtain an unfair advantage at trial and in ultimately obtaining a death sentence. Having informed Mr. McKenzie that his statements were inadmissible because of his drug use, and with Mr. McKenzie having to rely on memory rather than a recent viewing of the video, there was no chance that Mr. McKenzie would gain any benefit from the statements he made to law enforcement.

Contrary to the prosecution's misadvice to Mr. McKenzie, information from both interrogations was admissible for a number of reasons. First, while Mr. McKenzie could not simply play the videotape or make reference to his statements, once the State used his isolated statements in a misleading way, under the rule of completeness, Mr. McKenzie could have moved to have further statements or the entire videotape admitted into evidence to rectify the State's selective account given by law enforcement. *See* Sections 90.108, 90.401, 90.402, Florida Statutes. Second, statements which were not admissible as substantive evidence may be used for impeachment, and for other purposes besides being offered for the truth of the matter asserted - - and this was only in the guilt phase. *See* Sections 90.608, 90.801, 90.803, 90.806, Florida Statutes.

In the penalty phase, Mr. McKenzie's mental and physical condition were relevant, and the videos showed both. Hearsay is admissible during the penalty phase so long as it is probative and the defendant has an opportunity to rebut any hearsay statements. *Section* 921.141(1), Florida Statutes. If upon admission of the videos, or after Mr. McKenzie decided to testify, the State tried to avail itself of the opportunity to refute the clear mitigating evidence contained in the videos, Mr. McKenzie would at least have had some mitigation had the State not misadvised Mr. McKenzie on the inadmissibility of the content of his interrogation. Additionally, in contrast to Detective Rollins penalty phase testimony that Mr.

McKenzie went to the victim's house "planning to kill . . . for money," *see* Vol. VIII R. 528, Mr. McKenzie explains in the videos how his drug addiction and mental illness led to the events in question and how he originally planned to simply borrow money. *See* (Supp. Vol. I); *See also* (Vol. V R. 212)(Where Detective Burress testified that Mr. McKenzie said he went to the victim's house because of his addiction). Detective Rollins testimony violated *Giglio v. U.S*, 405 U.S. 150 (1972) because it was intentionally misleading. Mr. McKenzie never said that he went over to rob and kill but rather that he formed the intent later. This Court also justified the CCP aggravating factor in part on this statement.

The State's multiple meetings with Mr. McKenzie at which the State misinformed Mr. McKenzie about the admissibility of evidence should not have taken place. There would be no complaint if the State merely dropped off some jury instructions, but this went well beyond that.

The trial court denied this basis for a hearing and stated:

> To the extent Defendant claims prosecutorial misconduct, such claims could have and should have been raised on direct appeal and are barred from consideration in a postconviction motion. *Spencer v. State*, 842 So. 2d 52, 60 (Fla. 2003). Additionally, Defendant voluntarily chose to represent himself and assumed the consequences of such representation; therefore, he cannot complain that he received ineffective assistance of counsel. *Behr v. Bell*, 665 So. 2d 1055, 1067-57 (Fla. 1996) *citing Faretta v. California*. 422 U.S. 806, 835 n.46, 95 S.Ct. 2525, 2541 n.46, 45 L.Ed.2d 562 (1975)).

(Vol. III PCR. 330).

The trial court's order erred in denying this subclaim and basis for an evidentiary hearing. Mr. McKenzie could not raise prosecutorial misconduct on appeal if he did not know that prosecutorial misconduct took place or if the State's misconduct affirmatively prevented its discovery. On direct appeal, counsel could not raise the issue of Mr. McKenzie modeling his presentation after the State's actions and the State's misinforming Mr. McKenzie about the admissibility of his statements to law enforcement because there was an inadequate record. As stated before, Mr. McKenzie did not have personal knowledge that the interrogation was videotaped. The State never admitted the videotape of Mr. McKenzie's two interrogations into evidence so this Court could not consider the issue of whether the videotape could be presented. Most importantly, the State never informed the Court that there was a videotape and never informed the court that the State had told Mr. McKenzie he could not question law enforcement about his interrogation because Mr. McKenzie was on drugs at the time. Mr. McKenzie may have assumed the consequences of his self-representation; he did not assume the consequence of the State misleading him regarding what could and could not be presented to the jury by the example of the State's own misconduct. Accordingly, this Court should reverse.

5. The State's intentional failure to play Mr. McKenzie's videotaped interrogations prevented consideration of mitigation

The State's strategic decision to present a limited and filtered version of Mr. McKenzie's custodial interrogation was a violation of Mr. McKenzie's right to due process, confrontation and discovery. Mr. McKenzie was never given a copy of the video recordings of his two interrogations. By not giving Mr. McKenzie the opportunity to view the video recordings, Mr. McKenzie went to trial with a false impression that there was no compelling evidence that he was on drugs at the time of the offense or that there was compelling evidence of his drug use besides his bank records. The first video shows Mr. McKenzie under the influence of cocaine and that he even had a potentially deadly amount of cocaine in his mouth at the time of his initial questioning. It also shows Mr. McKenzie suffering from mental illness and drug addiction. The video of the second confirms both Mr. McKenzie's drug use and mental illness.

Even if the State could justifiably pick and choose which part of the true statement Mr. McKenzie made to law enforcement, the State had a duty to show the videos to the trial court that was making a determination of sentence. While the State's discovery may have listed the recording, Mr. McKenzie was personally not aware of the existence of recordings that showed his interrogation and his mental health generally and near the time of offense. The State was aware of the video interrogations of Mr. McKenzie. There is nothing in the record that showed that Mr. McKenzie or the trial court knew of the videos or in fact viewed the

videos. If Mr. McKenzie had the opportunity to view the videos he would have requested the jury, or even just the Court, view the videos. The videos could have been redacted for the jury. Had the trial court viewed the videos, the trial court would have appointed a mental health professional to evaluate Mr. McKenzie. Such an expert, after evaluating Mr. McKenzie and viewing the videos would have informed the trial court of the existence of statutory and non-statutory mitigation.

The trial court denied relief on this subclaim and as a basis for granting a hearing and stated:

> The State's Discovery Exhibit did disclose the existence of electronic surveillance of conversations, and in sub-issue four, Defendant indicates that he and the prosecutor discussed the videotaped statements. See State's Discovery Exhibit, attached hereto as Appendix G. The State does not have a duty to present mitigating evidence for the defendant. As stated earlier, Defendant knowingly, intelligently, and voluntarily chose to represent himself and assumed the consequences of such representation. Therefore, this claim will be denied.

(Vol. III PCR. 330-31).

The trial court erred. There is a big difference between listing on a piece of paper "electronic surveillance of conversations" and Mr. McKenzie being aware that there was a full recording of Mr. McKenzie when he was first interrogated by law enforcement. As seen in the first video, law enforcement informed Mr. McKenzie that he was not being recorded. The State then affirmatively told him that what was said during the first interrogation could not be used because Mr.

McKenzie was on drugs. The State did not inform Mr. McKenzie that there was a video; when the State spoke with Mr. McKenzie they discussed the admissibility of Mr. McKenzie's statements, not that the statements were videotaped.

If Mr. McKenzie "chose to represent himself and [to] assume the consequences of such representation" he never consented to being misinformed by the State as to the admissibility of important evidence. The State did not have a duty to present mitigating evidence for Mr. McKenzie, the State had a duty to indicate to Mr. McKenzie and the trial court that there were videotaped interrogations that showed Mr. McKenzie's drug addiction, mental illness and also mitigating information about Mr. McKenzie's background.

The prosecutor in a death case has significant duties to carry out besides winning at any cost. Florida has adopted the American Bar Association Standards of Criminal Justice Relating to Prosecution Function. *See* Rules Regulating the Florida Bar Comment to Rule 4-3.8 Special Responsibilities of a Prosecutor. The ABA Standards for Criminal Justice: Prosecution and Defense Function, 3d ed., (1993), state in 3.1 that:

> These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

In Mr. McKenzie's case, the Standards are relevant because the State's

misconduct in the instant case actually violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Most notably, the Standards provide the well known principle that, "The duty of the prosecutor is to seek justice, not merely to convict." 3.1-2(c). Other rules that are relevant include and state in relevant part:

Standard 3-3.11 Disclosure of Evidence by the Prosecutor

> (a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.
>
> (b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.
>
> (c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

This rule should have even more applicability if the State is dealing with an unrepresented party. Here, the State also failed to present Mr. McKenzie's videotaped statements knowing that there was no defense attorney who would have known of their existence and insisted on the videotape being played.

Standard 3-5.6 Presentation of Evidence

> (a) A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

***

In the instant, case the lack of completeness and context rendered law

enforcement's account essentially inaccurate. An accurate determination by the jury necessitated that the jury be informed of how Mr. McKenzie acted and the full context of what was said.

Standard 3-5.8 Argument to the Jury

***

> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

Standard 3-5.9 Facts Outside the Record

> The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

Obviously, when the State asked the jury to consider Mr. McKenzie's opening statement as evidence this was outside the record and impermissible. It also led Mr. McKenzie to model his penalty phase presentation after the State's improper argument.

During sentencing the State has significant duties beyond just obtaining the harshest sentence possible:

Standard 3-6.1 Role in Sentencing

> (a) The prosecutor should not make the severity of sentences the index of his or her effectiveness. To the extent that the prosecutor becomes involved in the sentencing process, he or she *should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.*
>
> (b) Where sentence is fixed by the court without jury participation,

the prosecutor should be afforded the opportunity to address the court at sentencing and to offer a sentencing recommendation.

(c) Where sentence is fixed by the jury, the prosecutor should present evidence on the issue within the limits permitted in the jurisdiction, but the prosecutor should avoid introducing evidence bearing on sentence which will prejudice the jury's determination of the issue of guilt.

Standard 3-6.2 Information Relevant to Sentencing

(a) The prosecutor should assist the court in basing its sentence on complete and accurate information for use in the presentence report. The prosecutor should disclose to the court any information in the prosecutor's files relevant to the sentence. If incompleteness or inaccurateness in the presentence report comes to the prosecutor's attention, the prosecutor should take steps to present the complete and correct information to the court and to defense counsel.

(b) The prosecutor should disclose to the defense and to the court at or prior to the sentencing proceeding all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

The State had far greater responsibilities in this case than the State actually met. At some point, knowing what Mr. McKenzie said on the videotape and how Mr. McKenzie acted, the State should have informed at least the trial court about the mitigation present in the video of Mr. McKenzie's interrogation. What would have resulted would have been some form of mitigation and a small step towards a constitutional process.

There was substantial mitigation in the video recording of Mr. McKenzie's interrogation. At least the trial court, if not the jury, should have seen the video.

Had the jury seen the video there reasonably could have been a different outcome in this case. If just the court saw the video, any reasonable jurist would have appointed a mental health expert to evaluate Mr. McKenzie and the mitigation discussed below would have been considered by the trial court. Accordingly, this Court should reverse.

6. Despite the trial court's order the Department of Corrections Pre-Sentence Investigation was constitutionally deficient and all parties with mitigating information concerning Mr. McKenzie should have presented such to the trial court

The trial court ordered the Department of Corrections to compile a pre-sentence investigation report that contained Mr. McKenzie's mental history and family background. The trial court ordered that the PSI be "comprehensive." In *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), this Court addressed situations in which the relevant sentencer lacks meaningful mitigation information on which to base a decision and required a Pre-Sentence Investigation report. The Court determined that:

> To be meaningful, the PSI should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background. In addition, the trial court could require the State to place in the record all evidence in its possession of a mitigating nature such as school records, military records, and medical records. Further, if the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion to call persons with mitigating evidence as its own witnesses. This precise procedure has been suggested by the New Jersey Supreme Court in *State v. Koedatich*, 112 N.J. 225, 548 A.2d 939, 992 (1988),

> and recognized as appropriate by the Georgia Supreme Court in *Morrison v. State*, 258 Ga. 683, 373 S.E.2d 506, 509 (1988). If the trial court prefers that counsel present mitigation rather than calling its own witnesses, the trial court possesses the discretion to appoint counsel to present the mitigation as was done in *Klokoc v. State*, 589 So.2d 219 (Fla.1991) or to utilize standby counsel for this limited purpose.

Muhammad v. State, 782 So.2d 343, 363-64 (Fla. 2001)(footnotes omitted).

Mr. McKenzie appeared and acted delusory and mentally ill in the videos of his custodial interrogation. The State, which included the prosecution, the Department of Corrections and the actual law enforcement officers who interrogated Mr. McKenzie, never informed the trial court of the existence of videos showing Mr. McKenzie in the throes of delusion and mental illness. These videos also detailed Mr. McKenzie's drug abuse. The trial court would have attributed more weight to Mr. McKenzie's drug abuse had the trial court viewed the videos before deciding Mr. McKenzie's sentence. Moreover, had the trial court seen Mr. McKenzie in close proximity to the events in question, the trial court would have exercised its discretion to appoint a mental health expert to evaluate Mr. McKenzie and offer a report or testimony about Mr. McKenzie's drug history and mental illness. Such a report would have been important in determining whether Mr. McKenzie should receive death because it would have shown how compelling Mr. McKenzie's drug and mental illness mitigation was at the time of offense and throughout Mr. McKenzie's life leading up to the crimes in question.

An adequate PSI would have been one step towards aligning Mr. McKenzie's trial with the Constitution's requirement's for determining whether the ultimate sanction should be imposed. An adequate report that noted the existence of videos would have alerted the trial court to the need for review of the videos. The Department of Corrections, like law enforcement and the prosecutors, failed to alert the trial court to simple video tapes that would have opened the gateway for full consideration of all of the mitigation that showed that Mr. McKenzie should not be sentenced to death.

The trial court denied relief and a hearing on Mr. McKenzie's mitigation on this subclaim. The trial court stated that "Though the Court was not required to order a PSI in this case, in an abundance of caution the Court ordered a PSI due to the minimal amount of mitigation presented by the defendant." (Vol. III PCR. 331). This was in distinct contradiction to the notion that Mr. McKenzie waived mitigation, as discussed throughout the trial court's order. Before imposing sentence, the trial court issued an e-mail that ordered the Department of Corrections as follows:

> Today, I ordered a PSI in the case of the State of Florida v. Norman Blake McKenzie. The PSI is ordered pursuant to 3.710(b), Florida Rules of Criminal Procedure. Apparently, Mr. McKenzie recently had a PSI completed in either Alachua or Marion County. You may be able to update that PSI. Since this is a case where the State is seeking the death penalty and the Defendant put on little mitigation, the PSI must be comprehensive and should include information such as previous mental health problems (including hospitalizations), school

> records, and relevant family background. He has a history with DOC, so some of the information may be available in his prison file.

(Vol. I R. 174).

The trial court's order denying postconviction relief quoted the above referenced *Muhammad* but concluded:

> The Court did not order the State to place any evidence in the record. At trial, the defendant did not challenge the PSI, and the State did not have a duty to present mitigating evidence for the defendant. Therefore, Defendant's claim will be denied. Additionally, any claim regarding the adequacy of the PSI could have and should have been raised on direct appeal, and such claim is procedurally barred.

(Vol. III PCR. 332) (Internal record citations omitted). It was accurate that Mr. McKenzie did not waive mitigation, but other than a few comments and some bank records, the result was the same. Whatever Mr. McKenzie presented was not given much weight at all. *See* (Vol. I R. 191-194). The trial court apparently sensed that Mr. McKenzie's mitigation amounted to almost a complete waiver and ordered a PSI. The trial court went so far as to decline to give the jury's recommendation great weight based on *Muhammad. See* (Vol. I R. 195). This would appear to indicate that the trial court treated the case as one in which *Muhammad* applied. A PSI, under *Muhammad* required far more information to be collected by the Department of Corrections. By presenting a PSI without the easily available mitigating information, Mr. McKenzie was harmed more than he would have been had no PSI been completed; the trial court sentenced Mr. McKenzie

with an understanding that the PSI was comprehensive and conclusive; it was not and it falsely removed any barriers to a death sentence.

If this was a PSI done for the reasons requiring a PSI in *Muhammad*, the PSI should have been just as comprehensive as *Muhammad* required. While technically, the trial court never ordered the State to place any mitigation in the record, the State was heard at sentencing and asked to comment in the PSI, but reserved comment for sentencing. *See* pg.7 of PSI. Law enforcement "could not be reached to comment on this case." *Id.* Certainly the State and law enforcement had a duty to indicate that there were videotapes that were highly mitigating. As discussed above, the State has significant duties in a death case beyond seeking death. Mr. McKenzie could not have raised this issue on appeal because he was not personally aware of the recordings and because the State never informed the trial court of the existence of this highly mitigating video.

7. Without full consideration of Mr. McKenzie's drug abuse, mental illness and developmental factors, the death penalty is unconstitutional.

The death penalty is only constitutional if it is reserved for the most aggravated and least mitigated of murders. Whether this case qualifies as such is a constitutional question that cannot be answered without a full presentation of the mitigation in favor of Mr. McKenzie. An evidentiary hearing would have shown that Mr. McKenzie and his actions place this case squarely in the most mitigated of

cases thus rendering the death penalty a constitutionally impermissible penalty. This Court is adamant that:

> In performing a proportionality review, a reviewing court must never lose sight of the fact that the death penalty has long been reserved for only the most aggravated and least mitigated of first-degree murders. *State v. Dixon*, 283 So.2d 1, 7 (Fla.1973). *See also Jones v. State*, 705 So.2d 1364, 1366 (Fla.1998) (reasoning that "[t]he people of Florida have designated the death penalty as an appropriate sanction for certain crimes, and in order to ensure its continued viability under our state and federal constitutions 'the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious crimes.' ") (footnote omitted).

Urbin v. State, 714 So.2d 411, 416 (Fla. 1998). Without a full understanding of the mitigation, the Eighth Amendment was violated because no proportionality or weighing took place. Mr. McKenzie's case allowed for virtually no consideration of whether in fact Mr. McKenzie's crimes were the most aggravated and least mitigated.

Moreover, evolving standards of decency should prevent the execution of the mentally ill. Evolving standards of decency clearly do prevent the execution of the mentally ill without due consideration of the mental illness. Mr. McKenzie was sentenced to death without any consideration of whether he was mentally ill and whether such mental illness should have prevented a death sentence. This constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. In conformance with these Amendments, the United States Supreme Court has long recognized that:

> The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles*, 356 U.S. 86, 100–101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion).

Roper v. Simmons, 543 U.S. 551, 560-61(2005). Indeed:

> Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Atkins*, supra, at 319, 122 S.Ct. 2242. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. *Godfrey v. Georgia*, 446 U.S. 420, 428–429 (1980) (plurality opinion). In any capital case a defendant has wide latitude to raise as a mitigating factor "any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *see also Johnson v. Texas*, 509 U.S. 350, 359–362 (1993) (summarizing the Court's jurisprudence after *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*), with respect to a sentencer's consideration of aggravating and mitigating factors). There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. *Coker v. Georgia*, 433 U.S. 584 (1977) (rape of an adult woman); *Enmund v. Florida*, 458 U.S. 782(1982) (felony murder where defendant did not kill, attempt to kill, or intend to kill). The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. *Thompson v. Oklahoma*, *supra*; *Ford v. Wainwright*, 477 U.S. 399(1986); *Atkins*, supra. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.

Id. 568-69. While severe mental illness has not been recognized as an absolute bar to execution, evolving standards of decency have rendered the execution of the severely mentally ill constitutionally impermissible. Even if the Court is not convinced that Mr. McKenzie is so mentally ill that his execution is barred, an evidentiary hearing would have shown that Mr. McKenzie's crime is not the least mitigated. Just as age and mental retardation were recognized as mitigation prior to being recognized as bars to execution, such is at least the case here.

The trial court denied Mr. McKenzie relief and hearing based on this subclaim:

> As stated previously, Defendant knowingly, intelligently, and voluntarily chose to represent himself and assumed the consequences of such representation. Defendant had a fair opportunity to present any applicable evidence regarding his drug abuse, mental illness and developmental factors during the guilt and penalty phases, and Defendant is not permitted to present additional evidence post-judgment and sentencing due to his own failure to present such evidence at the appropriate time. Additionally, a competent defendant may waive presentation of mitigation evidence. *Hojan v. State*, 3 So. 3d 1204, 1211 (Fla. 2009). In light of the minimal amount of mitigation evidence presented by the defendant, the Court ordered a PSI. The Court was able to review the testimony and evidence presented, and the PSI, to determine what mitigating factors were established. The Court found as mitigation that the defendant suffers from an addiction to cocaine, and the sentencing order specifically notes the defendant's drug addiction and drug use at the time of the murders. Sentencing Transcript, pp. 22-23, attached hereto as Appendix I.

(Vol. III PCR. 332).

The trial court erred. The record refutes the notion that Mr. McKenzie waived mitigation and shows that Mr. McKenzie tried to present mitigation. While Mr. McKenzie may have waived counsel, this is not the same as a knowing, intelligent and voluntary waiver of mitigation that was seen in *Hojan*, cited by the trial court. In *Hojan*, the trial court, following Hojan's refusal to present mitigating evidence, "appointed special counsel to investigate and present mitigating evidence to assist the trial court in sentencing Hojan." *Hojan*, 3 So. 3d at 1216. Mr. McKenzie did not have either special counsel or an expert as allowed under *Muhammad.*

Mr. McKenzie did not waive anything but the counsel that violated his trust by failing to see him before waiving Mr. McKenzie's right to speedy trial. Whether someone lives or dies is a decision of the ultimate importance. While Mr. McKenzie's mental illness may have presented challenges to the capital system, the system gathered false, inaccurate and incomplete information. A decision of life or death should not be made in this manner. This Court should reverse.

II. MITIGATION THAT COULD HAVE BEEN PRESENTED HAD THE TRIAL COURT GRANTED AN EVIDENTIARY HEARING.

The trial court ruled on Claim II as follows:

> In ground two, Defendant claims that he was denied the effective assistance of counsel during the course of his representation, thus

> causing him to dismiss counsel. In this ground Defendant repeats the allegations raised in ground one, claiming counsel was ineffective for causing Defendant to represent himself, and because Defendant represented himself, he failed to conduct a complete mitigation investigation. Ground two simply details the mitigation that would be presented at an evidentiary hearing if granted, and based on the ruling on ground one, this ground will be denied.

(Vol. III PCR. 333). Claim II of Mr. McKenzie's postconviction motion presented a summary of the mitigating evidence that should have been presented during penalty phase. This evidence was:

MR. MCKENZIE'S MITIGATION

Mr. McKenzie has compelling mitigation. The jury and the trial court that sentenced Mr. McKenzie to death never heard this mitigation because it remained hidden. The reasons that this mitigation was hidden are discussed above. The nature of this mitigation is discussed here, although the full extent and nature of Mr. McKenzie's mitigation can only be understood through proper testimony at an evidentiary hearing.

Dr. Mark Cunningham evaluated Mr. McKenzie. Dr. Cunningham is a well-qualified expert in clinical and forensic psychology licensed to practice in 20 states, including Florida. (Vol. II PCR. 259). He is one of approximately 275 psychologists board certified in forensic psychology by the American Board of Forensic Psychology and one of approximately 1200 psychologists who is board certified in clinical psychology by the American Board of Clinical Psychology.

(Vol. II PCR. 259).

Dr. Cunningham has testified extensively regarding capital sentencing determinations in both state and federal courts. (Vol. II PCR. 259). Dr. Cunningham is also a recognized scholar and researcher in his field. He has contributed a number of peer-reviewed works to scholarly publications, journals, practice books and papers. (Vol. II PCR. 260). Dr. Cunningham has, and continues to, provide continuing education to other psychologists. (Vol. II PCR. 260).

Dr. Cunningham met with Mr. McKenzie at Union Correctional Institution. He conducted interviews and reviewed records and mitigation summaries, which Dr. Cunningham detailed in his report. He also reviewed scholarly perspectives and research that were contained in the scientific literature at the time of Mr. McKenzie's trial and thus available to defense counsel, a mitigation investigator, and/or mental experts. (Vol. II PCR. 261).

Dr. Cunningham detailed "Conceptual Considerations" in his report to show the analytical framework for his opinion:

> Moral culpability is a concept at the heart of mitigation. *Burger v. Kemp*, 483 U. S. 776 (1987), *citing Woodson v. North Carolina,* 428 U.S. 280 (1976); *see also, e.g., Coker v. Georgia*, 433 U.S. 584 (1977); *Lockett v. Ohio*, 438 U.S. 586 (1978); *California v. Brown*, 479 U. S. 538 (1987); *Franklin v. Lynaugh*, 487 U. S. 164 (1988); *Penry v. Lynaugh*, 492 US 302 (1989); *South Carolina v. Gathers*, 490 U. S. 805 (1989); *Payne v. Tennessee*, 501 U. S. 808 (1991); *Graham v. Collins*, 506 U.S. 461 (1993); *Penry v. Johnson*, 532 U. S.

782 (2001); *Atkins v. Virginia*, 536 U. S. 304 (2002); *Wiggins v. Smith*, 539 U. S. 510 (2003); *Roper v. Simmons*, 543 U. S. 551 (2005); *Abdul-Kabir v. Quarterman*, 550 U. S. 233 (2007). An understanding of the concept of moral culpability is critical to the jury's or court's consideration of the nexus between the mitigating factors presented to the jury and the capital offense. To explain, the concept of moral culpability acknowledges an elementary psychological reality: we do not all arrive at our choices out of equivalent raw material. It follows that the degree of "blameworthiness" of an individual for criminal or even murderous conduct may vary depending on what factors and experiences shaped, influenced, or compromised that choice. The relationship of developmental damage and other impairing factors to the exercise of choice, and subsequently to moral culpability at the heart of capital sentencing and mitigation. As the damage and impairing factors (e.g. neglect, abuse, psychological disorder, corruptive socialization, substance dependency/intoxication, etc.) increase, choice is exercised on an increasing slope, and moral culpability is correspondingly reduced.

The greater the damaging or impairing factors, the steeper the angle or slope on which the choices are made; and thus the lower the level of moral culpability. This concept of moral culpability is central to the rationale of *Wiggins*, *Atkins* and *Roper* – i.e. background factors, mental retardation and/or youthfulness all impact on the level of moral culpability of a capital defendant, and the associated death eligibility and deathworthiness of that defendant. The formative or limiting impact from any source of developmental damage or impairment is relevant in weighing of moral culpability. An appraisal of moral culpability involves an examination of the degree to which the background and circumstances of the defendant influenced, predisposed, or diminished the defendant's moral sensibilities and the exercise of volition or free will. Stated more plainly, how steep was the angle from which the choices were made?

The typical theory of the State at capital sentencing is that the defendant's criminal conduct, including the capital offense, is the result of the totally volitional, unfettered, free exercise of choice of the defendant arising solely from his malignantly evil heart. The equally typical and predictable argument by the State at capital sentencing is a focus on the depravity of the criminal offenses and/or

lack of remorse/conscience (e.g., cold, calculating, premeditated), thus providing a clinical characterization of that "evil heart." Consistent with this assertion of unfettered choice, and in the absence of defense testimony linking Mr. McKenzie's background to his moral development, self-control, decision-making, and criminal violence in the capital offense, the State argued at the Spencer hearing:

> I believe the strongest mitigator [sic] for the court to consider is obviously the cold, calculated, premeditated element of this crime, that the defendant was at the victims' residence for hours. He was there in a very calm situation. It wasn't in the midst of some sort of drug-induced party. There were no outside factors...And the events - his interactions with both victims - you know, before Mr. Peacock came home after he was there reflects absolutely no stressors on the defendant.

(Spencer Hearing, 10-12-07, page 9: 4-9, 15-18).

Further consistent with the State's theory of a malignantly evil heart, in argument at the Spencer hearing the State even framed potential mitigating factors as further evidence of the defendant's "coldness" and "premeditation." The State argued:

> We see other behavior which the Court may see as yielding to mitigation toward the defendant. Immediate cooperation with the police. He handed over the wallet to the first law enforcement he came upon on the victims'. But I think that also inures back to that cold - coldness, the heightened premeditation he had. It just really reflects more coolly on that there is no frenzied attempt to hide. He did proceed in a car chase across several counties, but once he's caught, that coldness reasserts itself, Your Honor, just like it did in the killing of these two victims for the car and for their money, that he would just confess, hand over the wallet. And it - I just think it really dovetails to the total facts that we saw in the victims' house that day.

(Spencer Hearing, 10-12-07, page 12: 3-18).

Evidence was not presented to the jury or the Court, either through a

> truly "comprehensive" PSI or expert mental health testimony, that would have demonstrated that prior maladaptive and capital tragic "choices" followed a myriad of malignant formative influences that he did not choose. Such evidence would have been consistent with and provided evidence to support the primary theory of the defense at capital sentencing.
>
> The theory of an informed defense at capital sentencing is typically that the defendant's choices in the capital offense were limited, shaped, and arose from the interaction of damaging and impairing bio-psycho-social factors and experiences (*see Haney*, 1995). Unfortunately, the defense did not present or explain the relevance of the damaging developmental experiences that impacted on Mr. McKenzie's development, his vulnerability to drug addiction, and/or the impact of these factors on his mental state at the time of the offense. Thus the jury and Court did not hear testimony that would allow them to make an informed test of the role of unfettered volition as opposed to the influence of bio-psycho-social factors in the capital conduct.

(Vol. II PCR. 261-63).

Dr. Cunningham was prepared to testify at an evidentiary hearing to the extensive mitigation that the jury and the courts never heard. In his report, Dr. Cunningham identified "26 distinct toxic formative influences and compromising actors." (Vol. II PCR. 269). Each of these factors supplemented and elaborated "on the risk factors for delinquency and criminal violence detailed by the 1995 and 2000 reports of the U.S. Department of Justice." (Vol. II PCR. 269). Dr. Cunningham grouped these factors as follows:

Transgenerational

1. Trans-generational family dysfunction and distress
2. Hereditary predisposition to psychological disorder and personality

pathology

3. Hereditary predisposition for alcohol and drug abuse/dependence

Neuro-developmental

4. Fetal cigarette exposure
5. Fetal alcohol exposure
6. Pregnancy and birth complications
7. Childhood symptoms consistent with Attention Deficit Hyperactivity Disorder
8. Inhalant abuse
9. Alcohol and drug abuse
10. Chronic stress in childhood
11. Hepatitis C and HIV status

Parenting and Family

12. Mother in mid-teens at parenting onset
13. Physical and psychological abuse
14. Functional abandonment by father
15. Physical and emotional neglect post-divorce
16. Perverse family sexuality and probable family-context sexual abuse
17. Observed family violence
18. Mother's alcohol abuse
19. Corruptive and alcoholic stepfather figures
20. Corruptive influence of siblings

Community

21. Traumatic sexual exposures and abuse
22. Availability of alcohol and illicit drugs

Disturbed Trajectory

23. Childhood onset alcohol and drug abuse
24. Substance-related offending and incarceration in early adulthood
25. Traumatic experiences with incarceration in late adolescence/early adulthood
26. Cocaine-induced psychological decompensation and extended sleep deprivation at the time of the offense, in a temporal context of psychotic symptoms

Dr. Cunningham's Findings and Support of Mitigating Factors

Transgenerational

1. Trans-generational family dysfunction and distress

Dr. Cunningham obtained a thorough history of Mr. McKenzie's family system. (Vol. II PCR. 271). Dr. Cunningham found that Mr. McKenzie's family system was characterized by marked dysfunctions that extended for generations. (Vol. II PCR. 271).

Mr. McKenzie's maternal grandfather was an alcoholic who was physically abusive of his wife and his younger daughter. (Vol. II PCR. 272). He was violent and reactive, especially when drinking. This led to a period of incarceration following a knife fight. Mr. McKenzie's maternal grandmother remained married to the grandfather for 14-15 years the first time and 2-3 years a second time. (Vol. II PCR. 272).

Mr. McKenzie's mother, Pamela Ann Rowell McKenzie Littlefield, was the oldest of three children and reared by her paternal grandparents until her early teens. (Vol. II PCR. 272). As Dr. Cunningham described:

> Pamela married in 9th grade, at age 15, to Robert "Bob" McKenzie (dob 12-15-39) who was then age 19. She reported that this early marriage was precipitated by her father (JP) following and "stalking" her when she was with Bob, and making unfounded "dirty" remarks regarding his suspicions of their activities. She gave birth to Bobby (dob 11-29-60) when she was age 16, twins Gary (dob 10-19-61) and Nona (dob 10-19-61) when she was age 17, and Norman "Blake" (dob

> 07-08-64) when she was 20. Pamela thus had had three children by age 17 and, at Blake's birth, was barely 20 and had four children under the age of four. It is not a strained inference that her parenting resources were overwhelmed. Blake's sister, Nona, reported that her mother had poor sexual boundaries. Siblings Gary and Pamela both described Pamela's post-divorce boyfriends/stepfather figures as alcoholic and sexually abusive. Pamela acknowledged periods of heavy drinking.

(Vol. II PCR. 272).

Other members of Mr. McKenzie's maternal-side family experienced problems with alcohol, violence and drug addiction. (Vol. II PCR. 273). Also, there were a number of instances of out-of-wedlock births. (Vol. II PCR. 273).

Mr. McKenzie's paternal-side family was deeply dysfunctional and distressed. (Vol. II PCR. 273). His paternal grandfather fathered numerous children from numerous extramarital affairs. (Vol. II PCR. 273). The grandfather was physically abusive to Mr. McKenzie's father, Robert "Bob" Lee McKenzie. (Vol. II PCR. 273).

Mr. McKenzie's father left school in the sixth grade and left home at age 12. Mr. McKenzie's father did not see his parents again until he was 20. Mr. McKenzie's stepmother reported that Mr. McKenzie's father "was hooked on vodka" in his teens and "had to be de-toxed in a rubber-room." (Vol. II PCR. 273).

Mr. McKenzie's parents had 4 children. Bobby was the oldest, followed by twins Gary and Nona, and the Appellant, Norman Blake McKenzie, the youngest. (Vol. II PCR. 274). Mr. McKenzie also has a stepsister named Catherine. Mr.

McKenzie and his other siblings described Bobby as being physically abusive when they were children. (Vol. II PCR. 274). Nona and Catherine also reported that he was sexually abusive of his other siblings. (Vol. II PCR. 274). Bobby abused marijuana and Quaaludes. (Vol. II PCR. 274). Bobby went on to serve 17 years in prison for a charge of accessory to murder. (Vol. II PCR. 274). In and out of prison Bobby injected opiate-based drugs. (Vol. II PCR. 274). He was killed in a single-vehicle motorcycle accident which the family believes was the result of foul play. (Vol. II PCR. 274).

Mr. McKenzie's brother Gary was "physically abused by his father" and sexually abused by stepfather figures and other men. (Vol. II PCR. 274). He has a history of drug experimentation and "more chronic marijuana abuse." (Vol. II PCR. 274). As a teenager Gary had "a streaking problem." (Vol. II PCR. 274). He also has a criminal record for assault and spent 20 months in county jail. (Vol. II PCR. 274).

Mr. McKenzie's sister Nona was "sexually abused by her father, stepfather figures, brothers and community members." (Vol. II PCR. 274). At 17, Nona became pregnant. (Vol. II PCR. 274). Nona had two children out-of-wedlock. (Vol. II PCR. 274). She has a history or alcohol abuse, drug abuse and psychiatric hospitalizations. (Vol. II PCR. 274). Step-sister Catherine had a long history of substance abuse from her early teens and was opiate dependent to 2009

when she was incarcerated for drug offenses. (Vol. II PCR. 274). She also informed Dr. Cunningham that she was "jailed for 98 days in 2001 related to a 'crazy confrontation' that culminated in gunfire and a house fire and" for four days related to a traffic stop. (Vol. II PCR. 274).

In his report, Dr. Cunningham explained the "implications of trans-generational family dysfunction and distress."

> Implications of trans-generational family dysfunction and distress: Family history is critically important to character and background through several fundamental processes. First, some psychological disorders, personality characteristics, behavior patterns, and social vulnerabilities are genetically transmitted. Thus, independent of whether Blake had interaction with or knowledge of these individuals in his family system, inherited predispositions, personality aberrations, and behavioral tendencies placed his life trajectory and choices at greater risk.
>
> Second, many characteristics and behaviors are transmitted across generations by "family scripts." Family scripts are broad outlines of behavior and life sequence that are conveyed both verbally and more importantly by example in the lives of parents, grandparents, siblings, and extended family. School dropout, early pregnancy, early marriage, criminal activity, domestic violence, parental abandonment, substance abuse, and/or many other maladaptive behaviors may be extensively represented in a family system from one generation to the next.
>
> Third, modeling of specific behaviors or coping responses is also an important aspect of family influence - for good or ill. In Blake's childhood, adverse parental modeling included alcoholism, family violence, callousness, parental emotional neglect, parental failure to protect and functional abandonment, dysfunctional relationships, and other deviant processes.
>
> Fourth, maladaptive behaviors, including criminal activity and

violence, may result from "sequential emotional damage." In other words, individuals who have been significantly emotionally damaged in childhood come into adulthood with limited emotional resources, and as a result may not parent their own children humanely or effectively. Consistent with this observation, Green (1988) reported that "the childhood history and background of abusing parents include a high frequency of physical abuse and neglect, scapegoating, maternal deprivation, and exploitation"(843). The children of these neglectful or abusive parents are then, in turn, emotionally damaged themselves and thus at greater risk for broad adverse adult outcomes including child abuse and neglect, substance dependence, criminal activity, and violence. Sequential generational neglect characterized by deficient parental care and attachment is particularly damaging, as it results in fundamental damage to the foundations of personality and interpersonal functioning. The problematic effects of early abandonment, disrupted primary parental attachment, or other disruptions may not be evident until adolescence or early adulthood.

Blake's own life has reflected this generational legacy. There was historical information that could have demonstrated that Blake was the product of a disturbed family system with associated genetic predispositions, pathological modeling, and sequential damage. This generational history was critically important for a capital sentencing jury and Court to have as they examined the formative influences in Blake's history, his character, and his psychological limitations. This history provides vital insights into the origin and nature of his psychological vulnerabilities. Equally important in the weighing of his moral culpability, Blake had no choice regarding the family system that was fundamental to his development. Blake's participation in the charged offenses is thus not a singularly individual story, but instead occurs within a multigenerational context. While this does not obviate individual responsibility, the above multigenerational context does illustrate that Blake did not arrive at this current life situation unassisted by pathological family influences, injury, norms, and modeling.

(Vol. II PCR. 274-75).

2. Hereditary predisposition to psychological disorder and personality pathology

Dr. Cunningham found personality pathology in Mr. McKenzie's family, as detailed above. (Vol. II PCR. 275). Dr. Cunningham reported that, "Blake's maternal great-aunt appears to have suffered from schizophrenia (as evidenced by chronic delusions and hallucinations). (Vol. II PCR. 276). His sister, Nona Sherrie, has had multiple psychiatric hospitalizations with diagnoses of bipolar Disorder, Depression, and "schizo." (Vol. II PCR. 276).

Dr. Cunningham explained "the implications of the hereditary predisposition to psychological disorder and personality pathology" in his report. (Vol. II PCR. 276). "Psychological disorders and maladaptive personality traits have a significant genetic component." (Vol. II PCR. 276). This includes the disorders that are evident in Mr. McKenzie's family system. (Vol. II PCR. 276). For example, the DSM-IV-TR describes a hereditary predisposition for schizophrenia:

> The first degree biological relatives of individuals with Schizophrenia have a risk of Schizophrenia that is about 10 times greater than that of the general population. Some relatives of individuals with Schizophrenia may also have an increased risk for a group of mental disorders, termed schizophrenia spectrum. Although the exact boundaries of the spectrum remain unclear, family and adoption studies suggest that it probably includes Schizoaffective Disorder and Schizotypal Personality Disorder. Other psychotic disorders and Paranoid, Schizoid, and Avoidant Personality Disorders may belong to the schizophrenia spectrum as well, but the evidence is more limited.

(DSM-IV-TR at 309; *cited* at (Vol. II PCR. 276)). Dr. Cunningham explained that even if someone does inherit a full blown diagnosis of Schizophrenia, an individual

may inherit other mental illnesses on the Schizophrenia Spectrum or some of the characteristics of the illness. (Vol. II PCR. 276). The existence of these disorders in Mr. McKenzie's family is important to understanding Mr. McKenzie's "vulnerability to psychotic disturbance (e.g., paranoia, delusions, hallucinations, disorganized behavior) when heavily abusing cocaine such as proximate to the offense." (Vol. II PCR. 276).

A significant risk factor for mood disorders is also hereditary. (Vol. II PCR. 276). Bipolar Disorder is one such mood disorder and one which Mr. McKenzie's sister Nona has been diagnosed and treated. (Vol. II PCR. 276). Dr. Cunningham found that Mr. McKenzie exhibited symptoms on the bipolar and mood disorder spectrum as seen by Mr. McKenzie's "impulsivity from childhood, vulnerability to substance dependence, and grandiosity regarding his occupational capabilities, prison persona, and self-representation abilities." (Vol. II PCR. 276). Dr. Cunningham concluded:

> Heredity is also a significant risk factor in mood disorders, including Bipolar Disorder, for which Blake's sister Nona Sherrie has been diagnosed and treated. To illustrate DSM-IV-TR (2000) describes that first degree relatives of individuals with Bipolar Disorder have increased rates of various forms of Bipolar Disorder, as well as Major Depressive Disorder. Klein, Depue, and Slater (1985) found that mood disorders occur 7.6 times as often in children with at least one affectively ill parent (38%) compared to those without (5.0%). Akiskal et al. (1985) in a prospective investigation of the offspring and younger siblings of patients with Bipolar Disorder found that 57% of these close family relatives were diagnosed with a disorder on the Bipolar spectrum within four years. Symptoms in Blake on this

> Bipolar and mood disorder spectrum include his impulsivity from childhood, vulnerability to substance dependence, and grandiosity regarding his occupational capabilities, prison persona, and self-representation abilities.

(Vol. II PCR. 277). This is highly mitigating because "the predisposition to traits of poor empathy and behavioral misconduct arising from hereditary and childhood experience were important perspectives in explaining" Mr. McKenzie's disturbed personality traits and misconduct. (Vol. II PCR. 277). Mr. McKenzie's predisposition to these factors "was not willfully chosen" rather, "it is the net result of predisposing influences and damaging developmental experience." (Vol. II PCR. 277).

3. Hereditary predisposition for alcohol and drug abuse/dependence

Dr. Cunningham found that Mr. McKenzie's genetic family had an extensive history of alcohol and drug abuse. (Vol. II PCR. 277). This had significant implications for Mr. McKenzie's risk of substance abuse and dependence. (Vol. II PCR. 277). Dr. Cunningham explained:

> Drug dependence is not simply "bad conduct." Rather, the drug dependent individual often has inherited a metabolic preference for the effects of such substances that fundamentally alter their experience of "choice." Blake's genetic predisposition to alcohol and drug dependence, including cocaine abuse and dependence, has a specific nexus to his capital conduct - as this occurred in the midst of a period of very heavy cocaine abuse and was motivated by his seeking to perpetuate this abuse (i.e., in the service of his addiction).

(Vol. II PCR. 278).

Neuro-developmental

4. Fetal cigarette exposure

Mr. McKenzie's mother smoked cigarettes while pregnant with him. (Vol. II PCR. 278). *In utero* nicotine exposure causes "deficits in growth and neural development, having long-term effects of brain function, cognition, and behavior." (Vol. II PCR. 278). Fetal Tobacco Exposure "is associated with higher risk of psychiatric problems . . . including substance abuse." (Vol. II PCR. 278).

5. Fetal alcohol exposure

Mr. McKenzie's mother drank alcohol while pregnant with Mr. McKenzie. (Vol. II PCR. 278). Dr. Cunningham explained fetal alcohol exposure causes brain dysfunction and deficits such as verbal learning, visual-spatial learning, attention, executive functions, abandoning ineffective strategies, distractibility and impulsivity. (Vol. II PCR. 278-79). Dr. Cunningham found that Mr. McKenzie displayed attention-related problems (ADHD) with associated impulsivity symptoms" and that "[d]efecits in executive functioning associated with prenatal alcohol exposure have significant implications for Blake's judgment and decision-making, particularly when under stress or under the influence of substances." (Vol. II PCR. 279).

6. Pregnancy and birth complications

In addition to negative effects caused by Mr. McKenzie's mother's smoking

and drinking during pregnancy, she also had the additional stress of being separated from Mr. McKenzie's father for several months while pregnant. (Vol. II PCR. 279). Mr. McKenzie even became stuck in the birth canal during birth and forceps were required to remove him. (Vol. II PCR. 279). Several other doctors were called in because this was an emergency. (Vol. II PCR. 279). Supported by a U.S. Department of Justice study, Dr. Cunningham reported pregnancy and birth complications are risk factors for criminality and criminal violence. (Vol. II PCR. 279). The complications to Mr. McKenzie's birth also lead ADHD, "learning problems, conduct disturbance -- all precursors for an increased risk of delinquency and criminality in adolescence and adulthood." (Vol. II PCR. 280).

7. Childhood symptoms consistent with Attention Deficit Hyperactivity Disorder

Mr. McKenzie's mother and step-mother described Mr. McKenzie as "hyper." Mr. McKenzie's step-sister also found that Mr. McKenzie was "hyper, distractible and impulsive. (Vol. II PCR. 280). She described Mr. McKenzie as "off the chain crazy as a kid" and recounted how Mr. McKenzie engaged in risk taking behavior as a kid. (Vol. II PCR. 280).

Dr. Cunningham reported that the implications of ADHD and/or deficient inhibitory controls "constitute a significant risk for problematic outcomes in adolescence and in adulthood." (Vol. II PCR. 280). If untreated with sustained counseling or psychotropic medication, as was the case with Mr. McKenzie,

"ADHD is a broad risk factor for disturbed peer relationships, academic failure, juvenile delinquency, alcohol and drug abuse, and adult criminal activity." (Vol. II PCR. 280). In particular relation to Mr. McKenzie, Dr. Cunningham found:

> The presence of historical impulsivity in Blake's behavior was particularly important to inform the jury and Court of because of its relevance to his conduct in the capital offense. To explain, "spontaneous" and "impulsive" are overlapping, but not synonymous terms/concepts. Rather, there are two types of impulsivity. The first type is *reactive impulsivity*. Reactive impulsivity involves an immediate reaction without pause or reflection: you are shoved and you shove the other person back. It is spontaneous in its immediacy. Reactive impulsivity is most often observed in pre-school age children, persons who are intoxicated, persons in a crisis or emergency situation, and persons who are demented. Elements of reactive impulsivity may be evident in Blake's murderous conduct in the capital offenses and its aftermath, as he is force to improvise in killing the victims, including having to go back and forth between them; leaves his car at the scene; drives back and forth between Florida and Georgia; and fully implicates himself in statements to law enforcement.
>
> The second type of impulsivity is judgment impulsivity. Judgment impulsivity is characterized by the press of internal forces with inadequate consideration for the consequences or alternative options. For example, you meet an attractive person today and spend the next two days planning your wedding and life together. On the third day you marry. This represents a profoundly impulsive action, even though two days were spent in planning. Judgment impulsivity is characteristic of children and adolescents; persons with ADHD; and persons with substance dependence -- all conditions affecting the decision-making of Blake. Thus even if Blake had premeditated the murder of the victims prior to arriving at their residence, the offenses reflect a high degree of judgment impulsivity. To illustrate, the offense occurred shortly after the exit of a neighbor who could place Blake at the scene. Blake left his car at the scene. Blake took the victim's car and has identification of the victims in his possession when he was apprehended. All of these behaviors point to poor

> decision-making and an associated high likelihood of apprehension. In this sense, it appears that his "forethought" extended no further than the next few hours.
>
> The jury and the Court did not have the benefit of expert testimony regarding Blake's highly impulsive history -- or the two types of impulsivity and their relevance to his offense conduct. Expert testimony could have specified that impulsivity is a fundamental aspect of how Blake's ADHD symptoms, inhalant abuse, childhood trauma, and drug dependence impacted on his decision-making, including decisions to engage in criminal activity and the capital offense. Importantly, this testimony could have clarified that impulsivity is not excluded as an explanation if some planning preceded the murders.

(Vol. II PCR. 281-82).

8. Inhalant abuse

Mr. McKenzie informed Dr. Cunningham about his extensive inhalant abuse as an adolescent. This was also corroborated by family members. (Vol. II PCR. 282). Inhalant abuse causes many "[l]ong-term neurological, intellectual, and psychiatric" problems "may result from inhalation of volatile solvents." (Vol. II PCR. 282). This would have affected Mr. McKenzie's development and had long lasting effects. It also can lead to intravenous drug abuse, as seen with Mr. McKenzie's drug abuse history. (Vol. II PCR. 283).

9. Alcohol and drug abuse

Dr. Cunningham detailed Mr. McKenzie's extensive drug and alcohol abuse and its effects on Mr. McKenzie's life and conduct later in the report. (Vol. II PCR. 283). Confirmed by numerous sources, Mr. McKenzie abused a number of

drugs and marijuana in addition to the above mentioned inhalants. (Vol. II PCR. 283). As a factor in Mr. McKenzie's neuro-development, Dr. Cunningham described the implications of developmental alcohol and drug abuse:

> Implications of alcohol and drug abuse: Alcohol and drug abuse, independent and apart from the above described risks associated with inhalant abuse, have deleterious implications for brain development, as well as sensitizing impacts on neurons and brain metabolism that increase the likelihood of substance dependency in adulthood.

(Vol. II PCR. 283).

10. Chronic stress in childhood

Also detailed in the report, Dr. Cunningham found that Mr. McKenzie's "middle childhood and adolescence were impacted by chronic stress, including physical abuse, observed domestic violence, maternal alcohol abuse, sexual abuse and perverse family sexuality, emotional and supervisory neglect, functional paternal abandonment, and other ongoing stressors." (Vol. II PCR. 283). Dr. Cunningham explained "that trauma can activate various systems in the brain that actually change neuron response and cognitive pathways." (Vol. II PCR. 283). "[C]hronic stress in childhood does more than create bad memories. Rather it alters the reactions patterns (i.e., psycho-physiologic effects), the chemistry (i.e., neuro-hormonal effects), and the architecture (neuro-anatomical effects) of the brain (van der Kolk, 1996). Such changes may increase the likelihood of aggressive reactivity, particularly in the face of toxic levels of drug abuse." (Vol. II

PCR. 283).

11. Hepatitis C and HIV status

Mr. McKenzie suffers from a number of medical ailments that has led at times to a sense of fatalism and substance abuse used as coping mechanism. (Vol. II PCR. 284).

Parenting and Family

12. Mother in mid-teens at parenting onset

Mr. McKenzie's mother was a teenage mother. (Vol. II PCR. 284). There are "a number of developmental risks associated with having a teenage mother . . . realized in Mr. McKenzie's childhood and adult outcomes." Children of teen mothers are: Less likely to grow up in a home with a father; twice as likely to physically abuse, abandoned or neglected; do worse in school; experience academic difficulties and a lack of achievement and have a higher incidence of incarcerations. (Vol. II PCR. 284-285).

13. Physical and psychological abuse

Dr. Cunningham obtained accounts of the child abuse suffered by Mr. McKenzie and his siblings through interviews:

> Blake reported that his father "gave whippings that would send someone to prison today." He described that his father would whip the children with a leather belt on their bare buttocks. If the child moved, the blows might strike the lower back or legs. These whipping left welts and bruises. Blake described that the welts

sometimes oozed and bled. He described the frequency of these beatings as "all the time," explaining: "We were snot-nosed bastards who were always doing something wrong.

Gary, Blake's older brother, characterized that their father "beat the living shit out of us." He described that his father would beat the children with a belt – directing these blows to "wherever they landed." Gary reported that these beatings would leave bloody blisters and open wounds. Gary reported that his father beat him in this fashion 1-2 times weekly. He recalled that Blake was beaten less often. Gary reported that if none of the children would admit the misconduct, their father would beat them all until someone confessed. He recalled: "my Dad went nuts – like a shark attack, in a frenzy." Gary reported that on these occasions, their father would continue to beat Gary and Nona Sherrie after he had stopped beating Bobby and Blake. Gary reported that their mother would attempt to intervene to stop their father during these beatings, but he would just push her away.

Nona Sherrie, Blake's older sister, also recalled her father's abuse of the children. She recalled that their father mostly beat them with a folded leather belt, but he would "grab whatever when angry" – including sticks and table legs. She described that these beatings left welts, bruises, and cuts. Nona Sherrie reported that she did not wear dresses or short-sleeved shirts as a child because she always had marks on her from being beaten. She recalled that these beatings were daily – "even Christmas." Nona Sherrie reported that their mother would instigate these beatings at times by "telling lies" on the kids. These reports might result in their father dragging them from being asleep in bed to beat them. Nona Sherrie also described that if the misconduct could not be immediately attributed to a particular child, their father would beat all of the children until the guilty party confessed. Childhood neighbors Mark Chaney and David Trainer also described being able to hear the children as they were being beaten inside the house. They characterized Bob McKenzie as mean and scary.

Nona Sherrie reported that when their father was psychologically abusive of the children as well. She described that on occasion, he would make the children beat each other. She recalled that she once peed herself when this demand was made of her and she was unable to

make herself hit her brothers. Nona Sherrie reported that their father would terrorize the children by having them dig their own graves - threatening to strip them naked and torture them until they died, and telling them that no one would find them or even know that they had been born. Carol Landrua, former girlfriend of Blake, described in a letter dated 05-16-04 to DOC Counselor Ms. Snow, having learned of this history of the children being made to dig their own graves. She described that he also punished the children with stress positions, such as having to hold encyclopedia volumes with their arms outstretched - then beating the child when their arms began to sag. Gary recalled that his father's reactions were far out of proportion to the offense. Gary recalled that when he was only six years old, his father kicked him across the room for dropping an empty plate.

Gary recalled that when Blake was age 14, their father beat Blake with a baseball bat over drugs. Blake described that after his father picked him up at the police station at age 15, where Blake had been taken after being apprehended in a vehicle smoking marijuana, his father "punched the cry out of me."

Nona Sherrie reported that their mother, Pamela, was abusive in her discipline as well. She recalled their mother whipped them with a belt, coat-hanger, or shoe - "whatever she could get her hands on." Blake reported to David Newsome, Public Defender Investigator, on 05-29-07 that "both his mother and father beat him severely." Gary, older brother, recalled that their mother whipped them with a switch, leaving marks on them, but described the whippings the children received from her as being "nothing like Dad's."

Nona Sherrie reported that her mother and Chuck would lock the children in closets for days. Partial corroboration of this report was provided by peers of Bobby, Mark Chaney and David Trainer, who described that they would bring food and water to the children when they were locked in their bedroom - sometimes for days. Nona Sherrie reported that Chuck terrorized her via her pets as well. She described that he put her favorite cat in the trunk of a car during the summer and she had to listen to it die.

Catherine, stepsister, reported that her older stepbrother, Bobby, was also physically abusive of the children. She recalled that when Bob

> (stepfather) and Olivia (her mother) went to work, Bobby would boss and intimidate his siblings. He would make them do his chores and "knock the crap out of them if they didn't." Catherine recalled that Bobby referred to the younger children as his "slaves."

(Vol. II PCR. 285-286).

Dr. Cunningham discussed the implications of physical and emotional abuse in his report which were well-known and supported by scientific literature. *See* (Vol. II PCR. 286-88). According to the American Psychological Association Presidential Task Force on Violence and the Family:

> [A]bused or neglected children may show a variety of initial and long-term psychological, emotional, physical, and cognitive effects including low self esteem, depression, anger, exaggerated fears, suicidal feelings, poor concentration, eating disorders, excessive compliance, regressive behavior, health problems, withdrawal, poor peer relations, acting out, anxiety disorders, sleep disturbance, lack of trust, secretive behavior, excessively rebellious behavior, drug or alcohol problems. The task force further identified the following broad conclusions:
>
> 1. Child abuse and neglect can seriously affect a person's physical and intellectual development and can lead to difficulty in self control.
> 2. Abused and maltreated children are more likely than non-abused children to be arrested for delinquency, adult criminal behavior, and violent criminal behavior.
> 3. When abused children are not given appropriate treatment for the effects of the abuse, the lifetime cost to society for an abused child is very high.

(Vol. II PCR. 287).

Dr. Cunningham explained how the physical and mental abuse that Mr. McKenzie experienced in childhood led adult criminal activity:

> Childhood maltreatment disrupts not just the subjective experience of childhood, but also the trajectory of development and the psychological structures of middle and later adulthood. The fundamental alterations in the way the child perceives himself, others, and the world around him, as well as potential trauma-based adaptations in brain functioning, likely account for the sustained experience or resurgence of PTSD symptoms, or their character-engrained legacy, into adulthood (see Schwarz & Perry, 1994).
>
> The maltreatment the child experiences becomes pathologically engrained into the developing child's personality structure, resulting in pervasively maladaptive and even antisocial functioning. The most serious expressions of trauma in childhood may be delayed. This has been analogized as being like rheumatic fever, where the child initially appears to have recovered, but heart damage becomes apparent many years later. In the same way, grave emotional damage may be done to a developing psyche and value system, even though the expression of this damage may not be evident for many years (see Terr, 1991). Trauma-induced influences on development can extend well beyond childhood, resulting in long-term developmental disturbances and undesirable changes in life trajectory (life direction and course) and eventually coalescing into personality disorders in adulthood. These conceptualizations give some understanding to Blake's life trajectory.

(Vol. II PCR. 286-87).

14. Functional abandonment by father

Mr. McKenzie's father functionally abandoned Mr. McKenzie and his siblings for a period after the divorce. While Mr. McKenzie's father's relationship was damaging "in what it was, it was also damaging in what it was not." (Vol. II PCR. 288). This affected Mr. McKenzie's "capacity to value, care, and respond benevolently to others . . . was stunted." (Vol. II PCR. 289). Dr. Cunningham found that "[t]his conceptualization has a direct nexus to the capital offenses" (Vol.

II PCR. 289).

15. Physical and emotional neglect post-divorce

Mr. McKenzie and his siblings experienced physical and emotional neglect which was intensified after their parents' divorce. (Vol. II PCR. 289). There were times when the children did not have food in the house and they would have to borrow food from neighbors or shoplift to make a communal meal. (Vol. II PCR. 289). Sometimes the children would eat from trashcans. (Vol. II PCR. 289). The McKenzie children were thin and hungry. (Vol. II PCR. 289).

There was inadequate supervision for the children "and [the] kids fell through the cracks." (Vol. II PCR. 289). Some weekends during this period Mr. McKenzie would not see an adult from Friday night until Sunday. (Vol. II PCR. 289). Often there was no adult present during weeknights. (Vol. II PCR. 289). Mr. McKenzie recalled for Dr. Cunningham that neighbors would complain to Family and Children's Services that the children were without supervision. (Vol. II PCR. 289). The children would rehearse escape routes just in case FCS was knocking on the door. (Vol. II PCR. 289).

Dr. Cunningham found many adverse implications to the neglect Mr. McKenzie suffered. "[N]eglect has been identified as more psychologically and developmentally damaging than physical abuse." (Vol. II PCR. 289). A "lack of parental discipline contributes of parental discipline contributes to aggressiveness

and predisposes to violence in the community." (Vol. II PCR. 290). Mr. McKenzie was certainly denied the parental care needed to develop into a law abiding adult. "Children need positive order and external structures to develop internal structures and capacity for self-guidance. The chaos and abusive discipline of Blake's experience gave little opportunity for the internalization of family order and structure." (Vol. II PCR. 290).

Mr. McKenzie also "has no well-bonded relationship to a constructive father figure. This vacuum was aggravated by the inadequacy of any extended family or community support network. The very limited model of manhood that Blake had from his father was one of callousness and explosive violence." (Vol. II PCR. 291).

16. Perverse family sexuality and probable family-context sexual abuse

Dr. Cunningham found a great deal of sexual abuse in Mr. McKenzie's family. (Vol. II PCR. 291). Mr. McKenzie's father molested a number of the young girls in the family, including Mr. McKenzie's sister, stepsister and cousins and exhibited a broad pedophilic pattern. (Vol. II PCR. 291-92). Mr. McKenzie informed Dr. Cunningham that "he recalled giving his father backrubs as a child, but denied that this was accompanied by any sexual activity." (Vol. II PCR. 292). Dr. Cunningham, however, found that Mr. McKenzie admitted to a public defender investigator "that he had been sexually abused by his 'biological father and his

mother's boyfriend." (Vol. II PCR. 292).

Mr. McKenzie's mother became involved with a man named Chuck Higgins. (Vol. II PCR. 292). Very shortly after this, Chuck Higgins began molesting Mr. McKenzie's twin brother and sister. The children complained to their mother who refused to believe the children and accused them of lying. (Vol. II PCR. 292). When Gary complained about Chuck's molestation Chuck reversed the allegation and accused Gary of molesting one of Chuck's children. (Vol. II PCR. 292). Mr. McKenzie's mother "believed Chuck rather than Gary and whipped Gary in punishment." (Vol. II PCR. 292). Mr. McKenzie's mother also did not believe Nona when she reported Chuck's sexual abuse. (Vol. II PCR. 292). One time, when Mr. McKenzie was approximately 9 years old, Chuck came in to a bed that Mr. McKenzie was asleep and molested Nona. (Vol. II PCR. 292). When Nona complained to their mother about the molestation, the mother asked Mr. McKenzie if Chuck had attempted to take Nona from Mr. McKenzie's bed. (Vol. II PCR. 292). Mr. McKenzie did not confirm this for fear of hurting his mother.

The twins were also molested by the next man that Mr. McKenzie's mother brought into the home, J.D. King. (Vol. II PCR. 293). As reported by Nona, J.D. King "made repeated sexual advances" toward Nona. (Vol. II PCR. 293). In the final instance, Mr. McKenzie's mother pretended to pass out drunk to see if J.D. King attempted to rape Nona. (Vol. II PCR. 293). When J.D. King attempted to

rape Nona, Mr. McKenzie's mother confronted him and put him out of the house. (Vol. II PCR. 293). J.D. King did not stay out of the house very long and reconciled with Mr. McKenzie's mother after Nona went to live with her father. Mr. McKenzie's mother's "rationale was that since Nona Sherrie was no longer in the home, there was no risk to JD being in the household. The implications for their relationship of his being a child molester and/or the gravity of the boundary violation . . . do not appear to impact on Pamela, even to date." (Vol. II PCR. 293).

Dr. Cunningham detailed many other sexual abuses, sexual promiscuity and infidelities involving Mr. McKenzie's family and peers of his older brother Bobby. (Vol. II PCR. 294-95). This certainly was not a healthy environment for Mr. McKenzie to grow up. Dr. Cunningham explained the implications of sexual abuse:

> Traumatic sexual exposures may take a number of forms. These include exposure to sexual interactions, perverse family atmosphere, observed sexual abuse, premature sexualization, and direct sexual abuse. All of these traumatic sexual exposures occurred in Blake's childhood (see also the discussion of his sexual abuse by a band teacher in a subsequent section).
>
> The impacts of sexual trauma in childhood have been the focus of much scholarship. Finkelhor and Brown (1985) in a seminal article identified four broad traumatic impacts of being sexually abused or sexually traumatized as a child. Traumatic sexualization may occur as the child's sexuality is inappropriately shaped by the abuse experience. Being sexually abused represents a profound betrayal as someone whom the child was dependent on or vulnerable to has caused the child harm. This betrayal may subsequently be associated with relationship distrust, feeling unlovable, interpersonal

dependency, and retaliatory aggression. The child experiences a marked sense of powerlessness in the face of sexual abuse - as the child's will and sense of control are overwhelmed. This may result in continuing feelings of incompetence, depression, anxiety, and adult victimization or predatory domination. The sexually abused child may experience a significant sense of stigmatization as the feelings of "badness," shame, and guilt associated with the sexual abuse become incorporated into the child's self image. This can result in low self-esteem, anticipation of rejection, poor relationship choices, or promiscuity. These four traumagenic dynamics of sexual abuse - traumatic sexualization, betrayal, powerlessness, and stigmatization - were subsequently the conceptual basis for an amicus curiae brief filed with the U.S. Supreme Court in *Maryland v Craig* (1989) by the American Psychological Association.

In their research, Finkelhor and Brown found that the psychological trauma of associated with sexual abuse is greater with male perpetrators, father figures, and abuse that involves penetration. Blake's siblings describe sexual abuse reflecting all three of these aggravating features, and by strong inference they apply to Blake as well. A history of childhood sexual victimization appears to be associated with equal levels of later psychological dysfunction in both male and female clinical subjects (Briere et al., 1988). These psychological dysfunctions include dissociation, anxiety, depression, anger, sleep disturbance, and post sexual abuse trauma. Interestingly, males displayed as much psychological disturbance as females though reporting less extensive and less extended abuse. This suggests one of two hypothesis: (1) There is an equivalent impact of sexual abuse for males or females regardless of any differences in its severity or duration between the sexes, (2) sexual abuse is more traumatic for males since lower male abuse levels were associated with symptoms that were equal to that of more severely abused females.

A number of factors may negatively affect the recovery of males from sexual abuse. These include reluctance to seek treatment, minimizing the experience of victimization, difficulty accepting shame and guilt, exaggerated efforts to reassert masculinity, difficulties with male intimacy, confusion about sexual identity, power/control behavior patterns, externalization of feelings, vulnerability to compulsive behaviors, greater difficulty in adjusting to stress, and difficulty in

> expressing and communicating affect (Struve, 1990; Urquiza & Keating, 1990).
>
> Urquiza and Capra (1990) described that sexual abuse creates unique disclosure problems for male victims. In other words, males tend not to disclose their complaint about the sexual abuse experiences as readily as do females. The authors note that males are socialized with a male ethic of self-reliance that inhibits disclosure of victimization. Additionally, disclosure may result in a loss or curtailment of the boy's greater independence and freedom. Many men never disclose their sexual abuse or do so only decades later.
>
> Urquiza and Capra described initial effects on males following sexual abuse as most commonly involving behavioral disturbances including aggression, delinquency, and non-compliance. Other problematic initial effects may include emotional distress; displays of guilt, shame, negative self-concept; psychosomatic symptoms; confusion regarding sexual identify and sexual preference; problematic sexual behaviors; and vulnerability to juvenile sexual offenses. Long-term effects of sexual abuse as described by Urquiza and Capra include increased risk for depression, somatic disturbance, self esteem deficits; difficulty maintaining intimate relationships; problems with sexual adjustment; alcohol and substance abuse; and criminal offending.

(Vol. II PCR. 295-96).

17. Observed family violence

In addition to being the victim of "physical, psychological, and potentially sexual abuse within his household," Mr. McKenzie also observed the abuse of his siblings and mother. (Vol. II PCR. 296). Dr. Cunningham explained that these three types of family violence were present in Mr. McKenzie's home and resulted in four noteworthy considerations:

> First, the violence directed toward Blake's siblings increased the number of traumatic exposures of Blake's childhood, aggravating

and/or cumulatively potentiating this experience.

> Second, observation of abuse directed toward Blake's siblings would be profoundly anxiety-provoking, as a signal of violence that would be directed against Blake -- either in the immediate context or at some undetermined point.
>
> Third, this violence was another demonstration that their mother's own dependency needs took precedence over her obligation to protect her children. This realization would promote significant disillusionment with and anger toward her, and other women.
>
> Fourth, the observation of his siblings being brutalized represented another demonstration that in the world of Blake's childhood, there were no "noncombatants," i.e., women and children were "fair game" for brutal violence. This latter consideration of no "noncombatants" is particularly important as the victims in the capital offense had opened their home to Blake and did not directly provoke a violent response (based on Blake's statements in the course of law enforcement interrogations), offense features that likely added to the implicit aggravation of the offense.

(Vol. II PCR. 297).

18. Mother's alcohol abuse

There was extensive alcohol abuse by Mr. McKenzie's mother while in the home. (Vol. II PCR. 299-300). Additionally, there were reports of the mother's suicide attempts and pill taking. (Vol. II PCR. 300). Mr. McKenzie's father also abused alcohol. This all had a number of adverse implications. "In summary, parental alcoholism or substance dependence is a broad social/psychological risk factor for substance abuse and dependence relationship problems, self-control deficits and behavior disorders, feelings of defectiveness, psychological disorders,

and criminal behavior among the children of these substance abusing parents." (Vol. II PCR. 300).

19. Corruptive and alcoholic stepfather figures

Starting with Mr. McKenzie's father and through a number other men, there were a number of alcoholics in Mr. McKenzie's life. "In their alcohol abuse, these men represented corruptive models of the role of drinking/substances in one's life." (Vol. II PCR. 302). This was similar to what Mr. McKenzie saw with his mother. (Vol. II PCR. 302). This denied Mr. McKenzie the opportunity to form constructive relationships "that might have compensated for other deprivations and maltreatment" in Mr. McKenzie's life. (Vol. II PCR. 302). Dr. Cunningham found that "[n]ot surprising in the face of these redundant models, is lack of supervision, and the need to self-medicate, Blake began to abuse substances heavily in late childhood and early adolescence, prompting life-long substance dependence." (Vol. II PCR. 302).

20. Corruptive influence of siblings

As Dr. Cunningham described earlier in the report, Mr. McKenzie's siblings abused substances in their teens. (Vol. II PCR. 302). "His older brother, Bobby, was involved in criminal activity and was sentenced to prison in his late teens. Because of the absence of nurturing parent figures in his life, Blake was particularly susceptible to negative sibling influences. The involvement of his

siblings in drug abuse in their teens was a factor in the onset of his own lifelong drug dependency - a disorder that was central to his capital conduct." (Vol. II PCR. 302).

Community

21. Traumatic sexual exposures and abuse

Mr. McKenzie was not safe from traumatic sex exposure and abuse when he left through the doors of his childhood home. Mr. McKenzie was sexually abused by a band teacher. Dr. Cunningham found that there was "a reasonable probability that Blake suffered greater sexual victimization in this event than he is willing to acknowledge." (Vol. II PCR. 303). Mr. McKenzie's siblings Nona and Gary experienced a great deal of sexual abuse in the community. (Vol. II PCR. 303). Dr. Cunningham found that "[i]t would seem improbable that [the teenage friends of older brother Bobby] would molest" Mr. McKenzie's sister and middle brother but not Mr. McKenzie who was more vulnerable and younger. (Vol. II PCR. 303).

Dr. Cunningham found that the "[i]mplications of traumatic sexual exposures and abuse in the community . . . increased the number of traumas impacting" Mr. McKenzie and his other traumatized siblings, "their perception of there being no sanctuary from maltreatment, their associated sense of vulnerability, and their risk of turning to drug abuse as self-medication of the associated trauma." (Vol. II PCR. 303). Even sexual trauma experienced by other siblings that Mr.

McKenzie had no knowledge of would have impacted Mr. McKenzie because it "reduce[d] the emotional availability and health of his older siblings, depriving him of alternative emotional resources in the family in the face of inadequate parenting." (Vol. II PCR. 303-04).

22. Availability of alcohol and illicit drugs

Dr. Cunningham found that Mr. McKenzie's:

> [A]buse of alcohol and drugs in his childhood and adolescence, launching a chronic substance dependency, was only possible because these substances were available to young people in the community. Blake's abuse of Quaaludes and cocaine in his mid-teens coincided with the explosion in the availability and abuse of these drugs in the United States at that time. In other words, there was a critical intersection between his vulnerability and substance availability in his school and neighborhood. Thus a high-risk child was in a high-risk social context. This intersection was aggravated by the lack of supervision that he experienced in the home.

(Vol. II PCR. 304).

Disturbed Trajectory

> Disturbed trajectory refers to the phenomenon that the combined effect of damaging developmental experiences is to distort and deflect the direction of the individual's life in a negative fashion. As this occurs, the individual makes poor choices that result in still more damage. This disturbed trajectory in Blake's life had progressively disturbed expressions.
>
> A key factor in a damaged trajectory is the experience of trauma.
>
> Enduring implications of trauma in childhood: In the absence of either essential historical information and scientifically-informed testimony regarding the formative implications and indelible scarring on the psyches of children experiencing the severity of observed

family violence, personally-experienced parental brutality, parental neglect and abandonment, parental alcohol abuse, perverse family sexuality and abuse, community sexual abuse, and other traumas, neither the jury nor the Court had an informed mechanism to consider and give weight to the implications of pervasive trauma in Blake's childhood.

Expert testimony would have established that the lasting effects from such traumatic exposures in childhood have been well-established in the psychological literature for decades. To illustrate, Terr (1991) described childhood psychic trauma as a crucial etiological factor in the development of a number of serious psychological disorders both in childhood and adulthood. Thus traumatic experience in childhood often results in long-term developmental disturbances and undesirable changes in life trajectory (life direction and course).

Schwarz and Perry (1994) described that trauma-induced influences on development can extend well beyond childhood. Primary developmental tasks may also be disrupted by childhood traumatic experience. Specifically, the intense negative emotion of childhood traumatic experience disrupts maturing mechanisms of emotional regulation and contributes to dissociation as a defense mechanism. These dissociative reactions may later be activated in other stressful life contexts. Traumatic experiences further have the potential to retard or accelerate critical developmental transitions. Experienced and/or observed physical abuse as well as other forms of childhood trauma are associated with substantial mental health morbidity - frequently taking the form of Posttraumatic Stress Disorder (PTSD), depression, relationship disturbances, personality disorder, and/or antisocial behavior. Traumatic experience in childhood from abuse or other insults can result in impairments of perception, judgment and behavior; vulnerability to poor role models and negative influences; chronic self-defeating behavior; chronic agitation; poor problem-solving skills; an inability to predict the consequences of one's behavior accurately; an inability to modulate or understand one's emotions; an inability to use emotions as guides for appropriate action; an inability to assign language to emotions; a constant state of internal and external fear; a foreshortened sense of future; chronic self-medication and substance addiction; a fragmented sense of self; an inability to successfully achieve developmental milestones;

pervasive low self-esteem; a chronic and inescapable sense of shame and worthlessness; and behavioral misconduct and criminal conduct.

The damaging impact of trauma in early childhood is independent of whether there are conscious memories of these events. Quite the contrary, as described previously, some of the enduring effects of trauma exposure in childhood may occur through misshaping of the brain's architecture and processing as well as faulty learning. There is evidence that these symptoms and disorders stem from trauma-initiated changes in brain structure and metabolism that can be persistent. Chronic victimization can also result in survival responses of attempting to emulate the toughness of those that perpetrated the victimization (i.e., identification with the aggressor).

Childhood trauma thus disrupts not just the subjective experience of childhood, but also both the trajectory of development and the psychological structures of middle and later adulthood (Tomb, 1994). The fundamental alterations in the way the child perceives himself, others, and the world around him, as well as potential trauma-based adaptations in brain functioning, likely account for the sustained experience or resurgence of PTSD symptoms, or their character-engrained legacy, into adulthood. These "characterological" elements in childhood trauma exposure are quite important in understanding Blake's personality development. Stated simply, the maltreatment the child experiences becomes pathologically engrained into the developing child's personality structure, resulting in pervasively maladaptive and even antisocial functioning. These conceptualizations give some understanding to Blake's life trajectory.

(Vol. II PCR. 305).

23. Childhood onset alcohol and drug abuse

Dr. Cunningham found that Mr. McKenzie's "early and chronic abuse/dependence on alcohol and drugs was much more extensive, and with much greater destructive implications for the trajectory of his life than was reflected in the skeletal treatment of this issue with a few sentences in the PSI provided for

Blake's Spencer Hearing." (Vol. II PCR. 305). Mr. McKenzie's drug and alcohol abuse started at a very young age and continued through his arrest. As detailed by Dr. Cunningham:

> **Age 9**: Blake's substance abuse described first abusing marijuana at age 9 when he found a baggie of marijuana in the woods.
> **Age 10**: Blake began to smoke cigarettes.
> **Age 11**: Blake smoked marijuana daily during the summer. He also took alcohol from his parents' liquor cabinet and got falling down drunk.
> **Age 12**: Blake smoked marijuana daily. He abused pills as well: i.e., "yellow jackets" (downers), "speckled birds" (amphetamines), and "Roche 12s" (pain meds). As described earlier in this affidavit, Blake began to abuse inhalants with his peers at age 12. This abuse continued for the next 18 months, including canvas sealant, Pam, gasoline, and spray paint.
> **Age 13**: Blake continued to abuse inhalants, including huffing gasoline until he lost consciousness daily for two months. He also smoked marijuana daily. Blake reported that at age 13 he drank whiskey heavily each weekend, standing in front of a liquor store until he persuaded an adult to make a purchase for him.
> **Age 14**: Blake snorted cocaine weekly. He smoked marijuana before school, between classes, at lunch, and after school. Blake continued drinking on weekends. He abused Quaaludes daily. Olivia McKenzie, stepmother, reported finding Quaaludes in Blake's bedroom when he was in middle school. She was also aware that he smoked marijuana.
> **Age 15**: Blake continued the same pattern he maintained at age 14, except changing to a different brand of Quaaludes. He began to abuse cocaine in mid-adolescence as well.
> **Age 17**: Blake contracted Hepatitis C from IV drug abuse.
> **Age 19**: Blake contracted HIV from needle-sharing as an IV drug abuser.
> **Age 37**: Blake was released from prison in October 2002 and resumed abuse of marijuana, cocaine, and methamphetamine. His parole was violated in March 2003 for a dirty UA.
> **Age 40**: Blake was released from prison in March 2005. He resumed cocaine abuse and was violated within six months for a dirty UA.

> **Age 41**: Blake was released from prison in March 2006. He was arrested seven months later in October 2006 for the instant offenses. Blake reported that he resumed heavy abuse of cocaine approximately three months after his release from prison.

(Vol. II PCR. 306). Dr. Cunningham explained the "implications of childhood onset alcohol and drug abuse for Mr. McKenzie:

> Blake's "choice" to begin substance abuse was made as a pre-adolescent child with the deficient reasoning and judgment that accompanies that developmental stage, and carrying the legacy of a dysfunctional family context of violence, alcohol abuse, perverse sexuality, and inadequate supervision. The resultant substance dependence impeded further gains in maturity. Substance dependence in adolescence and early adulthood significantly disrupts and blocks the developmental tasks of this stage including growth in maturity and coping capabilities, adaptive socialization, and responsible achievement.

(Vol. II PCR. 306-07).

Mr. McKenzie had all of the primary risk factors for alcohol and/or drug dependence, which "include genetic predisposition, modeling of substance abuse, developmental trauma, and Attention Deficit Hyperactivity Disorder." (Vol. II PCR. 307). As previously described by Dr. Cunningham, Mr. McKenzie's "parents, siblings, and multiple other relatives were alcohol and/or drug dependent, representing a significant genetic predisposition for his own development of substance dependence." In Mr. McKenzie's early childhood family background there was "routine modeling of alcohol abuse - by his mother, stepfather figures, and older siblings." (Vol. II PCR. 307). Individuals with a history of

developmental trauma, like Mr. McKenzie, attempt to self-medicate their anxiety and mood disorder spectrum by abusing intoxicating and illicit substances. (Vol. II PCR. 307).

Mr. McKenzie had a markedly increased risk to become alcohol and/or drug dependent. (Vol. II PCR. 307). He was greatly "impacted by redundant substance dependence risk factors in childhood and adolescence that subsequently disrupted a healthy developmental trajectory and markedly increased his risk of criminal violence, ultimately including the capital offense." (Vol. II PCR. 307)

24. Substance-related offending

Dr. Cunningham found that Mr. McKenzie's "criminal offending, including the capital conduct, occurred in a context of substance dependence, was the central factor in these offenses." (Vol. II PCR. 307). This resulted from Mr. McKenzie's "drug-seeking behavior in the service of this addiction, degeneration of moral sensibilities as his addiction progressed, the synergistic interaction of drug effects with his underlying judgment impulsivity, and the erosion of psychological integration and reality-testing from the psychosis engendering effects of cocaine." (Vol. II PCR. 307).

Dr. Cunningham reported the "implications of alcohol and drug abuse/dependence on violent offending." (Vol. II PCR. 307). Studies have shown that substance abuse/dependence was associated with an approximately 10-fold

greater incidence of violent behavior (one-year prevalence). (Vol. II PCR. 307). There was an "adverse combined effect was observed if a co-morbid psychological disorder was present." (Vol. II PCR. 307).

The effects of "substance abuse and acute intoxication on the cause of a Criminally-violent act is not so simple as a dichotomy of being either acutely intoxicated on one hand or completely unaffected on the other." (Vol. II PCR. 307). As Dr. Cunningham explained:

> [T]here is a continuum of the extent to which substance dependence and intoxication undermine the quality of personality and cognitive processes, with associated resentment, projection of blame, brooding obsession, inappropriate emotional reactions, poor behavioral control, poor judgment, impaired capacity to consider alternatives, and poor planning. Thus it is not necessary for someone to be staggeringly intoxicated before their judgment is impaired by substance abuse – particularly chronic substance abuse.

(Vol. II PCR. 307-08). Dr. Cunningham also explained that:

> [S]ubstance abuse/dependence can significantly affect the quality of judgment and behavioral responses though the individual is still capable of purposeful behavior and may not overtly appear to be under the influence. Further, substance dependence undermines the quality of judgment apart from episodes of intoxication.

(Vol. II PCR. 308). Thus, even when Mr. McKenzie was not directly under the influence of drugs he still was subject to the pervasive and chronic effects of drug abuse on his mental state and behavior.

Dr. Cunningham next explained the "Nexus between alcohol abuse/dependence and homicide." (Vol. II PCR. 308). Dr. Cunningham cited a

number of studies that showed that "[a]lcohol abuse and dependence has a strong association with homicidal violence." (Vol. II PCR. 308). Moreover, drug abuse is a very strong risk factor for violence in the community. (Vol. II PCR. 308).

25. Traumatic experiences with incarceration in late adolescence/early adulthood

Mr. McKenzie reported to Dr. Cunningham "that sexual assaults were rampant in Florida prisons when he was first incarcerated in Florida DOC at age 19." (Vol. II PCR. 308). Mr. McKenzie reported that in the first several years of his incarceration (ages 19-22) he heard multiple sexual assaults occurring each night. Dr. Cunningham also found, "However improbable given his youthfulness and the above described prison milieu, Blake reported that he was able to fend off the two sexual attacks that he experienced during the early phase of his first incarceration in Florida DOC." (Vol. II PCR. 309).

Dr. Cunningham explained that the damage from trauma exposure is not limited to childhood "and rather psychological damage often results from experiences of extreme trauma in late adolescence or adulthood." (Vol. II PCR. 309).

26. Cocaine-induced psychological decompensation and extended sleep deprivation at the time of the offense, in a temporal context of psychotic symptoms.

Dr. Cunningham found that Mr. McKenzie suffered from cocaine-induced psychological decompensation and extended sleep deprivation at the time of the

offense, in a temporal context of psychotic symptoms. Mr. McKenzie "relapsed into cocaine dependency July 2006, approximately three months after his release from prison as his parole ended and he was no longer subject to urinalysis." (Vol. II PCR. 309). Mr. McKenzie "was soon shooting cocaine up to 300 times daily, often with multiple needles in his arms so that he could shoot them with little delay between. He estimated his abuse as 5.5 grams of cocaine daily." (Vol. II PCR. 309).

Mr. McKenzie would abuse cocaine continuously for 7-9 days, followed by eight hours of sleep, followed by 7-9 days more of cocaine abuse, before another 7-9 day run. (Vol. II PCR. 309). "[H]e experienced marked decompensation in his psychological integration and associated psychotic ideation." (Vol. II PCR. 309).

Mr. McKenzie's "decompensation was aggravated by heavy marijuana and alcohol abuse, as well." He drank 15-20 beers daily while abusing of cocaine and drank a liter of scotch weekly. (Vol. II PCR. 309). Between July - October 2006, Blake drank a liter of single malt scotch weekly. Mr. McKenzie "also shot Dilaudid a couple of times, as well as taking Percodan and Oxycontin pills on occasion." (Vol. II PCR. 309).

From July to October 2006, during Mr. McKenzie's multiple day cocaine abuse, Mr. McKenzie "was plagued by marked paranoia and delusions of being pursued." (Vol. II PCR. 309). Mr. McKenzie "would spend $500 on a cell phone,

then toss it out the window because he believed he was being tracked." (Vol. II PCR. 309).

During this period of psychotic delusions and accompanying hallucinations Mr. McKenzie's "belief that he was being pursued was so strong that he jumped out of his truck and ran into the woods" and "laid very still in the forest for several hours." (Vol. II PCR. 309). Mr. McKenzie thought that "an aircraft flying overhead as evidence that he was being tracked by his cell phones, so removed the batteries and SIM cards from them." (Vol. II PCR. 309). "[H]e heard dogs so he started a fire to cover his scent. Blake additionally described in detail a series of sightings of various vehicles that he believed were following him, with his engaging in a series of turns and evasive maneuvers." (Vol. II PCR. 309). Mr. McKenzie experienced "visual hallucinations of microphones in the ears of persons following him and multiple sightings of the same persons. The persistence of these delusions was evident when he was interrogated by law enforcement shortly after his arrest, as he repeatedly asked them whether they had been following him." (Vol. II PCR. 309-10).

Dr. Cunningham also recounted that:

> Blake reported in his 10-05-06 post-arrest video interrogation statement (the day following the offenses) that he had been without sleep for nine days. He described that he had abused cocaine heavily on those days. In the interrogation video statement Blake reported that he had perceived at least 40 unmarked government vehicles tracking him prior to arriving at the home of Randy Peacock and

> Charles Johnson (murder victims). He described crawling under his car to search for the tracking devices he thought had been implanted on his vehicle. Blake described that following the murders he believed that he was being chased and that his vehicle was even bumped by the police as he drove back and forth to Savannah, Georgia.

(Vol. II PCR. 309, 298) (The sequence of Dr. Cunningham's report is out of order in the record).

Dr. Cunningham detailed the implications of cocaine dependence. (Vol. II PCR. 309, 298). "Risk for using cocaine is related to severe trauma history such as present in Blake's background." (Vol. II PCR. 298). Studies cited by Dr. Cunningham have shown that high numbers of cocaine dependent individuals "met DSM-III-R criteria for lifetime PTSD, and had higher rates of exposure to traumatic events, earlier ages of first assault, and more severe symptomatology than comparison subjects." (Vol. II PCR. 298). "[M]ost cocaine dependant subjects with PTSD, the PTSD preceded the onset of cocaine dependence." (Vol. II PCR. 298). While there has been more extensive studies of sexual abuse and cocaine dependence among women, "any sexual abuse in childhood, penetrative sexual abuse in childhood, and sexual abuse by a family member were significantly associated with lifetime crack use." (Vol. II PCR. 298).

Cocaine is highly addictive and cocaine dependency is difficult to break. Studies cited by Dr. Cunningham in the report showed that there is a high relapse

rate, especially with the level of severity that Mr. McKenzie suffered. (Vol. II PCR. 298).

Dr. Cunningham's report detailed the "[i]mpact of chronic use on psychological integration." (Vol. II PCR. 299). Cocaine abuse creates conditions in which violent behavior is much more likely to occur. (Vol. II PCR. 299).

> Sustained runs of cocaine are associated with significant disruption in the logic and reasoned integration of thought. Chronic abusers frequently experience marked paranoia, which may develop into an overt psychosis. Once produced, such a psychosis may be re-triggered by a single instance of abuse even after a sustained period of sobriety. Also reflective of the disruption and deterioration of psychological processes, impulsiveness, restlessness, irritability, and hypervigilance are also frequently observed. Mood regulation is undermined, with abrupt shifts from warmly congenial to furiously hostile for the most trivial of reasons. Suspiciousness often combines with irritability, impulsiveness, and hyperactivity to induce spontaneous and unwanted aggressive behavior. Chronic abusers often simultaneously consume large amounts of alcohol and other drugs. This combination increases the potential for poor judgment and impulsive responses. Mutual enhancement of suspiciousness and paranoid ideas with other "speed freaks" adds to the likelihood of violence. The combination of weapons access and using large doses of cocaine is awesomely dangerous.
>
> The psychotic symptoms exhibited by Blake proximate to the offense and his associated psychological deterioration did not cause him to be incapable of making a plan or engaging in goal-directed behavior. Rather, the psychological derailment produced plans that were characterized by aggression, extraordinarily poor judgment, immediate reward, and profoundly disturbed calculus of benefit as opposed to certain and not far-distant consequences. They are the plans of a deranged individual.
>
> Impact of chronic use on moral sensibilities: Chronic abuse of cocaine is associated with substantial psychological and behavioral

disturbance. The psychological disruption observed in chronic cocaine abuse frequently takes the form of marked deterioration in self-regard, life-structure, interpersonal loyalty and responsibility, and moral sensibility.

Summary

Dr. Cunningham summarized his findings as follows:

The jury and the court were deprived of hearing critically important evidence regarding 26 damaging or limiting developmental factors and the nexus of these factors to Blake's substance dependence, associated recurrent criminal offending, and the drug-related capital offense. The sentencing jury and court were also not provided with perspectives on how these hereditary predispositions and developmental adversities interacted with a significant drug-related decompensation on the day of the capital conduct. The absence of such critically important evidence and associated perspectives fundamentally diminished the mitigating history and factors that were brought to the attention of the jury and the court at Blake's capital sentencing phase, and further significantly diminished the ability of the jury and the Court to give these factors proper weight in determining his death worthiness.

Dr. Cunningham found that:

The perspectives detailed above support the following statutory mitigation factors by a preponderance of the evidence":

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. [reflecting the cumulative psychological damage, dysfunction, and associated disturbance from the specified adverse developmental factors, in combination with cocaine-induced psychological decompensation]

(e) The defendant acted under extreme duress or under the substantial domination of another person. [*reflecting the cumulative effects of the specified adverse developmental factors on the defendant's*

perception of his situation, relationships, choices, and perceived alternatives, in combination with cocaine-induced psychological decompensation]

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired. [reflecting the cumulative effects of the specified adverse developmental factors on the defendant's morality, value system, social identification, empathy, judgment and impulse control, in combination with cocaine-induced psychological decompensation and extended sleep deprivation at the time of the offense, in a temporal context of psychotic symptoms]

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty. [*See* Mitigating Factors 1-25 discussed above]

(Vol. II PCR. 310-311).

The above mitigation existed at the time of trial. Had Mr. McKenzie been evaluated by a competent mental health expert, either because the trial court appointed such an expert or because counsel did not ineffectively allow the attorney-client relationship deteriorate and hired an expert, Mr. McKenzie's case would have been one of the most mitigated of cases. This Court should grant relief.

CUMULATIVE ERROR

Due to the errors that occurred individually and cumulatively in the lower court, this Court should grant relief from this unconstitutional death sentence.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed above, Mr. McKenzie respectfully urges this Honorable Court to reverse the circuit court's order denying a new penalty phase trial or, in the alternative, remand for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by E-MAIL to [ken.nunnelly@myfloridalegal.com and CapApp@myfloridalegal.com] on this 7th day of November 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of the Appellant, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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