No. _____

IN THE

Supreme Court of the United States

DAVID RUSS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

PETITIONER'S APPENDIX

THIS IS A CAPITAL CASE

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EXHIBIT 1

2022 WL 1055029
Only the Westlaw citation is currently available.
Supreme Court of Florida.

David Byron RUSS, Appellant(s)

v.

STATE of Florida, Appellee(s)

CASE NO.: SC21-1205

APRIL 8, 2022

Lower Tribunal No(s).: 592007CF002377A000XX

Opinion

***1** Appellant David Russ, a prisoner under sentence of death, appeals the circuit court's order summarily dismissing his instant motion for postconviction relief, which was filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

We previously affirmed Appellant's convictions and sentences on direct appeal. *Russ v. State*, 73 So. 3d 178, 200 (Fla. 2011). We also previously affirmed Appellant's waiver of his postconviction proceedings. *Russ v. State* (*Russ II*), 107 So. 3d 406 (Fla. 2012) (table). Appellant filed his instant postconviction relief motion on December 30, 2020. The circuit court, after considering the parties' arguments and briefing, summarily dismissed Appellant's motion in a written order. This appeal followed, with Appellant raising five claims.

In his first claim, Appellant argues that no reasonable assessment was ever made by trial counsel or the circuit court regarding his competency before he was allowed to waive his rights to a guilt phase and penalty phase trial by jury and the presentation of mitigation evidence. In their briefing, both parties establish that the issue raised by Appellant in his third claim (alleged incompetence at the time Appellant made his waiver of postconviction proceedings) arises out of the same facts as the first claim. Our analysis of Appellant's first claim therefore also applies to his third claim. The trial court properly summarily dismissed these claims because Appellant failed to meet any of the time limitation exceptions contained in Florida Rule of Criminal Procedure 3.851(d)(2), making his motion procedurally barred. Fla. R. Crim. P. 3.851(e)(2). We find no error in the circuit court's summary dismissal of Appellant's first and third claims.

In his second claim on appeal, Appellant argues that he was rendered ineffective assistance of counsel because no reasonable assessment was made by trial counsel regarding his competency before he waived his rights to a guilt and penalty phase trials and the presentation of mitigation evidence. We previously affirmed Appellant's waiver of his postconviction proceedings and counsel. *See Russ II*. Under similar circumstances, we previously affirmed a trial court's summary dismissal of a postconviction motion as untimely when the prisoner validly waived postconviction proceedings. *See James v. State*, 323 So. 3d 158, 161 (Fla. 2021). We find no error in the circuit court's summary dismissal of Appellant's untimely second claim.

In his fifth claim on appeal, Appellant argues that his death sentence violates *Hurst v. Florida*, 577 U.S. 92 (2016). As Appellant acknowledges in his briefing, a valid waiver of a penalty phase jury and postconviction relief vitiates any entitlement to *Hurst* relief under Florida law. *State v. Silvia*, 235 So. 3d 349, 351-52 (Fla. 2018). We find no error in the trial court's summary dismissal of Appellant's fifth claim.

Appellant's fourth claim on appeal is a cumulative error claim. Because we find no error in the circuit court's summary dismissal of Appellant's other claims, there is no cumulative error for us to analyze here. "[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail." *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003).

***2** For these reasons, we affirm the circuit court's order summarily dismissing Appellant David Russ's instant motion for postconviction relief.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

All Citations

Not Reported in So. Rptr., 2022 WL 1055029

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EXHIBIT 2

IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO. 07-CF-2377-A

STATE OF FLORIDA,

Plaintiff(s),

vs.

DAVID BYRON RUSS,

Defendant(s).

_____/

ORDER DISMISSING DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE WITH LEAVE TO AMEND

The Defendant pled guilty on February 6, 2008 to one count each of first-degree premeditated murder, kidnapping with a weapon, grand theft of a motor vehicle, robbery with a deadly weapon, and burglary of a dwelling with an assault or battery. (See Appendix A). He waived the presentation of mitigating evidence and a sentencing jury. (See Appendices B, C, and D). The penalty phase was held on January 8 - 9, 2009, with special counsel appointed to present mitigating evidence on the Defendant's behalf. On May 13, 2009, the Defendant was sentenced to death for the murder, life for the kidnapping, robbery, and burglary charges, and five years for grand theft. No party involved in the case suggested that he was incompetent, so the Court never appointed experts for purposes of a competency evaluation and hearing. The judgments and sentences were affirmed on appeal. *Russ v. State*, 73 So. 3d 178 (Fla. 2011).

After the mandate affirming the sentence was issued, the Office of Capital Collateral Regional Counsel – Middle was appointed to represent the Defendant, pursuant to Fla. R. Crim. P. 3.851. On November 7, 2011, the Defendant filed a pro se "Motion to Dismiss Capital Collateral Counsel [and] also to Dismiss Pending Post Conviction Proceedings Beyond the Initial Appeal." The Defendant refused to meet with collateral counsel to discuss further issues relating to the filing of a 3.851 motion. The Defendant was transported to Seminole County to determine whether he was competent to make the decision to waive his opportunity for collateral relief. On January 19, 2012, the Court inquired of the Defendant to determine whether his waiver was knowingly and voluntarily made. The Defendant denied being under the influence of any drugs and denied having any mental illnesses that affected his ability to

*** E-FILED: GRANT MALOY, CLERK OF CIRCUIT COURT SEMINOLE COUNTY, FL 07/16/2021 04:46:30 PM.****

understand the legal proceedings. He further refused to meet with any experts that this Court would have appointed to assess his competency. The Court found that he was competent to make his decision. (See Appendix E). The Defendant did not seek to rescind his waiver at any time during the time frame set forth for filing a collateral motion under Fla. R. Crim. P. 3.851. The Florida Supreme Court affirmed the Defendant's waiver. *Russ v. State*, 107 So. 3d 406 (Fla. 2012).

On August 10, 2018, the Office of the Federal Public Defender was appointed to represent the Defendant for purposes of filing a federal habeas corpus petition. Because the Defendant had not exhausted his State remedies, CCRC - North was appointed by this Court on April 12, 2019 to represent him in pursuing relief in this Court pursuant to Fla. R. Crim. P. 3.851.[1] The Defendant e-filed the instant "Successive Motion to Vacate Judgments of Conviction and Sentence with Leave to Amend" on December 30, 2020, in which he raises five grounds for relief: (1) the Defendant's due process rights were violated when he was allowed to enter his pleas despite being legally incompetent; (2) trial counsel was ineffective for failing to investigate the Defendant's competency to enter the pleas; (3) the Defendant was incompetent to waive his collateral rights; (4) cumulative error regarding the entry of the pleas; and (5) the death sentence violates *Hurst v. Florida*, 136 S.Ct. 616 (2016). The case management conference on the motion was held on March 25, 2021, during which the parties argued the timeliness of the motion and whether it should be set for an evidentiary hearing.

In his motion, for the first time in these proceedings, the Defendant argues that he was incompetent to enter his initial plea or to waive his rights to pursue collateral relief. The initiation of a federal petition does not constitute newly discovered evidence that would authorize a defendant to override a prior voluntary waiver or overcome the time bar. "To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence." *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008), *as revised on denial of reh'g* (Sept. 29, 2008), *as revised on denial of reh'g* (Dec. 18, 2008).

The facts of this case refute his claims of incompetency, both at the time of his initial plea and at the time he waived his collateral rights.

> In order to evaluate this claim in a postconviction setting, a court must answer two questions: "(1) whether the court could make a meaningful retrospective evaluation of the defendant's competence at the time of trial; and, if so, (2) whether the defendant was in fact competent at the time of trial." *Jones v. State*, 740 So. 2d 520, 523 (Fla.1999). Some of the factors to be considered include: the defendant's appreciation of the charges and the range and nature of possible penalties; the ability to assist one's attorney and disclose

[1] Because some of the claims necessarily challenged CCRC-Middle's representation of the Defendant when he waived his right to proceed with his claims for collateral relief, CCRC–North was appointed to avoid a conflict of interest.

> relevant facts surrounding the alleged offense; the ability to manifest appropriate courtroom behavior; and the capacity to testify relevantly.

Lawrence v. State, 969 So. 2d 294, 304 (Fla. 2007). Collateral counsel cited several factors, including his abusive upbringing, his drug use, his mental illness, evidence of traumatic brain injuries, and the stress of the situation as contributing to his incompetency. Attached to the motion are several written reports generated after examinations conducted by Drs. Jethro Toomer, Harry Krop, Drew Edwards, and Richard Dudley. Each of these doctors examined the Defendant in December 2019 or later, more than ten years after the Defendant's plea.[2] They opined that the factors listed above would have impacted his judgment, although none of the experts opined that he did not understand the proceedings or that he was unable to consult with counsel.

Having reviewed the new reports prepared by the experts, this Court does not dispute the extreme abuse the Defendant faced as a child, the fact that he had a lengthy history of drug abuse,[3] that he likely suffered from mental illness, and he was under severe stress resulting from his incarceration and potential death sentence at the time of his waivers. But these factors, without more, did not render him incompetent. "'Competency to stand trial' means the defendant can consult with counsel with a reasonable degree of rational understanding and has a rational and factual understanding of the proceedings." *Thorne v. State*, 271 So. 3d 177, 187 (Fla. 1st DCA 2019), *review denied*, SC19-994, 2019 WL 7369215 (Fla. Dec. 31, 2019). "[N]ot every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges." *Thompson v. State*, 88 So. 3d 312, 319 (Fla. 4th DCA 2012), quoting *Card v. Singletary*, 981 F.2d 481, 487–88 (11th Cir.1992).

To the contrary, the case file reflects that trial counsel felt that the Defendant was competent to proceed. Early in his representation, trial counsel had the Defendant assessed by Dr. Deborah Day for a general mental health evaluation and for mitigation purposes. Although she was not tasked specifically with performing a competency evaluation, she opined that he was competent to proceed. This Court, in both colloquies, comprehensively discussed the case, the Defendant's decisions, and the consequences of those decisions with the Defendant. The Defendant consistently demonstrated that he understood the legal process, the participants in the process, the decisions he was making, and the legal effect of those decisions. Based upon his understanding of the proceedings and his circumstances, this Court accepted his pleas, his waiver of mitigation, and waiver of collateral relief. Both times, the Florida Supreme Court

---

[2] Counsel did not provide any evidence from those involved in the case contemporaneously with his pleas, such as any of the attorneys who represented him in the original or collateral proceedings, opining that he was incompetent. These individuals were in the best position to evaluate the Defendant's ability to communicate with them to understand the proceedings

[3] In fact, his history of abuse was given moderate weight and his drug use some weight by this Court in the sentencing order.

affirmed this Court's findings, confirming that his waivers were knowingly, intelligently, and voluntarily made.

The Defendant was not incompetent because he made decisions which, to an outside observer, did not appear to be in his best interests. The Defendant undoubtedly understood the decisions he was making. They were rational decisions that he made because he felt that he should take responsibility for his actions. Trial counsel tried to change his mind because he felt that the Defendant was not making a smart decision, but he had no reason to doubt the Defendant's competency to make the decision. Based on this Court's interactions with the Defendant during the colloquies, it was clear that he understood his options and the consequences of his decisions. He understood that he was making a final decision, but now, for whatever reason, the Defendant has decided to collaterally attack his convictions and sentences. He stood firm in his decision, even refusing to meet with any experts this Court would have appointed to examine or otherwise assist him. "[A] mere change of mind is an insufficient basis for setting aside a previous waiver." *Trease v. State*, 41 So. 3d 119, 126 (Fla. 2010), quoting *James v. State*, 974 So. 2d 365, 368 (Fla. 2008). Because the Defendant was, in fact, competent at the time of his plea and his waivers, his due process rights were not violated. Accordingly, trial counsel was not ineffective for failing to further investigate his competency.

This case shared key characteristics with two other death penalty cases originating out of Seminole County, Edward James and William Silvia. Both waived their right to pursue collateral relief and later sought to rescind their waivers. The trial courts dismissed their motions and the Florida Supreme Court affirmed both dismissals.

Edward James was sentenced to death in 1995 and in 2003, he waived his right to pursue collateral relief. He sought to rescind his waiver on the basis that he was incompetent to proceed at the time he waived his rights. The presiding judge dismissed the motion as untimely because his incompetence could have been discovered within one year of the waiver. The Florida Supreme Court affirmed the trial court's dismissal of the motion as untimely. *James v. State*, ___ So. 3d ___, 2021 WL 2835334 (Fla. July 8, 2021). Here, the Defendant asserts that he, too, was incompetent to dismiss his collateral motion, but the issues relating to his competence to waive his rights were known to him or would have been discoverable within one year of his waiver. None of the exceptions in Fla. R. Crim. P. 3.851(d)(2) apply to this case. Thus, as in *James*, claims relating to the Defendant's competency are untimely.

William Silvia found himself in the class of inmates who would have been entitled to relief under *Hurst*. However, the trial court found that his waiver permanently barred further collateral motions, even in the case of a new constitutional right applying retroactively, and dismissed the motion. The Florida Supreme Court affirmed the dismissal, stating:

> The transcript of the hearing in this case reflects that, as required by Florida Rule of Criminal Procedure 3.851(i)(3) – (4), the trial court held a hearing and conducted an inquiry of Silvia, eliciting that Silvia was not under the influence of any medicines, drugs, or alcohol. The transcript reflects that Silvia understood the consequences of waiving postconviction counsel and proceedings, and he understood that his right to pursue postconviction proceedings would be forever lost. The transcript further reflects that Silvia understood that if the court granted his request to discharge his attorneys and waive postconviction proceedings, he would become warrant-eligible-that is, the governor could sign a warrant for his execution. Silvia also indicated that he understood that his waiver of postconviction proceedings was permanent and that he could not change his mind in the future.
>
> In addition, Silvia indicated that he understood that by waiving postconviction proceedings early in the process-before a motion was filed - he was losing permanently his right to take advantage of any changes that may occur in the law, that he was waiving his right to federal review, and that because his attorneys had not yet completed their discovery, it was unknown what issues could be raised. Silvia acknowledged that he understood everything his attorneys had done to date and that his attorneys could discover information that would be beneficial to him in postconviction. Silvia indicated that he understood that the issues in his case were not fully developed, that his attorneys could not proceed further in their investigation without his cooperation, and that his attorneys could discover information that would be beneficial to him. He nevertheless indicated that he did not wish his attorneys to proceed with any further discovery and that he was voluntarily waiving his postconviction counsel and proceedings.
>
> On the basis of this record, we conclude that the trial court did not abuse its discretion in discharging Silvia's postconviction counsel and dismissing postconviction proceedings.

Silvia v. State, 228 So. 3d 1144, 1145–46 (Fla. 2013). The Florida Supreme Court therein held that he had permanently waived his right to collateral relief, even to grounds that were unknown at the time of the waiver. Under this case, too, the Defendant's waiver should bar any further relief.

The *Hurst* claim raised in ground five is also without merit. The Florida Supreme Court receded from *Hurst* in *State v. Poole*, 297 So. 3d 487 (Fla. 2020). Under *Poole*, a factfinder must only find the existence of an aggravating factor to render a defendant to be death eligible.[4] Once that occurs, the court retains discretion to impose the death penalty or sentence the defendant to life in prison based upon its weighing of the aggravating and mitigating factors. *Id.* at 503-04. Because the Defendant pled to three other violent felonies contemporaneously to his plea to first-degree premeditated murder, the prior violent felony aggravator was necessarily proven beyond a reasonable doubt, thus permitting the imposition of the death sentence. As such, he is death eligible and the death sentence is legal.

[4] As the Defendant waived a penalty phase jury, this Court acted as the factfinder. This negates the portion of the Defendant's argument that the presentation to the jury would have been different had the rationale of *Hurst* been utilized.

ORDERED AND ADJUDGED:

1. The Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence with Leave to Amend is **dismissed**.
2. The Defendant has 30 days from the date of rendition of this Order in which to file an appeal.

DONE AND ORDERED in chambers at Sanford, Seminole County, Florida on Friday, July 16, 2021.

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Marlene Alva, Circuit Judge
59-2007-CF-002377-A 07/16/2021 04:46:26 PM

I hereby certify that copies of the foregoing have been furnished by mail this ___ day of _____, 2021, to:

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EXHIBIT 3

2022 WL 17257044
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Supreme Court of Florida.

David Byron RUSS, Appellant(s)

v.

STATE of Florida, Appellee(s)

CASE NO.: SC21-1205

|

NOVEMBER 29, 2022

Lower Tribunal No(s).: 592007CF002377A000XX

Opinion

***1** Appellant's Motion for Rehearing is hereby denied.

MUÑIZ, C.J., and CANADY, POLSTON, LABARGA, COURIEL, and GROSSHANS, JJ., concur.

FRANCIS, J., did not participate.

All Citations

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EXHIBIT 4

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v. CASE NO. 2007-2377-CFA

DAVID BYRON RUSS,
Defendant.
_____/

DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE WITH LEAVE TO AMEND

Defendant, David Byron Russ, through undersigned counsel, files this successive motion to vacate his judgments and sentences under Fla. R. Crim. P. 3. 851.

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record: "T" refers to the transcript of trial proceedings; "R" refers to the record on direct appeal to the Florida Supreme Court; and "PCR" refers to the postconviction record on appeal to the Florida Supreme Court. All other record references will be self-explanatory.

1. The judgments and sentences under attack.

On February 6, 2008, Russ pleaded guilty to first-degree murder and other offenses. *Russ v. State*, 73 So. 3d 178, 184 (Fla. 2011). Trial counsel stipulated that the State could establish the proffered evidence by competent evidence for the penalty phase. *Id.* The trial court found that Russ was "alert and intelligent" and that the plea was "freely and voluntarily made with knowledge of the consequences after advice of competent counsel." *Id.*

On April 9, 2008, trial counsel informed the trial court that Russ wanted to waive presentation of all mitigation during the penalty phase and the penalty phase jury. *Id.* On April 14, 2008, the trial court conducted a status conference and discussed Russ's desire to waive mitigation. *Id.* at 185.

On April 30 and May 1, 2008, the trial court conducted a hearing pursuant to *Koon v. State,* 513 So. 2d 1253 (Fla. 1987). At the conclusion of the hearing, the trial court accepted Russ's waiver.

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Russ's penalty phase trial was conducted on January 8 and 9, 2009. During the penalty phase, the State called seven witnesses. Special counsel participated in the penalty phase and offered various mitigation.[1]

On January 15, 2009, the trial court conducted a *Spencer* hearing. During the *Spencer* hearing, special counsel presented additional evidence in mitigation.[2]

---

[1] (1) presenting prison medical records from previous incarcerations, (2) developing four witnesses' testimony through cross-examination, and (3) arguing against imposition of the death penalty and noting a number of potentially mitigating factors. Special counsel called three witnesses during the penalty phase. Special counsel also presented Russ's records from the following facilities: (1) the Texas Department of Criminal Justice (1993–1996); (2) the University Medical Center, Lubbock, Texas (1996–1998); (3) the Texas Department of Criminal Justice (1998–2001); (4) the Correctional Managed Health Services, State of Texas (2001–2005); and (5) the John E. Polk Correctional Facility (May 2007–present). Additional documents were admitted into evidence, such as Russ's (1) G.E.D., (2) college transcripts showing a G.P.A. of 3.67, (3) letter of acceptance to Texas Tech, (4) scholarship donor forms, and (5) thank-you letters to the scholarship donors.

[2] (1) Russ suffered from a long-term severe addiction to illegal drugs; (2) the crimes of conviction were the result of a long history of drug abuse and a direct result of said addiction; (3) Russ was severely physically abused as a child by his father; (4) Russ was verbally abused as a child by his father; (5) Russ had the capacity to form and maintain loving relationships with family members, before and after incarceration; (6) Russ was a devoted brother; (7) Russ was a devoted son to his mother; (8) Russ suffered from multiple medical problems, including: (a) a thyroid condition, (b) hepatitis C, (c) head trauma, (d) severe headaches, (e) vertigo, (f) vision problems, (g) dental problems, (h) heart attack, (i) allergies, (j) kidney stones, (k) chronic acid reflux, (l) asthma, and (m) degenerative disc disease; (9) Russ made numerous attempts to cure his drug addiction by going to multiple drug rehabilitation programs; (10) Russ was spending $500–600 each week on cocaine prior to the crimes of conviction; (11) Russ suffered from undiagnosed mental illness due to his physical abuse and drug use; (12) Russ pleaded guilty to the crimes and accepted responsibility in this matter; (13) Russ behaved appropriately in the courtroom; (14) Russ obtained his high school GED; (15) Russ had the trade skill of being a roofer; (16) Russ suffered from depression; (17) Russ had been taking prescription medicine while in custody which was very helpful for his mental health status; (18) Russ had been trained and educated in the field of drug abuse; (19) Russ attended Western Texas College from 1994 to 1997 and had a cumulative GPA of 3.67; (20) Russ was accepted to attend school at Texas Tech University in Lubbock, Texas, on July 17, 1997; (21) Russ was a member of the "Center for the Study of Addiction" which was run by Dr. Carl Anderson, Ph.D., at Texas Tech University; (21) Russ received a substance abuse studies scholarship for him to address his substance abuse addiction with Dr. Anderson on December 10, 1996; (22) Russ wrote a thank-you note and kind words to scholarship sponsors concerning his receipt of the scholarship in 1997 and 1998; (23) Russ was a father figure to the young son of his live-in girlfriend; (24) Russ took his girlfriend's son fishing and helped with his school work; (25) Russ carried an 80–year–old woman from her car to the ocean so she could sit in a chair and fish; (26) Russ had a loving relationship with his girlfriend; (27) Russ did not want to put the victim's family members

On May 13, 2009, the trial court issued its order and sentenced Russ to death. The trial court found that the aggravating circumstances outweighed the proffered mitigation.[3] The trial court found the existence of the following statutory[4] and nonstatutory mitigators.[5]

2. Issues raised on direct appeal and disposition thereof.

On direct appeal, counsel argued (1) the trial court failed to require an additional investigation into the mitigation that it was on notice of, (2) the trial court failed to adequately fulfill its constitutional obligation to ensure that Russ receive individualized sentencing, and (3) the death penalty was unfairly and unconstitutionally imposed. The trial court's findings were upheld by the Florida Supreme Court. *Id.* at 200.

3. Postconviction.

On October 14, 2011, the Florida Supreme Court appointed Capital Collateral Regional Counsel – Middle Region (CCRC-M) to handle Russ's postconviction proceedings.

On November 1, 2011, Russ filed a motion to dismiss CCRC-M and "'any and all' remaining or pending postconviction relief on appeals" and on February 9, 2012, the trial court granted Russ's motion to dismiss, ordered all pending postconviction proceedings dismissed and

---

through the emotional process of the penalty phase proceedings; (28) Russ had been counseling children concerning criminal activity and the dangers of drug use while in custody at the county jail for roughly the previous twelve months—the counseling was part of a program run by the Sheriff's Office; (29) Russ had no violent criminal history.

[3] The capital felony was (1) committed while the defendant was engaged in the commission of a kidnapping (significant weight), (2) committed for pecuniary gain (moderate weight), (3) especially heinous, atrocious, or cruel (HAC) (great weight), and (4) was committed in a cold, calculated, and premeditated manner (CCP) (great weight). The trial court rejected the aggravating factor that the murder was committed to avoid lawful arrest, finding that the State failed to prove that aggravating factor beyond a reasonable doubt.

[4] (1) Russ had an abusive childhood (moderate weight), and (2) Russ suffered from severe, long-term addiction to drugs which he was unable to conquer despite numerous attempts at rehabilitation (some weight). *Russ v. State*, 73 So. 3d 178, 187 (Fla. 2011).

[5] (1) the defendant was remorseful for the homicide (moderate weight), (2) the defendant suffered from multiple medical problems (very little weight), (3) the defendant had the capacity to form and maintain loving and caring relationships with both family and nonfamily members (little weight), (4) the defendant had pursued higher education and was skilled in the roofing trade (little weight), (5) the defendant had no violent criminal history (little weight), (6) the defendant behaved appropriately in the courtroom (little weight), and (7) the defendant wrote thank-you notes to his scholarship donors at Texas Tech University in 1997 (very little weight). *Id.* at 187.

discharged CCRC-M from further representation. The Florida Supreme Court affirmed the trial court's order on November 27, 2012.

Russ went unrepresented from November 27, 2012, until August 10, 2018, when the Federal Public Defender's Office Capital Habeas Unit (CHU) was appointed to represent Russ in Federal Court. United States Code § 2254 (b)(1)(A) provides in pertinent part that for the CHU to proceed in federal court, all State remedies must be exhausted. CCRC-M was appointed to exhaust State court remedies. Due to a conflict, CCRC-M withdrew and Capital Collateral Regional Counsel – North (CRCC-N) was appointed. Undersigned counsel filed her notice of appearance on April 15, 2019.

GROUNDS FOR POSTCONVICTION RELIEF

By his motion for relief under Fla. R. Crim. P. 3.851, Russ asserts that his conviction and sentence of death were obtained in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution. Taken individually or in combination, the constitutional violations described herein warrant relief. Russ moves this Court to vacate his conviction and sentence and order that he be granted a new trial, if he is found competent to proceed.

Facts Relevant to All Claims[6]

The following facts are based on interviews with David Russ's family and records obtained during investigations. David Russ was born in 1962, the third child of James ("Arnold") Russ and Ollie Mae Baxter. Arnold and Ollie both had bipolar disorder, and Arnold had schizophrenia, but during Russ's childhood both were undiagnosed and accordingly not treated. Russ's family summarizes Russ's childhood in one sentence: "He never stood a chance."

Arnold fathered four children with Ollie (Debbie, Aarron, David, and Melissa), and one daughter with Johnnie Marie Jackson (Mickey). Ollie and Arnold divorced in 1968, but briefly reconciled and Melissa Russ was born in 1970. Despite a court order finding paternity, Arnold never recognized Melissa as his biological child and refused to pay child support. *See* Declaration of Melissa Russ, Attachment 8, generally. Melissa also observed the disparate abuse of Russ as opposed to her other siblings and herself and recounted one incident where Arnold beat Russ

[6] The facts alleged in this section and throughout this motion are based on information obtained in interviews with David Russ's family, lay witnesses, records obtained during investigations conducted by the CHU and CCRC-North, and the records on appeal.

almost to the point of unconsciousness because he put the toilet paper on the roll incorrectly. *Id.* at 2.

In 1975, Mickey was born to Arnold and Johnnie Marie. *See* Declaration of Johnnie Marie Jackson, Attachment 7. Arnold had been abused as a child and perpetuated that cycle with his own children. He also physically abused his wife, Ollie, for the duration of their marriage. Arnold emotionally abused his oldest daughter, Debbie, causing her to develop a severe obsessive – compulsive disorder. Although Debbie was not physically abused by her father, she left the house around the time that Ollie left Arnold. Debbie married young in order to get away from the family, but was physically abused by her husband until she died at a young age under mysterious circumstances that suggested foul play on the part of her husband.

While emotionally abusive to all of his children and eventually physically abusive to Mickey, Arnold was always more inclined to physically abuse his sons than his daughters and was far more abusive to Russ than to his brother Aarron. The Russ family credits this to a combination of factors. First, Arnold valued firstborn sons and saw them as the continuation of his bloodline and namesake. As a result, Arnold valued Aarron in a way he never valued Russ. Second, Russ formed an early bond with his mother, which added to Arnold's suspicion that Russ was not his biological child. Third, Aarron had social savviness and confidence about him that Russ never had. Aarron was able to pacify his father and avoid much of the abuse Russ was subjected to.

Arnold began physically abusing Russ before Russ was out of the womb. Arnold repeatedly assaulted Ollie in the hopes of causing her to miscarry Russ. The beatings Arnold inflicted on Ollie while she was pregnant with Russ caused a deformity to Russ's ear that is suggestive of *in utero* brain trauma.

The first beating by his father that Russ can remember was at the age of four. Arnold became angry one morning after he saw Russ and Aarron playing with chickens. He whipped both boys until they could barely move, then forced them to stand against the wall from morning to night.

Arnold beat Russ with whatever he could reach including switches, rake handles, hangers, baseball bats, garden hoses, pots and pans, belts, and items of furniture. When Arnold had nothing in hand, he used his fists, pummeling every area of Russ's body, including his head. Often, Arnold would preemptively beat Russ for mistakes he believed Russ might make during the day, such as failing to put the toilet paper on the roll correctly, failing to take trash out, or failing to wash the

dishes. At other times, Arnold would come home in the evening and beat Russ for things he imagined his son had done. "If the wind blew the wrong way," Arnold lashed out at Russ. When Arnold beat Russ, Russ would curl into a ball and scream out, begging his father to stop. He would plead, and Arnold would respond with additional insults, like "I'm going to kill you", "you sorry son of a bitch", "your mom is a whore," "you're not mine," and "you're worthless." The more Russ cried, the more Arnold beat him.

After his father's routine beatings, Russ would retreat to his room and sit in a catatonic state for hours. Over the years, he became increasingly withdrawn and quiet. He was polite but kept to himself as a way of avoiding his father's wrath and fury.

Arnold placed unrealistic expectations on his wife and children, and intentionally created situations to set them up for failure. He then used that perceived failure as an excuse for beating them. One frequently recounted instance occurred when the family drove across the country in furtherance of Arnold's work as a commercial beekeeper. Arnold stopped the truck, opened the compartment where the bees were kept so they would enter the vehicle, and threatened his wife, stating, "if any of these kids get stung, I'm going to beat the hell out of you." Arnold provoked the bees, which predictably stung Russ. Arnold grabbed Ollie by the hair, dragged her out of her seat to the rear of the truck, and repeatedly bashed her head against the steel bed prior to lashing her with his belt.

On other occasions, Arnold hid Russ's clothes, then blamed Russ for losing them and used that as an excuse to beat him. He also withheld food for Russ for no reason.

Arnold terrorized his wife and children. Their total existence was fear-driven. They became so accustomed to abuse, they would flinch when Arnold coughed or sneezed. (Attachment 10, p. 2, Declaration of Mickey Rodriguez). If Arnold saw Russ flinch, he would backhand him, drawing blood from his mouth, and would shout, "What are you jumping for?!" Russ was never able to control his fear response, so he was constantly struck by his father. To this day, Russ often jumps when he hears a loud noise.

When Russ was six or seven, he was caught stealing a jar of change from his grandmother's house. As punishment, Arnold forced Russ to run approximately 4 miles on the main road in the middle of the summer without water or rest breaks, carrying the jar of change. Arnold followed Russ in his truck, screaming insults and obscenities out the window at Russ. If Russ cried or showed emotion, Arnold would beat him.

When Ollie became pregnant with her fourth child, Arnold assaulted her in hopes of causing a miscarriage. Ollie fled from Arnold, initially taking the boys with her but ultimately discovering she was unable to care for them. Ollie's house was filthy and unsafe, and she slept all day before going out with men all night. She failed to feed her children or provide them with adequate clothes. Unwilling or unable to provide her sons a safe home, Ollie terminated her parental rights and left Russ and his brother Aarron in Arnold's custody. *See* Attachment 12, Petition of Marilyn Pruitt for an Order Declaring James Aarron Russ and David Byron Children in Need of Supervision. Russ became distraught at his mother's abandonment, and at the age of eight began to self-medicate with alcohol.

Arnold's beatings of Russ increased after Ollie's abandonment. The beatings occurred nearly daily, lasting from 5 to 10 minutes. Arnold "was crazy as hell" and foamed at the mouth when he inflicted beatings. He threatened to kill Russ, saying that he brought him into the world and he would take him out of it. Russ's family speculates that Arnold only wanted custody of his sons to use them as free labor for his beekeeping business. Once, when Arnold did not believe Russ was performing beekeeping tasks correctly, he threw a hive full of bees at him.

Often, Russ was forced to strip naked for beatings, even as he entered his teenage years. The forced nudity always humiliated Russ, but became more traumatic after Russ – at age eight or nine – after his mother abandoned him-- was sexually assaulted by an adult male in an orange grove. Compounding Russ's sexual trauma, around this time, he and his brother were subjected to sexual abuse by an adult relative. Neither of the boys reported the sexual abuse out of fear that their father would punish them for it or use the information as ammunition to further psychologically abuse them.

Arnold coupled his physical abuse with mental torment, screaming that Russ was worthless and would never amount to anything, that Russ was not his son, and that he didn't care if Russ died from his beatings.

The physical abuse was extraordinary and severe. Arnold broke Russ's bones. Arnold repeatedly hit Russ in the head, often causing him to lose consciousness and prompting seizures. Russ was left with black eyes and split lips. Russ bled from the nose and mouth, and it sometimes appeared as if the bleeding was internal. Russ did not receive medical treatment for most of these injuries because Arnold feared arrest for child abuse. Russ wore long pants regardless of the season

to hide the injuries, and often missed school until he could hide the visible marks and move around freely.

When Arnold became angry with Aarron, he would beat Russ. One such beating took place when Aarron ran away and was later apprehended in Ohio. Arnold, furious, insisted that Aarron weed the garden as punishment for running away. Aarron refused. In response, Arnold forced Russ to hoe the garden while Aarron watched, until Russ's hands were blistered and bleeding. Then claiming Russ was not working quickly enough. Arnold knocked Russ into the dirt, sat on him, pushed his head into the dirt, and beat Russ with a 1" x 2" strip of wood filled with nails and spikes that he'd been using as beanpole. When Aarron tried to intervene, Arnold said, "if you move, I will kill you." Russ nearly died of suffocation that day.

Every year, Arnold moved the boys from Florida to South Dakota and back, as well as taking multiple trips to Texas for his bee business. The boys bounced around from school to school, never settling in one place long enough to make outside friends. They struggled in school as a result of their home life – they were often sleep deprived, nursing injuries ranging from bruises to broken bones, and undernourished when food withholding was used as another of Arnold's torments. As a result, Russ was evaluated for special education despite his intelligence, which further isolated and demeaned him. The boys frequently found joy in a Little League baseball team, but Arnold often prevented them from attending because he believed the coach was suspicious that the boys were being abused.

Aarron and Russ believed the only escape was to kill their father, but could never bring themselves to do it. They believed no one at school knew about their daily torment, because Arnold refused to let them go to school when his beatings left physical marks that could not be hidden. They also believed no one in their community cared, because Arnold kept them so isolated. They were wrong. Shortly after Russ was nearly killed in Arnold's garden after Aarron ran away, a local farmer reported the abuse. Russ and Aarron were removed from Arnold's care for their physical safety, but with devastating consequences: they were separated in the foster care system.

Russ was devastated by the loss of Aarron, whom he called his "life preserver." Aarron was placed in a foster home with some children he was friendly with at school. Russ was placed miles away on an isolated farm. Russ never adjusted to the separation from Aarron. He felt like he did not belong at the foster home, and as though the only way to get attention was to act out. He ran away from every foster care placement he received and at one point nearly died of alcohol

poisoning after drinking eight coffee cups of Canadian club whiskey. He was crying out for help. Russ was nicknamed "the runner" and was placed at the Okeechobee School for Boys in Florida where he was exposed to further abuse.

When Russ was 15, the foster care system was able to locate Ollie and Russ was sent to live with her. By then, he had been uprooted so much that he struggled to assimilate into his old surroundings. He tried to rebuild a relationship with his mother, but felt resentful and hurt that she abandoned him by voluntarily terminating her parental rights and leaving him with his abusive father. Unable to cope with these pressures, Russ dropped out of school in 10th grade and work full-time in roofing so he could move out of his mother's home.

When Russ was around 20 years old, Aarron introduced him to intravenous cocaine. Russ developed an instant addiction. He used cocaine to self-medicate and avoid the effects of his then undiagnosed mental illnesses.

For the next 25 years Russ's life revolved around crack cocaine. Russ began to lose construction jobs because he was constantly high. Even when he had periods of employment, his income could not support his drug habit. Russ began to deceive friends and family for money. He abandoned relationships and even his own infant daughter in order to keep using drugs. Eventually, he began to commit burglaries and pawn stolen items so that he could buy crack cocaine. Beginning in 1986, Russ was arrested no less than six times. His offenses were all nonviolent and centered around drugs – either possession of controlled substances or burglary and theft for the purpose of purchasing drugs. Records from various out-of-state incarcerations indicated that Russ suffered from "disorganized" thought processes. Russ's family and friends reported hearing that Russ had been sexually assaulted during one of his early prison terms, possibly in the form of a gang rape.

Russ's only significant periods of recovery happened while he was incarcerated or under a court order. When Russ was incarcerated, he maintained sobriety and attempted to forge a successful future. He was regarded as a model inmate and was profiled on TV for his rehabilitation. He enrolled in college while in prison and maintained a 3.67 grade point average on a 4.0 scale. He was often paroled early. Aarron, who was recovering from his own addictions and rebuilding his life with Russ's emotional support, tried to support Russ's efforts by finding him work, housing him, and attending various 12-Step programs with him. Each time Russ was released from prison, he began his reentry with motivation and appeared to thrive. Upon one release, Russ received a

scholarship to the preeminent Texas Tech University Center for Study of Addiction and Recovery, where he studied counseling. He formed relationships and married. He excelled in construction and roofing and was promoted to a supervisory position. But as soon as things began to look up, Russ cycled into self-destruction and began to use drugs again.

From years of abuse and neglect, Russ developed a "self-destructive mechanism" that caused him to panic "when things started getting good." He fell into a pattern: starting off a new job or relationship with hope and fervor, beginning to excel, then self-sabotaging as soon as he started to feel successful. He suffered from low self-esteem, but portrayed confidence in order to mask his insecurities. He frantically sought approval from employers, coworkers, friends, and romantic partners, but it was never enough. If he did not receive the validation he sought, he crumbled emotionally. He was a serial monogamist who married multiple times after short, intense courtships, but emotionally distanced himself in each relationship when it failed to fill his sense of emptiness. He "sabotaged every opportunity he ever had because [of] those negative messages he'd heard as a child came to fruition." *See generally* Declaration of Molly Sanchez, Attachment 11.

No matter what happened in Russ's whirlwind adulthood, he always went back to using crack cocaine. Aarron and other family members often recognized when Russ was relapsing, but Russ still tried to hide his drug use. He distanced himself from Aarron and anyone else who might recognize he was using again. Russ spent an average of $500-$600 per week to buy crack cocaine. He relied on burglaries and deception to finance his habit. During his periods of sobriety, he vowed never to return to the shame of his addiction, but he had never developed sufficient coping mechanisms to deal with his inner turmoil.

In another upward cycle in late 2006, Russ moved to Florida to live with Kimberly ("Kim") Williams. He had met Kim through his sister, Missy, but had never met her in person. He instantly took on the role of perfect boyfriend and father figure to Kim's son, Tanner. He cared for Kim's ill great aunt, who was living in the same house, and assisted Kim's parents with household tasks and yard work. *See generally* Declaration of Kimberly Williams, Attachment 9.

By early 2007, Russ was back to using crack cocaine. One evening, he repetitively checked under the beds, in closets, and elsewhere around the house, believing police were pursuing him and hiding in the house. He slept for the next two days, and was filled with shame when he awakened and realized he had relapsed.

Russ attempted to get clean, but could not do so on his own. He began staying out all night, smoking crack and trying to hide it from Kim and his family. He loaned Kim's car to a drug dealer in exchange for more crack, and when he lost that car he took his sister's car without permission. He was laid off from his job because he was constantly high.

His sister Missy and Kim attempted to find Russ when he left home to use drugs. Most times when they found him, he would flee from them or cover his face and cry. In between drug binges, Russ was filled with remorse, but the cycle never ended. At the end of April, Kim caught Russ on another crack binge, and told him if he relapsed again he should not bother coming home. Less than a week later, Russ never came home and ceased to contact Kim and Missy. They believed he was dead until they were informed by the police that he had been arrested for murder.

After Russ's arrest for the instant charges, he exhibited obvious signs of mental instability during recorded phone calls from the jail. Each of the following statements was made by Russ prior to September 2007:

- "I just wanted to beat myself to death."
- "If I go through the trial, they are just going to paint me as his lifelong habitual screwup for my whole life."
- "That's not how I want you to look at me, that's not how I want you to remember me..."
- "Depression is a hell of a thing."
- "It's depression that I am fighting. It's deep, deep rooted – I don't know if you will ever go away."
- "I'm on this emotional roller coaster where I'm happy one moment, I'm hopeful, and the next moment I'm hurting and beating myself half to death."
- "The only reason I want to keep living as you. The only reason I want to keep breathing is for you. That's it. This is a living hell right here."
- "I'm going to go in there next week and I'm going to go in there and plead guilty or whatever I'm just going to let them fucking hang me. I'm not gonna fight them. I'm not gonna do a goddamn thing. I'm gonna go ahead and fucking leave this world. That's what's going to happen."
- "I feel like I'm in the middle of the ocean by myself here. I can't see land."
- "You're all I live for, Kim."
- "I'm being selfish for wanting to leave this world right now."
- "The lesser of two evils is to be able to go ahead and get into the next life or whatever it is and not have to deal with this on a daily basis."
- "[Dr. Day] already told me that my judgment was impaired, that was my issue, my judgment, now why is my judgment the way it is. . .There are things in me that are blatant flaws and there's a reason for that and we need to figure out why."
- [After Kim threatened not to visit again] "If you jeopardize our visits. . . I don't know, I don't know, how do I deal with that, I don't know if I can. . . You know how that devastated me. . . I don't care anymore."

- "They are going to make me look like a piece of shit in that courtroom[.]"
- "Something is broken in me I don't understand it."
- "They're going to try to execute me and part of me is okay with that."
- "My attorneys and I have agreed that we don't really need to go to trial, trial is a big circus, were they really humiliating to grade you, they really try to paint things into ways that they are not. . . So then I go ahead and plead regardless of what they do."
- "I know I'm going to be humiliated degraded, cussed at."
- "My lawyers have told me I'm coming home in a pine box. . . That's my attorney.
- there's going to be a lot of people there really trying to turn me into Hannibal Lector."
- "I'm so damn depressed."
- "I can't, I can't. . . I don't want to live life without you, I can't."
- "[Tim Caudill]said, 'David, if you go to trial they are gonna sentence you to death. It's not in your best interest to go to trial'. . . I been instructed. . . to go ahead and plead and then six months down the road I'll have a sentencing hearing and then I'm vulnerable because there is no mitigation, because they're not trying to prove guilt. I've already pled guilty, so there is no mitigation on my behalf, all the district attorney has the opportunity going to just paint me as a monster. . ."
- "Not only is my mother gonna abandon me, she's going to treat me like she is a vulture."
- "[My attorney] has told me one thing after another, after another, instilling false hope, trying to encourage me to be vulnerable, to go in and be vulnerable to the fiasco, the circus, to bring my family and let them be humiliated and degraded, and all this crap and still get the death penalty, he told me that if I went to trial that's what's going to happen. . . He said, Dave I'm not going to sit back and watch you roll over and let the son of the bitches kill you. . . And I am like what do you mean? You already told me if I go to trial I'm going to lose so what am I supposed to do, what do you mean rollover?"
- "[Tim Caudill] is telling me one thing, telling me another, telling me another. . . "
- "Well I'll go ahead and just plead out and then deny any appeals or anything like that, just wave them."
- "Missy and Mom have no desire to stay in touch with me anymore."
- "I just want to die."

By lay witness accounts, Russ's mental state continued decline between September 2007 at his guilty plea, and further declined from then on. Russ exhibited signs of depression prior to his trial and was placed on antidepressant medication, an improper course of treatment for someone with bipolar disorder.

In the months leading up to Russ's guilty plea he became increasingly hopeless about his situation. His relationship with his fiancée, Kim, had ended and his only regular visitor was Donna Jenkins, whose son had been incarcerated with Russ. *See* Attachment 6, Declaration of Donna Jenkins. He became frustrated that Aarron was not writing or contacting him and asked Ms. Jenkins to reach out to Aarron. Aarron, unable to handle the combination of anger regarding Russ's crime, grief for the loss of David, and guilt because he had first introduced Russ to cocaine,

attempted to minimize the emotions by distancing himself from Russ. *Id.* at 2. The longer Russ went without hearing from Aarron, the more lonely, frightened, and depressed Russ felt.

Russ became consumed with remorse, and fixated on showing his family he was taking responsibility for his crime. He hoped that would induce his family to visit.

As a result, on February 6, 2008, Russ entered a guilty plea to all charges, in exchange for which he received no benefit from the State. The trial court never ordered a competency evaluation, nor did trial counsel request one. The trial court relied on Russ's own assurances and trial counsel's assurances that Russ's judgment was not impaired to find that he had made an intelligent waiver of his rights. (R12: 24).

On April 14, 2008, trial counsel informed the trial court that Russ wished to waive the presentation of mitigation. The State expressed concern that the court would need to decide Russ's competency to waive the presentation of mitigation, asking, "Is he mentally competent? And two, is he legally competent to waive presenting any type of mitigation evidence, as well as waving the jury?" (R12: 472).

Russ responded that when he pled guilty, he was found competent and that should still be the case… "I have a desire to stand before you, vulnerable again, as should be the case." (*Id.* at 473-476); ("I just ask that, you know, just as my pleas were accepted, and that I was found competent for that, that I'll be found competent to waive the jury and to waive mitigation"). *Id.* He referenced his extensive drug abuse, childhood abuse and head injuries, but the Court did not ask for details.

The Court asked defense counsel whether there had been a competency evaluation and what the status of any such evaluation was. Trial counsel represented that they had retained Dr. Deborah Day, and that she had, as part of her initial evaluation, performed a competency evaluation. (R. 12: 476). However, Dr. Day was retained only for mitigation purposes and did not conduct a competency evaluation. Counsel stated that Dr. Day "At that time, thought that Russ was competent. He has, of course, been deemed competent by two different courts including you, to enter pleas. I have not had a recent update to that." *Id.* While counsel stated that they believed Russ was making a "horrible decision" they did not seek any further evaluation raise concerns about Russ's competency. *Id.* The Court stated, "Well, I know there was no issue of competence at the time of the plea. We had addressed it." *Id.* at 477. Trial counsel represented the it seemed nothing since that time to indicate a lack of competency. *Id.*

On April 30, 2008, the Court asked trial counsel if there had been any suggestions Russ may be incompetent to proceed. *Id.* at 486. Counsel represented that although "there were indications that he had personality problems that interfere with his decision-making capabilities," they did not feel there is any indication that Russ was not competent. *Id.* The Court specifically asked counsel if a defense expert had found Russ competent to proceed, and trial counsel affirmed that Dr. Day had evaluated Russ shortly after his arrest and had found him competent. Trial counsel stated he had not asked for a follow-up examination "because I haven't seen any indications in my client as to. . . that he had in any way lost competency such that I need to have an expert see him again to make another determination of the current state of competence." *Id.* at 487. Again, Dr. Day did not conduct a competency evaluation.

The Court, despite finding Russ competent to waive his penalty phase rights, appointed special counsel for the purpose of advising the court in its duty of weighing if aggravating and mitigating circumstances. (R13: 545). The court instructed special counsel that its responsibility "as special counsel is to present mitigation, whatever mitigation there is in the same manner that you would presented in any capital trial." *Id.* at 552. The Court made clear that special counsel was not relieved of their duty to do a full investigation and presentation, stating "it would be just as if you were representing him as the public defender here." *Id.* at 554. Pretrial hearings indicate the special counsel essentially ended their investigation four months later in September 2008, seemingly out of frustration that Russ would not speak to the first expert they attempted to retain.

Prior to sentencing, Russ became obsessed with self-loathing and martyrdom. He ruminated about concepts of victimization, and used the term melodramatically. Russ developed a self-deprecating fixation that he had been a victimizer. Russ called everyone who ever cared about him a victim of the negative messages he had heard as a child which caused him to self-sabotage. He stated that, by stealing a jar of his grandmother's change of the age of eight, he had "switched roles" from being a victim to becoming the victimizer and further stated that by entering a home without permission when he was approximately in the first grade, he proved that he had a "lack of morals and values" due to a "total disregard for another human being's privacy."

On May 14, 2008, Russ wrote to the trial court in response to its order for a mitigation investigation. Russ stated that he did "not deserve or desire anyone present mitigating evidence concerning my past." He referenced his childhood abuse, head injuries, and over 20 years of drug abuse, and called himself self-destructive. He referred to the upcoming penalty phase as "this, the

final sentencing[.]" He stated that he would make no excuses because he was not a victim any longer. He stated that for the 10 days prior to the murder he was "24/7 nonstop getting high, smoking crack. No sleep, no food, no shower." He claimed to be a "cold-blooded killer on that day" despite several accounts from his family and friends indicating that he never intended to kill anyone. He made several prejudicial statements under the guise of assisting the judge to decide his fate "by facts. By truth." At no time did Russ's counsel or the Court seek further evaluation of Russ based on the self-sabotaging nature of the letter.

On November 23, 2008, Russ again wrote the trial court expressing his anger that the court appointed "new counsel on my behalf to present mitigation of which I waived." Russ claimed that the facts of the case are "very brutal" and that he didn't want his actions "on attorney Dowdey's conscience." Russ urged the trial court to "decide my fate based on the facts the state attorney's office will provide. . . I personally believe I belong on death row for my actions. . . My future should be clear to all." Russ became inflammatory, stating, "If I do not receive the death penalty then all men on death row should be released off death row. Period!!! That is my sincere conviction." Again, neither the trial court nor defense counsel moved for a competency determination or any further evaluation based on Russ's quasi-suicidal letter.

Rather than investigating whether Russ's behavior was the result of decompensation in jail and/or an indication of incompetency, Russ's lawyers praised him for "wanting the same justice that he gave the victim." One of his lawyers, a recovering alcoholic, filmed Russ for the purpose of sharing his story with members of Alcoholics Anonymous as a cautionary tale, and stated that in filming Russ he believed it was important not to present mitigating evidence on "his friend David's" behalf.

At Russ's trial, special counsel made a superficial showing of mitigation, calling only three witnesses: an investigator who testified solely to introduce records; Russ's former stepmother, whom counsel hardly questioned, and Aarron Russ, who was also asked hardly any questions. Although special counsel made no pretrial requests for more time for its investigation, special counsel commented after his closing argument that they wished to have a *Spencer* hearing because "there may be a few last nuggets that we do want to present [.] (R 11:329).

Despite special counsel being "not sure at this point if [Russ was] technically our client" and believing themselves to be simply at the Court's direction and disposal, they objected when Russ's counsel attempted to speak during the penalty phase. (R 10:9, 76). ("I'd object to Mr. Caudill

interfering in any way with our penalty phase. . . We've been appointed to represent him in the penalty phase. Mr. Caudill doesn't have a voice in it.")

At postconviction, counsel never investigated Russ's incompetence in the trial proceedings or in the postconviction proceedings. The Court again relied on representations of counsel that Russ was competent to proceed. Russ was permitted to waive postconviction proceedings without a competency evaluation.

CLAIM 1

RUSS WAS DENIED HIS PROCEDURAL AND SUBSTANTIVE FEDERAL AND STATE CONSTITUTIONAL RIGHTS AS THEY PERTAINED TO HIS INCOMPETENCY AT THE TIME OF HIS PLEAS, WAIVERS, PENALTY PHASE AND SENTENCING.

This claim is evidenced by the following:

All other allegations and factual matters contained elsewhere in this motion are fully incorporated herein by specific reference.

Despite having a long history of substance abuse and clear signs of mental illness, no reasonable assessment was made by trial counsel or the Court regarding Russ's competency before he was allowed to waive his rights to a guilt/innocence and penalty phase trial by jury and the presentation of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and corresponding provisions of the Florida Constitution.

The test for assessing Russ's competency is whether he "ha[d] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he ha[d] a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960).

Where there is sufficient doubt of the defendant's mental capacity to stand criminal proceedings, such an inquiry includes, at a minimum, a hearing to determine the competency of a defendant. *Pate v. Robinson*, 383 U.S. 375, 387 (1966) (explaining that a hearing is constitutionally guaranteed when the record contains "sufficient indicia of incompetence" to doubt the defendant's competency).

The criminal trial of an incompetent defendant violates due process. *Drope v. Missouri*, 420 U.S. 162, 171 (1975). This due process right cannot be waived. *Pate v. Robinson*, 383 U.S. at 384 (1966).

Based on Russ's history of substance abuse, head injuries, trauma and mental illness, there is a bona fide concern as to his competency at the time of his trial. This evidence was available prior to his trial. Yet, Russ's trial counsel did not request--and the court did not *sua sponte* order--a competency evaluation or competency hearing.

As a result of the lack of action by trial counsel or the trial court, Russ was incompetent when he pled and waived a panoply of constitutional rights, *see, e.g., Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969) (a waiver of constitutional rights that is not knowing, intelligent, and voluntary is void and violates due process); as well as during his penalty phase jury and presentation of mitigation at sentencing.

Had trial counsel effectively investigated red flags related to Russ's extraordinary drug use and severe physical and mental abuse by his father, they could have challenged his competence to proceed.

First, Dr. Richard Dudley, M.D., was retained by the CHU in October, 2018 for the purpose of evaluating Russ's mental health and competency and evaluated him at Union Correctional Institution on October 11 and 12, 2018 for a total of 5 hours. *See* Declaration of Dr. Dudley, Attachment 4, pp. 1-2. He reviewed a psychiatric evaluation conducted by the Department of Corrections and other records in the case before meeting with Russ. *See* Attachment 5, FSP Psychiatric Evaluation dated November 5, 2009. Dr. Dudley wrote a report in which he found that Russ suffers from multiple psychiatric and neuropsychiatric disorders, most of which, if not all, predate his guilty pleas and subsequent waivers of a jury trial and presentation of mitigation in the initial trial proceedings. Dr. Dudley found that Russ meets diagnostic criteria for:

- Possible traumatic brain injuries, the likely result of multiple head injuries and longstanding, severe stimulant use disorder. *See* Dudley report at 10.
- Post-Traumatic Stress Disorder caused by years of unrelenting physical and emotional abuse by his father, primarily, and related dissociative episodes in the wake of events that trigger memories of the abuse, characterized by persistent and negative beliefs about himself that he is evil and without redemption and persistent emotional states of fear, shame, anger and detachment resulting in self-destructive behavior and overreaction to perceived threats and everyday events. *Id.* at 2.
- Manifests developmental difficulties consistent with borderline personality disorder, the result of inadequate parenting (extreme abuse by his father and repeated abandonment by his mother), characterized by relationships marked by intensity and instability with an abiding fear of abandonment. As a result, he often created "self-fulfilling prophecies" that destroyed his most prized relationships. *Id.* at 3.

- Manifests symptoms of a mood disorder, most likely bi-polar disorder characterized by periods of profound depression, hopelessness, anhedonia, feelings of worthlessness and excessive guilt with suicidal ideations.
- Manifests schizotypal features, such as cognitive and perceptual distortions characterized by suspicion and paranoid ideations with inappropriate effect. *Id.* at 6.
- Presents indicia of psychosis. *Id.* at 8.

Dr. Dudley is of the opinion that each of these brain and psychiatric impairments impacted and continue to impact Russ's ability to function in his everyday life and his ability to function at every stage of the legal process. The collective impact of each condition exacerbates the other conditions.

Dr. Dudley recommended further examinations by a trauma expert, neuropsychologist, neurologist, and psychopharmocologist. Dr. Dudley concluded his examination in October, 2018.

Undersigned counsel was not appointed until April, 2019 and endeavored to retain the experts recommended by Dr. Dudley as expeditiously as possible after an independent investigation of the case and with the limitations imposed by a worldwide pandemic.

Undersigned counsel retained the following experts:

Dr. Drew Edwards holds a master's of science in health science/addictions counseling from the University of North Florida and a doctorate degree in education from Nova Southeastern University. *See* Declaration of Dr. Drew Edwards, Attachment 3, at p. 1. He has established and directed chemical dependency centers in Minnesota, Indiana and Florida and has been on the medical faculty at the University of Florida's Health Science Center in Jacksonville. He has counseled countless drug addicted patients.

Dr. Edwards met with Russ at UCI on February 26 and June 17, 2020 for a total of five hours. Dr. Edwards is of the opinion, based on his thorough examination, that Russ was likely incompetent to proceed in his initial trial proceedings due to his documented history of drug addiction caused by his unrelenting and extreme physical abuse by his father. Dr. Edwards cited to relevant literature in the field demonstrating discernable injuries to the frontal cortex that controls executive functioning in humans caused by extensive stimulant use, leading Dr. Edwards to conclude that Russ suffered impairment to his frontal cortex "to the degree that it could no longer inhibit his hedonic survival drives." He further stated, "It is possible that Russ relied on language from Alcoholics Anonymous to justify his legal waivers, masking the level of his impairment and irrationality, and misleading the court into believing Russ was making rational

decisions when the opposite is true." Based on his understanding of the legal definition of incompetence to proceed in Florida and elsewhere, he is of the opinion that Russ fell short of the competence required to enter pleas and waive other constitutional rights.

Dr. Jethro Toomer holds a doctorate degree from Temple University and completed his post-doctoral residency at the Albert Einstein Hospital-Moss Rehabilitation Center and teaching hospital in Philadelphia. *See* Declaration of Dr. Jethro Toomer, Attachment 1 p. 1. In 2009, he retired from his teaching position at Florida International University in the graduate studies program in Mental Health and has engaged in the private practice of clinical and forensic psychology for more than twenty-five years. *Id.*

Dr. Toomer examined Russ in December, 2019 at UCI. Based on his examination and his review of pertinent sections of the record in this case, Dr. Toomer opined that, "Despite Russ's prior assurances [to the court], the totality of data indicates, to a reasonable degree of psychological certainty, that Russ's capacity to make competent decisions was impaired at the time of his trial level and postconviction waivers." *Id.* at 4.

Dr. Harry Krop holds a doctorate degree in clinical psychology and is licensed in the State of Florida. *See* Declaration of Dr. Harry Krop, Attachment 2. p. 1. He was retained by undersigned counsel and conducted a neuropsychological examination on Russ on January 31, 2020 at UCI. Based on his review of the records and his examination of Russ, it is his opinion within a reasonable degree of psychological certainty that Russ's capacity to make rational decisions, communicate with counsel, and assist counsel in the preparation of his defense, was compromised at the time he entered his pleas, waived a jury trial, waived mitigation, and waived initial postconviction. *Id.* at 4.

CLAIM 2

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY INVESTIGATE AND RAISE THE ISSUE OF RUSS'S INCOMPETENCY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

This claim is evidenced by the following:

All other allegations and factual matters contained elsewhere in this motion are fully incorporated herein by specific reference.

Despite having a long history of substance abuse and clear signs of mental illness, no reasonable assessment was made by trial counsel regarding Russ's competency before he was allowed and even encouraged by counsel to waive his rights to a guilt/innocence and penalty phase trial by jury and the presentation of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and corresponding provisions of the Florida Constitution.

Counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U. S. 668 (1984). *Strickland* requires a defendant to establish unreasonable, deficient attorney performance, and prejudice resulting from that deficient performance. Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings results are rendered unreliable. See, e.g. *Kimmelman v. Morrison*, 477 U. S. 365, 384-388 (1986) (failure to request discovery based on mistaken belief state obligated to hand over evidence); *Henderson v. Sargent*, 926 F. 2d 706 (8th Cir. 1991) (failure to conduct pretrial investigation was deficient performance); *Chambers v. Armontrout,* 907 F. 2d 825 (8th Cir. 1990) (en banc) (failure to interview potential self-defense witness was deficient performance); *Nixon v. Newsome*, 888 F. 2d 112 (11th Cir. 1989) (failure to obtain transcripts of witness's testimony at co-defendant's trial was deficient assistance); and *Code v. Montgomery*, 799 F. 2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witness was deficient performance). Also, trial counsel cannot be found to have made a strategic decision when he failed to fully investigate. *Strickland* at 690-691; *Wiggins v. Smith*, 539 U. S. 510, 527 (2003) (a reviewing court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."); and *Henry v. State*, 862 So. 2d 679, 685 (Fla. 2003) ("A reasonable strategic decision is based on informed judgment.").

As incompetence is an absolute bar to prosecution and to the imposition of the death penalty, trial counsel's failure to thoroughly investigate issues surrounding Russ's competence to proceed and challenge his competence at the trial court level falls far below what is expected of counsel representing a client charged with a capital offense. This deficient conduct by counsel renders any results in the instant case unreliable under the Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

CLAIM 3

RUSS WAS INCOMPETENT AT THE TIME OF HIS STATE POSTCONVICTION WAIVER AND WAS INCOMPETENT TO WAIVE HIS RIGHTS AT THAT PROCEEDING.

This claim is evidenced by the following:

All other allegations and factual matters contained elsewhere in this motion are fully incorporated herein by specific reference.

Russ's death sentence violates the federal Constitution because he was not competent to waive his state collateral review rights. Russ was not competent to plead or waive his postconviction rights. *See infra* Claim 1. Due to Russ's continued incompetency during the state postconviction waivers, his continued confinement on death row violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution and the corresponding provisions of the Florida Constitution.

Even if Russ had been competent at the time of his trial, too much time had passed to rely on a competency determination from multiple years prior. *See Drope*, 420 U.S. at 181; *Bishop v. United States*, 350 U.S. 961 (1956).

Russ was not actually competent to waive his postconviction proceedings. In addition to the impairments Russ had at trial, he was under stressors related to being incarcerated under a death sentence, estranged from family and other sources of emotional support, and his solitary confinement on death row.

CLAIM 4

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED RUSS OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.

This claim is evidenced by the following:

All other allegations and factual matters contained elsewhere in this motion are fully incorporated herein by specific reference.

Russ did not receive the fundamentally fair trial to which he was entitled under the Sixth, Eighth, and Fourteenth Amendments. The sheer number of errors in Russ's guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel significantly tainted Russ's guilt and penalty phases. The errors as claimed in this motion are hereby specifically incorporated into this claim. These errors cannot be harmless.

Under Florida case law, the cumulative effect of these errors denied Russ his fundamental rights under the United States and Florida Constitutions. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). A series of errors may accumulate a very real prejudicial effect. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative efforts did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967).

The flaws in the system which convicted Russ of murder and sentenced him to death are many. This Court cannot determine whether this claim should be granted until it has heard all the testimony in this case. As such, this Court should defer ruling until the evidence has been presented and Russ has an opportunity to make further argument.

CLAIM 5

RUSS'S DEATH SENTENCE VIOLATES HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

On January 12, 2016, the United States Supreme Court rendered its decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and found that Florida's capital sentencing statute is unconstitutional. *Id.* at 619. The Court ruled that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* The *Hurst* opinion identified the statutorily defined facts that must be found under Florida law before a death sentence may be imposed. *Id.* at 622. Under Florida's statute, a death sentence is not authorized unless a finding of these statutorily defined facts after a unanimous verdict finding the defendant guilty of first-degree murder has been returned. The additional statutorily defined facts required to authorize the imposition of a death sentence are 1) the existence of "sufficient aggravating circumstances" and 2) the absence of "sufficient mitigating

circumstances to outweigh the aggravating circumstances." *See* § 921.141(3); *Hurst*, 136 S. Ct. at 622.

Despite the Florida Supreme Court's decision in *Asay v. State,* 224 So. 3d 695 (Fla. 2017), *et al,* declining to extend *Hurst* retroactivity to cases that were final before the decision in *Ring v. Arizona*, 536 U. S. 534 (2002), *Hurst* should be retroactive under *Witt v. State*, 387 So. 2d 922 (Fla. 1980) and under federal retroactivity principles. To date, the United States Supreme Court has not agreed to hear a case on this partial retroactivity issue. Under *Witt*, Florida courts apply holdings favorable to criminal defendants retroactively provided that the decisions (1) emanate from the United States Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Id. Hurst* satisfies the first two *Witt* retroactivity factors—(1) it is a decision of the United States Supreme Court, and (2) its holding is constitutional in nature: The Sixth Amendment forbids a capital-sentencing scheme that requires judges, as opposed to juries, to conduct the fact finding that subjects a defendant to a death sentence. *Hurst* also satisfies the third *Witt* factor because it "constitutes a development of fundamental significance," *i.e.*, it is a change in the law which is "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of the United States Supreme Court decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). *Falcon v. State*, 162 So. 3d 954, 961 (Fla. 2015) (quoting *Witt*, 387 So. 2d at 929) (internal brackets omitted)).

Although Florida courts follow *Witt*, *Hurst* is also retroactive under the federal approach of *Teague v. Lane*, 489 U.S. 288 (1989). *See Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016) (*Teague* "requires the retroactive application of new substantive and watershed procedural rules in federal habeas proceedings."). *Hurst* is retroactive under *Teague* notwithstanding *Schiro v. Summerlin*, 542 U.S. 348 (2004), which held *Ring* not retroactive in an Arizona case evaluated under *Teague*. Although *Hurst* was based on the reasoning of *Ring*, the two cases are not interchangeable because of the fundamental differences between the Arizona capital sentencing scheme at issue in *Ring* and the Florida death penalty statute invalidated by the more robust *Hurst*. In *Hurst* itself, the Supreme Court overruled its prior cases that formed the basis for the Florida Supreme Court's ruling that *Ring* was non-retroactive. *See Hurst*, 136 S. Ct. at 616 (overruling *Hildwin* and *Spaziano*). It should also be noted that the Supreme Court's early reticence to hold *Ring* retroactive under *Teague* may be eroding, as highlighted by the recent decision in

Montgomery v. Louisiana, 136 S. Ct. 718 (2016), where the United States Supreme Court approved retroactive application of a new rule prohibiting mandatory life sentences for juveniles. And most recently, in *Johnson v. Alabama*, 136 S. Ct. 1837 (2016), the Supreme Court granted a *Hurst*-based petition for rehearing, in a case where the certiorari petition had not made a *Hurst* or *Ring* argument, vacated the state court's judgment, and remanded to the state court for further consideration in light of *Hurst*. The Court thereafter followed that approach in two other cases. *See Wimbley v. Alabama*, 136 S. Ct. 2387 (2016) and *Kirksey v. Alabama*, 136 S. Ct. 2409 (2016). Given such indications about federal retroactivity law, *Hurst* should be deemed retroactive under *Teague* federal law.

The *Hurst* error in this case is not harmless because *Hurst* error is structural. Florida courts should hold that *Hurst* errors are structural because they represent a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991) (distinguishing between "structural defects in the constitution of the trial mechanism," which are not subject to harmless error review, and errors that occur "during the presentation of the case to the jury, which may be quantitatively assessed in the context of other evidence presented."). *Hurst* errors invariably "infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). For Florida courts to hold otherwise would "deprive defendants of the basic protections without which a [death penalty] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist. *Neder v. United States*, 527 U.S. 1, 9 (1999).

Russ's death sentence is also entitled to relief post-*Hurst* because his jury was misled as to its role, evolving standards of decency require unanimous verdicts, and counsel would have tried the case differently had the jury been required to make the "sufficiency" and "insufficiency" findings of fact. The jury's consideration of the evidence in Russ' case may well have been different had the jury been required to conduct the fact finding, instead of making only an "advisory" recommendation for a sentence of death or life imprisonment. *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985). Further, had a jury heard the extensive mitigation set forth in this motion, it is probable that it would have recommended life or rendered a non-unanimous death recommendation. The Eighth Amendment considerations of the "evolving standards that mark the progress of a maturing society" dictate that a unanimous vote by a jury that conducts fact finding is required to sentence a person to death. *Atkins v. Virginia*, 536 U.S.

304, 312 (2002). Capital penalty phase proceedings do not occur in a vacuum and a defense counsel's entire approach to presentation of evidence would have been different had the jury, as opposed to the judge, been required to make the "sufficiency" and "insufficiency" findings. A hearing is appropriate to evaluate the effect of the statute invalidated by *Hurst* on counsel's development of challenges to aggravation, mitigation, and defense penalty-phase theories at the sentencing.

CONCLUSION AND RELIEF SOUGHT

Russ requests the following relief, based on his prima facie allegations demonstrating violations of his Constitutional rights: (1) that an evidentiary hearing be scheduled pursuant to Fla. R. Crim. P. 3.851(f)(5)(A)(i) on all fact-based claims, at which time Russ may present evidence in support of his claims; and, (2) that he be provided subpoena power for the production of witnesses, both during the hearing and for all pre-hearing discovery; and, on the basis of that information and all the reasons claimed herein, (3) that he be permitted to amend this motion as further investigation may dictate, and (4) that his conviction and sentence, including his sentence of death, be vacated.

CERTIFICATE OF COUNSEL

Undersigned counsel certifies that she has discussed the contents of this motion fully with the Defendant, that she has complied with Rule 4-1.4 of the Rules of Professional Conduct, and that the motion is filed in good faith.

Respectfully submitted,

ROBERT S. FRIEDMAN
Capital Collateral Regional Counsel-North

/s/ Karin L. Moore
KARIN L. MOORE
Assistant CCRC – North
Florida Bar No. 351652
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been furnished by electronic service to Gino Feliciani, Assistant State Attorney, (gfeliciani@sa18.state.fl.us and semfelony@sa18.org); Patrick Bobek, Assistant Attorney General, (Patrick.bobek@myfloridalegal.com and capapp@myfloridalegal.com); and by U.S. Mail to David B. Russ, DOC # 358986, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083; on this date, December 30, 2020.

/s/ Karin L. Moore
KARIN L. MOORE

ATTACHMENT 1

Declaration and Final Report of Dr. Jethro W. Toomer
Pursuant to Fla. Stat. 92.525(2) and 28 U.S.C. 1746

I, DR. JETHRO TOOMER, hereby testify, affirm and declare as follow:

1. The undersigned is a Clinical and Forensic Psychologist. I am licensed to practice in the State of Florida. I am a Diplomate of the American Board of Professional Psychology and a member of the American Academy of Board-Certified Psychologists. Board certification, in addition to recognizing the highest level of achievement and practice, grants practice reciprocity in all fifty states. My Ph.D. degree is from Temple University, Philadelphia, Pennsylvania and I completed a post-doctoral residency at Albert Einstein Hospital - Moss Rehabilitation Center (Philadelphia, Pa.).

Effective June 30, 2009, I retired from the teaching faculty as a tenured, full profession in the graduate program in mental health at Florida International University, Miami, Florida. For over 20 years I served as Director of the Graduate Training Program in Mental Health. My duties included internship site management and supervision of graduate students completing their internships at the Veterans Administration Hospital, Post Traumatic Stress Disorder Unit, in Miami, Florida.

In addition to my private practice, I serve as a consultant in forensic mental health in the Immigration and Human Rights Clinic at Florida International University, College of Law. I have been engaged in the private practice of clinical and forensic psychology for over twenty-five years. I have significant experience testifying in proceedings involving the death penalty and non-death penalty cases. I have been retained as an expert in criminal cases throughout the United States and have testified as an expert witness in the assessment of developmental trauma and culture on behavior. I have been appointed and qualified by courts in such cases and have testified in civil and criminal proceedings in state and federal court. My private practice also includes work as a treatment consultant with the National Football League and the National Basketball Association. I have experience in my private private practice in judicial proceedings and in

association with my past directorship of the Graduate Training Program in Mental Health (where we established a training unit in traumatology), evaluating and treating adolescents and adults who suffered abuse, mental illness and impaired cognitive behavior secondary to trauma exposure.

2. I have been retained by the Capital Collateral Regional Counsel, Northern Division, ("CCRC-N") to provide expert services and opinions related to the competency of the Defendant, David Russ, a death-sentenced inmate. Specifically, I was asked to conduct an evaluation of Mr. Russ, to address the impact of developmental trauma on his overall functional capacity, as it relates to his case.

3. I have reviewed records from Mr. Russ's case provided to me by CCRC-N, including his record on appeal with transcripts of his plea, his waiver of a jury for his penalty phase, his waiver of the presentation of mitigation evidence, and his waiver of postconviction proceedings; letters written by Mr. Russ to this Court; his Texas and Florida Department of Corrections files; school and college records, and social service records pertaining to Mr. Russ's childhood; police reports; various mental health reports, including documentation regarding failed attempts to evaluate Mr. Russ; Florida Supreme Court opinions related to Mr. Russ, the federal habeas petition filed by his federal lawyers with supporting declarations from Dr. Dudley, family members, and acquaintances; and a mental health evaluation by the Florida Dept. of Corrections, among other things.

4. In December 2019, I evaluated Mr. Russ at Union Correctional Institution in Raiford, Florida. Mr. Russ was very cooperative and evinced a desire to go forward with court proceedings. This is a significant change from Mr. Russ's desires prior to his guilty plea and sentencing in 2008-2009, and his postconviction waiver in 2012. I was retained, in large part, to explore this divergence, and to opine not only on Mr. Russ's present competency, but also his competency at

the time of his guilty plea, waiver of a jury at the penalty phase, waiver of the presentation of mitigation evidence, and waiver of his postconviction proceedings.

5. Following my initial records review and clinical interview with Mr. Russ, I recommended that a complete neuropsychological evaluation be administered. Such an evaluation was necessary to confirm and expand on my initial findings, as Mr. Russ's history (which I have detailed below) is rife with risk factors for organic brain damage. Dr. Harry Krop conducted this evaluation on January 31, 2020, and I have consulted with Dr. Krop regarding his findings. I also believed that the extreme nature of Mr. Russ's drug use necessitated evaluation by a professional specializing in substance abuse issues, in order to further explore the behavioral impact of Mr. Russ's crack cocaine intake. Dr. Drew Edwards completed this evaluation of Mr. Russ in June of 2020, and I am aware of his conclusions.

6. From the various documents I have reviewed; the evaluations of Drs. Dudley, Edwards, and Krop; and my evaluation of Mr. Russ, I have concluded to a reasonable degree of psychological certainty that Mr. Russ's horrific childhood has contributed to significant impairment in his overall functioning. Poverty, nurturance deprivation, abandonment, persistent and unrelenting physical and emotional abuse, and ongoing instability were prominent features of his development, as was parental indifference. Stability, predictability, sameness, and structure were lacking. These toxic factors led Mr. Russ to experience symptomatology reflective of a variety of mental illnesses and neuropsychological deficits.

7. Mr. Russ's early experiences have served as a model for vacillation, inconsistency, unpredictability and discontent. The cumulative effect of this trauma adversely impacted his cognitive, behavioral and affective functioning. Cognitive deficits are reflected in Mr. Russ's poor abstract reasoning, difficulty in weighing alternatives, projecting consequences, apperceptive ability and managing conflictive data. Behavioral deficits include impulsivity, anxiety, substance

abuse, chronic anxiety and an elevated and easily-triggered survival reflex. Affective (emotional) deficits include mood lability, depression, hypervigilance, phobias of unknown precipitance, and vulnerability to stressors, real and/or perceived. Early onset or persistent trauma, as experienced by Mr. Russ, portends life-long maladjustment.

8. Despite Mr. Russ's prior assurances, the totality of data indicates, to a reasonable degree of psychological certainty, that Mr. Russ's capacity to make competent decisions was impaired at the time of his trial-level and postconviction waivers. Specifically, as a result of the combined effects of Mr. Russ's traumatic developmental history; undiagnosed mental illness; and the repeated physical and chemical assaults on his brain from head injuries and chronic drug abuse, Mr. Russ's cognitive processing skills and ability to engage in logical, intelligent decision-making were significantly compromised.

9. Mr. Russ's drug use, developmental psychopathology, history of head trauma and symptomatology linked to numerous psychological deficits and disorders all had a deleterious impact on logical, adult decision-making and judgment. Although Mr. Russ is able to respond in superficial fashion to concrete questions and situations, he remains significantly impaired in his ability to reason abstractly and discriminatively, or to utilize secondary thought processes, necessary for reasoned participation in the legal process.

10. Mr. Russ was severely abused emotionally and physically by his father, Arnold, beginning in early childhood and continuing until Mr. Russ was removed from his father's care around the age of 14 or 15. Mr. Russ observed his father's abuse of his mother, Ollie Mae, and at least one sibling.

11. By multiple accounts, Arnold was creative and ruthless in his abusive tactics. He beat Mr. Russ on all areas of his body, and caused potentially hundreds of head injuries of varying severity.

Arnold beat Mr. Russ with his fists, switches, rake handles, clothes hangers, baseball bats, garden hoses, pots, pans, belts, and pieces of furniture. He paired demeaning insults with the beatings, and often forced Mr. Russ to strip nude. It appears from these accounts that Arnold cultivated the abuse to inflict maximum humiliation.

12. In addition to suffering and witnessing overt abuse at the hands of his father, Mr. Russ was abandoned by his mother, who fled while pregnant after Arnold beat her in an attempt to cause a miscarriage. Ollie Mae left Mr. Russ behind, despite knowing Arnold would continue to abuse him. Numerous studies reflect that neglect and abandonment are two of the most profound adverse developmental experiences impacting subsequent functional capacity of children. The key ingredient of this process, experienced by Mr. Russ, includes the existence of ego deficits related to family generated trauma, insecure attachment, and abandonment. The structural organization and functional capability of the mature brain, develops throughout life, with a vast majority of the critical structural organization taking place in childhood. Due to the sequential development of the brain, disruptions of normal developmental processes early in life alter the development of cognitive, behavioral, and affective functioning.

13. As noted above, Mr. Russ has a longstanding history of exposure to violence, physical abuse, abandonment, emotional deprivation, and lack of nurturing. These exposures negated the stability and predictability of life necessary for him to develop a consistent pattern of behaving and thinking. In other words, Mr. Russ's myriad childhood exposures hindered his ability to properly respond to internal and external stimuli as an adult. For instance, Mr. Russ's father would beat him savagely not only for small mistakes and transgressions--he would also beat Mr. Russ preemptively for mistakes he assumed Mr. Russ might make later. It is well-known that physical abuse has devastating emotional and developmental consequences. However, when the abuse occurs not just as excessive punishment, but for no discernable reason whatsoever, it is even

more disruptive to a child's ability to project consequences and learn from experience. And, the harm is especially pronounced when abuse or neglect occurs at the hands of the child's caretakers, and is most harmful at the hands of the child's primary caretaker (in this case, Mr. Russ's parents).

14. Another example of destabilization was Mr. Russ's abandonment by his mother. As a young child, Mr. Russ witnessed firsthand the abuse Arnold inflicted upon Ollie Mae, and witnessed his mother remaining in the home and in the marriage for several years. Family accounts indicate that Ollie Mae and Arnold divorced at one point, then remarried; later, Ollie Mae permanently left the relationship and left Mr. Russ behind in the process. This all occurred while Mr. Russ was very young, so he had no ability to comprehend the complexities of domestic violence and the decision-making that governs whether one continues or ends a relationship. As a result, Mr. Russ had no framework through which to understand why his mother left the home, and why she did not take him with her. Adding to this confusion was the fact that Ollie Mae was pregnant when she left, and herself raised that child (Mr. Russ's full sibling, Melissa). Maternal abandonment is considered profoundly traumatic. Those having experienced such abandonment reflect that if your mother, who "carried" you for nine months abandons you, then your worthlessness is confirmed.

15. The pervasive inconsistency and unpredictability in Mr. Russ's developmental history negated the stability and predictability of life necessary for acquiring a consistent pattern of behaving and thinking. Energy that would be normally utilized in a predictable, supportive environment, to develop higher order thought processes, (e.g. weighing alternatives, projecting consequences, etc.) is instead geared towards survival. Mr. Russ's survival mentality is reflected in a developmental immaturity characterized by deficits in the acquisition of a repertoire of mature social skills, deficits in impulse control, impaired cognition, and general inadequacy with respect

to normal ego functioning. This orientation and response pattern are typical of individuals like Mr. Russ, who have experienced a chaotic background, erratic parenting and nurturing, lack of appropriate acculturation to significant social norms and inconsistent treatment by their immediate environment. His overall behavior is not based upon a logical thought process, but motivated primarily by unresolved cognitive and psychological deficiencies. Mr. Russ's overall behavior has included periods in which mood variability, irrational impulses, lack of apperceptive ability and impaired thought, are exhibited, which impact behavior. These deficits in functioning are reflected in his behavior relative to his case. His record on appeal, including transcripts of his plea, waiver of jury for penalty phase, mitigation evidence and post-conviction proceedings reflect his deficiency motivation. His behavior has been characterized by impaired decision making, secondary to irrational altered associations, emotional lability, attribution of malicious intent by others, mis-interpretation of the intentions of counsel and others, belief of being a victim of unfair treatment, and betrayal. He has been at times receptive to and has refused attempts at evaluation. This behavior is manifest in the context of negative thought processes, mood lability, pressured speech and micro vs. macro assessment of facts.

16. The Adverse Childhood Experiences Scale (ACES) identifies ten factors that suggest trauma and adverse environment. If a person encounters just one of these factors, that person is considered significantly more at risk for psychological and mental problems. Furthermore, the more factors applicable, the higher the risk. Mr. Russ's history reflects that he has experienced at least eight of the ten factors. This portends an individual who is neurologically, cognitively, and psychosocially underdeveloped in later life.

17. Mr. Russ appears to re-experience the residuals of certain aspects of his traumatic development. This manifests in recurrent and distressing recollections of past traumatic episodes upon experiencing an external cue or situation that resembles or symbolizes an aspect of the past

episode. Mr. Russ went through repeated patterns of attempting to avoid such cues and recollections; but when he cannot avoid them, he becomes terrified and exhibits a number of symptoms of intense anxiety. Mr. Russ grew up in a situation where he and family members were victims of long-term abuse. Given his circumstances, Mr. Russ constantly felt "on-edge", likely suffering the effects of a Post Traumatic Stress Disorder. His drug use can be traced to childhood trauma, serving as a mechanism to feel comfortable, reduce his constantly elevated anxiety and relieve an ongoing state of psychic distress.Mr. Russ's heightened emotionality associated with predispositional factors, recall of victimization, abandonment, and a deep sense of loneliness and isolation suggest that Mr. Russ suffers from severe post traumatic stress disorder.

18. Unlike individuals whose post traumatic stress disorder arises from a single event, or isolated series of events, Mr. Russ's presentation is the result of repetitive trauma spanning his entire childhood and well into his adolescent years. This type of complex, repetitive trauma is exponentially more harmful to a developing brain than simpler or more isolated traumas. Another way to describe this is as "toxic stress".

19. Toxic stress exposure elicits the most severe reponses, particularly when combined with other risk factors or brain damage, such as an injury and substance abuse. It catastrophically disrupts executive function, and results in anatomical changes in the brain that are precursors to later impairment in learning behavior and cognitive processing. This results in functional differences in learning, memory, and aspects of executive function. In many cases of toxic stress, the first thing to suffer is an individual's sense of self-worth or self-validation. This is seen in Mr. Russ's history by his myriad attempts to seek external validation; yet, even when he received validation in certain adult relationships, it was not enough. He was constantly trying to fill a void, and drug use appears to have been one method of doing that. When someone's sense of self-worth is chronically eroded by toxic stress and trauma, a sense of self-hate and loss of self-esteem

persists. At a certain point, the individual's impairment, secondary to the aforementioned thought processes, serves to compromise any functional capacity. Vacillation and mood variability, such as in the case of Mr. Russ, reflects an inability to adapt internal thought processes, the psychological roots of which have never been addressed.

20. As a result of this condition of toxic stress and severe post-traumatic stress disorder (especially when compounded by further brain damage from head injuries and drug use), Mr. Russ is likely to feel detached from others and have difficulty maintaining an appropriate affect based on his environment. He experiences mood lability distinct from what would be expected from his comorbid disorders (such as bipolar disorder, as is indicated from Dr. Dudley's evaluation, anecdotal accounts of Mr. Russ's mood and behaviors, and Mr. Russ's family history of the disease). He displays concentration difficulties, hypervigilance, and an exaggerated startle response. Significantly, consistent with a severe post traumatic stress disorder diagnosis, Mr. Russ has a sense of a foreshortened future. As a result of lifelong, compounded trauma, Mr. Russ learned not to expect to have a normal life or even a normal life span.

21. This is significant in the retroactive evaluation of Mr. Russ's competency at the time leading up to his guilty plea, waiver of a jury at his penalty phase, waiver of the presentation of mitigation evidence, and waiver of post-conviction proceedings. Mr. Russ, as a result of complex post traumatic stress disorder, was in a near constant state of hypervigilance, anxiety, and belief that he was doomed. Even before the occurrence of the crime for which he is on death row, Mr. Russ could not appreciate the possibility of a full life or normal life span. Thus, when presented with the gravest decisions of his life (namely, whether to plead and waive various legal rights) Mr. Russ was unable to rationally understand the consequences of those waivers. Put another way, because Mr. Russ already believed he was doomed, he was unable to functionally comprehend what it meant to give up legal rights that may have saved his life.

22. Mr. Russ has a limited tolerance for frustration and anxiety which stems from his poor self-esteem, mood lability, and need for acceptance. Given his history, the level of perceived stress, the more pronounced is Mr. Russ's impaired cognitive, behavioral and emotional functioning. His pressured speech, fluctuating behavior, lack of trust, self-deprecation, variable pattern of interacting with counsel over time, and written correspondence to the judge, all reflect his deficits in cognitive processing and rational decision-making resulting in self-defeating behavior.

23. I am also concerned by the extent to which Mr. Russ's impairments may have been masked by his coexisting strengths. Mr. Russ exhibits excellent verbal skills and is highly motivated. While this has resulted in some impressive achievements such as receiving an admission and scholarship to an external drug counseling college program (even while Mr. Russ was still incarcerated), it also likely served as a barrier to proper recognition of Mr. Russ's incompetency during trial and post-conviction proceedings. Because of this, it was especially critical for counsel to have had a thorough competency evaluation performed at the time Mr. Russ attempted to waive his rights. However, counsel did not do this.

24. Mr. Russ's background reflects his developmental history in a crucible of despair. The predispositional factors in his history were substantial and debilitating, and resulted in an individual suffering from interrelated emotional, psychological, and cognitive impairment. This has caused lifelong, substantial problems in all areas of his life, including relationships, abstract thought, and decision-making. In the context of Mr. Russ's legal proceedings, his decisions were primarily motivated by underlying psychological and cognitive deficits and not based upon the exercise of abstract thought processes (i.e. weighing of alternatives, projection of consequences, management of conflictive data, and apperceptive ability). His overall performance reflects deficits in higher order thought processes indicative of an inability to imagine alternatives, responses or potential solutions to problems. Under stress, pressure to perform, and stressors, real or

imagined, he would also have difficulty conceiving or perceiving the steps leading from one's intention to a desired end, or in weighing the consequences which one's alternative decisions or solutions might have. Poor integrating and synthesizing ability is indicated, with mental confusion and difficulty managing stress, combined with poor frustration tolerance. Mr. Russ's functioning, instead of being based upon a process of logical reasoning, is based upon his being a victim of the aforementioned deficits, resulting in behavioral and cognitive responses that are maladaptive, impulsive and self-destructive.

25. To a reasonable degree of psychological certainty, based upon the defendant's history, evaluation and totality of the data and behavior, I am of the opinion that Mr. Russ's plea and waivers were tainted by his impaired patterns of perception, thought and action.

Under penalties of perjury, I hereby declare, affirm, verify, state and certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. § 1746 and Fla. Stat. § 92.525 (2020).

Jethro W. Toomer
Dr. Jethro W. Toomer

8-13-20
Date

ATTACHMENT 2

DECLARATION AND FINAL REPORT OF DR. HARRY KROP
Pursuant to Fla. Stat. 92.525(2) and 28 U.S.C. § 1746

I, DR. HARRY KROP, hereby testify, affirm and declare as follows:

1. I am a licensed clinical psychologist in the state of Florida. My practice has included both clinical and forensic psychology. I have been qualified by courts in several jurisdictions across Florida and other states to testify as to my opinions as a forensic psychologist. Please see my attached vita which contains my professional experiences in more detail.

2. I have been retained by the Capital Collateral Regional Counsel, Northern Division, ("CCRC-N") to provide expert services and opinions related to the competency of the Defendant, David Russ, a death-sentenced inmate, at various stages of his legal proceedings, including his guilty plea, waiver of a penalty phase jury, waiver of the presentation of mitigation, and waiver of postconviction proceedings.

3. I have reviewed records from Mr. Russ' case provided to me by CCRC-N, including his record on appeal with transcripts of his plea, his waiver of a jury for his penalty phase, his waiver of the presentation of mitigation evidence, and his waiver of postconviction proceedings; letters written by Mr. Russ to this Court; his Texas and Florida Department of Corrections files; school and college records; social service records pertaining to Mr. Russ' childhood; police reports; the Presentence Investigation Report; various mental health reports, including documentation regarding failed attempts to evaluate Mr. Russ by trial and special counsel and the initial postconviction counsel; Florida Supreme Court opinions related to Mr. Russ, the federal habeas petition filed by his federal lawyers with supporting declarations from Dr. Dudley, family members, and acquaintances; and a mental health evaluation by the Florida Dept. of Corrections,

among other things. I also consulted with and reviewed the report and declaration of Dr. Jethro Toomer, who also evaluated Mr. Russ regarding mental health issues related to the severe physical and emotional trauma and abandonment suffered by Mr. Russ.

4. I met with David Russ at Union Correctional Institution on January 31, 2020 at which time I conducted a neuropsychological evaluation. Mr. Russ cooperated throughout the evaluation that lasted several hours. Based on the results of the neuropsychological testing, a review of the records provided by counsel and information provided by Mr. Russ, I have significant concerns about the factors influencing Mr. Russ' decision to plead guilty, to waive a penalty phase jury and the presentation of mitigating evidence, and to waive initial post-conviction review. In this regard, it is my opinion that Mr. Russ' judgment and decision-making at these critical times were based on irrational thought processes which were compromised resultant to a number of factors including organic impairment, his traumatic developmental history and mental health issues associated with the significant number of adverse childhood experiences (ACEs) when younger, which include among others physical abuse by his father and his perceived abandonment by his mother. These ACEs, which are known to contribute to both mental health and substance abuse issues include the recurrent paternal physical abuse, abandonment and neglect and moral instability in his life.

5. Mr. Russ' history of extraordinary childhood abuse and abandonment influenced his ability to make rational decisions in two distinct but compounding ways. First, Mr. Russ suffered several traumatic brain injuries due to egregious physical abuse by his father, a head injury received as a twelve-year-old in a car accident in South Dakota which resulted in a lengthy hospitalization and injuries he sustained from a fall and being struck in the head with a two-by-four board while he was incarcerated in Georgia. As a result of these injuries, which were exacerbated by his longstanding drug abuse, Mr. Russ suffered significant neurocognitive deficits as reflected in the

neuropsychological testing conducted by this examiner. These deficits appear to be primarily related to those executive functions associated with the frontal lobe which include judgment, problem-solving, impulse control and decision-making.

6. Based on the evaluations conducted by this examiner as well as Dr. Toomer, Mr. Russ has a number of unresolved family conflicts which likely contributed to his decision-making at the time that he pleaded guilty, waived a jury trial and presentation of mitigation at sentencing and waived his initial post-conviction proceedings. In this regard, Mr. Russ' decision making was the byproduct of his impaired cognitive functioning, intrusive thoughts from past trauma, a pathological fear of abandonment, and decompensation under extreme stress. As a result of Mr. Russ' preoccupation and acute fear of being abandoned, he risked dying by execution in a frantic attempt to keep his family close to him.

7. The results of the neuropsychological testing indicate Mr. Russ suffers from a Neurocognitive Disorder due to multiple etiologies (DSM-IV 331.83). This diagnosis is made when there is evidence of cognitive decline from a previous level of performance in one or more cognitive domains documented by standardized neuropsychological testing. Mr. Russ' neurocognitive functioning is currently at a higher level than one would expect it to have been at the time he entered his plea resultant to his cessation of illicit substances and the relatively structured and stable environment since his incarceration on death row.

8. Mr. Russ has a significantly lowered capacity to tolerate frustration. During my evaluation of him, he became easily frustrated with segments of the testing process (particularly the Wisconsin Card Sorting Test and WAIS IV) wherein he "blocked up," and had trouble completing portions of the tests despite his earnest efforts. These results, coupled with the records reviewed

suggest that Mr. Russ may decompensate under stress. This, in turn, likely hindered Mr. Russ' ability to communicate with and assist his counsel, and to rationally process their advice and weigh the consequences of his legal options. Despite his insistence to enter a plea and waive presentation of mitigation before a jury, given the stress he was experiencing, it is likely that his capacity to rationally appreciate the consequences of his waivers was compromised.

9. Based upon my review of the records provided to me and my own examination of Mr. Russ, it is my opinion within a reasonable degree of psychological certainty, that Mr. Russ' capacity to make rational decisions, effectively communicate with counsel, and assist counsel in the preparation of his defense at the times he entered his plea, waived a jury trial, refused to present mitigating evidence in his penalty phase, and waived initial post-conviction proceedings was compromised resultant to the afore-referenced factors.

Under penalties of perjury, I hereby declare, affirm, verify, state and certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. § 1746 and Fla. Stat. § 92.525 (2020).

Harry Krop Ph.D.
Dr. Harry Krop

8/20/2020
Date

ATTACHMENT 3

DECLARATION OF DR. DREW EDWARDS
Pursuant to Fla. Stat. 92.525(2) and 28 U.S.C. § 1746

I, DR. DREW EDWARDS, hereby testify, affirm, and declare as follows:

1. I am the co-founder and Chief Clinical Officer for "The Neurogenesis Project". I am a behavioral health researcher, writer, clinical consultant, and forensic expert in the neurobiology of addictive disease. I currently reside in Jacksonville, Florida. I was formerly an Assistant Clinical Professor in the Department of Psychiatry at the Medical College of Georgia, where I served as Director of the Department of Psychiatry supervising the clinical activity of three inpatient departments, the clinical activity of all faculty psychiatrists, psychiatric residents, psychologists, licensed mental health therapists, and nursing staff within the hospital and faculty practice. I held a similar position at the University of Florida, as Associate Director of Psychiatry, where my appointment included clinical practice and clinical instruction for medical residents and post-doctoral fellows in the Division of Addiction Medicine. I hold a Bachelor of Arts degree from the University of Minnesota, a Master of Science in Health Science/Addiction Counseling from the University of North Florida, and a Doctor of Education from Nova Southeastern University. I have authored, co-authored, and published over 200 peer-reviewed articles, book chapters, and Continuing Medical Education (CME) programs in psychiatry and addiction medicine. I have developed and directed chemical dependency treatment centers in Minnesota, Indiana, and Florida. In addition, I was the Director of the Center for Health Outcomes and Improvement Research in the Department of Medicine at the University of Florida Health Science Center in Jacksonville.

2. In December 2019, I was retained by the office of Capital Collateral Regional Counsel, Northern Division (CCRC-N) to conduct an interview of Mr. David Russ. The purpose of my interview was to determine to whether Mr. Russ's use of intoxicants met the criteria of Substance Use Disorder, and to opine about any impact his drug use—and any associated cognitive and emotional impairment—may have had on Mr. Russ's competency to waive various legal rights.
3. Prior to my meetings with Mr. Russ, I reviewed records from his case provided to me by CCRC-N, such as his record on appeal including transcripts of his plea, waivers of a jury for his penalty phase, waiver of the presentation of mitigation evidence, waiver of his post-conviction proceedings, letters written by Mr. Russ to this Court; his Department of Corrections files from Florida and Texas; school and college records; social service records pertaining to Mr. Russ's childhood; police reports; various mental health reports, including documentation regarding failed attempts to evaluate Mr. Russ by trial and special counsel and initial post-conviction counsel; Florida Supreme Court opinions related to Mr. Russ; the federal habeas petition filed by his federal lawyers with supporting declarations from Dr. Dudley, Mr. Russ's family members, and acquaintances; and a mental health evaluation by the Florida Department of Corrections, among other things.
4. In addition to my record review and personal evaluation of Mr. Russ, I also consulted with Dr. Sean Orr, M.D., a clinical neurologist, clinical neurointensivist, and brain trauma expert. Dr. Orr was formerly the neurologist for the Jacksonville Jaguars, an NFL team. He has extensive practice experience with the impact of repetitive head trauma, and is well-versed in neuroimaging methodologies. In this case, I consulted with Dr. Orr to

determine which imaging modalities would be best suited to identify and elucidate the extent of any anatomical damage or functional changes to Mr. Russ's brain as a result of his multiple head injuries, emotional trauma, and addictive disease.

5. I met with Mr. Russ on February 26, 2020, and June 17, 2020, totaling approximately five hours. Mr. Russ actively participated in the evaluation and was cooperative and forthcoming during the interview. He discussed his life history with me without defensiveness and in adequate detail, including descriptions of physical and emotional abuse inflicted upon him by his father; abandonment by his mother; his extensive history of drug use; traumatic brain injuries; education and employment history; and his past criminal conduct and multiple incarcerations.

History of Abuse

6. Mr. Russ described his father, Arnold, as an angry, short-tempered, loud, unhappy, and violent man. Mr. Russ's observations and summations are corroborated by statements obtained by his sister, brother, and mother, which indicate that Arnold was abusive to everyone in his family, but much more so toward Mr. Russ. The consensus among Mr. Russ's family members was that Arnold did not believe Mr. Russ was his biological son—Arnold frequently expressed rage and verbal and physical abuse toward his wife and Mr. Russ, claiming Mr. Russ was the result of his mother's impregnation by another man. As Mr. Russ's sister, Melissa, explained after Mr. Russ's arrest in 2007, "David received most of the abuse and the criticism[.]"

7. For as long back as Mr. Russ could remember of his childhood, he endured verbal and physical abuse, degradation, and humiliation at the hands of his father. Arnold incessantly punched, slapped, shook, kicked, and threw Mr. Russ, often forcefully

striking Mr. Russ on his head and face, using his fists or any other items he could get his hands on. If Mr. Russ cried, Arnold would hurt him worse. Incidents that triggered Arnold's assaults were as simple as a perceived look on Mr. Russ's face, or any comment or action that displeased his father—such as asking a question or making a mistake while working for his father as a prepubescent boy.

8. From the time they were approximately 7 years of age, Mr. Russ and his brother, Aaron, were forced by Arnold to work long hours in the Florida summer heat doing hard physical labor. They were also forced to assist Arnold with his beekeeping. Mr. Russ described a particularly traumatic episode of abuse that occurred when he, Aaron, and his mother arrived at the place where Arnold's bees were being stored. The bees were swarming, and due to the heat, the windows of Arnold's truck were open. As Arnold exited the vehicle to investigate the bees, he angrily told his wife that if either of the boys were stung, he would "beat her ass." The boys were stung countless times, but tried not to cry or react to the pain in order to protect their mother from a beating. When Arnold returned and saw the large number of welts on the boys' faces, necks, and arms, he grabbed his wife by her hair and dragged her from the vehicle to a nearby stairwell, and threw her down the stairwell. He then proceeded to walk down the stairs, where he punched and kicked her repeatedly. Mr. Russ describes the experience as terrifying. He felt helpless and afraid that his father would seriously injure or even kill his mother. He also reported feelings of guilt that, as a small child, he could not help his mother.
9. This type of abusive behavior from Mr. Russ's father was common throughout Mr. Russ's childhood and early adolescence, with the worst of the attacks directed toward Mr. Russ himself. The violence toward Mr. Russ became even more pronounced after his

mother fled and left Mr. Russ and his brother, Aaron, behind. Years later, a neighboring farmer in South Dakota rescued Mr. Russ and Aaron. The farmer approached the boys and stated if they wanted to get away from their father, he would take them to the local authorities for protection. The boys agreed and were immediately driven to town, where they were processed, placed in the foster care system, and separated.

10. Mr. Russ's history of abuse at the hands of his father has significant implications for his brain function. To begin with, Mr. Russ suffered numerous head injuries during his father's beatings. Head injuries are the most common cause of death and disability in people aged 1-40 years in the United States and United Kingdom. Specifically, traumatic brain injury (TBI) is a non-congenital insult to the brain from an external mechanical force that causes damage to nerve tissue and neural circuitry. These injuries cause impairments of cognitive, physical, and psychological function, with diminished or altered states of awareness and mental ability. Unfortunately, many of these injuries cause persistent or permanent brain impairment.

11. Clinical management for individuals with head injury (concussion) varies in presentation, but is critical. Thus, it is recommended that patients with head injuries be brought to Emergency Medicine and evaluated. The clinical practice guidelines for Emergency Medical Care, particularly for children and adolescents, includes a mental status exam, brief cognitive testing, electroencephalogram (EEG) or computed tomography (CT) scan. Children with a head injury should be admitted for observation even if the CT scan does not reveal a hemorrhage or fracture, if the clinical examination reveals evidence of a blow to the face or head. This is because the risks of missing a severe condition, such as a small hemorrhage, white matter changes, or normal pressure hydrocephalus (NPH) are

too severe. Many severe, post-concussive conditions are not readily seen on a CT scan and develop after the acute trauma. For instance, the best available evidence reveals that for every single concussion someone suffers, there is a fivefold risk increase for major depressive disorder (MDD). Repetitive head trauma (as Mr. Russ experienced) is exponentially more damaging. Early diagnosis followed by rapid treatment can prevent further concussive damage and inflammation, and it is necessary to monitor for abnormal personality or behavioral changes, glymphatic draining of cerebral spinal fluid (CFS), test for functional impairment via electroencephalogram (brain mapping) and repeated cognitive testing.

12. Mr. Russ was never treated for the countless head injuries he received, except for one instance when he was in a car accident and lost consciousness for a prolonged period of time. The still-visible long vertical scar on his face and scalp indicate the severity of the injury. All of his childhood injuries at the hands of his father went untreated; injuries that would be harmful to any brain but were catastrophic to a developing brain, as in Mr. Russ's case. The human male brain does not fully develop until about age 30 and the frontal cortex is the final lobe to fully mature. Without follow-up treatment and cognitive therapy for Mr. Russ's injuries, he was literally walking wounded for years. Many of his impulsive decisions were undoubtedly influenced by his brain injuries—particularly in tandem with his chronic addiction.

13. In addition to Mr. Russ's head trauma, he experienced multiple adverse childhood experiences (ACEs). A seminal study conducted approximately 10 years ago revealed that adverse events and experiences that occur early in life have a negative impact on social, emotional, cognitive, and physical well-being throughout one's lifespan.

Examples of adverse childhood events include physical, emotional, verbal, and sexual abuse, verbal abuse; neglect; abandonment; loss of a parent or caregiver due to death, incarceration, or divorce; and exposure to, or witnessing, violence and substance abuse. Growing up in a dysfunctional family is damaging to the development of the frontal cortex where our executive function and motivational salience develop, and directs our choices and actions throughout life. Children like David Russ learn to survive by being in a state of hypervigilance—or "survival mode"—which is part of the primitive, hedonic area of the human brain, located just above the brain stem and which controls the autonomic nervous system (e.g., heart rate, respiration, sleep). Also known as the limbic system, the midbrain is where our hedonic and self-preservation activity is engaged, such as the "fight or flight" system in the face of a threat or fear.

14. Mr. Russ lived in a perpetual state of fear of being harmed by his father. When a threat such as this is sensed, the amygdala signals the brain to release adrenaline, cortisol, and many other neurohormones for self-preservation and survival. Without adequate protective factors (which Mr. Russ did not have) this conditioning of the brain under chronic threat lasts far longer than the actual threat of harm that triggered the responses. During adolescence, children who have suffered ACEs—particularly those without protective factors—are predisposed to either turn the resulting emotions inward, outward, or both. Those who turn fear and sadness inward often show symptoms of self-destructive behavior including depression, hyper-sexuality, suicidality, isolation, cutting, substance abuse, and post-traumatic stress disorder (PTSD). Others turn their fear, hurt, insecurities, and emotional pain outward in order to survive by minimizing their vulnerability and not letting others hurt them again. Aggression, substance abuse, juvenile delinquency,

running away, joining a gang, and violence overlay the underlying depression, attachment disorder, anxiety, PTSD, and social insecurities.

15. Only within the last decade have medical investigators and clinicians in the primary care setting fully begun to understand the extent of the impact of adversity in childhood, and its predictive value and impact on adolescent and adult health. It is well established in the scientific literature that ACEs are risk factors for substance use disorder, eating disorders, bed wetting, nightmares, juvenile delinquency, post-traumatic stress disorder, violence, cutting, STDs, incarceration, suicidality, and mortality. This correlation remains even after adjusting for confounding variables such as socioeconomic status, race, and zip code. ACEs are also dose dependent. The more events, the greater the risk. And, increased severity of the event is also correlated with greater risk. In Mr. Russ's case, where he was constantly exposed to multiple ACEs with severe presentation and with an absence of protective factors, his risk was maximal.

16. Mr. Russ was a victim of, and witness to, incessant degrading, violent, deplorable, and criminal abuse at the hands of his father. His mother abandoning the family was especially traumatic for Mr. Russ, as he had previously felt she was his advocate, protector, and comforter. After she left, the positive factors he associated with his mother were nullified, and she—through her abandonment—became a source of further insecurity, and feelings of inadequacy, pain, and worthlessness. Mr. Russ now, as a sober adult, understands why his mother left—she was fearful for her own life, could not cope with the physical and emotional torment, and felt helpless to save herself or Mr. Russ. Mr. Russ had no such agency as a child. He was abused physically, emotionally, and verbally the entire time he lived with his father. This, plus the wounds of abandonment,

manifested in Mr. Russ as drug dependence, non-violent juvenile delinquency, anhedonia, depression, and anxiety that in the absence of proper treatment escalated predictably throughout his life.

Drug Dependence

17. The association between untreated physical and emotional trauma during childhood and substance use disorder is nearly 100%--while not every untreated traumatized child becomes addicted, nearly all adolescents who are addicted have a trauma history. This is seen in Mr. Russ's addiction to drugs, which began in his preteen years and escalated in his late adolescence.

18. Current evidence has established that early onset drug use is predictive of addiction. To wit, initiation before age 16 is associated with a prevalence rate for addiction of 18-20% (as in the case of Mr. Russ). Those initiated after age 16 are less likely to become addicted, with a prevalence rate of 8-9%. In each of these age groups, as mentioned above, untreated traumatized children are at the highest risk for substance use disorder, psychopathology (e.g., depression, anxiety disorder, or post-traumatic stress disorder), self harm, unhealthy self-soothing behaviors, juvenile delinquency, criminal activity, and violence.

19. In earlier stages of Mr. Russ's addiction, Mr. Russ experimented with several drugs including marijuana, heroin, and crack cocaine. He states that when he first smoked crack, he "loved" the effect and it was like no other drug he had tried. This is termed as a "drug of choice" and when an individual has a significant preference for a particular drug, it can often be likened to a form of medication. In other words, we can

extrapolate—to a general degree—brain deficits based upon the addicted person's drug of choice, due to the desired effects.

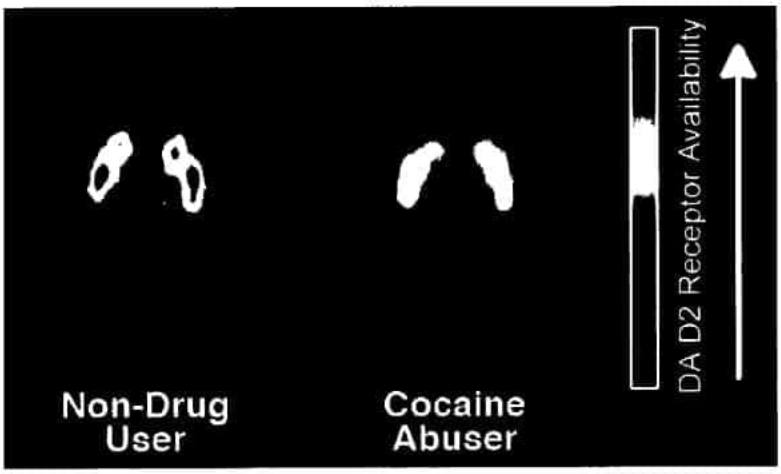
20. Cocaine is a stimulant with perhaps the most direct access to the brain's reward center. Cocaine abuse produces a rapid onset of addiction, and crack cocaine produces immediate euphoria followed by an acute stress, dysphoria, and agitated state. It works immediately, but only temporarily, and leaves the user feeling worse than before—and believing the remedy for these symptoms is more cocaine. Over time, neuroadaptations occur and the acute withdrawal symptoms become chronic. When this occurs, the new normal, or baseline mood, of the cocaine addict is one of dysphoria and anhedonia. Neuroinflammation of the nervous tissue occurs, resulting in high levels of the excitatory neurotransmitter glutamate, which manifests as agitation, depressive lethargy, and can be toxic, causing further brain damage and psychopathology—particularly in brains that are already inflamed due to traumatic brain injury.

21. Crack cocaine, which Mr. Russ most frequently used, is the crystalline free-base form of cocaine. It is hydrophobic (water insoluble) and thus ingestion is through volatilization and smoking. Smoking of crack results in an almost instantaneous "high" due to the rapid absorption through the lungs, into the heart, up the carotid artery, and into the brain in a matter of three to five seconds. This method, as opposed to snorting cocaine, averts the rapid metabolism associated with cocaine hydrochloride, where nearly 85% of the drug is metabolized in the blood and liver, and only 15% of the cocaine reaches the brain. In contrast, smoking crack is minimally metabolized as it does not pass through the entire circulatory system of the liver. Therefore, over 95% of the cocaine reaches the brain in about three seconds. The euphoria resulting from this method of administration is

estimated by users as 100 times more powerful than that produced by snorting cocaine—and far exceeding any natural human reward. But, that initial euphoria only happens once or twice when smoking crack, setting the user up to "chase the high" of previous ingestion and increase usage.

22. Crack cocaine has a disastrous effect on the brain. It constricts blood vessels, meaning less oxygen is available for healthy brain tissue and neurogenesis. Concurrently, cocaine use inhibits the initiation and conduction of electrical impulses along the dopaminergic reward circuitry. Specifically, cocaine blocks neurotransmission at the neuronal synapse (junctions) by altering the reuptake of dopamine, and the cascade of norepinephrine, serotonin, and acetylcholine. The consequent reactivation of the sympathetic nervous system produces an acute rise in arterial blood pressure, tachycardia, a risk for ventricular arrhythmias in the heart, and an increased risk for heart disease, seizures, and stroke. This can also present as severe physical anxiety that cannot be soothed.

23. The dopaminergic neuronal circuits are central in producing euphoria and addiction. In the short term, cocaine activates dopaminergic neurotransmission by blocking the reuptake of dopamine at the synapse. For crack cocaine, where the resulting high is approximately 100 times more potent and euphoric than snorting cocaine, persistent use causes a depletion of dopamine and a down regulation of dopamine receptors, most notably in the frontal cortex. This is shown in the following PET scan image, which takes a coronal view (looking down from the crown of the head at the level of just above the thalamus):



24. These images are striking. The red color indicates dopamine activity and receptor density in the prefrontal cortex (which serves to mediate and inhibit the hedonic urges of the survival-oriented limbic system of the midbrain, with the uniquely human values and virtues which are informed and animated in the frontal cortex). Cocaine addiction inhibits the function of the frontal cortex, leaving the primitive hedonic limbic brain in charge of decision-making, based on biological needs and potential threats. In other words, structural changes in the brain as a result of crack cocaine addiction prevent rational, abstract, or complex thought.

25. When the brain is hijacked by addiction to cocaine—which has the most direct access to the Mesolimbic Dopaminergic Reward Path—the drug artificially expends dopamine far beyond what the normal human brain's reward system can produce. As a result, the user experiences an intense euphoric state because the dopamine is elevated to a level far beyond normal human capacity. But the high is short-lived, as it depletes the bioavailability of central dopamine, which is intended to reward and provide salience for healthy survival-oriented and pro-social behavior.

26. Because so much dopamine is expended when first using crack, there is little in reserve. In the dopamine-depleted state (hypodopaminergia), the chronic user cannot experience

natural, non-drug induced rewards. As a result of this neuroadaptation and depletion with chronic use, a new dysphoric mood state called Reward Deficiency Syndrome is created due to deficits in the volume and accessibility of dopamine and related neurotransmitters that reward humans for pro-survival and pro-social activity. This causes dysphoria (a profound sense of unease and dissatisfaction) and anhedonia (the inability to experience pleasure or contentment).

27. This anhedonic state begins within an hour from the last use of crack cocaine. Without bioavailable dopamine neurotransmittal, the user has no means by which to attain a normal mood state, other than by further drug consumption. A life with limited dopamine availability has been likened to watching a 12-inch black-and-white television, while being high on crack is like watching a 60-inch HD color television. These neuroadaptive mechanisms redefine reward and pleasure for the user, exacerbating withdrawal symptoms.

28. The hippocampus, adjacent to the amygdala, processes and retrieves memory through an iconic filing and recall system. This can amplify craving and anxiety if the environment feels unsafe to the user. Craving results primarily from hypodopaminergia. The fastest way to raise dopamine levels is to use more crack. So, as time passes, the addicted person is craving dopamine, but experiences this sensation as needing more crack. Thus, the cycle continues. The irony was expressed eloquently by Mr. Russ:

> *When I first smoked crack, I was not expecting anything near the experience I had. When I first hit the pipe I was so high within 5 seconds and it was so unlike any experience I had ever felt before. It was a pleasure that manifested over my entire being. But within 5-10 minutes, the high was gone. So I'd spend a lot of money chasing that high again, but never achieving it...After the binge and consequence, sobriety would be forced upon me by jail time, or just trying to get my life together. All the while, your mind is fighting you, always drifting back to getting cocaine and getting high. It was Hell.*

29. Due to the short half-life of crack cocaine, which is the time required for half of the cocaine to be metabolized and cleared from the body (not the brain), severe withdrawal and craving for crack cocaine occurs within 90 minutes. This phase is called the "crash" following abrupt cessation of heavy cocaine use—as in the case of Mr. Russ, who had been on a multi-day crack binge, followed by abrupt discontinuation of use after he was approached by law enforcement and fled.

30. Acute crack withdrawal symptoms include generalized angst, distress, and even paranoia from the compensatory activation of the fight-or-flight response. The amygdala signals the brain to release cortisol and norepinephrine in preparation for fighting or running from a perceived threat. In acute withdrawal, the user experiences acute dysphoria and anhedonia, irritability. He becomes hypervigilant, anxious, and paranoid, while simultaneously exhausted.

31. A crack addict learns that a single rock of crack will alleviate all of these symptoms within seconds. If no crack is available, cocaine addicts will often use benzodiazepines, which activate gamma-aminobutyric acid (GABA), to inhibit the action of norepinephrine and glutamate, in order to calm the agitation and tactile anxiety that overwhelms some users. If these substances are also unavailable, the binge comes to an end. The user will crash and sleep if possible (as in Mr. Russ's case, where he passed out on a rooftop, reportedly during inclement weather).

32. Upon awakening, the user is dysphoric, anxious, agitated, and experiences bodily anxiety due to the bolus release of norepinephrine and hypodopaminergia. The user cannot experience any sense of happiness, pleasure, or reward. Thus, the user becomes singularly focused on attaining more cocaine—and, at the same time, feels a sense of

severe paranoia, that something or someone is after them. The fastest way to elevate this negative mood state, albeit temporarily, is to use more cocaine. It is a powerful drive.

33. When the cocaine is gone, the hedonic-driven midbrain overrides the impaired rational frontal cortex and will go to extreme lengths to attain and use cocaine. With this, we see individuals with no history of crime or violence commit impulsive crimes and become impulsively violent in order to get cocaine. The presentation is analogous to a starving or dehydrated person going to extreme lengths against their value system in order to survive, as cocaine usurps the reward system designed to reinforce survival oriented behavioral functions—e.g., food, hydration, or copulation (reproduction as species survival).

34. In Mr. Russ's case, he was going through this acute withdrawal at the time he entered the victim's home. The physical and mental symptoms of this withdrawal would have been amplified by the instability of Mr. Russ's physical environment (alone, without resources, having fled from law enforcement). The power of this condition should not be underestimated. As explained above, withdrawal after chronic use would cause Mr. Russ's midbrain to override his frontal cortex—meaning his primitive survival needs would have hijacked any higher level rational thinking or evaluation of consequences—and would in this situation have led to a singular focus on obtaining more cocaine at any cost.

Impact on Competency During Legal Proceedings

35. Chronic use of crack cocaine is associated with psychological and somatic complications including hypophagia, hyperphagia, insomnia, hypersomnolence, depression, anxiety, PTSD, impulsivity, agitation, and violence. Importantly, chronic use of cocaine—

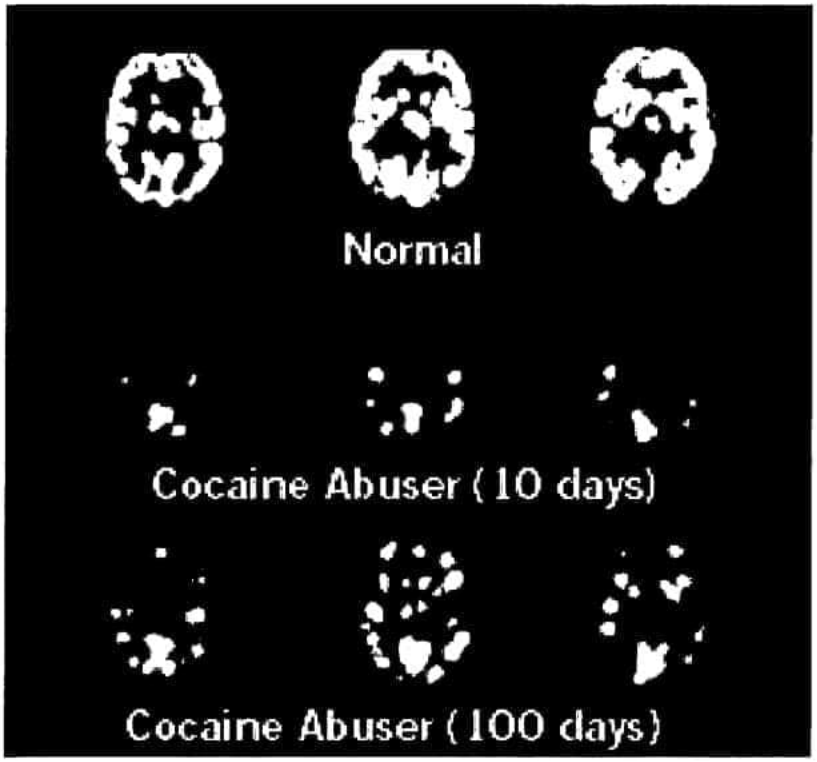
particularly crack cocaine—impairs the brain's neurocircuitry and function long after the last intake.

36. High resolution 3D Doppler imaging tomography is a technique developed at the Department of Biomedical Engineering at Stony Brook University in New York, in order to view and analyze the effects of cocaine on the brain. The Doppler neuroimaging technique provides evidence of how cocaine inhibits the blood supply in vessels and small capillaries within the brain, which parallel functional neuronal connectivity and activity. The resulting cerebral microischemia from chronic cocaine use is functionally associated with cerebral hemorrhage (stroke). Moreover, researchers from the National Institute on Drug Abuse concluded that sustained cocaine use causes neurotoxic effects and multiple neurological complications including the loss of impulse control, and a narrowing of interests so that their single focus and desire is to obtain and use more cocaine—similar to a person who has gone without hydration for an extended period of time focusing all energy and drive on procuring water.

37. Addiction to cocaine is a chronic disease state that creates a progressive psychopathology. That pathology remains active even after a sustained period of abstinence from cocaine use. Cocaine addiction is characterized by preoccupation with obtaining and using a drug, and neuroadaptive changes in brain structure and function. The extent and nature of these harmful consequences varies based on many factors including, but not limited to: age of onset (how old one was at first usage), level of toxicity (amount used), pharmacodynamics, pharmacokinetics, the drug user's genetic and epigenetic addiction risk, the amount and frequency of use, and the duration of the acute effects and level of emotional and cognitive impairment. Community and familial

environment, as well as pre-existing or co-occurring physical or mental conditions of the user, and presence or absence of community and social supports are all factors in the addicted person's unique profile.

38. As mentioned above, it is important to note that once cessation from cocaine occurs, the hypodopaminic state and other brain systems remain dysfunctional. These functional deficits can last several months to over a year. The PET scan image below was created at the Brookhaven National Lab, and shows a coronal view, which is looking down in the crown of the head at the level of the thalamus. These images were among the first to show the chronic debilitating effects of cocaine use on the functional blood flow and innervation of the human brain.



39. In this image, the yellow areas represent normal blood flow, innervation, and dopaminergic receptor density, particularly in the frontal brain (which is the top portion of each image). The images compare a computerized amalgamation of non drug-abusing

age matched controls (top row, or row 1) with a computerized amalgamation of cocaine-addicted persons after 10 days of supervised abstinence (middle row, or row 2). Lastly, the same persons from row 2 after 100 days of supervised and confirmed abstinence (bottom row). One can see that the frontal areas (which govern rational decision-making, impulse control, and ability to predict consequences) are most severely impacted by cocaine addiction, and the last part of the brain to recover.

40. Research reveals that after 10 days without cocaine use, less than 10% of regional blood flow and innervation of dopamine receptors has been restored. After 100 days (over 3 months) only about 20% of regional blood flow and innervation has been restored—which shows a nonlinear recovery period. In other words, it took ten times as long to get to 20% restoration of blood flow and innervation as it took to get to 10%. This indicates that further restoration would take a great deal longer.

41. This restoration does not occur evenly across the brain. Even as restoration occurs, it is concentrated more in the primitive portions of the brain, as opposed to the frontal cortex. This is significant for two reasons. First, the brain operates via interconnected networks. If one network is damaged or impaired, all networks are impacted to some degree. Thus, even if a certain percentage (say 20%) of restoration has occurred overall, if one area of the brain lags behind, it hinders the overall brain so that it will not be functioning at that 20% level.

42. Second, it is significant that the frontal cortex is the most extensively impaired area. The frontal cortex is the area of the brain is the last area of the brain to develop—full development is generally not attained until the mid-20s in females and late 20s in males—and is where our executive functions reside. Executive functions are the ability to

reason; think practically; organize our lives around a productive purposeful existence; and understand abstract concepts, moral codes, empathy, and consequences. It is the thing that makes us uniquely human. It is also where humans attach salience or importance to a person, activity, or state of mind. In other words, it is where decisions and priorities are assembled.

43. After crack addiction occurs, the brain's default network is no longer daydreaming or relaxed—it is preoccupied with how to get more cocaine, in spite of the knowledge that using cocaine is making one's life miserable and that the consequences for continuing are extremely high, including incarceration and death. In Mr. Russ's setting—incarcerated, under extreme stress, unable to use cocaine but also without structured treatment for his addiction—this default network state would cause profound agitation and hopelessness. As the images above show, the oxygenation and innervation of Mr. Russ's frontal cortex would have been impaired to the degree that it could no longer inhibit his hedonic survival drives from the primitive midbrain. This drive overrides all other priorities and domains, including safety, sleep, socially significant and intimate relationships, job performance, and acting upon one's higher virtues and values that operate in the frontal cortex. The great irony in Mr. Russ's case is that these same primitive survival drives overrode the mental processes that could have enabled Mr. Russ to defend himself against a death sentence.

44. Chronic cocaine exposure diminishes the user's ability to adapt behaviorally to negative consequences caused by their addiction. In Mr. Russ, these symptoms historically manifested in diminished employment and academic opportunities, failed relationships, multiple non-violent criminal behaviors and arrests primarily motivated by his craving

for cocaine. Mr. Russ's criminal history is highly correlated with his drug use. These maladaptive behaviors, when observed in an adult of normal intellect like Mr. Russ, is a strong indicator of corruption of the dopamine circuitry connecting the primitive midbrain and the frontal cortex. Put differently, Mr. Russ's brain circuitry was impaired in a way that prevented mediation of his decision-making and behavior.

45. Despite Mr. Russ appearing to possess average or above average intelligence, at the time of his arrest and subsequent criminal proceedings, he was still grossly impaired and had very little ability to cope or make objective decisions. He reverted to his Default Mode Network, which ponders, wonders, ruminates, thinks, and feels—but never initiates the frontal brain in order to engage in a positive action because it is too taxing to the impaired brain.

46. Mr. Russ's deep feelings of remorse, guilt, and shame have been consistent throughout his legal proceedings and to this day. However, whereas Mr. Russ can now—with 13 years of cocaine abstinence and removal from the environmental stressors he faced prior to his incarceration—productively work through that remorse, he did not have those capabilities at the time of his legal waivers at the trial and initial postconviction stages. Thinking about what he had done and how his crime was interwoven with his history of abuse and subsequent addiction was prohibitively distressful for him. It was too taxing for his brain, which was still operating under significant chemical and structural impairment. He had lost hope that he could ever redeem himself and concluded he deserved to be punished. Moreover, he believed even the ultimate punishment would be less overwhelming than having to go through the mental processes necessary to effectively communicate with his counsel and mount a defense to capital murder.

47. The best analogy from my experience is that—while Mr. Russ was using, undergoing withdrawal, and for years after while his brain was still operating under the neuroadaptive processes brought on by his crack addiction—he was like a car whose headlights only extend 10 feet. The headlights in this analogy represent Mr. Russ's forethought. A fully functioning adult of his intelligence could see the long term implications of one's actions and take appropriate or corrective steps. However, Mr. Russ was functionally impaired at the time he waived his rights, and this process of recognizing consequences and taking action toward a desired outcome was overly taxing, highly emotional, guilt-producing, and exhausting for him. His frontal cortex was essentially "off line" and he was unable to engage in these processes.

Other Areas of Concern

48. During the course of reviewing Mr. Russ's records, case history, and my interviews with Mr. Russ, I identified two additional areas of concern that, in my professional opinion, necessitate further investigation.

49. One area of concern is that many "facts of the crime" that were introduced as purported evidence of premeditation (such as the knots tied in the ligatures and other of Mr. Russ's behaviors inside the victim's house) have alternative explanations that are consistent with individuals in acute withdrawal. Although I was not retained to opine regarding Mr. Russ's criminal responsibility or the elements of his crime, my experience with individuals in acute crack cocaine withdrawal leads me to believe his legal team should further investigate this as a potential challenge to the cold, calculated, and premeditated aggravator used to secure a death sentence against Mr. Russ.

50. Another potential area of concern is the role that Mr. Russ's participation in Alcoholics Anonymous—particularly the meeting he attended in Texas after the crime—played in Mr. Russ's rhetoric before this court regarding "taking responsibility". Alcoholics Anonymous places strong emphasis on performing an accounting of one's transgressions and making amends. This is often phrased as "taking responsibility". This suggests a possibility that, in Mr. Russ's anhedonic and hypodopaminergic state during his legal process, his rational processes and any sense of hope for the future were overridden by sorrow, guilt, and self-hatred for taking someone's life. In the absence of higher level functions, with a brain that is overtaxed, it is entirely possible that Mr. Russ relied on rote language from Alcoholics Anonymous to justify his legal waivers, masking the level of his impairment and irrationality, and misleading the Court into believing Mr. Russ was making rational decisions when the opposite is true.

Conclusion

51. It is my professional opinion that Mr. Russ was impaired in his cognitive capacity and ability to assist his attorneys in preparing a defense. Specifically, Mr. Russ was unable to sustain appropriate focus and engage in the rational thinking processes necessary to go through the mitigation assessment process. He lacked the cognitive and emotional capacity to appreciate the gravity and consequences of his decisions to plead guilty and waive various legal rights. Based on my understanding of the legal competency standard, I strongly suspect Mr. Russ fell short of it at the time of his trial and waivers.

Under penalties of perjury, I hereby declare, affirm, verify, state and certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, pursuant to 28 U.S.C. § 1746 and Fla. Stat. § 92.525 (2020).

DEdwards

Drew W. Edwards, Ed.D., M.S.

ATTACHMENT 4

DECLARATION OF DR. RICHARD DUDLEY, JR., M.D.

PURSANT TO 28 U.S.C. SEC. 1746 AND SEC. 92.525 OF TITLE VII, FLORIDA STATUTES

1. I, Richard G. Dudley, Jr., am a physician, who is licensed to practice medicine in the state of New York, and I am board certified in psychiatry by the American Board of Psychiatry and Neurology.

2. I obtained my medical degree in 1972 from Temple University School of Medicine, and I completed my residency in psychiatry at Northwestern University Medical Center in 1975. Since 1984, I have maintained a private practice in psychiatry which has been about equally divided between a clinical practice and a forensic practice. As a forensic psychiatrist, I have consulted and testified as an expert in psychiatry in hundreds of cases, in both state and federal courts, throughout the United States, including in Florida. These cases have included capital cases, at both the trial level and post-conviction. In addition, for decades I team-taught courses and seminars on expert evidence at New York University School of Law.

3. My curriculum vitae is attached to this declaration.

4. Pursuant to a request from the legal team for David Byron Russ, I conducted a forensic psychiatric evaluation of Mr. Russ. I was asked to identify any psychiatric or neuropsychiatric conditions impacting Mr. Russ in the past or present, including those relevant to sentencing matters and mitigation as well as those relevant to Mr. Russ's various waivers.

5. I met with Mr. Russ for a psychiatric examination at Union Correctional Institution ("UCI") on October 11 and 12, 2018, for a total of about five hours. I have also reviewed records, including statements from family members, friends, and romantic partners; jail

and prison records; school records; recordings from jail visitations; court transcripts; and police reports.

6. Based on my examination of Mr. Russ and my review of records and documents, it is my opinion that there are clinically significant indications that Mr. Russ has suffered and continues to suffer from multiple psychiatric and neuropsychiatric disorders, which will be described below. However, due to the time constraints and the need for additional information, I consider the results of my evaluation of Mr. Russ to be preliminary. More specifically, although I can state with a reasonable degree of medical certainty that Mr. Russ meets the diagnostic criteria for multiple psychiatric disorders, I believe further exploration is required to confirm these diagnoses and provide a detailed description of their combined impact on his ability to function.

7. Given Mr. Russ's history and clinical presentation, it is clear that he suffers from a trauma-related psychiatric disorder, most likely posttraumatic stress disorder ("PTSD"). Mr. Russ and multiple other sources indicate he was repeatedly, severely physically and emotionally abused by his father, beginning in early childhood and continuing without reprieve, to age 14. Mr. Russ was then removed from his father and placed in foster care. Mr. Russ has recurrent, involuntary, and intrusive distressing memories of these early traumatic experiences, and suffers from insomnia. He describes dissociative reactions to triggering events that should be furthered explored. Mr. Russ tries to avoid distressing memories and external reminders of his trauma, by doing such things as cutting off ties with his father and some family members. These symptoms have caused significant emotional distress and have impaired Mr. Russ's functioning for years, dating back to childhood.

8. Other signs and symptoms of Mr. Russ's trauma-related psychiatric difficulties include his persistent and exaggerated negative beliefs about himself and others. Statements of those who have been close to him show Mr. Russ has a long-standing belief he is "evil" and is personally irredeemable. They also report that Mr. Russ has experienced persistent, negative emotional states, such as fear, anger, and shame; he becomes detached and estranged from loved ones; and that, despite periods of success in sobriety, work, school, and personal relationships, Mr. Russ is unable to experience lasting happiness and satisfaction. He has a longstanding history of self-destructive behavior, impaired concentration, and hypervigilance to perceived threats, and he demonstrates an exaggerated startle response to everyday events, such as hearing someone sneeze.

9. Mr. Russ also evidences numerous indicators of severe developmental difficulties that are consistent with the diagnosis of borderline personality disorder ("BPD"). Symptoms of BPD include frantic efforts to avoid real or imagined abandonment as well as a pattern of intense and unstable relationships. A perception of impending rejection can lead to a profound change in self-image, cognition, and affect. People with BPD are also prone to abrupt, unstable and drastic changes of mood and their view of others. This can lead to anger and sudden outbursts, which then trigger situations for abandonment. Such expressions of anger and outbursts are often followed by shame and guilt. Records from the Florida Department of Corrections ("DOC") indicate Mr. Russ also has symptoms of irritability, restlessness, loss of temper, anxiety, and depression, all of which are characteristic of BPD. Family members and former romantic partners describe Mr. Russ reacting excessively, including heightened and repetitive expressions of shame and self-loathing.

10. The mood instability seen in individuals with BPD results in an almost constant dysphoria – a profound state of uneasiness or dissatisfaction – as well as chronic feelings of emptiness. In addition, individuals with BPD evidence a persistently unstable sense of self, including sudden and dramatic shifts of goals and career, and a belief one is innately bad or evil. Furthermore, impulsivity, such as substance abuse and other reckless behaviors, is also common.

11. As evidenced in accounts by Mr. Russ, his friends, partners, and family, Mr. Russ fits many of the diagnostic criteria of BPD. Even though Mr. Russ is frightened of being alone and abandoned, he has quickly switched from intense love and reverence for people in his life (including relatives and romantic partners) to feelings of intense anger, including a belief they do not love him or are not there for him enough. For example, while Mr. Russ was in jail awaiting trial, he expressed feelings that he could not live without his fiancé, but quickly pushed her away with his anger and resentment for her not visiting him enough. All of Mr. Russ's relationships prior to the offense escalated quickly and were quite intense, but then did not last more than a few years.

12. Individuals with BPD have childhoods characterized by inadequate parenting; most such individuals were psychologically and or physically abused by their parents; and many were virtually abandoned by their parents. Mr. Russ still harbors resentment for his mother who abandoned him as a young child and left him with his father when she knew firsthand that his father was abusive. There is documentation that Mr. Russ's father subjected Mr. Russ to severe physical and psychological abuse and neglect. The environment during Mr. Russ's early developmental years and the absence of parental attachment made him especially vulnerable to the development of emotional and

developmental difficulties. He has continued feelings of distrust and fear of abandonment, and modifies his behavior in anticipation of perceived future rejection by loved ones. He then explodes in anticipation of being abandoned. Afterwards, he apologizes profusely and expresses severe disappointment in himself. He still has not forgiven himself for his past drug use and his failure to previously achieve permanent sobriety.

13. Additional features associated with BPD include recurrent job loss, interrupted education, and multiple separation/divorces, all of which are present in Mr. Russ's history. Mr. Russ has held many roofing and construction jobs, dropped out of college twice, and been divorced three times. He also tried to switch careers by going back to school and has moved many times.

14. Mr. Russ's difficulty regulating his mood is so severe that it cannot be fully explained by his above-described trauma-related psychiatric difficulties and other developmental difficulties. Therefore, it is reasonable to suspect that he may also have a super-imposed mood disorder, such as a bipolar disorder or a major depression. There is considerable evidence that Mr. Russ has had multiple major depressive episodes, characterized by a profoundly depressed mood, feelings of emptiness and hopelessness, markedly diminished pleasure in daily activities, feelings of worthlessness and excessive guilt, and recurrent suicidal ideation. All of these symptoms are documented in his DOC records, and while being held by the DOC he was diagnosed as suffering from "bipolar I, manic episode, moderate." Therefore, further investigation into Mr. Russ's mood deregulation is clearly indicated.

15. Mr. Russ's DOC records also indicate that he was diagnosed as suffering from antisocial personality disorder ("ASPD"). However at this juncture, I do not believe the diagnosis of ASPD is appropriate. The finding that an individual has committed a crime and is being held by the DOC on death row is not enough to make the diagnosis of ASPD. There are other, equally critical diagnostic criteria that Mr. Ross does not meet, such as the associated childhood history criteria, and the other symptoms seen in persons suffering from ASPD that he does manifest are better explained by his other, above described psychiatric difficulties.

16. If Mr. Russ evidences symptoms of an additional personality disorder in addition to BPD, it would be schizotypal personality disorder. This personality disorder is characterized by a pervasive pattern of social and interpersonal deficits marked by acute discomfort with, and a reduced capacity for, close relationships. Additionally, schizotypal personality disorder is characterized by cognitive or perceptual distortions and eccentricities, such as overelaborate thinking, suspicious or paranoid ideation, and inappropriate affect, all of which Mr. Russ presents. However here, too, these difficulties are likely better attributed to his other above described psychiatric difficulties, but this is another question that must be clarified.

17. The DOC records from Mr. Russ's arrival death row in May of 2009 through the present further document symptoms of bipolar disorder. In November of 2009, Mr. Russ filed an official request indicating he was having problems because he had not taken medication since his transfer from county jail. Mr. Russ saw a DOC psychiatrist who noted that Mr. Russ had been experiencing bipolar symptoms, such as mood swings, periods of depression, insomnia, loss of appetite, poor concentration, restlessness, hypervigilance,

periods of anxiety manifested by periods of irritability, psychomotor agitation, racing thoughts, pressured speech, distractibility, and loss of temper. His behavior was described as guarded, defensive suspicious, manipulative, "silly," and "childlike." He was using words that sound similar but are not logically connected. He had inappropriate affect and fluctuated from irritability to euphoria. Having been diagnosed with bipolar disorder, Mr. Russ was prescribed Remeron but he said he stopped taking it because he did not like the effects.

18. Through 2014, Mr. Russ has sporadic DOC mental health evaluations that note similar symptoms. However, since 2010, Mr. Russ has consistently refused mental health care and has not been prescribed any psychotropic medicine because of his refusal to attend psychiatric sessions. Mr. Russ's continued refusal to participate in DOC mental health screenings or any type of psychiatric treatment is not uncommon for individuals with bipolar disorder, because they often want to maintain the euphoria of mania and lack insight into their mania's negative impact on their ability to function. In this regard, it should also be noted that refusal of psychiatric treatment is also common in PTSD and major depressive disorder, and especially common with persons who suffer from BPD.

19. Mr. Russ and his family also report a history of mental health issues and drug abuse. There are indications that both Mr. Russ's father and mother had bipolar disorder. It is important to note that the single greatest risk factor for developing bipolar disorder is having a parent with the illness. Additional investigation into the family medical history and genealogy is necessary to facilitate accurate diagnoses.

20. Given all of the above noted, it is reasonable to opine that Mr. Russ does, in fact, suffer from a mood disorder, superimposed upon his trauma-related psychiatric difficulties and

other developmental difficulties. It is also reasonable to opine that this mood disorder is best described as a bipolar disorder, characterized by swings between depression and mania, with a mix of euphoria and irritability. However, a clearer understanding of the course of his difficulties, how rapidly his mood swings, and the impact of his mood-related difficulties on his ability to function still needs to be developed. In addition, some of the symptoms reported in Mr. Russ's DOC records suggest his mood disorder is at least at times accompanied by psychotic symptoms, and so this needs further exploration as well.

21. In addition, Mr. Russ presents clear indications that he meets the diagnostic criteria for stimulant abuse disorder, which includes cocaine and crack. This diagnosis is supported by the DOC records that document Mr. Russ as being diagnosed with polysubstance use disorder. Statements from Mr. Russ and others indicate that Mr. Russ used crack and cocaine since he was 19 years old. The only sustained periods of sobriety were when Mr. Russ was incarcerated for offenses which he had committed to finance his drug dependency that was so severe that he could not finance it simply through a normal job. Mr. Russ and others report he tried numerous times to stop using cocaine substances, including rehabilitation programs and 12-step groups. Despite periods of success in his life and sobriety, such as returning to school and receiving a scholarship for former substance users in recovery, Mr. Russ continually relapsed. As is the case with individuals who suffer from substance abuse disorders, even though he knew continued use of drugs would negatively affect his personal relationships, his career and his overall ability to function, Mr. Russ could not stop using drugs. During his periods of substance use, Mr. Russ would abandon his romantic partners and disappear for days on drug

binges. He pawned his family's jewelry for money for his habit, stole from family members and acquaintances, and deceived family friends to get money to buy drugs.

22. Stimulant use disorder can be classified as mild, moderate, or severe. Mr. Russ displays more than six of the criteria for stimulant abuse disorder and thus would be classified as "severe," currently in "sustained remission in a controlled environment." The DOC records notate they diagnosed Mr. Russ with polysubstance dependence, in remission in a controlled environment, which is consistent with my findings. While Mr. Russ and his friends and family primarily speak of Mr. Russ' cocaine/crack addiction, the DOC records also mention cannabis, alcohol, and amphetamines; thus, other substance use disorders should be explored, especially because of the differing impact of these various substances on Mr. Russ's other psychiatric difficulties.

23. Importantly, all substance use disorders have high comorbidity with PTSD, bipolar disorder, and BPD. Drug use provides a coping mechanism for the uncomfortable, emotionally painful, and "negative" symptoms of the above-mentioned disorders, such as anxiety, feelings of emptiness, and restlessness. In addition, stimulant use is particularly common among individuals with bipolar disorder, who seek to return to the euphoria of their manic/hypomanic episodes. However, ultimately the use of stimulants such as cocaine can exacerbate the hypervigilance and over reactivity that is symptomatic of PTSD; the abuse of stimulants can make it all the more difficult to regulate one's mood; and the abuse of stimulants can make the instability associated with BPD all the more severe.

24. Further effects of prolonged stimulant use must also be explored. Prolonged stimulant abuse has the ability to temporarily as well as permanently alter brain chemistry, which

can cause many problems. These include, but are not limited to: mood changes, frontotemporal lobe regulation problems, and neuropsychological deficits and disorders, all of which impact on logical adult decision-making and judgment. The DOC records also report Mr. Russ has a history of head injuries, which also increases his risk for neuropsychological difficulties. It is my medical opinion that, for a complete and accurate assessment of Mr. Russ's mental health status and brain functioning, Mr. Russ must be evaluated by additional experts who can evaluate whether these effects were present at and subsequent to Mr. Russ's final arrest, and whether any lasting damage continues today.

25. In summary, based on the information currently available to this psychiatrist, it is reasonable to opine that Mr. Russ suffers from multiple psychiatric and neuropsychiatric disorders. These likely include trauma-related psychiatric difficulties, best described as PTSD; clinically significant developmental difficulties, best described as BPD, possibly mixed with schizotypal personality disorder; severe mood deregulation, best described as bipolar disorder; severe addiction to and abuse of stimulates, particularly cocaine substances, and possibly other types of substances; and quite possibly, given his history of drug use and trauma to his head, neurocognitive difficulties. However, further evaluation and investigation, such as that noted above, needs to be conducted to more precisely identify the nature and course of Mr. Russ's psychiatric issues. It is my professional opinion that Mr. Russ should be additionally examined and tested by at least a trauma expert, a neuropsychologist and a neurologist, and a substance abuse expert/psychopharmacologist. Such evaluations can help to properly and more fully diagnose Mr. Russ and may identify other issues which require further scrutiny.

26. In addition, in order to fully respond to the referral question, the impact of each of these disorders on Mr. Russ's ability to function and their collective impact on his ability to function must be elucidated. In fact, gaining a complete understanding of the collective impact of these disorders on Mr. Russ's ability to function is critical to the presentation of mental health evidence in capital proceedings. In this regard, the disorders that Mr. Russ has suffered from have overlapping symptoms, and even more importantly, they each exacerbate the others, thereby making their collective impact on his ability to function much more than simply the sum of their individual impact on his functioning. Therefore ultimately, an additional expert may be required to explore and then describe how each of Mr. Russ's psychiatric and neuropsychiatric difficulties have interacted with the others and collectively impacted on his ability to function throughout the course of his life, including at the time of the crimes for which he has been sentenced to death and during the course of his trial.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. Sec. 1746 and Sec. 92.525 of Title VII, Florida Statutes.

Richard G. Dudley, Jr.

Richard G. Dudley, Jr., M.D.
NY Medical Lic # 125925

18 DECEMBER 2018
Date

CURRICULUM VITAE

Richard G. Dudley. Jr, M.D.

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New York, New York 10025

(212) 222-5122

EDUCATION:

* Temple University School of Medicine Philadelphia, Pennsylvania
  M.D., 1972
* Northwestern University Medical Center Chicago, Illinois
  R6 Internship
* Northwestern University Institute of Psychiatry Chicago, Illinois
  Psychiatric Residency, completed 1975

LICENSURE AND CERTIFICATION:

* License for the Practice of Medicine, State of New York
* Diplomate, American Board of Psychiatry and Neurology

PAST ACADEMIC APPOINTMENTS:

* Visiting Associate Professor of Medicine, Department of Behavioral Sciences
  City University of New York Medical School at City College
* Adjunct Assistant Professor of Law, School of Law
  New York University

PROFESSIONAL EMPLOYMENT HISTORY:

* January '76 to Present: Private Practice of Psychiatry

At present, the practice includes a clinical practice primarily focused on adolescents and adults (evaluation, consultation, and both individual and family psychotherapy); a forensic practice (I regularly appear as a psychiatric expert in various types of legal proceedings throughout the United States); and consultation/education (the development and/or presentation of continuing medical education programs, as well as education programs for other health professionals, attorneys, and the public).

* September '85 to June '05: Associate Professor of Medicine
Behavioral Sciences
CUNY Med School at City College

From September, 1985 to August, 1992, I was Director of the Department of Behavioral Sciences, at which time my primary responsibility was to direct the full-year/required course in behavioral sciences. The goal of this course was to help students acquire knowledge, skills and attitudes which would assist them in becoming effective primary care physicians, for a range of persons from different cultural backgrounds, through the incorporation of contributions from the fields of psychiatry, psychology, social work, sociology, and anthropology. After I retired from the position of Director, I continued to teach in the course.

* September '84 to April '05: Adjunct Assistant Professor, then
Visiting Lecturer
School of Law
New York University

Initially, as an Adjunct, I team-taught full seminars on "Expert Evidence" and also team-taught Family Law. Then, I transferred to the Law Clinic, funded under a different mechanism, where I team-taught "Expert Evidence" with various law professors in connection with clinical seminars. Lectures included an exploration of the interface between the behavioral and social sciences and the law, and how lawyers might more appropriately work with psychiatric experts. In other settings I have lectured on various other aspects of law and psychiatry to judges, attorneys, law students and others.

* July '82 to June '94: Teaching Attending Physician
Department of Psychiatry
New York Medical College
Lincoln Hospital Division

Responsibilities included course, seminar and case conference teaching, as well as individual psychotherapy case supervision for psychiatry residents, and the direction of the psychotherapy group for psychiatry residents. Previously, through the department's Consultation and Liaison Service, I also taught as part of the Chairman's Rounds for the Department of Internal Medicine.

* January '79 to October '84: Assistant Director
Professional Services Dept.
Roche Laboratories, Div. of
Hoffmann-La Roche, Inc.

The principal responsibilities were to actively and creatively participate in the medical aspects of marketing Roche products and services, and to direct the activities of the Professional Services Product Group. As a participant on Marketing Teams, I helped to develop marketing strategies and plans, train Roche Field Representatives and implement various promotional programs. My responsibilities also included the coordination of Phase IV research efforts, and the development of scientific exhibits, medical education films, monographs, and symposia for physicians.

* April '76 to July '82: Psychiatric Consultant
Mental Health Programs
Children's Aid Society of
New York City

Responsibilities included teaching, diagnostic evaluations and treatment of selected cases.

* December '77 to December '78: Medical Director
Washington Heights-West Harlem
Community Mental Health Center

Responsibilities included the design, development and then day-to-day operation of a full, twelve service community mental health center. When I accepted this position, the center had just been funded, and every program element and support system had to be developed. Once the twelve service chiefs and other key administrative staff were hired, and basic support systems were developed and put into place, I supervised the chiefs, developed in-service training programs and

worked towards the development of program elements not covered by the original grant, for example, research programs, transitional housing programs, and vocational rehabilitation programs.

* January '76 to December '77: New York City Department of Mental Health, Mental Retardation & Alcoholism Services

Assistant to the Commissioner January '76 to November '76

June Jackson Christmas, M.D. - Commissioner

Deputy Commissioner February '77 to December '77

Primary responsibilities included the development of new clinical programs/services, as well as the ongoing monitoring, evaluating, and upgrading of the existing mental hygiene service system. This system included all of the medical centers, voluntary hospitals and agencies, and the municipal hospitals and public mental hygiene programs in all five boroughs.

November '76 to January '77: [On leave from the Department]

Coordinator/Team Leader
Carter-Mondale Transition Planning Group

The focus of this effort was to develop policy options in the areas of mental health, mental retardation, alcoholism, drug abuse and the developmental disabilities for the incoming administration.

* January '74 to December '75 Staff Psychiatrist
Lower North Community
Mental Health Center
Chicago Board of Health

Responsibilities included diagnostic evaluations, treatment and some supervision and teaching. In addition, there was primary responsibility for the Center's adolescent program.

PROFESSIONAL ORGANIZATIONS:

* American Psychiatric Association - Distinguished Life Fellow
Scientific Program Committee, 1998-2001
Delegate, APA Assembly 1979-1983

* New York County District Branch (APA)
  Committee of Black Psychiatrists 1984-1986
  Committee on Legislation 1980-1983
  Committee on Emergency Psychiatry 1978-1979
* American College of Psychiatrists – Fellow
  Awards Committee 1993-2001
  Nominations Committee 1989-1992
* Black Psychiatrists of America
  Nominations Committee 1985-1987
  Program Committee 1980-1982
  President, Metropolitan New York Chapter 1978-1988
* National Medical Association
* New York Academy of Medicine - Fellow
* One Hundred Black Men 1977-1982
  Health Committee 1979-1981
* American Orthopsychiatric Association 1988-1991
  Program Committee 1989-1990
* American Society for Adolescent Psychiatry 1984-1988
* American Academy of Psychiatry & the Law 1984-1988
* American Medical Association 1970-1976
  Council on Long Range Planning and Development 1973-1975
  Council on Mental Health 1971-1975
* American Medical Student Association Foundation 1979-1980
  Board of Directors 1979-1980
* American Medical Student Association 1970-1973
  Director, Video Journal 1971-1973
  Board of Trustees 1971-1972
* Student National Medical Association 1969-1972

OTHER PROFESSIONAL ACTIVITIES:

* Consultant in creative approaches to medical education, using a variety of media
* Lecturer/speaker for professional health and/or law related organizations and groups, as well as non-professional groups throughout the United States and, to a limited extent, abroad -- frequent guest on various television programs, as well as host and guest on radio programs.
* City University of New York Institute for State and Local Governance, Advisory Board, 2015-present

* Executive Session on Policing and Public Safety, Harvard Kennedy School, sponsored by the National Institute of Justice, 2013-2015
* Commission on Safety and Abuse in America's Prisons, 2005-2006
* Housing Works, Inc., Board of Directors 2005-present
* Vera Institute of Justice, Board of Directors 1989-2014
* Hospital Audiences, Inc., Clinical Advisory Board
* Examiner in Psychiatry, American Board of Psychiatry & Neurology
* Highbridge-Woodycrest Center, Inc., Board of Trustees 1991-2004
* Co-Principal Investigator, Minority Education, Research & Training Institute [New York State Department of Mental Health] 1990-1994
* Public Member, Fatality Review Panel, Child Welfare Administration (formerly Special Services for Children), NYC Human Resources Admin. 1990-1992
* Family Court Advisory Committee, First Judicial Department 1987-1989
* Program Development Committee, NYU AIDS Mental Health Project (NIMH Contract No. 278-87-005) first 3 years
* Coordinator of Training for Volunteers Minority Task Force on AIDS 1986-1988
* Poison Control Advisory Committee, N.Y. City Department of Health 1980-1981
* Education/Training Consultant, N.Y. State Office of Mental Health 1979
* Consultant, Conference on Minority Mental Health Manpower, HEW-ADAMHA Minority Advisory Committee 1979
* Member, Mental Health Committee, Task Force on the New York City Fiscal Crisis 1978
* Chairperson, Task Panel on the Mental Health of Black Americans, The President's Commission Mental Health 1978
* Physician Resources, Inc. Board of Consultants 1977-1979
* Board of Directors, and Chairman of the Ambulance Committee, New York City Regional Emergency Services Council 1977-1978
* Task Force on Services to Emotionally Disturbed Adolescents, New York City Human Resources Administration 1977
* Advisory Board, Center for Physician Career Development, American Medical Student Association Foundation 1977
* American Bar Association -- Young Lawyer's Section Committee on Mental Health, Physician Member/Consultant, 1974-1975
* The Thresholds (rehabilitation program for young psychiatric patients) Board of Directors 1974-1975

OTHER SELECTED ACTIVITIES:

* Walter Nicks Dance Theatre Workshop
  Chairman, Board of Directors 1985-1994
* Amistad World Theatre
  Chairman, Board of Directors 1983-1989
* National Urban League
  Black Executive Exchange Program 1979-1981
  Committee on Mental Health 1976-1979
* National Association for the Advancement of Colored People Advisory Committee, Project Rebound 1977-1978
* National Advisory Committee on Ethics 1975-1978
* New York City Black Citizens for a Fair Media Psychiatric Consultant 1977-1978
* Young Life, Inc. 1968-1972
* Big Brothers of America 1970-1972

SELECTED HONORS:

* New Jersey Black Achiever of Business and Education 1982
* Award of Merit, Black Psychiatrist of America 1977
* "Who's Who in America" 1976–1977
* American Biographical Institute
  "Community Leaders and Noteworthy Americans" Ninth Edition
* Dictionary of International Biography – Cambridge, England
  "Men of Achievement" Fifth Edition
* Solomon Carter Fuller Institute
  Traveling Fellow 1975
* Outstanding Young Men of America 1972
* National Medical Fellowship Recipient 1969–1971

PUBLICATIONS:

Dudley RG: African Americans and the Criminal Justice System in Black Mental Health Patients, Providers, and Systems, Griffith EEH, Jones BE & Stewart AJ (eds), American Psychiatric Publishing, Inc., Washington, D.C. 2019

Dudley, Richard G. Jr., M.D. Childhood Trauma and Its Effects: Implications for Police. New Perspective in Policing Bulletin. Washington, D.C.: U.S. Department of Justice, National Institute of Justice, 2015, NCJ 248686

Davis PC, Chandler E, Dudley RG: The Place of Families in Juvenile Defense: Work After *Miller v. Alabama*. New England Journal on Criminal and Civil Confinement, 19 (No. 2):293-301, 2013

Dudley R.G.: Being Black and Lesbian, Gay, Bisexual or Transgender. Journal of Gay & Lesbian Mental Health, Volume 17/number 2/April-June 2013, pgs 183-195

Dudley R.G., Blume Leonard P: Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment. The Hofstra Law Review, 36 (No 3): 963-988, 2008.

Dudley RG: Offering Psychiatric Opinion in Legal Proceedings When Lesbian or Gay Sexual Orientation Is an Issue in Mental Health Issues in Lesbian, Gay, Bisexual, and Transgender Communities, Jones BE & Hill MJ (eds), APA Review Psychiatry. Vol. 21, American Psychiatric Publishing, Inc., Washington, D.C. 2002

Dudley RG: All alike but each one different: orphans of the HIV epidemic in Orphans of the HIV Epidemic, Levine C (ed) Unit Hospital Fund, New York. 1993

Dudley RG: Serotonin partial agonists in the treatment of anxiety and depression: Introduction. Journal of Clinical Psychiatry, 51:30, 1990.

Bing EG, Nichols SE, Goldfinger SM, Fernandez F, Cabaj R, Dudley RG, Krener P, Prager M, Ruiz P: The many faces of AIDS: Opportunities for intervention. New Directions For Mental Health Services - Psychiatric Aspects of AIDS, 48:69-81, 1990.

Dudley R.G: Blacks in policy-making positions in Black Families in Crisis- The Middle Class, Coner-Edwards AF and Spurlock J (eds), Brunner/Mazel, New York, 1988.

Davis PC, Dudley RG: The black family in modern slavery. The Harvard Blackletter Journal - Harvard School 4:9-15, 1987.

Davis P, Dudley RG: Family evaluation and the development of standards for child custody determination. Columbia Journal of Law and Social Problems, 19 (No. 4):505-515, 1985.

LECTURES, PRESENTATIONS, AND EDUCATIONAL VIDEOTAPES

Described upon request

November/2018

ATTACHMENT 5

STATE OF FLORIDA—DEPARTMENT OF CORRECTIONS

PSYCHIATRIC EVALUATION PAGE 1 OF 4

This is the initial evaluation form to be used when the inmate is first fully evaluated by a psychiatrist in DC; intake screening and initial crisis contacts can be exceptions with that documentation on progress notes or other designated forms. This form would then be completed with the next scheduled encounter. A clean copy must be maintained for reference in any current volume of the patient's medical record. A new evaluation is to be done for each repeat incarceration following an EOS.

GUIDELINES
Use as Much Space as Needed for Each Topic.

IDENTIFYING DATA:

CHIEF COMPLAINT or REASON PATIENT REFERRED:

HISTORY OF THE PRESENT ILLNESS (Onset, Stresses, Symptoms [including vegetative functions], Current Treatment and Response):

CURRENT MEDICATIONS (All, not just Psychotropic):

PAST PSYCHIATRIC HISTORY (Hospitalizations, Outpatient Treatment, Suicide Attempts [including aborted attempts], Medications Used and Response, Substance Abuse History, Violence History [include relation to substance use if a factor]):

RELEVANT MEDICAL HISTORY (Hospitalizations, Surgeries, Acute or Chronic Illness, Head Injuries, Allergies):

FAMILY HISTORY (Psychiatric and Relevant Medical History):

noted
11/5/09
R Singletary SLPN

R. Singletary SLPN
Florida State Prison

DATE: 11/05/09 TIME 1400

This 47 year old Caucasian male CM status inmate who received the death penalty for first-degree murder present with a duration of 18 calendar days regulation.

The inmate claims that periods of a depressed and anxious mood have been associated with insomnia, loss of appetite, poor concentration, restlessness, hypervigilance, and feeling "keyed up" or "on edge". Episodes of irritability can include psychomotor agitation, racing thoughts, pressured speech, distractibility, low level of frustration tolerance, and bouts of temper. Characterological tendencies have been toward reckless and impulsive actions, physical aggression, and criminal behaviors.

There have been several attempts at substance abuse treatment for dependence on cannabis, "crack", alcohol, amphetamines, hallucinogens, and intranasal as well as intravenous cocaine. While being held in county jail, the inmate was treated with Risperdal initially, but this created acute dyspepsia. Most recently, the inmate was treated with Seroquel 200 mgs QHS with favored response being quite positive.

Medical history is significant for: [1] Hepatitis C infection resulting in hepatic, renal and hematological complications; [2] Hyperthyroidism resulting in the need for thyroid replacement therapy; [3] Anal Fistulas with Hemorrhoids scheduled for surgery in December 2009; [4] Peptic Ulcer Disease; [5] Head Trauma with loss of consciousness during motor vehicle accident in 1976; [6] allergies to dust and pollens.

The inmate claims that he was raised within the foster care system and that he was severely abused as a child.

e: Pages two and six are for itional comments.

TE NAME: RISS, DAVID
358986 RACE/SEX W/M
E OF BIRTH 02-24-68
TUTION F.S.P.

This form is not to be amended, revised, or altered (except for the addition of lines) without approval of the Deputy Assistant Secretary for Health Services Administration

HIATRIC EVALUATION
155 (6/99) Page 1 of 6

GUIDELINES

The use of the MSE check sheet is optional. Pages four and/or six are for additional comments or for a written mental status examination.

DATE: 11/05/09 TIME: 1400

MENTAL STATUS EXAMINATION

Level of Consciousness: ☑ Alert ☐ Drowsy ☐ Lethargic

Behavior: ☐ Appropriate ☑ Inappropriate (describe) SILLY/CHILDISH WITH "CLANG" ASSOCIATIONS

Attitude: ☐ Cooperative ☐ Hostile ☑ Guarded ☑ Defensive ☑ Suspicious ☐ Oppositional ☐ Passive ☐ Apathetic ☑ Manipulative ☐ Pleasant

Orientation: ☑ Person ☑ Place ☑ Time ☑ Situation

Eye Contact: ☐ No ☐ Poor ☐ Fair ☑ Good

Appearance: ☑ Neat ☐ Disheveled ☐ Unkempt ☑ Well Groomed ☐ Younger ☐ Older ☑ Stated Age ☐ Other _____

Psychomotor Activity: ☐ Increased ☐ Decreased ☐ Normal ☑ Impaired (+) RIGIDNESS/EBS

Immediate Memory (digit spans): ☑ Good ☐ Fair ☐ Poor

Recent Memory: ☑ Good ☐ Fair ☐ Poor
3 of three (3) objects remembered after five (5) minutes.

Remote Memory: ☑ Good ☐ Fair ☐ Poor

Concentration (Serial 7s, 3s, etc.): ☑ Good ☐ Fair ☐ Poor

Ability to Think Abstractly: ☐ Good ☑ Fair ☐ Poor
If Tested with Similarities and Differences: ☐ Good ☑ Fair ☐ Poor
If Tested with Proverbs: ☐ Good ☑ Fair ☐ Poor

Hallucinations: ☐ Acknowledges ☑ Denies ☐ Actively Hallucinating
Content: ☐ Auditory ☐ Visual ☐ Tactile ☐ Olfactory ☐ Gustatory
Describe: N/A.

Delusions: ☐ Present ☑ Absent
Nature/Content: Describe: N/A.

Speech: ☑ Coherent ☐ Loose ☑ Tangential ☑ Circumstantial ☐ Soft ☐ Loud ☐ Yelling ☐ Monotonous ☐ Slow ☑ Rapid ☑ Pressured ☑ Other: LOUD/APPROPRIATE + AT TIMES ILLOGICAL

Mood: ☐ Euthymic ☐ Depressed ☐ Sad ☑ Irritable ☑ Other: ELEVATED ☐ Anxious ☐ Angry ☐ Hostile ☑ Labile ☐ Cheerful ☑ Happy ☑ Euphoric ☐ Fluctuating

ATE NAME: RUSS, DAVID
t 358986 RACE/SEX W/M
E OF BIRTH 02-24-62
ITUTION F.S.P.

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CHIATRIC EVALUATION
655 (6/99) Page 3 of 6

STATE OF FLORIDA—DEPARTMENT CORRECTIONS

PSYCHIATRIC EVALUATION

GUIDELINES

DATE: 11/05/09 TIME: 1400

MENTAL STATUS EXAM CONTINUED:

Affect: ☐ Appropriate ☑ Inappropriate ☑ Broad ☐ Constricted ☑ Congruent ☐ Incongruent ☐ Blunted ☐ Flat ☑ Feeling tone: (see feelings noted in Mood): FLUCTUATIONS FROM IRRITABLE TO EUPHORIC AND RAPIDLY TRIGGERED BY EVEN THE SLIGHTEST + MOST BENIGN COMMENTS

Suicide: Ideation: ☐ Yes ☑ No Intention: ☐ Yes ☑ No Plan: ☐ Yes ☑ No Describe: N/A.

Nonverbal Cues: ☐ Giving Away Property ☐ Goodbye to Peers/Staff/Family ☐ Sudden Mood Change ☐ Very Depressed ☐ Very Cheerful when previously depressed — N/A.

Homicide: Ideation: ☐ Yes ☑ No Intention: ☐ Yes ☑ No Plan: ☐ Yes ☑ No Describe: N/A.

Insight: ☐ Poor ☑ Fair ☐ Good

Judgment: ☑ Intact ☐ Impaired

Reliability of Patient's Information: ☑ Reliable ☐ Unreliable - explanation N/A.

Optional written/typed MSE (may be continued on page six):

APPEARANCE: OLD LINEAR SCARS ON RIGHT FOREHEAD
INTERPERSONAL: EVIDENCE OF INFLATED SELF-ESTEEM WITH A TENDENCY TO BRAG/BOAST AND EXAGGERATE OWN ACCOMPLISHMENTS AND ABILITIES

ATE NAME: RUSS, DAVID
358986 / RACE/SEX W/M
E OF BIRTH 02-24-62
ITUTION F.S.P.

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CHIATRIC EVALUATION
355 (6/99) Page 4 of 6

GUIDELINES	DATE: 11/05/09 TIME: 1400
ASSESSMENT	[1] AFFECTIVE INSTABILITY (MOOD SWINGS)
Problems:	[2] MALADAPTIVE / DISRUPTIVE CONDUCT PATTERNS
	[3] SERIOUS MEDICAL ISSUES
Differential Diagnosis	[4] HISTORY OF SUBSTANCE ABUSE
Axis I (with code):	[5] SEVERE PSYCHOSOCIAL STRESSORS
	AXIS I 296.42 BIPOLAR I DISORDER, MANIC EPISODE - MODERATE
Axis II (with code):	304.80 POLYSUBSTANCE DEPENDENCE - REMISSION IN CONTROLLED ENVIRONMENT
	AXIS II 301.7 ANTISOCIAL PERSONALITY DISORDER
Axis III:	AXIS III [1] HEPATITIS C (+) STATUS [4] PEPTIC ULCER DISEASE
	[2] HYPOTHYROIDISM [5] HX OF HEAD TRAUMA
Axis IV:	[3] ANAL FISTULA + HEMORRHOIDS [6] ALLERGIES TO DUST + POLLEN
	AXIS IV INCARCERATION ON CONSTABLE WITH DEATH PENALTY
Axis V:	AXIS V GAF = 61

PLAN

1. Follow Up: ☐ Not Needed ☑ As Outpatient 14 days ☐ Admit to IMR ☐ Admit to CSU ☐ Admit to TCU

2. S Grade: ☐ S-1 ☐ S-2 ☑ S-3 ☐ S-4 ☐ S-5

3. Old Records: ☐ To Be Sent For ☑ Not Needed At Present

4. Labs (Refer to 15.05.19 for Requirements): ☐ CBC ☐ Chemistry Panel ☐ U/A ☐ TSH, Free T4 ☐ EKG ☐ Urine Drug Screen ☐ Pregnancy Test ☐ Blood Levels ☑ Other: NONE AT PRESENT

Other plans (as clinically indicated—to include patient education, consents, other testing, referrals, AIMS, psychotherapy, medication—with target symptoms):

[1] REMERON 15 mgs, PO, QHS TO ADDRESS DEPRESSION & ANXIETY
(NOTE: INMATE WILL ONLY ACCEPT ANTIDEPRESSANT TREATMENT AT THIS TIME, AND IT IS ANTICIPATED THAT IRRITABILITY, APPETITE, INSOMNIA, RESTLESSNESS, AND DISTRACTIBILITY WILL RESPOND WELL TO REMERON'S MORE SEDATING PROPERTIES.)
[2] REFERRALS HAVE BEEN MADE FOR OUTPATIENT PSYCHOTHERAPY SESSIONS
[3] PATIENT EDUCATION HAS BEEN PROVIDED AND CONSENTS OBTAINED
[4] RESULTS OF BASELINE LABORATORY STUDIES ARE AVAILABLE IN CHART

Emanuel Falcone
Emanuel Falcone, M.D.
Psychiatrist
FSP M.D.

TE NAME: RUSS, DAVID
358986 / RACE/SEX W/M
OF BIRTH 08-24-62
TUTION F.S.P.

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HIATRIC EVALUATION
55 (6/99) Page 5 of 6

ATTACHMENT 6

STATE OF FLORIDA)

)

COUNTY OF ORANGE)

Affidavit of Donna Jenkins

I, Donna Jenkins, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Donna Jenkins. I became friends David Russ through my son, Andy, who was in Seminole County jail with David right after David was arrested. Andy has since passed away.
2. After David Russ was arrested, I learned that he was at the same jail facility as my son, Andy, who was incarcerated at the Seminole County Jail for his drinking and substance abuse issues. I wrote David a letter telling him I would pray for him.
3. I began visiting David in the months leading up to his guilty plea and trial. From that, a friendship formed that lasted 6 years through his pretrial proceedings, plea and sentencing and a few years into his time on death row. I even became friends with his family, especially his mother, Beth, and his brother Aarron who thinks of me as being part of his family.
4. Once my son, Andy, got out of jail, he occasionally visited David at the jail with me. They got along well because they both had been in and out of jail

and rehab facilities for much of their lives. Andy even received letters in the mail from David, discussing his struggles with his own addiction as well as giving his advice to my son about going down the wrong path that leads to nowhere. David also wrote me informative letters advising me about AA and Al-Anon and how to cope with my son's struggles, and I was grateful for his help and assistance.

5. David began to open up to me. Prior to his guilty plea and sentencing, he saw his situation as hopeless and he felt helpless. I was his only visitor at that time. He spoke about this often, and his brother Aarron was angry at David for committing this crime. Aarron was frustrated that David had been unable to recover despite numerous treatment attempts and periods of sobriety. Every time Aarron thought about visiting David or even communicating with him, he became anxious and nervous. I first reached out to Aarron because Aarron would not write to David or answer any of David's letters to him. Aarron was unable to handle the combination of emotions he was feeling. So he distanced himself from David along with his other family members. That made David feel even more alone and lonely and frightened and depressed.

6. David was very remorseful. He was fixated on taking responsibility for his crime. He believed he was evil and said he believed this ever since he was a child. He said something evil had taken ahold of him while his grandmother

and mother were fooling around with a Ouija board. They called David to join them at the table. He was terribly frightened because he felt evil all around him, and this fear and belief has haunted him into his adulthood.

7. During one of our visits, David began acting strange and fidgety and nervous. Out of the blue he started shouting at Satan to get behind him and leave him alone. He also said he was bothered with the evil numerous times when he was in his cell. He finally told me that Satan had left, and we continued our conversation, but I could see that he was still on edge and upset. I was taken aback when this happened. It reminded me of the conversation I had with him when he told me that, as a child, he was told by his father so many times that he was no good and evil and worthless.

8. David was also coming off drugs. I know from my son's addiction counselor, who I spoke to regularly when Andy was in rehab, that your brain loses a lot of cells when you do heavy and repeated drugs and alcohol and that your brain never fully recovers. In my opinion, David was not thinking clearly during those first few critical years in prison. His emotions were all over the place. He had mood swings, and he did not appear mentally stable to me with his actions or with his behavior. He wanted to punish himself and hurt himself and make his life as hard as he could for himself because he felt that this was the only way he could atone for what he had done. David also told me that he

felt let down and was disappointed with his lawyers because they barely visited him and, when they did, they did not stay long enough to counsel him about his case. David believed they were not doing their job well and that they did not care about him or his case, and he felt abandoned.

9. David saw his situation as hopeless and thought it was pointless to put the victim's family and his own family through all of this. He gave up. I was present in the courtroom for his penalty phase and wrote a letter to the judge on his behalf. David had such a bad experience with his trial lawyers that he believed his post-conviction proceedings would be no different.

10. I believe David gave up on himself long ago. After his parents split up, his mother did not want him, and he was sent to live with his father even though his mother knew his father was an abusive man. He was also sent to a foster home and separated from his brother who he was close to and loved.

11. When David got to death row, his depression continued. He still had so much guilt and shame. He felt worthless. I think he felt everything his dad had berated him for was coming true.

12. David felt like his life did not have any meaning and that no one cared about his situation or about him. His feelings were shattered. Nothing mattered to him. So David waived his appeals, and he pushed me away, too. I was surprised and hurt about this. I think he was confused and depressed, and it

makes me sad because I don't think he was in a healthy state of mind to make those decisions.

13. My only child, Andy, has since died on August 17, 2017, at 38 years of age from an overdose.

FURTHER AFFIANT SAYETH NAUGHT.

Donna Jenkins

Donna Jenkins

Sworn or affirmed before me this 2 day of December, 2018 by, Donna Jenkins, who is personally know to me or has produced the following identification _____.

Notary Public, State of Florida

Seal:

EMMA IRIS DIANNA
Commission # GG 081445
Expires March 9, 2021
Bonded Thru Troy Fain Insurance 800-385-7019

ATTACHMENT 7

DECLARATION OF JOHNNIE MARIE JACKSON

PURSANT TO 28 U.S.C. SEC. 1746 AND SEC. 92.525 OF TITLE VII, FLORIDA STATUTES

1. My name is Johnnie Marie Jackson. I go by Marie. I know David Russ because I was the girlfriend of his father, James "Arnold" Russ, for about eight years in the 1970s to 1980s. During that time, I lived with David, Arnold, and David's full-biological brother, James "Aarron" Russ. Arnold and I also had a daughter, Mickey Russ, in 1975.

2. David was about 11 or 12 years old when I first met him. His brother, Aarron, was slightly older. I got pregnant with Mickey early on in our relationship. Arnold wanted me to have an abortion, but I refused.

3. Arnold was absolutely horrible to me, Aarron, and especially David. He was extremely physically and verbally abusive to both me and his sons. He was a bully. He was someone who was hell-bent on making other people miserable. To sum it up, he terrorized us.

4. Arnold used David and Aarron as workers for his beekeeping business – he always had something for the boys to do. There is a lot of work that goes into caring for bees, such as feeding them, smoking them out of the hives, scraping off the honey, putting it through an extractor, and jarring it. I think Arnold wanted custody of his sons to use them as free labor. That is all they were to him. He never acted like a father towards them. He never praised them, never said thank you. I never once heard Arnold say "I love you" to them or ask them how their day at school went.

5. The boys' days consisted of going to school, coming home, changing, working, eating dinner, and going to bed. The boys would get home from school and then work with the bees and hives until 8 or 9:00 pm before we ate dinner. Dinner only lasted 15 minutes,

just enough time to eat. The boys immediately went to bed after finishing their work. There was no family time. Their only break from it all was when Arnold was out of town on business.

6. Arnold was a "migratory" beekeeper, so we would move to South Dakota for about three months each summer. Those summers we lived in a tiny town, Fairview, in the middle of nowhere. The house Arnold had for us wasn't fit to live in. It was falling apart. I remember Aarron and I got plastic from the hardware store to patch up the broken windows. Arnold didn't care about uprooting his sons each summer. He needed them to do work. While other kids their age could have fun on summer break, Aarron and David had to work all day.

7. Arnold would become enraged at the flip of a switch. When he ordered you to do something and didn't think you started on it fast enough, he would hit you upside the head. He would beat David simply for looking at him wrong. Arnold would say to David, "Why are you looking at me like that?" and then slap David. Arnold would come back from a business trip and beat David for all the things Arnold assumed David did wrong when Arnold was away.

8. Arnold was more abusive to David than to me or Aarron. Arnold told me he didn't think David was really his son, and I think this is why he would beat David more frequently and more severely than Aarron. To me, the words "whipping" and "beating" mean different things. "Whippings" are getting slapped or hit a few times. Most kids back then got whipped from time to time. But "beatings" are longer and severe enough to leave injuries like bruises and cuts. Arnold beat David horribly at least once a week. Those

beatings lasted five to ten minutes. In between those major beatings and a couple of times a week, Arnold would slap David around.

9. When Arnold beat David, David would scream out things like, "Please, Daddy, stop!" or "I didn't do it, I swear!" Arnold would yell things like, "I'm going to kill you," "You sorry son of a bitch," "Your mom is a whore," "You're not mine," "You're worthless." David would curl into a ball to protect himself. The more David cried out for Arnold to stop, the more Arnold would beat him. Arnold would literally foam from the mouth as he beat David. Spit would pool at the corners of his lips and would fly out of his mouth.

10. Arnold made David take his pants off for the beatings, even when David got older. Arnold would beat David with anything he could get his hands on – his belt, switches, pieces of wood, garden tools. If nothing was around, he'd use his fists. He drew blood and left bruises. Arnold didn't avoid hitting David in the head or face. Arnold hit and punched David wherever his fists or the switch or the tool fell. I remember David bleeding from the mouth and nose and having black eyes and busted lips from Arnold punching him in the face. I also remember David bleeding from his back from Arnold hitting him with belts or switches. I don't remember Arnold ever making Aarron bleed from beatings.

11. Many times, David's injuries were so visible that he would have to miss school, often for days at a time. Other times, David could hide the marks but couldn't move about properly because of the lingering pain. Arnold made David stay home while he healed to avoid the school getting involved or reporting Arnold to the police. David never wore shorts – he only wore pants – because he always had to hide bruises or welts from the beatings.

12. I remember one time Arnold, Aarron, David, and I were outside planting peas. We had to make rows for the planting. I can't remember what Arnold claimed David wasn't doing right, but the next thing I know Arnold has a garden hoe in his hand and is beating David with it.

13. Another time, all of us were harvesting honey. You had to cut the tops off the hives to smoke them. Arnold thought David wasn't doing it right and threw a hive full of bees at David. David got stung a bunch.

14. In South Dakota, near our house, there were some railroad tracks that crossed over a river. David liked to go there on the rare occasions that Arnold gave him a break from working. Once while there, David fell and cut his leg open. Arnold beat him for getting hurt and refused to take him for medical treatment.

15. With Arnold, the physical and verbal abuse wasn't enough – he also had to play mind games with us and torture us that way, too. Arnold often set up situations for us to "fail" at so he would have an excuse – in his head – to beat us. For example, Arnold knew David hated oatmeal. Arnold would make me cook oatmeal for David and would tell me that if David didn't eat it, he would beat David and me. I remember sitting with David and telling him he had to eat it. I had to make him eat it because I knew we would both be beaten if he didn't. This happened over and over. I did not tell David that I would be beaten, too, because I didn't want him to know that I was beaten for what he did. I thought that would make it worse on him.

16. I also remember Arnold telling me to hide David's clothes. Arnold would then blame David for losing them and beat him. He never told me to hide Aarron's clothes.

17. Sometimes after the beatings, when I had the courage, I told Arnold he should take David to the hospital. But Arnold said he couldn't do that because he would be arrested for beating David. Arnold knew what he was doing was wrong, but he continued to beat David. Even as David became a teenager, Arnold never let up.

18. After Arnold beat David, David would go into his room and sit there in a catatonic state. When Aarron or I tried to talk to David, David did not respond in any way. He just sat still and stared straight ahead. He would stay there for hours and only come out for dinner.

19. Many nights after beating David, Arnold withheld dinner from David. Arnold would often not let the boys eat dinner for whatever reason he came up with. After Arnold went to bed, I would get up and sneak food to the boys.

20. David never had any friends. Aarron had friends and he would sometimes have them over. But not David. Over the years, David became very withdrawn and always wanted to be alone. He kept to himself. He was very quiet. David was polite, and he did not talk back to me. The only times I ever heard David talk back were when he was a teenager and Arnold would attack him. David would try to stand up for himself by telling Arnold to stop. Arnold did not listen, and, when David said to stop, Arnold actually hit him more.

21. I wanted to protect those boys, but I was helpless. When Arnold beat David, I would scream the whole time – I would often yell out, "You're going to kill him!" and Arnold would scream back, "I don't care!"

22. Many nights after the boys went to bed, Arnold beat me in retaliation for sticking up for David or because he blamed me for whatever he thought David did. Arnold beat the hell

out of David for doing something wrong, then beat me for it, too. Arnold also slapped me around in front of the boys for other small things – like not having grits when he wanted them – but he waited until we were alone in our rooms to really go at me. Arnold beat me with his fists, busted my lips, and pulled out my hair. Once he broke three of my ribs.

23. Another time, I confronted Arnold about an affair he was having. He smashed my face up against the wall and left it bruised and bloody. He smashed my face up against the wall and left it bruised and bloody. I was afraid to ever go to the hospital because the law would get involved, and I knew Arnold would beat me and the boys worse.

24. My youngest son, Rick, was about 14 months old when I met Arnold. I left him with my mom. I didn't want Rick around Arnold because of how violent Arnold was. About once a month, Arnold beat me so badly that I had to avoid my mother's house because I didn't want her, my son, or my other family to know about the abuse. I tried very hard to hide it all.

25. One summer, I stayed behind in Florida while Arnold and David and Aarron went to South Dakota. When Arnold came back at the end of the summer, he didn't have the boys with him. He hadn't told me beforehand that they had been put in foster care. Arnold was never upset about his sons being taken away. He went on like nothing happened.

26. I say I stayed with Arnold for eight years because it took me eight years to leave him. A couple of times I tried to leave, and I went to my mother's house. Arnold came and begged me to come back. He promised it would be different when I came back, that he wouldn't beat me. I caved and went back to him, but Arnold never held to his promise.

27. One day, Arnold came home extremely drunk. He said he was going to get a German Sheppard, lock me in the closet with the dog, and let the dog sexually assault me. That is when I decided, no more, and I finally left for good.

28. Arnold threatened me many time after I left. For example, he told me he was going to drive his truck through my mother's house, which is where I stayed after I left him. One time when I was out, Arnold tried to break in through the door while my mom was at home with the grandkids. He smashed the glass in the window. If my mom hadn't had so many locks on the door, he for sure would have gotten in. We tried calling the cops a few times, but back then they didn't really care about domestic violence and never showed up. We gave up calling for help and were left to fend for ourselves. It was horrifying and we lived in constant fear.

29. One weekend, Arnold took Mickey on a Friday and was supposed to bring her back on Sunday. When she didn't come back, I went over to the apartment where he was staying. Arnold refused to give me Mickey. He called the police, and they wouldn't let me take her.

30. I fought for custody of Mickey, but Arnold was able to get custody of her because he had a good business going while I had injured my foot and was unable to work. The judge saw Arnold had more money than I did. Later, Arnold claimed he paid the judge off.

31. Arnold continued to try to convince me to come back so we could be a family again. I think the only reason Arnold wanted custody of Mickey is because he thought I would come back if he had her. I later found out that he also tormented Mickey.

32. At one point, Mickey was taken away for about 30 days and placed in a foster home. Arnold had been accused of messing with an under-aged girl. When the charges were dropped, Mickey was returned to him.

33. While Mickey was living with Arnold, Mickey called my mom and asked if she could move in with her, but Arnold would not let Mickey stay with my mom. Finally, in high school, when Mickey was about 16 years old, a teacher saw Arnold beating Mickey in the car in front of the school. The school called social services, and Mickey was taken away. She went to live with Angie, my niece. Mickey stayed with Angie until Mickey was 18 years old.

34. Even today, Mickey is scared of Arnold, but she still loves her dad, despite the terrible things he has done to her. He continues to criticize her and is still vicious. Mickey often will ask me to come along with her to see Arnold because she doesn't like to be alone with him. I say hello to Arnold but that is it. If I can't go, Mickey will get someone else to go with her because, if someone else is there, then Arnold isn't as mean to her.

35. Arnold is truly the worst human being I have ever met. I don't know why he treated his own children the way he did except for maybe he was treated that way, too. Arnold told me that his mother left when he was real young. His dad, James, couldn't take care of him and his siblings so they were put into foster homes. It was only when James remarried that Arnold and his siblings went back to live with his dad and new stepmom, Eva. James also beat Eva.

36. I recently reviewed the testimony I gave at David's proceedings. The lawyer who questioned me at the trial had told me to say that I was married to Arnold, even though I never was, because it would look better to the judge. When I was on the stand, the lawyer

didn't ask me very many questions. I wanted to say more, but he didn't give me the opportunity to say all I knew about David and his upbringing and his life. It was frustrating. I knew so much about the pain and torment David had experienced as a child at the hands of his father. I would have told the court all of this had I been given the opportunity.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. Sec. 1746 and Sec. 92.525 of Title VII, Florida Statutes.

Johnnie Marie Jackson

Johnnie Marie Jackson

12-13-2018

Date

ATTACHMENT 8

STATE OF FLORIDA)
COUNTY OF SEMINOLE)

AFFIDAVIT OF MELISSA RUSS

I, Melissa Russ, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Melissa Russ. My friends and family call me Missy. David Russ is my elder brother. We are full siblings. Our biological mother was Ollie May Baxter. She is now deceased. Our biological father is James (Arnold) Russ.

2. Arnold has never been willing to admit that I am his biological child, even though a court found paternity. He and my mother were divorced for the first time in 1968. They later reconciled, and my mom told me they got married again after that. My mom said she left Arnold for good while she was pregnant with me after he threw her through a wall trying to cause a miscarriage. She sued him for child support, and the court ordered it, but my mom said he never paid the child support.

3. I have three full siblings, although we didn't live in the same house growing up. I am eight years younger than David, ten years younger than our brother, James (Aarron), and twelve years younger than our eldest sister, Debbie. Debbie is now deceased. I also have a paternal half-sister, Mickey. She is five years younger than me.

4. Throughout the years, I've heard a lot of stories about how Arnold abused my siblings – especially my brothers. After our mom left Arnold, he moved my siblings out to a place in Polk County that they called "The Green Swamp." It was in the middle of nowhere. I think Arnold wanted to keep my siblings isolated – away from our mom and the rest of our family – so he could have complete control over them.

5. Arnold was psychologically cruel to all of my siblings, but I've heard he never beat Debbie. Even so, Debbie said she was terrified of him because of what she saw him to do my brothers, and she got married at a young age to escape Arnold.

6. Arnold beat my brothers for the tiniest things he believed they had done wrong. I heard stories about him beating David for putting the toilet paper on the roll the wrong way or beating him with a garden hoe because he didn't think David was planting seeds the right way. Many, many times, I heard that he told David he was worthless and would never amount to anything.

7. Arnold was always crueler to David than to Aarron. As little kids, David had bonded closely with my mom, and Arnold hated it. He viewed their close relationship as evidence that David wasn't his biological child. Aarron had bonded more with Arnold than our mom and was able to pacify Arnold in ways David didn't know how to do. Aarron could always walk into a situation and quickly figure out how to turn it to his advantage, but David just wanted everyone to like him, and David would be devastated and give up if that didn't happen. David always wanted to make Arnold love him, but he never succeeded.

8. I had the strongest relationship with David out of the rest of my siblings. Debbie was much older than me, and she got married at a young age to escape Arnold. She kept to herself a lot and is now deceased. I lived with Aarron for a while when I was about eighteen, and we are close, but I think he believes Arnold that I'm not really his sister. David and I had an instant bond as children, and he has always been the sibling I felt closest to.

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9. When David and Aarron were placed in foster care, David used to run away and try to get "home" to my mom. I remember my mom getting phone calls from David, begging her to pick him up. I've heard stories that the foster care coordinators called David "the runner" and that he got bounced around among different places. Eventually, so many of David's foster care placements failed that the foster care coordinators tried to send him to a juvenile residential center. He wound up at my mom's for a brief period of time after that but moved out quickly. I loved being around David. I could joke around with him and always felt comfortable with him. Of all my siblings, he was the one who most accepted me as family. When I was around him, I felt like I fit in.

10. Our mother was married five times – twice to Arnold, and then to three other men. She first married our father when she was fifteen years old, and he kept her so isolated that she didn't have a chance to figure out who she was as an individual. She was dependent on whomever she married for her sense of self. I once commented to my mother's fourth husband that she gets addicted to love, even if it causes ruin around her. I don't remember my mom taking care of me. She wasn't around much. I grew up in poverty, and we were often homeless or on the verge of eviction because my mom's husbands wouldn't or couldn't provide for us. One of her husbands robbed a bank, and we got dragged into a bunch of legal issues because of him. Another one of her husbands spent all of our money to feed his addiction to alcohol.

11. David reminds me of our mom because he, too, depends on his romantic relationships for his sense of self. When he gets into a relationship with a woman, she becomes his whole world.

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12. In order to survive living with Arnold, David had to be a chameleon, and that's how he's been his whole life. He put on a face to the world that he was happy and successful, and only people who really knew him well could see through that to how unstable he was.

13. Nearly everyone in our family has struggled with mental illness or substance abuse, and a lot of us have struggled with both. Our mother had bipolar disorder. She was treated with many prescriptions, and she took Zyprexa, Ambien, and Xanax for many years until she died. Our father has bipolar disorder and schizophrenia, and he is on medication for it. My son also has bipolar disorder and ADHD, and he is medicated for it. Even on medication, I have to watch my son closely – he goes through periods of suicidality. I suspect other members of my immediate family to have bipolar disorder, but do not know if they have actually been diagnosed. Debbie had severe obsessive-compulsive disorder, and I'm pretty sure Aarron has it, but just hasn't been diagnosed.

14. I have been diagnosed with ADHD, and I have really severe mood swings. One minute, I'm racing around, feeling excited and energized and accomplishing everything I set out to do and more – then suddenly, I'm so depressed I can't function or do anything for days. I've talked about going to see a doctor or getting counseling, but it's overwhelming to do that when just getting out of bed is difficult. I've seen David exhibit the same extreme mood swings I and so many other people in my family have experienced.

15. David wasn't the only addict in our family, but he was the most severely addicted. ~~Both of my parents had substance abuse issues.~~ I've heard stories from my aunt that my mom couldn't breastfeed me because she was drinking and partying so much that her milk was bad. Because my mom couldn't afford formula, my aunt, who was breastfeeding her own child at the time, also breastfed me. When I was a kid, my mom stopped drinking, and,

for as long as I can remember, my mom abstained from drinking. Aarron was addicted to alcohol and drugs from the time he was about fifteen until sometime around his early thirties. I was addicted to methamphetamine for over a decade, starting when I was eighteen. Two of my nephews have struggled with addiction – one to alcohol, and one to cocaine. So many of my cousins and extended relatives are addicted to amphetamines or cocaine, it's hard to keep count. Even my cousins who had healthy family dynamics have addictive personalities – I have one cousin whose mom was very loving, and he still died of a crack overdose at the age of thirty. But the love and support matter, too, because I know from my own experience that it is really hard to recover without it.

16. For a long time, I had no self-esteem because I had spent my whole life internalizing the pain of my father's rejection and believing the negative things he had said about me, especially telling others that I wasn't his daughter. I felt like Arnold wouldn't acknowledge me as his daughter because I wasn't good enough for him. It turned out that I was lucky Arnold didn't want me. My siblings were physically and mentally tortured by him, especially David, and I'm sure the same would have happened to me if he hadn't abandoned me. His absence and the neglect I felt damaged me, too, but not like the suffering he brought on David.

17. Like David, I turned to drugs to numb my pain. My addiction to meth started when I was about eighteen. When I was living with my brother, Aarron, I walked in on him making meth. I tried some, and I wish I could go back in time to that day in the late 1980s and stop myself. I know Aarron would have stopped me if he had any idea how addicted I was going to get – but he couldn't have known. Even though Aarron struggled with his own addictions for about fifteen years, he was able to recover and get back on track.

18. My addiction to meth quickly became a mental and physical dependency. I used meth because without meth I was too depressed to get out of bed – I physically could not do it, and I did not have the motivation or wherewithal to eat or go about my other day-to-day activities. I'd get high, feel better, and be able to function. But then I would crash, and I'd have to get high again. I'd need more and more, and I'd think, "I need it NOW." I observed the same signs of physical dependency in David. He wanted sobriety and to resist drugs, but he craved it mentally and physically.

19. The difference between the way David used drugs and the way Aarron and I did is that we used drugs to help us function. Using made it possible for me to get out and bed and function, at least a bit. And Aarron always had a job and went to work when using. David wasn't like that. When David used, all he did was use. It didn't help him function – it prevented him from functioning. I think Aaron and I saw drugs as self-medication, but drugs completely consumed David.

20. When I think of David, I think, "There but for the grace of God go I." I could have easily ended up in prison. For about ten years, my life was in ruins as a result of my addiction to meth. I was powerless over my addiction. It controlled me. I was consumed by a need to get high, to chase any sort of fleeting happiness I could. I moved around a lot, thinking that I could run from my problems. Drugs made me mean, rebellious, and jealous. I was spending close to $700 a week on drugs, and I sold everything of value that I owned. I lied and stole to feed my addiction. I felt like such a failure. I kept making the same mistakes over and over again, succumbing to my addiction even though I had so many reasons – like my children – to pull myself out of it.

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21. When I was in the midst of my addiction, I knew I was disappointing the people I loved, and who loved me, but I still couldn't stop using. I hated myself for causing pain for them, and I wanted to change, to go back to the person I had been before drugs, but I couldn't figure out how to do it. I lost custody of my children due to drugs, and, even though I loved them more than anyone, that still didn't stop me from using. I lost my home due to drugs, and, even though I hated begging for a place to sleep or even to clean my clothes, that didn't stop me from using either. I lost educational opportunities and had to delay my dream of nursing school. I got into legal trouble when I got busted with drugs. I nearly died from overdosing, and still I couldn't stop using. The more I tried to stop and failed, the more depressed and hopeless I felt.

22. Many members of my family have dealt drugs as a way of making ends meet or as a way of funding their own use. As a child, I used to sell marijuana out of my bedroom window in order to buy food for myself. When I was an adult, my mom and her husband recruited my ex-husband and me to manufacture meth. My brother, Aarron, manufactured drugs like meth and grew pot from at least the time I was eighteen and for several years afterward. He figured that was a way to get drugs without paying for them. I heard stories that, when Aarron and David were kids, they would pick and sell "ditch weed," but, apart from that, David never dealt drugs. He wouldn't have been able to be a dealer – he would have done all of the drugs and had none left to sell.

23. During the periods when David was clean and sober, everyone who met him loved him. He was friendly and compassionate and would engage anyone in conversation. Around my other siblings, I felt like I had to be perfect. With David, I felt like I could be myself and he wouldn't judge me for it. But when David was on drugs, you couldn't trust him.

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When his daughter Danielle was just born, he used to come to my mom and beg for money, saying he needed to buy diapers for Danielle. My mom was a waitress and would give him her tip money for the diapers, but David would spend it on crack.

24. David has always been ashamed of his drug use. He tried desperately to hide it, and he fooled himself into thinking if he ran away when he was doing drugs, no one would realize what he was doing. It was like he was trying to maintain two different lives. On the outside, David would act like the perfect boyfriend, the perfect brother, the perfect father figure. He'd do anything for anyone, and all he wanted was to love and be loved. But on the inside, he was lonely and couldn't handle with the pressure of trying to be perfect. He'd always go back to using drugs to cope with those feelings.

25. David wasn't as good at hiding his drug use as he thought he was. His addiction was too strong. David's relapses came fast and hard. When he relapsed, he wouldn't start using a little. He'd take one single hit of crack, and he'd immediately be on a binge.

26. In 2006, I introduced David to my friend, Kim Williams. Kim and I worked together in the medical field and had been friends for years. David and Kim hit it off. After only talking on the phone for a few months, David moved from Texas to be with Kim. They immediately moved in together. I saw the same pattern of intensity as in David's past relationships.

27. Things between David and Kim seemed like they were going well until one night in February of 2007 when I got a phone call one night from Kim. She said David had come home out of his mind and was under the bed looking for police. She didn't know what to do to help him – he was so paranoid. I went to their place, and it took me and Kim hours to get him to calm down. After the crack had worn off, David was so disgusted with

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himself. He cried, apologized, and promised profusely that he wouldn't do any more drugs. I wanted to believe him, but I knew he was too addicted and wouldn't be able to stop on his own.

28. Over the next few weeks, Kim told me she thought David was cheating on her because he was lying and coming home late. I knew these signs and told her it wasn't another woman – it was drugs. I was right.

29. David started disappearing again – like he had done when he went on binges before. He had been laid off from work, and was using during the day. He'd take my car without permission. He would be gone all day and night. Kim and I tried to help him. We drove to all of the local spots we knew of where you could buy drugs, looking for David. Sometimes, we would find him, and he'd run away from us as though he thought avoiding us would make us forget what was happening. He would only be gone for a day or so at a time and then return to Kim. But in May 2007, he didn't come home at all. I thought he was dead until the police told me he'd been arrested for murder.

30. Shortly after David's arrest, my mom and I visited him. Because of my experience with addiction, I was able to understand David's actions in a way other people couldn't. He opened up to me in a way he couldn't to others. He told me he had never meant to kill anyone. He was sick with remorse. He knew the State was seeking the death penalty. MR He didn't want to die, but he didn't think he could live without drugs knowing what he had done He was tired of trying to recover and failing. His addiction was severe, and he thought the only way he could stay clean was to die. I got really worried about his mental stability, but I hoped that, once he had time to adjust and get the drugs out of his system, he might start thinking more clearly.

31. About two months after David's arrest, he wrote to my mother and me, begging us to visit more. At that point, I wasn't visiting too often because I was juggling raising my kids and working a lot of intense hours, and I was overwhelmed by the fact that David was facing the death penalty. My mom was still seeing David pretty regularly. David started getting angry, writing to my mother and accusing her of abandoning him again, just like when he was a child. He said he wanted a loving supportive relationship with us, not a "part-time" relationship. He didn't think we were doing enough, even though we were writing some and my mom was visiting.

32. Kim visited David a ton after he was arrested and brought to Seminole county jail. For at least a couple of months, she saw him pretty much every week and talked to him on the phone. David wrote and compared me and my mom to Kim, saying "Kim is the only one on this earth who loves me enough to provide me with love and support." He tried to force us to visit more, writing that we needed to tell him what our decision was regarding our future relationship. He was needy, and it seemed almost melodramatic. He wrote, "It's killing me inside to think that I'll never be an important part of your life again. I need both of you. Hear my cry."

33. David's reactions didn't make sense because, when I did visit him, he seemed disinterested. He acted more interested in his romantic relationship than in visiting with me. Because of transportation logistics and the visit schedule, I could never go see him alone. I would have to see him with Kim or with my mom. David begged me to visit, but I didn't want to go with Kim because he would focus on her and not pay attention to me. I didn't want to go see David with my mom because my mom would start sobbing, and I couldn't bear to see my mom so upset.

MR

34. I wrote David a Christmas card to tell him that I still loved him and was trying to come to grips with everything that was happening. I explained that seeing him was hard, especially because I kept worrying that he could be executed and that I would never see him again. I explained that it was my own personal issue I needed to deal with and not a lack of love for him. I was going through a lot in my life right then. But David didn't understand. He wrote a letter back and included in the envelope the card I had written to him, like he didn't want it. He filled the card with comments, responding and arguing with the things that I had written. He begged me to include him in my life. He said I needed to visit him immediately. He didn't believe what I had written about loving him, because he said I wasn't showing it. He said he needed me to love him and implied that, if I didn't do what he wanted, he wouldn't be able to go on. He enclosed a note to my mom telling her he was "on this roller coaster of emotions that I can't even predict."

35. Many of David's letters from jail seemed like ultimatums – if me or my mother weren't going to be there for him exactly how he wanted, he didn't want us in his life. But he continued to write. As time passed, David's moods in his letters fluctuated more and more. Sometimes he would seem profoundly depressed. Other times, he would be overly anxious and paranoid. He wrote that demons had taken up residence in him. He also overanalyzed my communications with him. For example, he thought there was a hidden meaning in the fact that I sent him a card for his birthday a few weeks earlier than the actual day. In another letter, he worried that I thought he just wanted money, and he wrote several pages explaining that all he wanted was contact with me. It did not make sense because David had not once asked me to put money on his inmate account. It got harder for me to respond because his thoughts got more bizarre.

36. Most of David's letters were defeatist and negative, but every once in a while, seemingly out of nowhere, David's letters would convey that he was in great mood. He would write long letters surmising what my life must be like. He would call me his rainbow, talk about how much joy I brought him, and draw smiley faces at the end of sentences. But these letters were rare. The good moods never lasted long and were always followed by more depression and bad moods.

37. Sometime before his trial, David's relationship with Kim ended. My mother had stopped visiting him, and David's only regular visitor was a woman named Donna whose son had been incarcerated with David at Seminole County jail with David. Like he had done with Kim, it seemed like David was putting Donna up on a pedestal and comparing me and my family to her. He wrote me, calling her his "saving angel" and his closest friend. He'd say he didn't know what would happen without her. But it didn't feel like he was just complimenting her – it felt like he was using her to guilt trip us that we weren't as good as her. He used her as a messenger, and I got overwhelmed by how much she approached me on his behalf. Instead of being grateful for a regular visitor, David was more agitated than ever that the rest of us weren't visiting.

38. Around this time period, David started to internalize past conversations he had had with Aarron. When David was in the midst of his addiction, he lied to or stole from a lot of people we knew. It was always to get money for drugs. Aarron used to get angry with David because he thought David wasn't taking responsibility for his actions. Suddenly, David started talking about how much he needed to "take responsibility." He wasn't going to fight the death penalty because he was "taking responsibility."

39. David was genuinely remorseful for what had happened, but it didn't feel like remorse was the reason he was pleading guilty or refusing to let his lawyers put on evidence to spare his life. David had always been remorseful for what had happened, but he wasn't always willing to waive his rights. It was only after David had tried everything to get us to visit him – after he had gotten this idea in his head that we had abandoned him and didn't love him – that he gave up and refused to fight the death penalty.

40. After David received his death sentence, our mom visited him. I think this reinforced David's belief that the closer he got to death, the more we would visit him. But even when she visited, he couldn't accept that our mom loved him. After our mom visited David, he wrote to me saying he thought I was making her come and that she didn't actually want to visit him. David had been begging me and my mom to visit, and, when our mom finally did, he was upset. He continued to complain that I wasn't visiting or writing him enough, saying that without me his life was meaningless.

41. Whenever I opened a letter from David, I never knew what sort of mood it was going to show. They varied so much. But one thing was similar about all of his letters: they were desperate. He talked about how "time is ticking" until he dies, and he promised we wouldn't regret it if we came to see him. He'd give a play-by-play of what a visit would be like.

42. When our mother died about eight years ago, it was very hard on David. He and our mother had a complicated relationship, and he had not yet been able to reach closure with her. David always felt abandoned and neglected by our mom's decision not to seek custody of him or of Aarron when she left our father. I understand these feelings. Even though she raised me, she was more concerned with her husbands than taking care of me.

MR

I may have physically been with her, but she neglected me because she was so busy paying attention to her husbands.

43. Shortly before David waived his appeals, he wrote to me and said "I'm still alive though it appears I am dead to your heart. I love you and wish you wouldn't write me off as though my sin is unforgiveable." It's like he needs our validation that he deserves to live, and, when he doesn't get the attention or reassurance he wants, he crumbles. David has been like this throughout his life. Before he was in prison, he used to fish for compliments all the time. He was constantly asking if he looked good, if he'd done something well, if we loved him, and so on. It baffled me because he had so many amazing qualities, and I assumed he'd have good self-esteem. But I guess David was like me in that way. Arnold was always belittling him and telling him he was worthless. Eventually, he began to believe it, and he's never stopped believing it.

44. I know David's decision to plead guilty and waive his appeals was motivated by his belief that we, his family, abandoned him. But he also thinks that the closer he is to death, the more we will rekindle a relationship with him. Our mom visiting him shortly after David was sentenced to death only reinforced this. Having a relationship with David is hard because, no matter what I do, it is never enough for David. He doesn't understand the pain that I and our relatives go through for having lost him to death row. I wish he could understand how much we love him and think about him, and how much we grieve for him every time we are together and are reminded of his absence.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. Sec. 1746 and Sec. 92.525 of Title VII, Florida Statutes.

FURTHER AFFIANT SAYETH NAUGHT.

Melissa Russ

Sworn or affirmed before me this 19th day of Dec., 2018 by, Melissa Russ, who is personally known to me or has produced the following identification _____.

Notary Public, State of Florida

Seal:

NELS RODERWALD
Commission # GG 173439
Expires January 6, 2022
Bonded Thru Troy Fain Insurance 800-385-7019

MR

ATTACHMENT 9

DECLARATION OF KIMBERLY WILLIAMS

PURSUANT TO 28 U.S.C. SEC. 1746 AND SEC. 92.525 OF TITLE VII, FLORIDA STATUTES

I, Kimberly Williams, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Kimberly Williams. I was the girlfriend of David Russ beginning in approximately the fall of 2006. We continued our relationship when David was in jail, through approximately the fall of 2007.

2. David and I were introduced to each other in the fall of 2006 through his sister, Melissa "Missy" Russ. At first, we talked on the phone. We began to talk on the phone every day, multiple times a day. About two months later, David decided to move to Florida to be with me. He moved in with me and my son, Tanner, who was about five years old at the time.

3. Tanner's father had walked out on us when Tanner was six weeks old. David and Tanner immediately bonded right away. David was a big guy, but he was so gentle and caring with Tanner. He always doted on Tanner. David would read to Tanner and pick him up and carry him around, take him to the park, snuggle with him on the couch. David was like a gentle giant. All three of us often snuggled in bed on the weekends and watched cartoons. I would often wake up on a weekend morning to a note from David, saying that he had taken Tanner fishing so I could sleep in. I think David was being the father he wished he had.

4. David had a heart of gold. He would do anything for anyone. He was all about the little things. I would come home after work to find that he had already cooked dinner and done the laundry. He would call me to see what time I would be home, and I would arrive to a

bubble bath drawn for me. He would take Tanner to buy flowers for me. He gave me foot massages.

5. My great aunt, Margaret, was living with me when David moved in. She had helped raise me, and we were very close. We didn't know it at the time, but she was dying of lung cancer. David was so kind to her. She often joked with him and razzed him. Since Margaret couldn't get around very well, David would help carry her, like from her bed to the couch. David would come home at lunchtime from his job to check in on her.

6. Margaret always loved fishing, but it became impossible for her to do on her own. David would carry Margaret out to the car, take her to the lake, and set her up in a chair with a fishing rod and help her fish. He even brought along coffee for her.

7. David also helped my parents with things around their house. For example, David would move heavy things for them and help them in the yard. David helped my dad clear a huge area to put down a swimming pool. My parents really liked David.

8. I knew David's past issues with drug use and prison time, but I immediately fell in love with him. Even though it was fast, it felt right. David was selfless and caring. I would often say to friends, "How did I get so lucky?" It was like David was supposed to be in my life. Me, David, my aunt, and Tanner – we were a family.

9. David and I talked about the future, about growing old together. We even discussed David adopting Tanner. I always felt protected by David – not because of his size, but because of his heart.

10. David told me about the abuse he experienced at the hands of his father, Arnold. David told me Arnold would beat him and his brother Aarron for insignificant reasons. They

would get beaten for waking up five minutes late or for coming home five minutes late. Or, they would get beaten for no reason at all.

11. David told me how once he, Aarron, his mom, and his dad were in a truck going to check on some beehives. Arnold got out to check on the bees, and everyone else stayed in the car. A bee got in the car, flew up David's nose, and stung him. David said Arnold beat him for it and then beat David's mom for letting it happen.

12. David also told me about a time he cut open his leg badly on a train track. He said his dad wouldn't take him to the hospital and told him to "suck it up."

13. I look at my son, and I can't understand how a parent could do that to their child. David talked about his childhood with such pain in his eyes. He talked about how he was good at baseball but that his dad never cared. He said his dad was never proud of him. He never felt loved as a child.

14. I do not believe David ever mentally escaped the abuse and neglect in his childhood. It was like David believed he didn't deserve to do well in life, and didn't know how to handle it when he started doing well.

15. David's mom, Beth, also told me about the abuse she suffered from Arnold. Beth mostly referenced the abuse generally – that Arnold was a mean and horrible person. But I remember Beth did tell me that Arnold threw her up against the wall when she was pregnant with Missy. Beth voiced remorse about not taking David and Aarron after the divorce from Arnold, but Beth said she was pregnant with Missy and was scared of raising three kids on her own. Missy was so lucky to have had a step-dad instead of Arnold.

16. David's relationship with his mom was complicated. David loved Beth, but it was tense. He told me he felt rejected and abandoned by her. He felt she hadn't protected him and Aarron from their abusive father or from foster care. He told me he couldn't understand how she could give up her parental rights knowing how abusive Arnold was. That dug into his heart. David tried to have a normal relationship with his mom, but the past was always there.

17. David's downhill spiral happened fast. The first relapse David had – that I was aware of – happened in February of 2007. He came home at 2 or 3:00 in the morning and busted down the front door, even though he had a key. He made me go look in the mudroom, under the beds, and in the closets for cops, not just once but over and over. It looked like there was nothing behind his eyes; they were empty. He was completely paranoid and freaking out. I had to call Missy to come over to help me. I wasn't scared of David, but I didn't know what to do. It wasn't until 6 or 7:00 that morning that we calmed him down. Then, he slept for the next two days. When he finally woke up, David was extremely apologetic. He admitted he had been using drugs. He cried and promised never to do it again. Things went back to normal for a few weeks.

18. Around March of 2007, David started coming home late. Instead of coming home right after work, he would come home around 10 or 11:00 at night. In the morning, I would confront him and ask him where he had been. At first, he made the excuse that his step-father was sick and that he was with him. Then, he would tell me he was with friends. I suspected he was cheating on me but Missy warned me it was drugs.

19. I started to confront David when I knew he was lying. At first he would deny it, but he would eventually cave and admit he had been doing drugs.

20. On one occasion, David came home and was flipping out because he had lent his work SUV to a drug dealer. He begged me to help him get it back. But again, he apologized and said it would never happen again.

21. By April, David was disappearing two to three nights a week. By then I knew what he was doing – crack. He had been laid off from his roofing job. He was returning home at 2 or 3:00 in the morning. He would come home with his lips burned.

22. Missy and I would go into the seedy, drug-dealing areas of Apopka, searching for David. I grew up in Apopka and knew what areas to look in. We would knock on the doors of drug dealers, asking them if they had seen David. One time we found David parked on the side of the road in Missy's van, which he had taken without her permission. He saw us and ran off into the woods, abandoning the van.

23. Many nights I would sit in a parking lot of church that was across from a convenience store where the drug dealers would go, hoping to catch a glimpse of David. Once, I found him walking up. I drove towards him, ran him off the road, and started beating on him. David is a big guy – he could have protected himself, but he didn't. He didn't try to fight back. He merely covered up his face and then let me hit him, over and over. He was crying. He didn't defend himself, verbally or physically.

24. Throughout these disappearances, David always came home in the middle of the night or early morning. He would then sleep for a few days straight, only getting out of bed to use the bathroom. Instead of confronting him, I began to give David the cold shoulder, since my aunt and Tanner were around, and I didn't want them to witness us fighting all the time.

25. When I was off looking for David, I would lie to Tanner and my aunt, telling them I was working late. I managed a doctor's office, so it was believable that I had to work long hours. I wanted to preserve their love of David, because I knew he was a good person.

26. Every time David admitted to disappearing to do drugs, he would apologize and promise not to do it again. He was so remorseful. He would sob. He would be in disbelief that he had relapsed again. He would say what a bad person he was. For a few days after, he would be perfect – he would be the David I knew who was always taking care of me, Tanner, and my aunt. And then he would disappear again. The cycle kept repeating.

27. The last time I caught him in a crack binge, I felt like I was finished with him. I told him that, if he relapsed again, he shouldn't ever come back. About a week after I told him that, on May 2, David did not come home. I will never forget that day. Even though he disappeared a lot, he had always returned home in the middle of the night or next morning. I figured he had relapsed again and taken me at my word.

28. I called and texted David, but he did not answer or respond. We normally talked or texted four or five times a day. He wasn't responding to Missy either. I was really worried. I went looking for him like usual, but I couldn't find him. After a few days, I started to worry that David was dead. I went to his mother's home. We were both very scared.

29. A couple of days later, detectives showed up at my work. I asked if David was dead. One responded, "No, *he's* not." That is when I knew something was wrong.

30. When I learned David was wanted for murder, I was beyond shocked. I couldn't believe it. I thought it was a mistake. It wasn't David's nature to harm anyone. Even with all the drug abuse, David was *never* violent towards me, Tanner, my aunt or anyone else I saw him around.

31. I did not have any contact with David when he was on the run. When he was extradited to Florida, I went to visit him in Seminole County jail as soon as I could. In the visitation area, I mouthed through the glass, "Did you do this?" David hung his head and sobbed. David told me he did not plan to kill the victim and that she herself was not the target, only her possessions.

32. At first, I didn't explain David's absence to Tanner. Tanner kept asking me when his dad was coming home. After a few weeks, I told Tanner that David was in jail for drugs. Tanner is now 17 years old, and I still had never told Tanner that David was in prison for murder. I wanted to protect my son. I wanted him to keep the memories of the David that Tanner loved. I recently learned Tanner figured out why David really went to prison. We don't talk about David. It is too painful for Tanner; he lost the only dad he ever really had.

33. I visited David for about four or five months while he was in the jail. David's mom also visited, but she stopped seeing him after a couple of months.

34. I tried to visit David every Thursday and Saturday. We also wrote hundreds of letters and cards back and forth. David ended up giving back to me all of the photos, letters, and cards I sent him. He also gave me a Bible of his that meant a lot to him. David was afraid that when he was moved to prison, he would lose it all. This was in the fall of 2007. It was like he had already decided his fate.

35. When I visited David, he was extremely depressed. He was guilt-ridden. He constantly asked if God would forgive him. He was certain he was going to hell. He kept calling crack "the Devil's drug." He thought he was evil.

36. I tried to talk to David about his case. I wanted him to fight the death penalty, but somewhere along the way, David stopped listening. He told me he didn't want to put the victim's family or his family through a trial and sentencing. He told me he would switch places with the victim to bring her back. He had nothing left in him.

37. Every few visits, I brought Tanner to the jail to visit David. David was always so joyful to see him. Tanner still called him "Dad." At home, Tanner asked when his dad was coming home.

38. The one thing in Seminole County jail that made David happy was the young kids he spoke to while there. There was a program where troubled youth would be brought in during the weekends. I guess it was like a "scared straight" program. David would talk to the kids about his troubles and give them advice on how to avoid ending up like him. These talks with those kids really meant a lot to him. Even in jail, David had the capacity to do good.

39. David eventually started to do things to push me away. He would ask how me and Tanner were doing and lash out when I told him what we were doing in the "outside world." One minute he would be telling me that he couldn't go on without me and Tanner and the next he would be angry and shouting at me, telling me all the ways I wasn't helping him. He thought I should be seeing and supporting him more. I was a single mom taking care of my dying aunt – he knew I was doing the best I could. David said I didn't care about him. He seemed scared and frightened of being abandoned but he was rejecting my love … It didn't make sense.

40. One day, Tanner told me he didn't like seeing David in jail, chained up behind glass. I couldn't take David's mood swings anymore and Tanner did not want to visit. David and

I started to drift apart. I don't even remember the last time I visited him. At first, I still wrote David a lot, but then it was less and less. It wasn't like we said we weren't going to write or that I wasn't going to visit anymore. Our communication simply faded until it didn't exist anymore. Tanner stopped asking when his dad was coming home.

41. David's special counsel lawyers brought me to their office to read the letter David wrote to the judge. They left me in a room alone to read the letter. I started laughing in shock because I couldn't believe what I was reading. I told David's lawyers there was no way David had written that letter. I couldn't believe the words in front of me. I knew it was not true what David said about planning the murder. From the beginning, he had consistently said he never meant to kill the victim. When we started drifting apart, I saw David become weary and defeated. I knew this letter was an effort to self-sabotage.

42. For a long time, I was angry at David. I couldn't understand how he could give up the amazing life we had together for drugs. He was living in a beautiful condo with a loving family, and he threw it all away. We had talked about retiring in the mountains with our grandchildren running around. I mourned the loss of the life I thought we would have. I also saw David doing the same, tenfold. Addiction is a heartbreaking disease. It broke my heart, and it broke David's heart.

43. When I testified at the trial, David cried and looked beaten down. I tried not to look at him because it was so upsetting. The prosecution, not the defense, called me as their witness. I wasn't sure why the defense didn't call me because I had talked to them many times before and they knew the information I had. When David's defense lawyers cross-examined me, they didn't ask me many questions. I wasn't able to fully able to explain

everything. I wanted to say more. I would have told the court the above information at the time of the sentencing had I been given the opportunity during my questioning.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. Sec. 1746 and Sec. 92.525 of Title VII, Florida Statutes.

Kimberly A Williams

Kimberly Williams

12-19-18

Date

ATTACHMENT 10

DECLARATION OF MICKEY RODRIGUEZ

PURSUANT TO 28 U.S.C. SEC. 1746 AND SEC. 92.525 OF TITLE VII, FLORIDA STATUTES

I, Mickey Rodriguez, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Mickey Marie Russ Rodriguez. I am the half-sister of David Russ. We share the same biological father, James "Arnold" Russ. I have three other half-siblings by Arnold – James "Aarron" Russ, Melissa "Missy" Russ, and our older sister Debbie Russ, who is now deceased.

2. I am thirteen years younger than David. I was very young when he went to foster care, so I don't have many memories of living with him. Later, when I was a little older and wanted to get to know him, my dad refused to talk about him. If I mentioned David's name or called him my brother, my dad would say "I've disowned him. Don't speak his name!" He always had it out for David.

3. My early childhood memories are mainly of the way my father treated my mother. I remember him beating her head into a doorframe and beating her with a frying pan. My mom left my father when I was about six or seven years old and took me with her. Eventually, she started letting my dad take me for visits during weekends.

4. One day, my dad picked me up from school when he was not supposed to. My mom got to the school and I was gone. She had to send the police to even find where I was, but my dad would not give me back. They had a custody fight and somehow my dad won. I don't know a lot of the details. I just remember going to the courthouse and my dad promising me that he, my mom, and I would all go home together as a family. That was a lie. He got custody of me and never let me see my mom for the next two years. After that, I only saw her on weekends. I don't know why my dad wanted custody of me. He

Mickey Russ-Rodriguez

never treated me like a father should treat a daughter. He never acted like he loved me. I think he was just looking for another way to torture my mom and taking me was a way to do it. I also think my dad thought my mom would go back to him if he had me as leverage.

5. Once my dad realized my mom wasn't going to come back to him, he stopped fixating on her and turned his abuse on me. He would punch me, slap me, and bash my head against hard objects. He choked me, threw furniture at me, and locked me in rooms. I became so afraid of him, whenever he would sneeze or cough, I would flinch. If he saw me flinch, he'd immediately backhand me. I dreamed of running away, but I didn't want to be a juvenile delinquent. Sometimes, when things were especially bad, I would see the pistol my dad kept on his nightstand and think how easy it would be to pick it up, shoot it, and permanently end his abuse. But I knew if I did that, I'd just be exchanging my current prison for an actual prison. It felt like there was no way out.

6. For a while, I thought if I made sure I was the best kid ever, and exceeded all of my dad's expectations, I wouldn't get hurt. I did everything I could think of to be perfect. I excelled in school, and rose to the top of my class. I became president of student organizations. I was the first-chair trombone in my school band. But that didn't work. If I made any tiny misstep, he'd punish me physically or emotionally. And if someone else did something to make my dad mad, he took it out on me.

7. As I got older, my dad added psychological abuse to the physical abuse. He had to have everything exactly the way he wanted it. He would fly into a rage if something wasn't perfectly right. For example, if his food wasn't cooked just right, he'd throw it. He'd get so angry that spit would literally foam at the corner of his mouth.

Micky Russ-Rodrigues

8. One time, he made me sit in a chair for three days facing a wall. I was a teenager at the time. I've blocked out what happened when I needed to go to the bathroom during those three days. It's like my brain is protecting me from remembering. There are other periods of time that I've blanked out like that. I've learned this is common in people who live through traumatic experiences.

9. Life with my father was very isolating because if people outside the family tried to do something nice for me, my father would retaliate. One Christmas, our neighbors got together and brought over a bunch of Christmas presents for me. I was excited to be getting Christmas presents but I never got to see what they were. My dad took the presents outside and set fire to them in plain view so that all of the neighbors could see. He yelled at the top of his lungs that we didn't need charity. I recently learned that he did the same thing when family members brought Christmas presents over for David and Aarron.

10. When I was twelve or thirteen, a neighbor called the police on my dad. My dad and I were sitting down to dinner and for some reason he got mad at me. I was wearing a necklace and he grabbed it and ripped it off my neck. He yanked it so hard he left a huge mark on my neck. Then he grabbed our dining table and threw it on top of me. There were no curtains on our windows so someone nearby must have seen this and called 911. My dad saw the police coming, and locked me in my bedroom. He told me, "If you make a peep, I'll kill you." I thought for sure the police would come into the house to investigate so I sat on my bed and stayed quiet. I thought, "Finally, I'm saved!" But the police never came in. I started to believe my dad was always going to get away with the

Nicky Russ-Rodrigue

abuse. I felt depressed and hopeless. I still had five or six years until I turned 18 and could move out. It seemed like a lifetime away.

11. One day, when I was sixteen, a teacher saw my dad beating me up outside of my high school while we were sitting in the car. I don't remember why he was upset but he was bashing my head into the window. The school called social services and I was taken away from my father. I went to live with my cousin, Angie, and finally I felt safe.

12. Just because I eventually got away from my father's control doesn't mean I was suddenly fine. I was still scared I'd have to go back to him. And the effects of that trauma linger with me to this day. I have recurring dreams that I'm my current age but that I had to move back in with my father, and I'm being treated like I was when I was younger. I wake up in a panic. Even though I have a good life now with an amazing husband and son, I have terrible anxiety, especially when I have to see my father.

13. For decades now, my father has been receiving Social Security disability benefits for mental health issues. I'm unsure of his exact diagnosis, but I know he is on a ton of medications for it, including medicines that sedate him. My father is very different on medication than before he took it but it hasn't changed all of his behaviors. He's still very controlling and manipulative. He's an old man, lives in an assisted living facility, has had colon and bladder cancer, and has to defecate in a bag. I have power of attorney over him yet I'm still frightened of him because of the past. I see him once or twice a month. I ask people to go with me because I hate being alone with him. I still jump out of fear whenever he coughs. I rarely let him see my son, because I don't trust him not to hurt him. My son doesn't even call him "grandpa" – he calls him "your father" and says he is mean.

Mickey Rios-Rodrigue

14. I've decided to maintain a relationship with my father because I know if I harbor anger and resentment, I am the only one it will hurt – my dad doesn't care enough about me or anyone to have his feelings hurt. My dad thinks he was the best father ever. In my whole life, he has never apologized to me or my brothers about *anything*. My dad denies ever lifting a finger to any of us kids. It's so outlandish because it's not like it was just a few times – we all grew up in a constant state of fear because of what he did to us physically and emotionally. Aarron and I often ask ourselves if he really believes he's never hurt us, or if it's just a way for him to avoid taking responsibility for all of the abuse and lasting damage he inflicted upon us.

15. All of my father's kids have been affected in different ways. Some of us have survived his abuse, and some of us haven't. I know because I was a girl, I got it easier than the boys – my father never broke my bones like he did to them. I also had Aarron, who was fifteen years older than me and did what he could to minimize the impact of my father's abuse. He was the big brother who tried to protect me. Aarron would come over and convince my dad to let me spend weekends and summers with him. I didn't realize at the time how incredible it was that my brother, in his twenties, was partially raising me. I didn't realize how much he was saving me. But looking back, I would not have ended up much better off than David if I hadn't had Aarron to love me, support me, and give me a respite from my dad. Aarron says I saved him and that I became his will to stay alive. He says he was able to avoid going down a more destructive path because he was able to focus on helping me.

16. As much as my dad put Aarron through hell, it wasn't id didn't come close to what he put David through. Aarron always says that our father never gave David any love or respect,

Micky Russ-Rodriguez

whereas Aarron got some of that interspersed with the abuse. David never got anything but pain from our father. David was never encouraged and never praised by my dad. Instead, my dad always told David that he was worthless and wouldn't amount to anything. Aarron says David learned to survive by creating a "shell" persona of confidence, but that inwardly he was miserable and had no self-esteem. Whenever my siblings and I talk about David, we all say the same thing: he never stood a chance.

17. My dad is so twisted that another reason Aarron never had it as bad as David is that my father believes it is important to "carry on the bloodline." He revered Aarron, because Aarron was his eldest son and namesake – they were both "James. A. Russ." It seems like a trivial thing but it is very significant to my dad. Even today, my dad is really nice to Aarron's son, James "Austin" Russ, also a "James A. Russ." But he ignores Aarron's second son, Ryan. My dad also rejected Missy because he didn't believe she was his biological daughter. His rejection caused so much pain for Missy, but his disinterest spared her from the abuse the rest of us endured. I tell her how lucky she was that she didn't go through the abuse like we did – but I know abandonment causes emotional scars, too.

18. David's lawyers spoke with me but they didn't spend enough time with me to give me the opportunity to tell them everything I knew. I also wanted to write David but David's lawyers told me not to. I don't know why I wasn't called to testify – I would have told the Court everything I'm saying now.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. Sec. 1746 and Sec. 92.525 of Title VII, Florida Statutes.

Mickey Russ-Rodriguez Dec. 18, 2018

Mickey Rodriguez Date

ATTACHMENT 11

STATE OF FLORIDA)

) ss

COUNTY OF POLK)

Affidavit of Molly Sanchez

I, Molly Sanchez, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Molly Sanchez. I dated David Russ from about age 16 to 21, which was about 1980 to 1985. He is older than me by one year. We had a daughter, Danielle, together.
2. David and I met at a game room when I was 16 years old and he was 17 years old. David did not have a stable home life. His mother could not provide for him. He was working full-time as a roofer – and had been for a while – and was living in a pay-by-the-week motel and also "house-hopping" with friends. Since he didn't have a stable family life or home, after one year of dating David moved in with me and my mom. When I turned 18, David and I moved into our own place together. We lived on our own for about another three years.
3. The David I knew for the first few years of our relationship was always very kind, considerate and dependable. He held down his a job as a roofer from the time I met him. He was never violent with me and was always respectful. We were young and had minimum wage jobs so it wasn't like we were

going out every weekend on dates. I do remember we went to a few concerts, like Cheap Trick and the Rock Superbowl, but most of our time together was spent at the house. I would cook dinner, and we would eat together most nights. Sometimes we had my family over.

4. David and I always spent a lot of time and the holidays with my family. We occasionally visited David's mom, but he seemed to have a resentment against her. He went through the motions of loving his mom, but it was always very tense. You could tell he had a resentment against her for abandoning him and his brother with his abusive father after his parents split up.
5. In 1983, I got pregnant with our daughter, Danielle. David was very supportive and affectionate towards me. He was very excited about being a father. But I think he may also have been nervous and a scared because of the abuse his dad had inflicted on him. He very much wanted to be different to our daughter than his dad had been to him. David was with me at the birth of our daughter. He cried the first time he held her.
6. David never used drugs in front of me or our daughter, so I didn't know he was using drugs during our relationship until after we broke up. It was in the middle of my pregnancy that David started acting weird. He would disappear. I remember waking up one night, and he wasn't there in the bed

beside me. I had no idea where he had gone. That is when the constant disappearing started. It was often in the middle of the night, but he would also not come home after work and come back late. I confronted him many times about where he would go. David would apologize for being late or disappearing, but he would say he was "just visiting friends." He would promise he wouldn't do it again. And then he would. Over and over. I began to think he was cheating with another woman, but looking back, I realized this was the beginning of David's drug use. He was cheating on me with drugs.

7. Because we were having our daughter together, I tried to put up with David's disappearances. Things started to really fall apart a few months before the birth of our daughter. He was still disappearing and coming home late. After all the excuses, apologies, and unfulfilled promises to change his behavior, I stopped trusting him. We started to fight more and more – really, it was me doing most of the yelling at him for disappearing, for being distant. David would just shut down. We would just go our separate ways, usually David into the bedroom, and then a few hours later, he would go on like nothing was wrong. This happened over and over. I realized I needed to leave David.

8. The day after our daughter turned one year old, I told David I was leaving. He didn't seem surprised at all, and he said he would leave instead. He didn't protest – there was no fighting, no yelling, no trying to convince me that we should stay together. He never tried to come crawling back and never even contacted me to get back together. It would have been easy to find me and Danielle because my mom lived in the same house that David and I lived in with her. He just left, and that was it.
9. Only once, when I married years later, my then-husband told me David came around looking for Danielle when I wasn't there. That was the only time David ever tried to contact me or our daughter. A few years after we broke up, I ran into a family member of David's who told me David was on drugs. It all made sense then. When I had told David I couldn't take his behavior anymore and had told him to leave, that is why he went so cooperatively – he was so addicted that he chose the drugs over me and his daughter.
10. For a long time, I didn't understand why David hadn't fought for me and Danielle. I knew he loved us, and it seemed so unlike him to just walk away. After learning about his addiction, I realized David had not tried to contact or visit me or Danielle because he was ashamed of his drug abuse.

11. When Danielle got older and was in her 20s, she eventually asked me about her father. I searched around for David, and that is when I found out he had been arrested and was awaiting trial for murder. I decided to reach out to him and wrote him a letter in jail. I offered to help him out, to be there for him. I told him I would like to be friends. But he didn't take me up on that. We wrote back and forth a few times but he said he wasn't able to tell me much. I haven't been in touch with him since prior to his trial.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. Sec. 1746 and Sec. 92.525 of Title VII, Florida Statutes.

FURTHER AFFIANT SAYETH NAUGHT.

Molly Sanchez

Molly Sanchez

Sworn or affirmed before me this 1st day of December, 2018 by, Molly Sanchez, who is personally known to me or has produced the following identification _____.

Notary Public, State of Florida

Seal:

EMMA IRIS DIANNA
Commission # GG 081445
Expires March 9, 2021
Bonded Thru Troy Fain Insurance 800-385-7019

ATTACHMENT 12

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
FILE NO. JUV DEL 76-21

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In the Matter of the Need of Supervision of

JAMES AARON RUSS and
DAVID BYRON RUSS,

Minor Children

ORDER

* * * * * * * * * * * * * * * * * *

The Petition of Marilyn Pruitt for an Order declaring James Aaron Russ and David Byron Russ children in need of supervision having come on for hearing before this Court on this 13th day of December, 1976, and it appearing and due and legal notice of said hearing was waived by J. Arnold Russ, father of said children and who consented to the disposition and findings of the Court that such children are children in need of supervision; Marilyn Pruitt from the Office of Community Service, Department of Social Services, State of South Dakota and Richard Bogue, State's Attorney for Lincoln County, South Dakota and said minors appearing in person at the said hearing, and the Court having heard the evidence finds:

That said James Aaron Russ is a minor child being 16 years of age, that the father of said child is J. Arnold Russ residing in Lincoln County, South Dakota;

That said David Byron Russ is a minor child being 14 years of age, that the father of said child is J. Arnold Russ residing in Lincoln County, South Dakota;

That said minors are children in need of supervision, and that all the allegations of the petition are true and correct.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said James Aaron Russ and David Byron Russ be and they hereby are declared to be children in need of supervision and are hereby placed in the custody of the Department of Social Services and the Office of Community Services of the State of South Dakota, [illegible] Robert Leach, Program Administrator,

... [illegible] successor in office is hereby appointed guardian over the ... of such children, until further order of this Court.

Dated at Canton, South Dakota this 13th day of December, 1976.

BY THE COURT:

Judge

ATTEST:

CLERK (SEAL)

Filed Dec. 13, 1976
Received by Minnehaha
County Sheriff
By Deputy

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
FILE NO. JUV. 76-21

MOTION AND ORDER

* * * * * *

COMES NOW, the State's Attorney in and for Lincoln County, South Dakota, and moves that the Court herewith enter and change it to Order without further notice herein to place custody of the above named juveniles to the mother of said children, Beth King at 219 Orange Street, Auburndale, Florida.

This motion is based upon the recommendations of the Department of Social Services, Division of Human Development, Office of Community Services, and in particular, Jan Bunkers, Social Worker III, Alternative Care Unit.

Dated this 19th day of September, 1977.

RICHARD HOGUE
State's Attorney
Lincoln County, South Dakota

* * * * * * * * * * *

O R D E R

It is hereby ordered that James Aaron Runa and David Byron Runa be forthwith delivered into the custody of their mother, Beth King, 219 Orange Street, Auburndale, Florida, and that the previous Order of this Court is hereby cancelled and terminated. That should there be any expense in connection with delivery of said children, it is to be borne by the family of James Aaron Runa and David Byron Runa.

Dated this 19th day of September, 1977.

Judge of First Judicial Circuit
Lincoln County, South Dakota

Sept. 19, 1977

Clerk

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
FILE NO. JUV DEL 76-21

* *

In the Matter of the Need of Supervision of

JAMES AARON RUSS and
DAVID BYRON RUSS,

Minor Children

ORDER

* *

The Petition of Marilyn Pruitt for an Order declaring James Aaron Russ and David Byron Russ children in need of supervision having come on for hearing before this Court on this 13th day of December, 1976, and it appearing and due and legal notice of said hearing was waived by J. Arnold Russ, father of said children and who consented to the disposition and findings of the Court that such children are children in need of supervision; Marilyn Pruitt from the Office of Community Service, Department of Social Services, State of South Dakota and Richard Bogue, State's Attorney for Lincoln County, South Dakota and said minors appearing in person at the said hearing, and the Court having heard the evidence finds:

That said James Aaron Russ is a minor child being 16 years of age, that the father of said child is J. Arnold Russ residing in Lincoln County, South Dakota;

That said David Byron Russ is a minor child being 14 years of age, that the father of said child is J. Arnold Russ residing in Lincoln County, South Dakota;

That said minors are children in need of supervision, and that all the allegations of the petition are true and correct,

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said James Aaron Russ and David Byron Russ be and they hereby are declared to be children in need of supervision and are hereby placed in the custody of the Department of Social Services and the Office of Community Services of the State of South Dakota,

IT IS FURTHER ORDERED that Robert Leach, Program Administrator,

or his successor or assign is hereby appointed guardian over the person of such children, until further order of this Court.

Dated at Canton, South Dakota this 13th day of December, 1976.

BY THE COURT:

Leopold C. Williamson
Judge

ATTEST:

Virgil Derby (SEAL)
Clerk

Filed Dec. 13, 1976
Recorded by Microfilm
Cecil No.
Virgil Derby Clerk
By Deputy

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
FILE NO. JUV. 76-21

MOTION AND ORDER

JAMES AARON RUSS and
DAVID BYRON RUSS,

Minor Children

* * * * * * * * * * * * *

COMES NOW RICHARD ROGUE, the State's Attorney in and for Lincoln County, South Dakota, and moves that the Court herewith revise and change it to Order without further notice herein to deliver custody of the above named juveniles to the mother of said children, Beth King at 219 Orange Street, Auburndale, Florida.

This motion is based upon the recommendations of the Department of Social Services, Division of Human Development, Office of Community Services, and in particular, Jan Bunkers, Social Worker III, Alternative Care Unit.

Dated this 19th day of September, 1977.

RICHARD ROGUE
State's Attorney
Lincoln County, South Dakota

* * * * * * * * * * * *

O R D E R

It is hereby ordered that James Aaron Russ and David Byron Russ be forthwith delivered into the custody of their mother, Beth King, 219 Orange Street, Auburndale, Florida, and that the previous Order of this Court is hereby cancelled and terminated. That should there be any expense in connection with delivery of said children, it shall be borne by the family of James Aaron Russ and David Byron Russ.

Dated this 12th day of September, 1977.

Judge of First Judicial Circuit
Lincoln County, South Dakota

ATTEST:

(SEAL)

Sept. 12, 1977

EXHIBIT 5

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by State v. Mason, Ohio App. 3 Dist., December 27, 2016

73 So.3d 178
Supreme Court of Florida.

David Byron RUSS, Appellant,

v.

STATE of Florida, Appellee.

No. SC09–923.
|
Sept. 22, 2011.

Synopsis

Background: Defendant was convicted following guilty plea in the Circuit Court, Seminole County, Marlene M. Alva, J., of murder in the first degree, and he was sentenced to death. Defendant appealed.

Holdings: The Supreme Court held that:

[1] trial court complied with procedures required when competent defendant waives right to present mitigation;

[2] mitigation evidence that was proffered during *Koon* hearing was not subject to trial court's consideration during sentencing phase;

[3] trial court did not abuse its discretion in failing to consider all of the mitigation that was present in the pre-sentence investigation (PSI) report;

[4] evidence was sufficient for cold element of cold, calculated, and premeditated manner (CCP) aggravator;

[5] evidence was sufficient for heinous and cruel (HAC) aggravator;

[6] death penalty was proportionate; and

[7] guilty plea was made knowingly, intelligently, and voluntarily.

Affirmed.

Pariente, J., filed a concurring opinion.

West Headnotes (35)

[1] Sentencing and Punishment Discretion of lower court

Supreme Court reviews a trial court's decision to accept a defendant's request to waive the presentation of mitigation during the penalty phase of a capital murder trial for an abuse of discretion.

1 Case that cites this headnote

[2] Sentencing and Punishment Reception of evidence

A competent defendant may waive the right to present mitigation during the penalty phase of a capital trial.

1 Case that cites this headnote

[3] Sentencing and Punishment Reception of evidence

When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase of capital murder trial, counsel must inform the court on the record of the defendant's decision.

[4] Sentencing and Punishment Reception of evidence

When defendant refuses to permit the presentation of mitigating evidence in the penalty phase of capital murder trial, counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be; the court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

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[5] **Sentencing and Punishment** Reception of evidence

Trial court complied in penalty phase of capital murder trial with procedures required when competent defendant waives right to present mitigation, where it previously found him competent, there was no indication that defendant had in any way lost his competency, court requested state to list the aggravating factors it was seeking, trial counsel listed mitigating factors that were arguably applicable to defendant, but defendant would not allow their presentation, and would not allow the cross-examination of state's expert to minimize the aggravating factors.

[6] **Sentencing and Punishment** Necessity

When a defendant waives the right to present mitigation evidence in penalty phase of capital murder trial, the trial court must order the preparation of a pre-sentence investigation (PSI) and, in its discretion, may call witnesses to present mitigation evidence to the extent that the PSI alerts the court to the existence of significant mitigation.

2 Cases that cite this headnote

[7] **Sentencing and Punishment** Evidence in mitigation in general

Mitigating evidence must be considered and weighed, to the extent it is believable and uncontroverted, when contained anywhere in the record in penalty phase of capital murder trial; but, if a defendant elects not to submit proof of mitigating circumstances, the trial court is not required to accept potential mitigating circumstances as proven based on defense counsel's proffer of evidence.

[8] **Sentencing and Punishment** Reception of evidence

Mitigation evidence that was proffered during *Koon* hearing regarding defendant's waiver of his right to present mitigation evidence was not subject to trial court's consideration during sentencing phase of capital murder trial; reason for trial counsel's proffer of possible mitigating evidence during the *Koon* hearing was to inform defendant of the potential mitigation to ensure that his waiver was made knowingly, intelligently, and voluntarily.

1 Case that cites this headnote

[9] **Sentencing and Punishment** Use and effect of report

Once the comprehensive pre-sentence investigation (PSI) is complete, the trial court must determine whether it suggests the existence of mitigation in penalty phase of capital murder trial.

[10] **Sentencing and Punishment** Reception of evidence

If the pre-sentence investigation (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 in penalty phase of capital murder trial.

1 Case that cites this headnote

[11] **Sentencing and Punishment** Use and effect of report

Trial court did not abuse its discretion in failing to consider all of the mitigation that was present in the pre-sentence investigation (PSI) report in penalty phase of capital murder trial, where report did not alert the court to the probability of significant mental mitigation, rather, evidence of psychiatric history was a self-diagnosis, defendant's onset of depression occurred after the murder while he was incarcerated and facing a capital trial, and special counsel requested a mental health evaluation and PET scan regarding defendant's head injuries, but he refused.

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[12] **Sentencing and Punishment** ⬅ Scope of review

In reviewing the trial court's finding of an aggravating circumstance in penalty phase of capital murder trial, Supreme Court's task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.

1 Case that cites this headnote

[13] **Sentencing and Punishment** ⬅ Planning, premeditation, and calculation

Cold, calculated, and premeditated manner (CCP) aggravator in sentencing phase of capital murder trial pertains specifically to the defendant's state of mind, intent, and motivation.

[14] **Criminal Law** ⬅ Weight and Sufficiency to Convict

A defendant's confession is generally considered to be direct, not circumstantial, evidence.

1 Case that cites this headnote

[15] **Criminal Law** ⬅ Construction of Evidence
Criminal Law ⬅ Reasonable doubt

Where evidence of guilt is direct, the following standard is applied: the evidence will be deemed sufficient to sustain the conviction where a rational trier of fact, upon reviewing the evidence in the light most favorable to the State, can find that the elements of the crime have been established beyond a reasonable doubt.

[16] **Sentencing and Punishment** ⬅ Planning, premeditation, and calculation

Evidence that defendant waited inside of victim's home for at least eight or nine hours, during which he had time to calmly reflect prior to her murder, bound victim's hands and legs so tightly that her hands were swollen and bruised, used such force to bind her that her collar bone became dislocated from her shoulder blade, placed her face-down on the bathroom floor so that she could not offer any resistance or provocation, as evidenced by the absence of any struggle, and at that point, he could have abandoned the crime or stolen victim's car and other items he intended to take and left the victim unharmed, but murdered her instead, was sufficient for cold element of cold, calculated, and premeditated manner (CCP) aggravator in sentencing phase of capital murder trial.

1 Case that cites this headnote

[17] **Sentencing and Punishment** ⬅ Planning, premeditation, and calculation

Evidence that defendant entered victim's house after she left for work and waited until she arrived home, while he was waiting, procured two types of rope, did his laundry, went through her belongings, and upon her return, bound her and used three different methods of killing, namely ligature strangulation, stabbing, and blunt force trauma, was sufficient for calculated element of cold, calculated, and premeditated manner (CCP) aggravator in sentencing phase of capital murder trial.

[18] **Sentencing and Punishment** ⬅ Planning, premeditation, and calculation

Defendant's admission that murder was premeditated, and fact that night before the murder, he ran from the police, abandoned his vehicle, and slept on a roof to avoid being arrested, decided to wait for victim to steal her vehicle, waited for eight or nine hours for her to return from work, during which time he showered, ate, did laundry, gathered valuables that he intended to steal, and upon victim's return, immobilized, beat, strangled, and stabbed her was sufficient for heightened premeditation element of cold, calculated, and premeditated manner (CCP) aggravator in penalty phase of capital murder trial.

1 Case that cites this headnote

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[19] **Sentencing and Punishment** ⬅ Planning, premeditation, and calculation

Finding that defendant was addicted to crack cocaine would not necessarily preclude the cold, calculated, and premeditated manner (CCP) aggravator from being found in penalty phase of capital murder trial; a chronic drug abuser can still act in accordance with a deliberate plan where the evidence indicates that the person was fully cognizant of his actions on the night of the murder.

[20] **Sentencing and Punishment** ⬅ Planning, premeditation, and calculation

Defendant lacked legal or moral justification for murder as required for cold, calculated, and premeditated manner (CCP) aggravating factor in penalty phase of capital murder trial.

1 Case that cites this headnote

[21] **Sentencing and Punishment** ⬅ Vileness, heinousness, or atrocity

In order for the heinous and cruel (HAC) aggravator to apply in penalty phase of capital murder trial, the murder must be conscienceless or pitiless and unnecessarily torturous to the victim.

[22] **Sentencing and Punishment** ⬅ Vileness, heinousness, or atrocity

Heinous and cruel (HAC) aggravator applies in physically and mentally torturous murders which can be illustrated by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

[23] **Sentencing and Punishment** ⬅ Vileness, heinousness, or atrocity

Heinous and cruel (HAC) aggravator in penalty phase of capital murder trial concentrates on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death.

1 Case that cites this headnote

[24] **Sentencing and Punishment** ⬅ Vileness, heinousness, or atrocity

There does not need to be a showing that the defendant intended or desired to inflict torture in order for heinous and cruel (HAC) aggravator to apply in penalty phase of capital murder trial; the torturous manner of the victim's death is evidence of a defendant's indifference.

1 Case that cites this headnote

[25] **Sentencing and Punishment** ⬅ Vileness, heinousness, or atrocity

Victim's mental state may be evaluated in accordance with common-sense inferences from the circumstances when considering whether heinous and cruel (HAC) aggravator applies in penalty phase of capital murder trial.

1 Case that cites this headnote

[26] **Sentencing and Punishment** ⬅ Vileness, heinousness, or atrocity

To support heinous and cruel (HAC) aggravator in penalty phase of capital murder trial, the evidence must show that the victim was conscious and aware of impending death; but, fear, emotional strain, and victim's terror during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.

1 Case that cites this headnote

[27] **Sentencing and Punishment** ⬅ Vileness, heinousness, or atrocity

Evidence that victim was bound, strangled, stabbed, and suffered blunt force trauma, was moving from right to left, pulling away from the ligature around her neck, and that she would have been in a significant amount of discomfort, both physically and mentally, was sufficient for

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heinous and cruel (HAC) aggravator in penalty phase of capital murder trial.

[28] **Sentencing and Punishment** ⬅ Scope of review

Supreme Court reviews the weight the trial court ascribes to mitigating factors in penalty phase of capital murder trial under the abuse of discretion standard.

[29] **Sentencing and Punishment** ⬅ Sufficiency

Sentencing court did not abuse its discretion in explaining its findings regarding aggravating and mitigating factors in penalty phase of capital murder trial, where it thoroughly considered the aggravating and mitigating circumstances at issue and supported each with specific written findings of fact, and concluded that the aggravating factors outweighed the mitigating circumstances. West's F.S.A. § 921.141(3).

3 Cases that cite this headnote

[30] **Sentencing and Punishment** ⬅ Proportionality

In reviewing a death sentence for proportionality, Supreme Court ensures that the death penalty is reserved only for those cases where the most aggravating and least mitigating circumstances exist.

2 Cases that cite this headnote

[31] **Sentencing and Punishment** ⬅ Proportionality in general

Supreme Court review on proportionality of death sentence is not a comparison between the number of aggravators and mitigators; proportionality review requires Court to engage in a qualitative review of the totality of the circumstances and compare the present case with other capital cases in which Court has found that death was a proportionate punishment.

1 Case that cites this headnote

[32] **Sentencing and Punishment** ⬅ Determinations based on multiple factors

Death penalty was proportionate, where defendant waited for victim for at least eight or nine hours in her house, and upon her return, bound, stabbed, and strangled her, and struck her with a blunt object, cold, calculated, and premeditated manner (CCP) and heinous and cruel (HAC) aggravators applied, and trial court found statutory mitigating factors of defendant's abusive childhood and severe, long-term addiction to drugs, and non-statutory mitigating factors including remorse, multiple medical problems, and lack of violent criminal history, among others, and Supreme Court had concluded that the death sentence was proportionate in cases where there was less aggravation and similar mitigation, in the face of fewer aggravators and significantly more mitigators, where there was similar aggravation and more mitigation, and in the face of similar aggravation and similar mitigation.

2 Cases that cite this headnote

[33] **Sentencing and Punishment** ⬅ Scope of review

In death penalty cases, Supreme Court has mandatory obligation to review the basis of conviction for murder in the first degree.

1 Case that cites this headnote

[34] **Criminal Law** ⬅ Waiver of Rights, Defenses, and Objections

Sentencing and Punishment ⬅ Scope of review

In cases involving imposition of a death sentence after the defendant has pled guilty to a charge of murder in the first degree, Supreme Court's mandatory review shifts to the knowing, intelligent, and voluntary nature of that plea; Court must scrutinize the plea to ensure that the defendant was made aware of the consequences of his plea, was apprised of the

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constitutional rights he was waiving, and pled guilty voluntarily.

3 Cases that cite this headnote

[35] **Criminal Law** Requisites and Proceedings for Entry

Criminal Law Ascertainment by court; advising and informing accused

Defendant's guilty plea to murder in the first degree was made knowingly, intelligently, and voluntarily, where defendant was represented by counsel, who informed court on day of plea that defendant would be withdrawing his pleas of not guilty, and tendering a plea of guilty to murder in the first degree, State provided a factual basis for the plea, defendant agreed with State's factual basis, including DNA evidence, and defendant testified that he understood that by entering the plea, he was facing life in prison or a death sentence. West's F.S.A. RCrP Rule 3.172(a, c–e).

4 Cases that cite this headnote

Attorneys and Law Firms

***183** James S. Purdy, Public Defender, and James R. Wulchak, Chief, Appellate Division, Assistant Public Defender, Seventh Judicial Circuit, Daytona Beach, FL, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, FL, and Barbara C. Davis, Assistant Attorney General, Daytona Beach, FL, for Appellee.

Opinion

PER CURIAM.

This case is before the Court on appeal from a judgment of conviction of first-degree murder and a sentence of death. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

I. OVERVIEW

David Byron Russ pleaded guilty to the first-degree murder of Madeleine Leinen. Prior to the penalty phase, Russ waived his right to present mitigation and waived his right to a penalty phase jury. The trial court accepted his waiver and sentenced Russ to death. On direct appeal, Russ raises two issues: (1) whether the trial court followed this Court's procedures and considered all properly presented mitigation, and (2) whether the trial court erred in finding the aggravators and mitigators, that the evidence is sufficient, and that the death sentence is proportionate. For the reasons expressed below, Russ is not entitled to relief.

II. FACTS AND PROCEDURAL HISTORY

On February 6, 2008, Russ, pleaded guilty to the May 7, 2007, first-degree murder of Madeleine Leinen.[1] The facts of the underlying crime are laid out in the trial court's sentencing order:

> Shortly before midnight on the evening of May 6, 2007, Longwood Police Officer Brad Tollas noticed a white Jeep Cherokee parked in the parking lot of a business on Bennett Road. He approached the vehicle and observed the Defendant, David Russ, asleep in the driver's seat. Russ had been on a ten day crack binge, and had cocaine and a crack pipe in the center console of the jeep.
>
> Officer Tollas knocked on the darkly tinted window of the jeep and the Defendant responded saying he was "okay." When Officer Tollas asked him to roll down the window, the Defendant started the jeep and drove away at a high rate of speed. Officer Tollas pursued the jeep and caught up with it in the Meadows West subdivision. He observed the vehicle, which was traveling at 5–10 mph, come to an abrupt stop. No one was found in the vehicle, and the defendant was not located after a search of the area was conducted. The jeep was abandoned about one block from the victim Madeleine Leinen's home ... in Longwood.
>
> After fleeing on foot, David Russ spent the night on the rooftop of a house adjacent to the victim's. Early the next morning, he observed Madeleine Leinen leave for work. It was at that precise moment she was selected as his victim.
>
> Madeleine Leinen returned to her home shortly after 6:00 p.m. after stopping ***184** as Sam's Club in Casselberry. At Sam's Club, the victim purchased both perishable and nonperishable items. A Sam's Club

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receipt detailing the items purchased and noting a checkout time of May 7, 2007, at 5:35 p.m. was on the kitchen counter. Frozen shrimp which were purchased were placed in the freezer and other items purchased were found on a box in the garage and on the kitchen counter.

After killing the victim, the defendant took her Toyota Camry and drove straight to the Fairwinds Credit Union in Apopka. There he attempted unsuccessfully to withdraw money from her account at an automatic teller machine. His efforts were captured by a video surveillance camera. The defendant then left Florida heading towards Texas.

Early on the morning of May 8, 2007, the victim's lifeless body was found facedown on the floor in her hall bathroom by a friend. The victim's hands and feet were tightly bound with rope and a rope ligature was around her neck.

The medical examiner observed injuries to the victim consistent with strangulation from the neck ligature. He also noted three lacerations to the victim's scalp which he attributed to blunt force trauma. Four stab wounds, three to the victim's back and one to the head were also found. Additionally, the victim suffered facial bruising, fractured ribs, and a dislocated clavicle in the attack. The cause of death was attributed to multiple injuries resulting from blunt force trauma, stab wounds, and strangulation with a ligature.

Enroute to Texas, the Defendant pawned various items of the victim's jewelry and continued his crack binge by purchasing drugs along the way. The victim's car was recovered in Gainesville, Texas. Items of her jewelry which had been pawned by the Defendant on May 11, 2007, were recovered at a pawn shop in Denton, Texas. The Defendant was arrested by the sheriff's department in Denton, Texas on May 16, 2007.

Guilt Phase

The Plea Hearing

Russ was indicted on the following charges (count 1) first-degree premeditated murder, (count 2) kidnapping with a deadly weapon, (count 3) carjacking, (count 4) robbery with a deadly weapon, and (count 5) burglary with assault or battery. At his first appearance, Russ pleaded not guilty to the charges against him and was appointed a public defender. Subsequently, on February 6, 2009, the trial court conducted a plea hearing where Russ withdrew his pleas of not guilty and tendered a plea of guilty as charged to counts 1, 2, 4, and 5, and pleaded guilty to the lesser included offense of grand theft as to count 3. The plea did not contain any sentencing agreements between Russ and the State and Russ was aware that the State intended to seek imposition of the death penalty despite his plea. The trial court requested, and the State furnished, a factual basis for the plea. Trial counsel stipulated that the State could establish the proffered evidence by competent evidence and Russ agreed with the facts offered by the State. The trial court found that Russ was "alert and intelligent" and that the plea was "freely and voluntarily made with knowledge of the consequences after advice of competent counsel."

Waiver

On April 9, 2008, at Russ's request, trial counsel informed the trial court that Russ wanted to waive the presentation of all mitigation during the penalty phase and the penalty phase jury. On April 14, 2008, the trial court conducted a status conference and discussed Russ's desire to waive ***185** the presentation of mitigation. Russ again indicated that he wanted to waive the presentation of mitigation, stating that he "did not want to drag the victim's family, [his] family, or anybody else through the mitigation," even though the mitigation was probably credible. Trial counsel confirmed that Russ was aware of the consequences of waiving mitigation and that Russ was aware of the difference between presenting mitigation to the jury and presenting it only to the trial court. The trial court informed Russ that presenting as much information as possible was in each party's best interest so that the court could determine an appropriate sentence for the crimes. The trial court urged Russ to reconsider waiving his right to present mitigation.

On April 30 and May 1, 2008, the trial court conducted a *Koon*[2] hearing. At the conclusion of the hearing, the trial court accepted Russ's waiver and again informed Russ that the trial court was obligated to independently weigh the aggravating and mitigating factors. Accordingly, the trial court ordered a presentence investigation (PSI) report. Although Russ was still represented by trial counsel, the trial court appointed special counsel to present mitigation to the trial court.

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On May 14, 2008, Russ wrote a letter to Judge Alva. Among other things, the contents of the letter expressed Russ's guilt, described the crime, stated that the crime was premeditated, and again requested that the trial court accept his waiver of the presentation of mitigation during the penalty phase.

The trial court conducted a status conference on August 7, 2008. At that time, special counsel requested that the trial court enter an order or ask Russ to cooperate so that he could be evaluated by a neuropsychologist. Special counsel informed the trial court that on various occasions, special counsel, investigators, and doctors had gone to the jail, but noted that each time they went, Russ refused to speak with any of them. The trial court asked Russ if he would cooperate, but Russ refused to undergo an evaluation and also refused to submit to a PET scan.

On August 27, 2008, the State filed a "Notice of Intent to Offer Evidence of Other Crimes, Wrongs, or Acts." The State sought to introduce evidence regarding Russ's criminal actions prior to and after the murder of Leinen. Specifically, the State sought to introduce the following evidence: (1) evidence that Russ broke into a woman's home in Texas after the murder of Leinen with the intent to commit a felony therein; (2) Russ was in possession of cocaine on May 6, 2007; (3) Russ was in possession of drug paraphernalia on May 6, 2007; and (4) Russ was loitering or prowling on May 7, 2007. Russ filed a motion in limine requesting the trial court to prohibit the State from offering evidence related to the crimes listed in the notice of intent. The trial court reserved ruling on the motion until the evidence was proffered during the penalty phase.

On November 23, 2008, Russ wrote another letter to Judge Alva indicating his desire to waive the presentation of mitigation and jury during the penalty phase.

In response to Russ's motion in limine, the State proffered the testimony of three witnesses. After argument, the trial court excluded the evidence regarding Russ's convictions for fleeing and eluding a police officer and for possession of cocaine and drug paraphernalia. The trial court reserved ruling on the motion in limine regarding ***186** the evidence for the remaining issues.

Penalty Phase

Russ's penalty phase trial was conducted on January 8 and 9, 2009. There, the State presented Russ's May 14, 2008, letter to Judge Alva. The State also proffered evidence regarding the crime Russ committed in Texas shortly after the Leinen murder. However, the trial court later determined that that proffer was irrelevant and declined to consider it.

During the penalty phase, the State called seven witnesses. Special counsel participated in the penalty phase trial by (1) presenting prison medical records from previous incarcerations, (2) developing four witnesses' testimony through cross-examination, and (3) arguing against imposition of the death penalty and noting a number of potentially mitigating factors.[3] Special counsel called three witnesses during the penalty phase. Special counsel also presented Russ's records from the following facilities: (1) the Texas Department of Criminal Justice (1993–1996); (2) the University Medical Center, Lubbock, Texas (1996–1998); (3) the Texas Department of Criminal Justice (1998–2001); (4) the Correctional Managed Health Services, State of Texas (2001–2005); and (5) the John E. Polk Correctional Facility (May 2007–present). Additional documents were admitted into evidence, such as Russ's (1) G.E.D., (2) college transcripts showing a G.P.A. of 3.67, (3) letter of acceptance to Texas Tech, (4) scholarship donor forms, and (5) thank-you letters to the scholarship donors.

Spencer[4] Hearing

On January 15, 2009, the trial court conducted a *Spencer* hearing.

During the *Spencer* hearing, special counsel presented the following mitigation evidence: (1) Russ suffered from a long-term severe addiction to illegal drugs; (2) the crimes of conviction were the result of a long history of drug abuse and a direct result of said addiction; (3) Russ was severely physically abused as a child by his father; (4) Russ was verbally abused as a child by his father; (5) Russ had the capacity to form and maintain loving relationships with family members, before and after incarceration; (6) Russ was a devoted brother; (7) Russ was a devoted son to his mother; (8) Russ suffered from multiple medical problems, including: (a) a thyroid condition, (b) hepatitis C, (c) head trauma, (d) severe headaches, (e) vertigo, (f) vision problems, (g) dental problems, (h) heart attack, (i) allergies, (j) kidney stones, (k) chronic acid reflux, (*l*) asthma, and (m) degenerative disc disease; (9) Russ made numerous attempts to cure

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his drug addiction by going to multiple drug rehabilitation programs; (10) Russ was spending $500–600 each week on cocaine prior to the crimes of conviction; (11) Russ suffered from undiagnosed mental illness due to his physical abuse and drug use; (12) Russ pleaded guilty to the crimes and accepted responsibility in this matter; (13) Russ behaved appropriately in the courtroom; (14) Russ obtained his high school GED; (15) Russ had the trade skill of being a roofer; (16) Russ suffered from ***187** depression; (17) Russ had been taking prescription medicine while in custody which was very helpful for his mental health status; (18) Russ had been trained and educated in the field of drug abuse; (19) Russ attended Western Texas College from 1994 to 1997 and had a cumulative GPA of 3.67; (20) Russ was accepted to attend school at Texas Tech University in Lubbock, Texas, on July 17,1997; (21) Russ was a member of the "Center for the Study of Addiction" which was run by Dr. Carl Anderson, Ph.D., at Texas Tech University; (21) Russ received a substance abuse studies scholarship for him to address his substance abuse addiction with Dr. Anderson on December 10, 1996; (22) Russ wrote a thank-you note and kind words to scholarship sponsors concerning his receipt of the scholarship in 1997 and 1998; (23) Russ was a father figure to the young son of his live-in girlfriend; (24) Russ took his girlfriend's son fishing and helped with his school work; (25) Russ carried an 80–year–old woman from her car to the ocean so she could sit in a chair and fish; (26) Russ had a loving relationship with his girlfriend; (27) Russ did not want to put the victim's family members through the emotional process of the penalty phase proceedings; (28) Russ had been counseling children concerning criminal activity and the dangers of drug use while in custody at the county jail for roughly the previous twelve months—the counseling was part of a program run by the Sheriff's Office; (29) Russ had no violent criminal history.

Sentencing Order

On May 13, 2009, the trial court entered its sentencing order. In the order, the trial court noted that Russ entered a plea of guilty to all charges and that he waived the penalty phase jury. The trial court relied on Russ's description of the events surrounding the murder in addition to other evidence.

The trial court found the existence of the following aggravating circumstances: the capital felony was (1) committed while the defendant was engaged in the commission of a kidnapping (significant weight), (2) committed for pecuniary gain (moderate weight), (3) especially heinous, atrocious, or cruel (HAC) (great weight), and (4) was committed in a cold, calculated, and premeditated manner (CCP) (great weight). The trial court rejected the aggravating factor that the murder was committed to avoid lawful arrest, finding that the State failed to prove that aggravating factor beyond a reasonable doubt.

The trial court found the existence of the following statutory mitigators: (1) Russ had an abusive childhood (moderate weight), and (2) Russ suffered from severe, long-term addiction to drugs which he was unable to conquer despite numerous attempts at rehabilitation (some weight).

Finally, the trial court found the existence of the following nonstatutory mitigators: (1) the defendant was remorseful for the homicide (moderate weight), (2) the defendant suffered from multiple medical problems (very little weight), (3) the defendant had the capacity to form and maintain loving and caring relationships with both family and nonfamily members (little weight), (4) the defendant had pursued higher education and was skilled in the roofing trade (little weight), (5) the defendant had no violent criminal history (little weight), (6) the defendant behaved appropriately in the courtroom (little weight), and (7) the defendant wrote thank-you notes to his scholarship donors at Texas Tech University in 1997 (very little weight).

Russ was sentenced to (1) death for first-degree murder, (2) life imprisonment for kidnapping with a weapon, (3) five years' imprisonment for grand theft of a ***188** motor vehicle, (4) life imprisonment for the crime of robbery with a deadly weapon, and (5) life imprisonment for the crime of burglary of a dwelling with an assault or battery. The trial court ordered that the sentences be imposed to run concurrently and gave Russ 704 days credit for time served on each count. We now address each issue in turn.

III. ANALYSIS

Issue I: Waiver of Mitigation

Russ contends that (1) the trial court failed to require an additional investigation into the mitigation that it was on notice of, (2) the trial court failed to adequately fulfill its constitutional obligation to ensure that Russ receive individualized sentencing, and (3) the death penalty was unfairly and unconstitutionally imposed. We disagree.

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[1] We review a trial court's decision to accept a defendant's request to waive the presentation of mitigation during the penalty phase for an abuse of discretion. *See Spann v. State,* 857 So.2d 845, 854 (Fla.2003) ("The trial court did not abuse its discretion when it granted Spann's request to waive presentation of mitigation.").

Koon Requirements

[2] **[3]** **[4]** It is well established that a competent defendant may waive the right to present mitigation during the penalty phase of a capital trial. *See Spann,* 857 So.2d at 853 (citing *Durocher v. State,* 604 So.2d 810, 812 (Fla.1992)). In *Koon,* this Court detailed a three-part procedure to be applied when a defendant requests to waive his or her right to present mitigation evidence during the penalty phase:

> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Koon, 619 So.2d at 250. Compliance with *Koon* necessarily requires that the defendant be aware of available mitigation.

Here, the record reveals that the trial court complied with the three-part procedure outlined in *Koon.* Once trial counsel and Russ informed the trial court of Russ's desire to waive the presentation of mitigation, the trial court conducted a *Koon* hearing. There, Russ maintained that he wanted to waive his right to present mitigating evidence during the penalty phase. Trial counsel indicated that a defense expert had previously found Russ competent, and trial counsel explained that Russ had not been evaluated since because there was no indication that Russ "had in any way lost his competency."

To ensure that Russ was aware of the aggravators that the State intended to rely on as support for imposition of the death penalty, the State, at the trial court's request, announced that it was seeking the following aggravators (1) CCP, (2) HAC, (3) pecuniary gain, (4) kidnapping, and (5) avoid arrest. At that time, Russ told the trial court that he did not want his lawyers to cross-examine or challenge the aggravation.

Russ indicated that he wanted trial counsel to continue representing him with the understanding that trial counsel would ***189** not present any mitigation. To ensure that Russ was aware of the potential mitigation, trial counsel announced the potential mitigation that was available on Russ's behalf. This mitigation included: (1) witness testimony regarding Russ's extreme remorse, (2) testimony from jail officials regarding Russ's good behavior while incarcerated, (3) testimony regarding the childhood beatings that Russ endured, (4) Russ's family's history of mental illness, (5) evidence of the psychological torture Russ endured at the hands of his father, (6) Russ's life while in foster care, (7) a psychological evaluation report that was conducted when Russ was 16 years old, (8) family member testimony, (9) testimony from Russ's childhood baseball coach that Russ's father would beat him for playing poorly, (10) testimony of two of Russ's former stepmothers, (11) testimony of a professor from the university in Texas where Russ enrolled in the Study of Addictions program, (12) evidence regarding Russ's rehabilitation efforts, (13) witnesses from a prison ministry, (14) presentation of a televised broadcast in which Russ spoke of the dangers of drug use at the behest of a city councilman, (15) accounts that Russ was a good employee until he developed his drug problems, (16) testimony regarding his employment just prior to the crime, (17) Georgia prison records indicating that Russ sustained head injuries while incarcerated, (18) expert testimony regarding the psychological impact of Russ's upbringing, (19) testimony from Russ's former girlfriend and former fiancée, and (20) records of Russ's injuries and ten-day hospitalization following a car accident in South Dakota.

Trial counsel also announced that he had a forensic pathologist who would present testimony rebutting the CCP and HAC aggravators. The trial court asked Russ whether he would allow trial counsel to cross-examine the State's expert to minimize the aggravators. Russ said that he would not. The trial court also asked Russ if he would allow trial counsel to present any mitigating evidence and specifically referred to each of the mitigating factors trial counsel had announced. Again, Russ said that he would not. Again, the trial court explained to Russ the trial court's duty to address mitigation and that the trial court might call its own witnesses if necessary.

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[5] On May 1, 2008, Russ was found competent to waive the penalty phase jury and the presentation of mitigation. Russ indicated that he still intended to waive the penalty phase jury and the presentation of mitigation. Thus, the trial court complied with the requirements set forth in *Koon*.

Muhammad[5] Requirements

[6] As articulated in *Muhammad,* when a defendant waives the right to present mitigation evidence, the trial court must order the preparation of a PSI and, in its discretion, may call witnesses to present mitigation evidence to the extent that the PSI alerts the court to the existence of significant mitigation. *See id.* at 363–65.

In the instant case, the trial court ordered a comprehensive PSI to be completed by June 30, 2008. The trial court granted Russ's request to waive the presentation of mitigation and the penalty phase jury and again informed Russ that the trial court was obligated to independently weigh the aggravating and mitigating factors. Although Russ was still represented by trial counsel, the trial court appointed special counsel to present mitigation to the trial court.

***190** Russ presents several different arguments to support his assertion that the trial court failed to consider all of the mitigation presented. First, Russ argues that the trial court should have considered the possible mitigation proffered by trial counsel at the *Koon* hearing. This argument is without merit.

[7] **[8]** The reason for trial counsel's proffer of possible mitigating evidence during the *Koon* hearing was to inform Russ of the potential mitigation to ensure that his waiver was made knowingly, intelligently, and voluntarily. "Mitigating evidence must be considered and weighed when contained 'anywhere in the record, to the extent it is believable and uncontroverted,' " *LaMarca v. State,* 785 So.2d 1209, 1215 (Fla.2001) (quoting *Robinson v. State,* 684 So.2d 175, 177 (Fla.1996)). However, we have repeatedly explained, "If a defendant elects not to submit proof of mitigating circumstances, the trial court is not required to accept potential mitigating circumstances as proven based on defense counsel's proffer of evidence." *LaMarca,* 785 So.2d at 1216 (citing *Chandler v. State,* 702 So.2d 186, 199–201 (Fla.1997)); *see Grim v. State,* 841 So.2d 455, 462 (Fla.2003). Further, we have stated that "[p]roffered evidence is merely a representation of what evidence the defendant proposes to present and is not actual evidence." *LaMarca,* 785 So.2d at 1216 (citing *State v. Warner,* 721 So.2d 767, 769 (Fla. 4th DCA 1998) (explaining that "a proffer is not evidence"), *approved on other grounds,* 762 So.2d 507 (Fla.2000)). Therefore, the trial court did not err in failing to consider the proffered mitigation evidence that was presented during the *Koon* hearing.

Second, Russ contends that the PSI report revealed the existence of significant mental mitigation and that the trial court's failure to consider all of the mitigation that was present in the PSI report violated the requirements articulated by this Court in *Muhammad. See Muhammad,* 782 So.2d at 363. Specifically, Russ contends that "the PSI suggests that Russ has been diagnosed with and treated for mental illness."

A review of the record reveals the following: (1) Russ "is [being] or was previously treated" for various illnesses, including "psychiatric Hx"; (2) Russ suffered from "major depression" for one month while incarcerated at the John E. Polk Correctional Facility in October 2007; (3) Russ was first prescribed the Sinequan antidepressant on June 17, 2007, after he met with a psychiatrist; (4) on August 4 and August 17, 2007, Russ requested that his dosage of Sinequan be increased "if [he] was still struggling with depression and lack of sleep"; (5) Dr. Westhead met with Russ on August 21, 2007, and noted that Russ suffered from "major depression"; (6) Russ said he was "extremely depressed" because he "had a good life and now it's gone due to the drugs"; (7) the only mention of Russ's diagnosis of "psychiatric Hx" is from a questionnaire filled out in June 2007, which asked "do you now have or have you ever had" "psychiatric Hx" and the box for "psychiatric Hx" was checked; (8) the mental health intake form noted that Russ was oriented, had a normal mood temperament, was able to use relevant speech, did not display abnormalities in his thought pattern although he was having problems sleeping; (9) Russ denied any history of psychiatric illness or treatment; and (9) a psychological evaluation was taken in 1978, when Russ was 16 years old. Further, the PSI provides:

> The mother stated he has no mental health illnesses diagnosed. She thinks he does, though. She stated that his father beat him half his life. The subject's ***191** mother stated that the father was a mean man. The Texas Department of Criminal Justice Health Summary dated 10/1/93 lists the subject was never treated for mental illness. The Denton County Medical Intake Information form of 5/16/07 lists chest congestion as being the only illness he was suffering from at that time.

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> The form also states medical was notified of the condition. There is no listing of any mental health problem and no medical attention was required on 5/16/07.

Additionally, the PSI report indicates that Russ was "treated for head trauma."

[9] Once the comprehensive PSI is complete, the trial court must determine whether it suggests the existence of mitigation. *See Barnes v. State,* 29 So.3d 1010, 1023 (Fla.) ("*Muhammad* does not set forth a hard and fast rule that a trial court has no discretion to order investigation and presentation of mitigation without first reviewing a PSI and without first making an express determination that the PSI suggests the existence of mitigation."), *cert. denied,* —— U.S. ——, 131 S.Ct. 234, 178 L.Ed.2d 155 (2010). In its sentencing order, the trial court considered Russ's multiple medical problems, including his depression, as a nonstatutory mitigating factor and assigned it very little weight after finding that there was no evidence that any of Russ's medical problems affected Russ's actions regarding the murder of Leinen.

[10] **[11]** As articulated in *Muhammad,* "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." 782 So.2d at 364; *see Barnes,* 29 So.3d at 1023 (explaining that the trial court, once alerted to the probability of significant mitigation, has discretion to call witnesses, appoint special counsel, or utilize standby counsel for the limited purpose of further investigation and presentation of mitigation). Here, the PSI report did not alert the court to the probability of significant mental mitigation. Rather, the evidence of "psychiatric Hx" was a self-diagnosis, Russ's onset of depression occurred after the murder while he was incarcerated and facing a capital trial, there is no indication that Russ's mother had much interaction with him while he was a child or as an adult, and special counsel requested a mental health evaluation and PET scan regarding Russ's head injuries, but Russ refused.

Accordingly, we conclude that the trial court did not abuse its discretion.

Issue II: Proportionality

Aggravating Circumstances

In the second issue, Russ first argues that the State failed to prove the CCP and HAC aggravators beyond a reasonable doubt. We disagree.

[12] In reviewing the trial court's finding of an aggravating circumstance, this Court's "task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." *McWatters v. State,* 36 So.3d 613, 642 (Fla.) (quoting *Lynch v. State,* 841 So.2d 362, 368 (Fla.2003)), *cert. denied,* —— U.S. ——, 131 S.Ct. 510, 178 L.Ed.2d 378 (2010).

CCP

[13] Russ's argument that the trial court erred in finding that the CCP aggravator applied to the murder is without merit. This Court has opined:

> ***192** To establish the CCP aggravator, the State must prove beyond a reasonable doubt that (1) the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant exhibited heightened premeditation (premeditated); and (4) the murder was committed with no pretext of legal or moral justification.

McWatters, 36 So.3d at 640–41 (citing § 921.141(5)(i) (Fla. Stat.; *Pearce v. State,* 880 So.2d 561, 575–76 (Fla.2004))). "The CCP aggravator pertains specifically to the defendant's state of mind, intent, and motivation of the defendant." *Wright v. State,* 19 So.3d 277, 298 (Fla.2009) (citing *Brown v. State,* 721 So.2d 274, 277 (Fla.1998)). A trial court's determination of whether CCP is present in a case is based upon the totality of the circumstances. *Hudson v. State,* 992 So.2d 96 (Fla.2008).

In the instant case, the trial court applied the correct rule of law and made the following findings:

> In his letter to the Court, [Russ] stated that after eluding pursuit by Officer Tollas, he spent the night on the rooftop of a house adjacent to Leinen's home. He wrote, "At dawn, I awakened. I saw the victim leaving for work. I choose my victim at that exact moment." Further in the letter, he states, "Was the murder premeditated? Yes, your Honor it was. Did I believe I was capable of such a crime while on

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a drug crime spree? No, I did not. I was no doubt a cold blooded killer on that day."

[Russ] remained in the victim's home the entire day, waiting for her to return. Crime scene Investigator Ohlson found rope similar to the rope used to bind [Leinen's] feet in the trash can behind the washer and dryer in the garage. A different type of rope was used for the neck ligature and to bind [Leinen's] hands using a complex series of knots.

[Leinen's] home was neat and tidy without any signs of a struggle. Blood droplets were found in the garage, but the actual killing appeared to take place in the hall bathroom. Common sense and the evidence at the scene indicate [Russ] likely first encountered the victim in the garage, subdued her with an initial blow, and walked her through the house to the hall bathroom.

The evidence indicates the victim's murder was not a spontaneous or impulsive act. Nor was it done in a frenzy or rage. While the evidence establishes [Russ] had been using crack cocaine heavily in the days preceding May 7, 2007, there was no evidence that [Russ] was under the influence of drugs at the time of the murder. Rather, ... Leinen's murder was the product of [Russ's] prearranged design. He had selected her as his victim early that morning. He waited hours for her to return home. Prior to the murder he procured two types of rope and a knife to execute his plan. The absence of any signs of a struggle and the lack of defensive wounds on the victim indicate she offered no resistance. Once in the bathroom, [Russ] meticulously tied Leinen's hands and feet and used three different means to ensure her death. Undoubtedly, many of the victim's wounds occurred as she lay bound and helpless on the floor. No evidence of moral or legal justification was presented or argued.

The Court finds the above stated evidence establishes this aggravating circumstance beyond a reasonable doubt, and it is given great weight.

[14] **[15]** As a preliminary matter, Russ contends the trial court's finding of the ***193** CCP aggravator is based solely on circumstantial evidence and thus is subject to the special standard for circumstantial evidence cases. This argument is misguided. Russ confessed to the crime. A defendant's confession is generally considered to be direct, not circumstantial, evidence. *See Walls v. State,* 641 So.2d 381 (Fla.1994). Where evidence of guilt is direct, the following standard is applied: the evidence will be deemed sufficient to sustain the conviction where a rational trier of fact, upon reviewing the evidence in the light most favorable to the State, can find that the elements of the crime have been established beyond a reasonable doubt. *Pagan v. State,* 830 So.2d 792, 803 (Fla.2002); *see also Pearce,* 880 So.2d at 576 (noting that to establish CCP, the State must prove each element of CCP beyond a reasonable doubt). Here, Russ's confession is consistent with the facts from the night prior to the murder, leading up to and regarding the murder, and occurring for over a week after the murder. Moreover, the record reveals that the State proved each element of the crime beyond a reasonable doubt.

Russ challenges the trial court's finding that the evidence satisfied the first "cold" element of the test for CCP—that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage. Russ presents two arguments in support of this claim: (1) Russ alleges that the State failed to prove this element beyond a reasonable doubt because the evidence suggests that the murder was the result of an emotional frenzy, panic, or fit of rage, and (2) Russ alleges that, because the murder occurred within a 25–30 minute time span, he did not have adequate time for reflection. We disagree.

[16] The first element, "cold," is supported by competent substantial evidence. Russ admitted that the murder was premeditated and described how he selected Leinen that morning, waited in her house for her return, and then murdered her. We have found CCP where the defendant only had a few minutes to murder the victim. *See Durocher v. State,* 596 So.2d 997, 1001 (Fla.1992) (affirming the trial court's finding of CCP where only a few minutes passed between the defendant's decision to merely rob the store and his decision to shoot the clerk). Here, the record evidence reveals that Russ waited inside of Leinen's home for at least eight or nine hours, during which he had time to calmly reflect prior to Leinen's murder. Although the exact moment that Russ decided to murder Leinen is not entirely clear, the record does establish that Leinen's hands and legs were so tightly bound that her hands were swollen and bruised, and the force used to bind her caused her clavicle (collar bone) to become dislocated from her scapula (shoulder blade). Leinen was placed face-down on the bathroom floor and could not offer any resistance or provocation, as evidenced by the absence of any struggle. At this point, Russ had the opportunity to abandon the crime or steal the car and other items he intended to take and leave Leinen unharmed. Nevertheless, Russ murdered Leinen after

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she was bound. Thus, there is competent substantial record evidence to support the "cold" element of CCP.

Next, Russ challenges the trial court's finding that the evidence supported the second "calculated" element of the test for CCP—that the defendant had a careful plan or prearranged design to commit murder before the fatal incident. Russ contends that the absence of any signs of struggle makes it reasonable to conclude that the murder was not calculated, because the lack of struggle indicates that Leinen was immediately tied up and murdered ***194** thus eliminating time for reflection. We disagree.

[17] We have held that where a defendant arms himself in advance, kills execution-style, and has time to coldly and calmly decide to kill, the element of "calculated" is supported. *See Lynch v. State,* 841 So.2d 362, 372–73 (Fla.2003) (citing *Hertz v. State,* 803 So.2d 629, 650 (Fla.2001)). Here, Russ himself admitted that he entered Leinen's house after she left for work and waited until she arrived home. Russ had hours to do some of his laundry and go through Leinen's personal belongings. As evidenced by the absence of a struggle, Russ procured two different types of rope prior to Leinen's return home. Again, once Leinen was bound and immobilized, Russ employed not one, not two, but three different methods of killing—ligature strangulation, stabbing, and blunt force trauma. Although the sequence of the attacks is not clear, it is clear that Leinen was alive during these attacks. Russ undoubtedly had time to reflect upon these events. *See Lynch,* 841 So.2d at 372–73 (finding that the murder was calculated where the defendant had time to reflect between firing the first shot and firing the final, fatal shot) (citing *Ford v. State,* 802 So.2d 1121, 1133 (Fla.2001) (finding CCP where defendant used three different weapons and had to stop and reload prior to shooting each victim execution-style)). Clearly, there is competent substantial evidence to support the trial court's finding of the "calculated" element.

Additionally, Russ challenges the trial court's finding that the third prong—that the defendant exhibited heightened premeditation—was satisfied. Russ contends that the trial court's reliance on his admission in his letter that he "chose [his] victim at that exact moment" to conclude that the heightened premeditation requirement was satisfied is erroneous. Russ claims that his statement merely meant that he intended Leinen as the victim of his burglary and theft or robbery, not as the victim of a murder. This argument is without merit.

[18] The third element, "heightened premeditation," is supported by competent and substantial evidence. Notably, in his letter to Judge Alva, Russ admitted that the murder was premeditated. Russ was aware that he was charged with first-degree premeditated murder and entered a knowing, intelligent, and voluntary plea to that charge. Further, we have "previously found the heightened premeditation required to sustain this aggravator where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder." *Lynch,* 841 So.2d at 373 (quoting *Alston v. State,* 723 So.2d 148, 162 (Fla.1998)); *see also McCoy v. State,* 853 So.2d 396, 407–08 (Fla.2003); *Looney v. State,* 803 So.2d 656, 678 (Fla.2001) (applying CCP where "the defendants had ample opportunity to reflect upon their actions, following which they mutually decided to shoot the victims execution-style"); *Alston v. State,* 723 So.2d 148, 162 (Fla.1998) (sustaining the CCP aggravator where the "appellant had ample opportunity to release [the victim] after the robbery," but chose to kill him); *Eutzy v. State,* 458 So.2d 755, 757 (Fla.1984) (sustaining CCP where there was no sign of struggle, yet the victim was shot execution-style).

Moreover, we have upheld a finding of CCP where a defendant lay in wait for the victim's arrival. *See Dennis v. State,* 817 So.2d 741, 765 (Fla.2002) (upholding CCP where facts showed defendant arrived at apartment before victim and waited for her arrival). Russ had the opportunity to leave the crime scene and not kill Leinen. As in *Dennis,* Russ arrived at Leinen's ***195** house and waited for eight or nine hours for her to arrive. During this time, regardless of what his intentions may have been prior to Leinen's arrival, Russ had ample opportunity to leave the scene. Further, after Leinen was bound Russ could have left the scene. Despite this time to reflect, Russ chose to murder Leinen.

Russ also contends that he was intoxicated on crack-cocaine at the time of the murder and thus was unable to establish the requisite intent to satisfy the heightened premeditation standard. The trial court rejected this argument, finding that "there was no evidence that [Russ] was under the influence of drugs at the time of the murder." Rather, the trial court considered Russ's long-term addiction as a statutory mitigator and assigned it some weight. Russ claims that this is clear from the language of his letter which states, "The last 10 days leading up to the murder I was 24–7 non-stop getting high, smoking crack." In his letter Russ explains that his motivation for running from the police and committing the subsequent crimes was because he "was willing to do anything to continue getting high." However, in his other letter to Judge

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Alva, Russ stated, "Do I believe I would have murdered anyone had I not [sic] been sober? I've never harmed anyone physically. I have a very serious and lengthy record (criminal history). I do not have any aggervated [sic] crimes past, I would never have hurt or murdered the victim had I been sober." In his letter, he also noted that he was on a "drug and crime spree."

Russ's reliance on *White v. State,* 616 So.2d 21, 25 (Fla.1993) (concluding that CCP was not established beyond a reasonable doubt because the trial court found that White was "high on cocaine" at the time of the murder), is misguided. A critical distinction between the instant case and *White* is that in *White,* the trial court made an express finding that White was "high on cocaine." Here, there is no dispute that Russ used cocaine leading up to the murder, but it is not entirely clear that he was in fact under the influence of the drug at the time of the murder. We have previously rejected a similar argument. *See Turner v. State,* 37 So.3d 212, 224 (Fla.2010) (concluding that the CCP was proper where, despite the defendant's assertion that he was high at the time of the murder, the trial court found that defendant was high leading up to the murder, but not at the time of the murder), *cert. denied,* —— U.S. ——, 131 S.Ct. 426, 178 L.Ed.2d 332 (2010).

[19] As we explained in *Turner,* "[e]ven if the trial court had found that [the defendant] was addicted to crack cocaine, such a finding would not necessarily preclude the CCP aggravator from being found." *Id.* at 224. "[A] chronic drug abuser can still act in accordance with a deliberate plan where the evidence indicates that the person 'was fully cognizant of his actions on the night of the murder.' " *Id.* (quoting *Guardado v. State,* 965 So.2d 108, 117 (Fla.2007)).

Here, Russ was fully cognizant of his actions the night before the murder and on the morning of the murder. The night before the murder, Russ ran from the police, abandoned his vehicle, and slept on a roof to avoid being arrested by the police. Russ watched as his car was towed and decided that he needed to obtain another vehicle. The next morning, he saw Leinen leave her home and selected her as his victim. Once inside of her home, Russ spent the day doing laundry, showering, eating, and collecting valuable items that he intended to steal. Russ was able to immobilize Leinen and proceeded to beat, strangle and stab her. At some point, ***196** Russ was able to locate Leinen's keys and load the items he intended to steal into her car. Then, Russ got into Leinen's car and drove away. Later, he pawned Leinen's belongings at a pawn shop. Russ was able to drive to Texas, where he attempted to commit another crime in the exact same way that he carried out Leinen's murder. All of these actions are consistent with someone who was fully cognizant of his actions at the time of the murder. Therefore, the trial court's finding of heightened premeditation is based on competent substantial evidence.

[20] Finally, Russ did not present evidence or argument to satisfy the fourth element before the trial court and does not now challenge the fourth element. However, it is clear that the fourth element—that the murder was committed with no pretense of legal or moral justification—was satisfied. The record is devoid of any evidence of a threatening act by Leinen prior to the murder that would constitute a pretense of legal or moral justification. *See Williamson v. State,* 511 So.2d 289 (Fla.1987) (rejecting Williamson's claim that even if the murder was cold, calculated, and premeditated, he had a pretense of moral or legal justification for having committed the murder because he was afraid a fellow inmate would harm his partner or himself for an unpaid debt). Accordingly, we affirm the trial court's finding of CCP and deny relief on this claim.

HAC

Russ challenges the trial court's finding of the HAC aggravator. Russ contends that because the evidence was inconclusive regarding whether Leinen was conscious, the finding of the HAC aggravator was improper. Russ claims that the absence of signs of a struggle or defensive wounds precludes a finding that Leinen endured prolonged suffering or foreknowledge of her impending death and submits that this aggravator was based on pure speculation. We disagree.

[21] **[22]** **[23]** **[24]** In order for the HAC aggravator to apply, the murder must be conscienceless or pitiless and unnecessarily torturous to the victim. *See Rogers v. State,* 783 So.2d 980, 994 (Fla.2001). The HAC aggravator applies in physically and mentally torturous murders which can be illustrated by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. *See Barnhill v. State,* 834 So.2d 836, 850 (Fla.2002) (citing *Williams v. State,* 574 So.2d 136 (Fla.1991)). HAC concentrates "on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death." *Barnhill,* 834 So.2d at 850 (citing *Brown*

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v. State, 721 So.2d 274, 277 (Fla.1998)); *Evans v. State,* 800 So.2d 182, 194 (Fla.2001). Thus, there does not need to be a showing that the defendant intended or desired to inflict torture; the torturous manner of the victim's death is evidence of a defendant's indifference. *See Barnhill,* 834 So.2d at 850 (citing *Brown,* 721 So.2d at 277).

[25] **[26]** The victim's mental state may be evaluated in accordance with common-sense inferences from the circumstances. *See Hernandez v. State,* 4 So.3d 642, 669 (Fla.2009) (citing *Swafford v. State,* 533 So.2d 270, 277 (Fla.1988)). To support HAC, the evidence must show that the victim was conscious and aware of impending death. *Hernandez,* 4 So.3d at 669 (citing *Douglas v. State,* 878 So.2d 1246, 1261 (Fla.2004)). However, this Court has explained that the actual length of the victim's consciousness is not the only factor relevant to HAC—"[F]ear, emotional ***197** strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." *Hernandez,* 4 So.3d at 669 (quoting *James v. State,* 695 So.2d 1229, 1235 (Fla.1997)).

In the present case, Leinen was beaten, stabbed, and strangled. We have explained, "Because strangulation of a conscious victim involves foreknowledge and the extreme anxiety of impending death, death by strangulation constitutes prima facie evidence of HAC." *Barnhill,* 834 So.2d at 850 (citing *Mansfield v. State,* 758 So.2d 636, 645 (Fla.2000)). The HAC aggravator is often found where the victim had been stabbed multiple times prior to death or was beaten to death. *See Williams v. State,* 967 So.2d 735, 762–63 (Fla.2007) (concluding HAC proper where the defendant repeatedly stabbed the victim); *Guardado v. State,* 965 So.2d 108, 116 (Fla.2007) (concluding that HAC was proper where the defendant repeatedly stabbed the victim); *Ibar v. State,* 938 So.2d 451, 474–75 (Fla.2006) (concluding that HAC was proper where the defendant beat the victim continually until finally shooting him).

[27] Here, the medical examiner testified that abrasions on Leinen's neck indicated she was moving from right to left, pulling away from the ligature around her neck and that she would have been in a "significant amount of discomfort, both physically and ... mentally." Moreover, Leinen sustained multiple blunt force trauma injuries and stabbing injuries, each of which would have been painful. It does not logically follow that Russ would have employed so many different methods to kill Leinen had she been rendered unconscious prior to the attack. Further, based on the evidence, common sense indicates that the absence of defensive wounds on Leinen's body resulted from either her cooperation or being bound prior to being murdered—it does not, as Russ contends, preclude a finding of HAC. Thus, we conclude that the trial court's finding of the HAC aggravator is supported by competent substantial evidence.

Proportionality

Russ challenges the proportionality of his death sentence. As explained below, Russ is not entitled to relief on this claim.

First, Russ argues that the trial court abused its discretion in the weighing process itself. Russ initially phrases this argument to imply that the trial court failed to consider valid mitigation in violation of *Eddings v. Oklahoma,* 455 U.S. 104, 114–15, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (explaining that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence), and *Rogers v. State,* 511 So.2d 526 (Fla.1987) (same). The argument contained in Russ's initial brief is actually an argument that the trial court's sentencing process violated the standards articulated in *Eddings* and *Rogers* because the "trial court glossed over the mitigating factors and improperly abused its discretion in giving them little weight, with no explanations why." Russ is really challenging the trial court's assignment of weight to the mitigation below. This argument is not compelling.

[28] "We review the weight the trial court ascribes to mitigating factors under the abuse of discretion standard." *Smith v. State,* 998 So.2d 516, 527 (Fla.2008). In the present case, the trial court considered each mitigating circumstance, provided a recitation of the factual basis for the mitigating circumstance, and assigned weight to each mitigating circumstance. After conducting its analysis and weighing the sentencing factors, the trial court concluded that "the aggravating factors outweigh ***198** the mitigating circumstances for the murder of Madeleine Leinen."

[29] Russ claims that the trial court should have explained its findings and cites to *Merck v. State,* 975 So.2d 1054, 1065 (Fla.2007), and *Offord v. State,* 959 So.2d 187 (Fla.2007), in support of this argument. Pursuant to section 921.141(3), Florida Statutes (2007), the trial court is required to make independent findings on aggravation, mitigation, and weight, "supported by specific written findings of fact." § 921.141(3), Fla. Stat. (2007). Here, there was no abuse of discretion because the trial court thoroughly considered the aggravating

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and mitigating circumstances at issue and supported each with specific written findings of fact. *See Dennis v. State,* 817 So.2d 741, 763 (Fla.2002). Thus, we will not reweigh these mitigators.

Russ also argues that the trial court failed to properly document the requisite findings of fact for mitigating circumstances and that the existence of mitigation regarding his long-term substance abuse renders the death sentence disproportionate. Russ cites to numerous cases in support of this argument. *See Mahn v. State,* 714 So.2d 391, 401 (Fla.1998) (concluding that the trial court erred in failing to give Mahn's extensive and uncontroverted history of drug and alcohol abuse any weight as a nonstatutory mitigating circumstance); *Jackson v. State,* 704 So.2d 500, 507 (Fla.1997) (concluding that the trial court erred in summarily disposing of statutory and nonstatutory mitigation); *Ferrell v. State,* 653 So.2d 367, 371 (Fla.1995) (concluding that the trial court's written findings were insufficient); *Nibert v. State,* 574 So.2d 1059, 1063 (Fla.1990) (physical evidence at the scene of the crime established that the defendant had been drinking heavily on the day of the murder); *Ross v. State,* 474 So.2d 1170, 1174 (Fla.1985) (concluding that the trial court erred in rejecting the mitigating circumstances of extreme mental or emotional distress and impaired mental capacity in view of the evidence that the appellant was an alcoholic and was intoxicated at the time of the homicide). In each of the cases cited by Russ, the trial court completely failed to consider uncontroverted record evidence or summarily rejected potential mitigation. In the instant case, the trial court made specific findings of mitigation related to Russ's long-term substance abuse problems. Further, the weight the trial court assigned to the mitigation does not amount to an abuse of discretion.

[30] **[31]** Next, this Court must conduct a qualitative analysis and comparison of other capital cases to determine whether the death sentence is proportionate. Russ contends that regardless of the aggravation present in his case, imposition of the death sentence is disproportionate because his case is among the most mitigated of cases. "In reviewing a death sentence for proportionality, we ensure that the death penalty is 'reserved only for those cases where the most aggravating and least mitigating circumstances exist.' " *McGirth v. State,* 48 So.3d 777, 796 (Fla.2010) (quoting *Terry v. State,* 668 So.2d 954, 965 (Fla.1996)), *cert. denied,* —— U.S. ——, 131 S.Ct. 2100, 179 L.Ed.2d 898 (2010). This Court's "review on proportionality is not a comparison between the number of aggravators and mitigators." *McGirth,* 48 So.3d at 796; *see Barnes v. State,* 29 So.3d 1010, 1028 (Fla.), *cert. denied,* —— U.S. ——, 131 S.Ct. 234, 178 L.Ed.2d 155 (2010). Proportionality review requires this Court to engage in a qualitative review of the "totality of the circumstances and compare the present case with other capital cases in which this Court has found that death was a proportionate punishment." *Wright v. State,* 19 So.3d 277, 303 (Fla.2009) (citing ***199** *Urbin v. State,* 714 So.2d 411, 416 (Fla.1998)).

[32] A qualitative review of the totality of the circumstances in this case and a comparison between this case and other capital cases reveals that the death penalty here is proportionate. We have concluded that the death sentence was proportionate in cases where there was less aggravation and similar mitigation. *See Boyd v. State,* 910 So.2d 167 (Fla.2005) (concluding that the death sentence was proportionate where the trial court found two aggravators, one statutory mitigator, and five nonstatutory mitigating factors); *Evans v. State,* 808 So.2d 92 (Fla.2001) (concluding that Evans' death sentence was proportionate where the trial court found two aggravating factors, one statutory mitigator, and the existence of eleven nonstatutory mitigators).

Moreover, we have found the death sentence proportionate in the face of fewer aggravators and significantly more mitigators. *See Johnston v. State,* 863 So.2d 271, 286 (Fla.2003) (concluding the death sentence was proportionate where the trial court found the existence of two aggravating circumstances and one statutory mitigating factor and trial court found the existence of 26 nonstatutory mitigating factors); *see also Blackwood v. State,* 777 So.2d 399 (Fla.2000) (strangulation murder; HAC aggravator; one statutory mitigator and eight nonstatutory mitigators); *Hauser v. State,* 701 So.2d 329 (Fla.1997) (victim strangled; three aggravators of HAC, CCP, and pecuniary gain, balanced against one statutory mitigator and four nonstatutory mitigators).

We have also found the death sentence proportionate where there was similar aggravation and more mitigation. *See Willacy v. State,* 696 So.2d 693, 695 (Fla.1997) (defendant lay in wait for victim, beat and strangled her; aggravating circumstances of committed in the course of a robbery, arson, and burglary; committed to avoid lawful arrest, committed for pecuniary gain, HAC, and CCP; no statutory mitigating factors and 31 nonstatutory mitigating factors). Finally, we have found the death sentence proportionate in the face of similar aggravation and similar mitigation. *See Zack v. State,*

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753 So.2d 9 (Fla.2000) (concluding the death penalty was proportionate where the trial court found the existence of four valid aggravating factors, three statutory mitigators, and three nonstatutory mitigators).

Russ's assertion that his case is among the most mitigated is without merit. Because the trial court did not abuse its discretion, we will not reweigh the trial court's assignment of weight below. Accordingly, we find that Russ's death sentence is proportionate.

Issue III: Sufficiency of the Evidence

[33] **[34]** Russ does not challenge the trial court's acceptance of his guilty plea in this appeal. Nevertheless, we have a mandatory obligation to review the basis of Russ's conviction for first-degree murder. *See Barnes v. State,* 29 So.3d 1010, 1020 (Fla.2010) (citing *Bevel v. State,* 983 So.2d 505, 516 (Fla.2008)). In cases involving imposition of a death sentence after the defendant has pleaded guilty to a charge of first-degree murder, "this Court's [mandatory] review shifts to the knowing, intelligent, and voluntary nature of that plea." *Barnes,* 29 So.3d at 1020 (alteration in original) (quoting *Tanzi v. State,* 964 So.2d 106, 121 (Fla.2007)). We must "scrutinize the plea to ensure that the defendant was made aware of the consequences of his plea, was apprised of the constitutional rights he was waiving, and pled guilty voluntarily." *Winkles v. State,* 894 So.2d 842, 847 (Fla.2005) (quoting *Ocha v. State,* 826 So.2d 956, 965 (Fla.2002)).

***200** A review of the record reveals that Russ's plea was made knowingly, intelligently, and voluntarily. Russ was represented by trial counsel on February 6, 2008. That day, trial counsel informed the trial court that Russ "would be withdrawing his pleas of not guilty, tendering a plea of guilty to Count One, to first degree premeditated murder." Prior to acceptance of Russ's plea, the trial court asked the State to provide a factual basis for the plea. *See* Fla. R.Crim. P. 3.172(a). The State provided a factual basis for the plea indicating, among other things, that Russ was responsible for the May 7, 2007, murder of Leinen, whose cause of death was a combination of blunt force trauma, stabbing, and ligature strangulation on May 7, 2007. Trial counsel stipulated that the State could establish the defendant's guilt by competent evidence and Russ agreed with the factual basis offered by the State. *See* Fla. R.Crim. P. 3.172(e). Further, the trial court inquired into whether exculpatory DNA evidence existed. The State informed the trial court that there appeared to be DNA evidence that would inculpate Russ. Defense counsel and Russ agreed. *See* Fla. R.Crim. P. 3.172(d). Russ testified that he understood that by entering the plea he was facing life in prison or a death sentence. *See* Fla. R.Crim. P. 3.172(c)(1)-(6).

Based on the plea colloquy, the trial court found that Russ was alert and competent. The trial court also found "the plea to be freely and voluntarily made with knowledge of the consequences after advice of competent counsel with whom [Russ was] satisfied. [The trial court also found a] sufficient factual basis for the plea based on the proffer of the State [and the] stipulation of defense counsel and the defendant." The trial court then accepted Russ's plea of guilty in open court. *See* Fla. R.Crim. P. 3.172(b).

[35] We conclude that Russ's guilty plea in this case was knowing, intelligent, and voluntary. Russ was made aware of the consequences of his plea and was apprised of the constitutional rights he was waiving as a result. Therefore, the plea and conviction were properly entered. Further, the factual basis for the plea, which was confirmed by defense counsel and Russ and was proven by the forensic evidence and Russ's confessions, provides competent, substantial evidence to support the conviction for first-degree murder and Russ's other convictions in this case. Accordingly, we affirm Russ's convictions and sentences.

It is so ordered.

CANADY, C.J., and LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

PARIENTE, J., concurs with an opinion.

PARIENTE, J., concurring.

I agree with the majority's affirmance of both the conviction for first-degree murder and the death sentence. When a defendant waives mitigation, as he did in this case, the trial judge's obligation under *Muhammad v. State,* 782 So.2d 343, 363 (Fla.2001), is to consider *all* mitigation anywhere in the record to the extent that it is believable and uncontroverted, including information contained within a PSI. *See also Grim v. State,* 841 So.2d 455, 462 (Fla.2003) ("Mitigating evidence must be considered and weighed when contained 'anywhere in the record, to the extent that it is believable and uncontroverted.' " (quoting *Robinson v. State,* 684 So.2d 175, 177 (Fla.1996))). This Court's decision in *Hamblen*

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v. State, 527 So.2d 800, 804 (Fla.1988), and its progeny make clear that while a defendant has a right to waive the presentation of mitigating evidence, the ***201** trial court must undertake the obligation of ensuring that the propriety of a defendant's sentence has been established according to the law. "This requirement 'applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence.' " *Muhammad,* 782 So.2d at 363 (quoting *Farr v. State,* 621 So.2d 1368, 1369 (Fla.1993)).

In my specially concurring opinion in *Muhammad,* I fully explained the basis for imposing additional obligations upon the trial court when faced with a defendant who decides to waive the presentation of mitigation during the penalty phase of a capital proceeding:

> This issue [of a defendant's waiver of mitigation] "involves the friction between an individual's right to control his destiny and society's duty to see that executions do not become a vehicle by which a person could commit suicide." *Hamblen v. State,* 527 So.2d 800, 802 (Fla.1988). We recognized in *Hamblen,* that "[t]his does not mean that courts of this state can administer the death penalty by default. The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence." *Id.* at 804.
>
> ....
>
> ... [P]ursuant to Florida's statutory scheme, whether or not the death penalty should be imposed must be determined by an independent review of the aggravating circumstances and mitigating factors to ensure that the death penalty is fairly, reliably and uniformly imposed. In all capital cases, this Court is constitutionally required "to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases." *Porter v. State,* 564 So.2d 1060, 1064 (Fla.1990); *see, e.g., Urbin v. State,* 714 So.2d 411, 416 (Fla.1998); *Tillman v. State,* 591 So.2d 167, 169 (Fla.1991). We cannot permit this constitutional obligation to be thwarted by the defendant's own actions or inactions.
>
> ....
>
> As with an appeal, during the penalty phase of a capital trial, the defendant has already been convicted. At this point, the State has an overriding interest in the integrity of the process by which the death penalty is imposed. As the United States Supreme Court has emphasized, the difference between the imposition of the death penalty and any other penalty gives rise to "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion). We have already recognized this interest when we have required the trial court to consider any evidence of mitigation in the record, even if the defendant asks the court not to consider mitigating evidence.

Muhammad, 782 So.2d at 369–70 (Pariente, J., specially concurring).

I also explained my position in *Muhammad* to take a trial court's waiver obligations one step further and endorsed a prospective rule providing for the appointment of special counsel to present available mitigation:

> Because of the tremendous responsibilities placed on the trial court and this Court in death penalty cases, rather than leave the appointment of counsel to the trial court's discretion on a case-by-case basis, I would thus adopt a prospective rule that would provide for the appointment ***202** of special counsel to present available mitigation for the benefit of the jury, the trial court and this Court in order to assist the judiciary in performing our statutory and constitutional obligations. This procedure, of course, would not prevent the defendant himself or herself from arguing in favor of the death penalty.
>
> Adoption of this procedure would serve to promote several important interests critical to the integrity of the process: (1) it would assist any advisory jury in making a more informed sentencing recommendation of either death or life and in fulfilling its statutory obligation to weigh mitigating and aggravating circumstances under section 924.141(2)(b); (2) it would assist the trial court in making a more informed decision as to whether to impose the death sentence by ensuring that the court has before it the available mitigating evidence; and (3) it would facilitate this Court's constitutionally mandated obligation to review each death sentence for proportionality.

Id. at 370–71.

In this case, the trial judge took the extra measure of appointing special counsel to investigate and present mitigating evidence to assist her in sentencing Russ, and special counsel did, in fact, present the court with additional mitigation to consider. I commend the trial judge for faithfully

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complying with the obligations imposed by our precedent when there is a waiver of mitigation and also for taking the extra step of appointing special counsel to further ensure the reliability of Russ's sentence. As evidenced by her sentencing order, the trial judge found both statutory and nonstatutory mitigation. In turn, these findings assisted this Court in performing its constitutional obligation to review the proportionality of Russ's sentence of death.

All Citations

73 So.3d 178, 36 Fla. L. Weekly S527

Footnotes

1 Russ was 45 years old at the time of the murder.

2 *Koon v. Dugger*, 619 So.2d 246 (Fla.1993).

3 Among other things, special counsel noted the existence of Russ's: (1) substance abuse addiction, (2) physical and verbal abuse that he experienced as a child, (3) relationship with his brother, (4) multiple attempts to cure his addiction, (5) acceptance of responsibility for the crimes, (6) courtroom behavior, (7) obtaining a GED, (8) employment as a roofer, (9) depression, (10) training as a counselor, (11) relationship with his fiancée's son and with his 80–year–old aunt, (12) lack of violent criminal history, and (13) desire to spare people from the penalty phase proceedings.

4 *Spencer v. State*, 615 So.2d 688 (Fla.1993).

5 *Muhammad v. State*, 782 So.2d 343 (Fla.2001).

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EXHIBIT 6

107 So.3d 406 (Table)
Unpublished Disposition
(The decision of the Supreme Court of Florida is referenced in the Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.')
Supreme Court of Florida.

David Byron RUSS, Appellant(s)

v.

STATE of Florida, Appellee(s).

No. SC12–509.
|
Nov. 27, 2012.

Opinion

***1** James L. Driscoll, Jr., discharged counsel for David Byron Russ, a prisoner under sentence of death, appeals the circuit court's order finding Russ competent to discharge his postconviction counsel and waive postconviction proceedings filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, sec. 3(b)(1), Fla. Const.

After this Court affirmed Russ's death sentence on direct appeal, *see Russ v. State,* 73 So.3d 178 (Fla.2011), James L. Driscoll, Jr., was appointed as postconviction counsel for Russ. On November 1, 2011, Russ filed a pro se motion indicating that he wanted to terminate postconviction counsel and proceedings. After a hearing pursuant to *Durocher v. Singletary,* 623 So.2d 482, 485 (Fla.1993) (requiring trial courts to evaluate defendants to determine if they understand the consequences of waiving collateral counsel and proceedings), the circuit court found Russ competent and issued an order discharging counsel and dismissing postconviction proceedings.

Discharged counsel does not assert that Russ is incompetent; however, discharged counsel notes that counsel's silence on the matter should not be taken as proof of Russ's competency. "[T]he relevant test for competency in the context of waiving collateral counsel and collateral proceedings in Florida is whether the person seeking waiver has the capacity to 'understand[ ] the consequences of waiving collateral counsel and proceedings.' " *Trease v. State,* 41 So.3d 119, 124–25 (Fla.2010) (quoting *Slawson v. State,* 796 So.2d 491, 502 (Fla.2001)). This Court reviews the postconviction court's determination of the defendant's competency during a *Durocher* hearing for abuse of discretion. *Alston v. State,* 894 So.2d 46, 54 (Fla.2004). "The party challenging the defendant's waiver request bears the burden of proving that the defendant is incompetent." *Trease,* 41 So.3d at 125 (quoting *Slawson,* 796 So.2d at 502).

In this case, the transcript of the *Durocher* hearing reflects that the trial court conducted a *Faretta*-typeevaluation of Russ, eliciting that Russ completed the ninth grade, started the tenth grade, later received his General Educational Development diploma and a college scholarship, and was not on medication or any other drugs. Russ also confirmed to the circuit court that he did not believe himself to have any mental defects, and that he understood the consequences of his waiver. Additionally, Russ has previously been found competent to stand trial and then to waive his right to trial when he entered his guilty plea, which this Court affirmed on appeal. *Russ,* 73 So.3d at 200; *see Durocher,* 623 So.2d at 484 ("A presumption of competence attaches from a determination of competency to stand trial."). Thus, the trial court did not abuse its discretion in finding Russ competent to waive postconviction counsel and proceedings.

Discharged counsel contends that because Russ filed a motion to waive postconviction counsel and proceedings before counsel had filed any postconviction claims, counsel has not had adequate time to investigate Russ's case to determine what postconviction claims are available. Accordingly, discharged counsel claims Russ's waiver is not fully intelligent or voluntary because he does not have a clear understanding of what claims he is waiving. This Court reviews the postconviction court's determination of whether the defendant's waiver of further postconviction counsel and proceedings was intelligent, knowing, and voluntary, for abuse of discretion. *Trease,* 41 So.3d at 124.

***2** The transcript reflects that Russ was fully aware of and understood the consequences of waiving postconviction counsel and proceedings. The colloquy provides that the trial court repeatedly stressed the implications of dismissing postconviction counsel and proceedings. Russ stated on the record that just like he waived his right to a jury trial, he wanted to take responsibility for his actions and was willing to face the consequences of those actions, including his death sentence. Russ also affirmed that his decision to waive postconviction proceedings was reached on his own, with no outside pressure. He affirmed that he was not coerced or

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threatened to make this decision, and that his decision was voluntary.

The colloquy conducted during Russ's *Durocher* hearing follows the procedure outlined in this Court's decisions in *Durocher* and *Trease*. *See Durocher,* 623 So.2d at 485; *Trease,* 41 So.3d at 122. Russ's responses to the questions posed by the trial court demonstrate that he comprehended his legal options and the consequences of his waiver. Based on the colloquy conducted and the answers provided by Russ, the trial court did not abuse its discretion in determining that Russ knowingly, intelligently, and voluntarily waived his right to postconviction counsel and proceedings.

Finally, discharged counsel asserts that should Russ change his mind regarding his waiver of postconviction rights before time limitations expire, counsel would have a very limited time to adequately investigate claims and represent Russ in postconviction proceedings. Discharged counsel's concern is unfounded. This Court has held that absent "attacking the validity of the prior waiver [,] ... 'a mere change of mind is an insufficient basis for setting aside a previous waiver.' " *Trease,* 41 So.3d at 126 (quoting *James v. State,* 974 So.2d 365, 368 (Fla.2008)).

Accordingly, we affirm the circuit court's order finding Russ competent to discharge postconviction counsel and waive postconviction proceedings.

It is so ordered.

POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

All Citations

107 So.3d 406 (Table), 2012 WL 5991331

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EXHIBIT 7

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID BYRON RUSS,

Petitioner,

v. No. 6:18-cv-00994-RBD-DCI

JULIE L. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

CAPITAL CASE

Respondent.
_____/

PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PRISONER IN STATE CUSTODY UNDER A SENTENCE OF DEATH

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I. Introduction

David Byron Russ, through counsel, petitions for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner is a death-sentenced Florida prisoner incarcerated at the Union Correctional Institution. Respondent Julie L. Jones is the Secretary of the Florida Department of Corrections and, in that capacity, is responsible for Petitioner's custody and for carrying out an execution warrant.

Petitioner has been on Florida's death row for nearly 10 years, but his case has never been reviewed by a federal court. This initial § 2254 petition is being filed less than five months after this Court appointed undersigned counsel, the Capital Habeas Unit ("CHU") of the Office of the Federal Public Defender for the Northern District of Florida, to represent Petitioner under 18 U.S.C. § 3599. The Court's August 10, 2018 appointment of the CHU is the first time that Petitioner has ever had federal legal representation.

The Court's appointment order directed the CHU to file any § 2254 petition within 90 days (later extended to 135 days), with a procedural memorandum of law explaining why the petition should not be summarily dismissed as time-barred and/or unexhausted. ECF Nos. 10, 13. On December 23, 2018, the CHU filed this petition and a procedural memorandum of law. The procedural memorandum explains that the Court should not prematurely dismiss the petition on any grounds, including timeliness and exhaustion. ECF No. 17.

The CHU's investigation of Petitioner's case so far has uncovered significant new evidence of federal constitutional violations arising from Petitioner's conviction and death sentence. Based on this evidence, the Office of the Capital Collateral Regional Counsel—Middle ("CCRC-M"), a state agency responsible for representing death-sentenced prisoners in Florida post-conviction proceedings, has informed the CHU that it will be moving for a state-court appointment in Petitioner's case to pursue potential state collateral remedies. As described further below, Petitioner has filed a separate motion for a temporary stay pending the state courts' decision on whether to appoint CCRC-M as state counsel. ECF No. 18.

Although counsel could not conduct a full investigation of this case in just four months, the evidence the CHU has developed to this point indicates that Petitioner's guilty plea, waiver of jury sentencing and mitigation, and waiver of initial state post-conviction review each occurred within the context of a pre-existing mental illness, as well as a decompensating process that took place between his arrest and critical stages of the litigation. These psychiatric factors undermined the competency of Petitioner's plea and waivers, and may be the primary reason why the ultimate result of the proceedings was a death sentence. Nevertheless, defense counsel never raised the competency issue, and only cursory examinations of Petitioner's competency were ever performed by the state courts. As a result, the full extent of Petitioner's mental conditions has never been considered by any court.

New evidence of Petitioner's incompetence to plead and waive during the state proceedings is not the only product of the CHU's investigation and legal development so far. This petition explains that Petitioner's conviction and death sentence resulted not only from decisions he made while incompetent, but also federal constitutional violations by the state courts. These errors include Petitioner's sentencing pursuant to a Florida state statute that the United States Supreme Court recently declared unconstitutional, and the denial of his right to the effective assistance of counsel. These federal constitutional issues each deserve review.

Based on the claims below, and for the reasons that will be addressed in Petitioner's forthcoming substantive memorandum of law, Petitioner's custody on Florida's death row is unconstitutional, and relief should be granted under § 2254.

II. Special Procedural Issues

This case presents the following special procedural issues at the outset, some of which are discussed in greater detail in Petitioner's procedural memorandum of law and/or stay motion: (1) counsel's ongoing investigation, (2) the petition's timeliness, (3) the petition's "mixed" status, (4) Petitioner's stay motion, and (5) Petitioner's request to file a substantive memorandum of law following exhaustion.

A. Counsel's Ongoing Investigation

As noted above, this Court appointed the CHU and immediately imposed a 90-day deadline (later extended to 135 days), to file a § 2254 petition. On December

18, 2018, the CHU filed a § 2254 petition for Petitioner in order to meet the Court's deadline. ECF No. 16. The petition includes significant newly-discovered evidence uncovered by the CHU's investigation so far, including evidence demonstrating not only numerous federal constitutional violations by the state courts, but also indicating that, as a result of numerous failures by the courts and counsel, Petitioner may not have been competent to plead guilty or waive his subsequent rights prior to being sentenced to death. The evidence is significant enough that CCRC-M, the state agency responsible for representing death-sentenced Florida prisoners in state post-conviction proceedings, is seeking an appointment to the case in state court to assess Petitioner's potential state remedies.

However, the investigation and legal development of Petitioner's claims is necessarily incomplete. A capital case like this one cannot be competently and adequately investigated by new counsel in just four months. *Cf. McFarland v. Scott*, 512 U.S. 849, 855-56 (1994). The CHU still has not received numerous records in this case. Red flags and leads in the evidence the CHU has discovered so far must be followed up on. In addition to the complexity of Petitioner's case and the scope of necessary investigation, logistical issues impact the time needed for a proper investigation. Counsel are bound by the prison's visitation hours, and are further limited in that they can only interview Petitioner when there are available visitation

rooms. Any medical experts retained by counsel are similarly constricted, and counsel must often wait weeks or months for openings in their expert's schedule.

The CHU filed the petition in order to meet the Court's deadline, but more time is needed to fully investigate, and ultimately exhaust, federal constitutional claims based on new evidence. The claims in this petition are based on the evidence the CHU was able to develop during the few months allotted by this Court, but there is every indication that more evidence will be uncovered, supporting the claims herein and possibly additional claims, as the CHU's investigation proceeds.

Because of the short deadline imposed by this Court, this petition should not be considered the last word on Petitioner's federal habeas claims, which the CHU should be permitted to amend. In addition, state counsel have informed the CHU that they will be moving for an appointment in state court within 30 days to further investigate and ultimately exhaust Petitioner's claims. Under those circumstances, action by the Court on the § 2254 petition at this time would be premature. At a minimum, as discussed below, the Court should grant Petitioner's motion for a temporary stay pending the state courts' decision on CCRC-M's appointment, *see* ECF No. 18, and allow the investigation to continue during that time.

B. The Petition's Timeliness

In accordance with this Court's August 10, 2018, order, ECF No. 10, Petitioner has filed a procedural memorandum of law discussing why this petition should not be summarily dismissed as time-barred, ECF No. 17.

In the procedural memorandum, Petitioner explains that although the statutory limitations period for an initial § 2254 proceeding expired before the December 2018 petition was filed, that limitations period is not jurisdictional, and the CHU's investigation so far has revealed evidence that the recognized exception of equitable tolling applies here. *See Holland v. Florida*, 560 U.S. 631 (2010).

For the reasons discussed further in Petitioner's procedural memorandum of law, the Court should not dismiss prematurely this petition as time barred. *See* ECF No. 17.

C. The Petition's "Mixed" Status and Exhaustion

As required by this Court's August 10, 2018, order, Petitioner's procedural memorandum of law also addresses why this petition should not be dismissed as unexhausted or procedurally defaulted. ECF No. 17.

In the procedural memorandum, Petitioner explains that the petition is presently "mixed," i.e., contains both exhausted and unexhausted claims. *See Rhines v. Weber*, 544 U.S. 269, 274 (2005). Specifically, the petition presents several claims that were exhausted in state court on direct appeal, including the improper

application of certain aggravating factors, among other issues. *See, e.g., infra* at 119-29; *see also Russ v. State*, 73 So. 3d 178 (Fla. 2011).

However, the petition also presents claims that have not yet been exhausted in state court. These claims are based on new evidence uncovered by the CHU that has never been reviewed by any state or federal court. For example, as noted above, the petition presents an unexhausted claim that Petitioner was incompetent at the time of his guilty plea and subsequent waivers. *See infra* at 52-54, 70-72, 112-13. The petition also presents unexhausted claims related to trial counsel's ineffectiveness. *See infra* at 54-70, 72-80, 81-86, 95-102. The petition additionally presents a claim under the Supreme Court's recent decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), based on the unconstitutional capital scheme that produced Petitioner's death sentence. *See infra* at 115-19. Other unexhausted claims are included as well.

With respect to the unexhausted claims, Petitioner's procedural memorandum explains, federal review is not precluded because good cause exists for the previous failure to exhaust and the claims are potentially meritorious. ECF No. 17. For those reasons, the memorandum explains, the petition should be treated in accordance with the procedure approved by the Supreme Court in *Rhines v. Weber*, 544 U.S. 269, which allows district courts to stay a mixed petition rather than dismissing the unexhausted claims. *Id.* At this time, Petitioner has sought only a temporary stay

pending the state courts' decision on whether to appoint state counsel to seek state-court relief for Petitioner. ECF No. 18. However, a full *Rhines* stay pending exhaustion may ultimately be necessary.

For the reasons discussed further in his procedural memorandum of law, the Court should not dismiss prematurely this petition as unexhausted. *See* ECF No. 17.

D. Petitioner's Temporary Stay Motion

In addition to this petition and the procedural memorandum of law, Petitioner has filed a motion for a temporary stay pending the state courts' decision whether to appoint CCRC-M as state counsel to exhaust Petitioner's federal constitutional claims. ECF No. 18.

In the motion, Petitioner explains that awaiting the state courts' appointment of CCRC-M before proceeding further into the federal case not only promotes exhaustion as required by § 2254(b), but also makes practical sense. As noted, the CHU's investigation into this case was constricted by a short deadline imposed by this Court. The CHU's development of Petitioner's claims, particularly his claims related to mental illness and incompetency, are incomplete. The CHU still has not received numerous records in this case. Red flags and leads in the evidence the CHU has discovered so far must be pursued. For example, counsel have still not received the State Attorney's Office files they have requested. Counsel also have an outstanding request for Petitioner's Department of Corrections files. Counsel have

not yet received access to Petitioner's sealed Presentence Investigation Report. A temporary stay pending CCRC-M's appointment will allow more time for CHU counsel to obtain these records and continue investigating the case before prematurely proceeding further.

At this time, Petitioner has sought only a temporary stay pending the state courts' decision on whether to appoint state counsel to seek state-court relief for Petitioner. ECF No. 18. However, a full *Rhines* stay pending exhaustion may ultimately be necessary. Petitioner's request for a temporary stay is supported by the *Rhines* factors. Those facts suggest that a stay pending full exhaustion is appropriate, and therefore certainly also support a temporary stay.

For the reasons discussed further in his motion, the Court should grant Petitioner's request for a temporary stay. *See* ECF No. 18.

E. Request for Leave to File a Substantive Memorandum of Law

Petitioner requests leave to file a substantive memorandum of law addressing the merits of his § 2254 claims. This petition, like all § 2254 petitions, is a fact pleading governed by the Federal Rules of Civil Procedure. *See Mayle v. Felix*, 545 U.S. 644, 670 (2005); *Hittson v. GDCP Warden*, 759 F.3d 1210, 1265 (11th Cir. 2014). As such, the petition sets forth Petitioner's claims for relief and facts supporting those claims, but does not contain Petitioner's complete legal arguments, which are more appropriately presented in a separate memorandum.

Allowing Petitioner to file a substantive memorandum of law is consistent with Rule 2(c) of the Rules Governing Section 2254 Cases, which requires habeas petitions to "specify all the grounds for relief available to the petitioner" and to "state the facts supporting each ground," but does not require legal arguments supporting the claims to be included within the pleading itself. As the Eleventh Circuit has recognized, Rule 2(c) simply requires "fact pleading . . . as authorized under Federal Rule of Civil Procedure 8(a)." *Hittson*, 759 F.3d at 1265; *see also Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007) (explaining that federal civil pleadings need only contain "enough facts to state a claim to relief that is plausible on its face").

Courts routinely allow § 2254 petitioners to file separate memoranda of law in support of their pleadings, including in the Middle District of Florida. *See, e.g.*, *Cooper v. Secretary, Dep't of Corrs.*, No. 8:08-cv-5-T-27MAP, 2011 WL 795812, at *1 (M.D. Fla. 2011) (considering § 2254 petition and separate memorandum of law). In a recent capital case in the Northern District, Judge Hinkle explicitly rejected the suggestion that a § 2254 petitioner should have included all of his legal arguments within his petition. *Hernandez v. Jones*, No. 3:15-cv-428, ECF No. 10 (N.D. Fla. 2015) (Hinkle, J.) ("The respondent asserts that any legal argument should have been included in, or submitted simultaneously with, the petition itself . . . . It makes sense, though, to allow a petitioner to file a memorandum of law and to give the petitioner a reasonable period in which to do so."). Indeed, allowing separate

legal memoranda is particularly important in capital cases, where legal arguments can be particularly complex, and often must address voluminous factual records developed during lengthy trial and state post-conviction proceedings.

Consistent with this precedent, this Court should grant leave for Petitioner to file a substantive memorandum of law in support of the claims in this petition.

III. Background and Procedural History

A. Background

1. Petitioner grew up in "hell."[1] Born to a schizophrenic, bipolar father who targeted him for sadistic physical and emotional abuse and a bipolar mother who neglected and ultimately abandoned him, Petitioner's childhood was marred by terror and deprivation.

2. For the first fourteen years of his life, Petitioner was beaten with whatever his father (Arnold) had in hand, including switches, rake handles, hangars, baseball bats, garden hoses, pots and pans, belts, and items of furniture. When Arnold had nothing in hand, he used his fists, hitting every area of Petitioner's body including his head. Arnold beat Petitioner for small perceived transgressions such as not planting garden seeds quickly enough, or for no reason at all. Often, Arnold would pre-emptively beat Petitioner for mistakes he believed Petitioner might make

[1] 12/18/18 Mickey Rodriguez Affidavit at 5.

during the day. At other times, Arnold would come home in the evening and beat Petitioner for things he imagined Petitioner had done during the day.

3. The beatings occurred nearly daily, and involved tactics designed to humiliate Petitioner. Petitioner was forced to strip naked for beatings, even as he entered his teenage years. The beatings broke Petitioner's bones and made him bleed, but Arnold refused to take Petitioner for medical attention because he feared arrest. Arnold coupled the physical abuse with mental torment, screaming that Petitioner was worthless and would never amount to anything, that Petitioner was not his son, and that he did not care if Petitioner died from his beatings.

4. At an early age, Petitioner began to display symptoms of Post-Traumatic Stress Disorder (PTSD). If Arnold sneezed, coughed, or spoke suddenly, Petitioner would jump in fear. If Arnold noticed Petitioner flinch, he would hit him. Petitioner initially sought protection from his mother (Ollie)[2], but quickly came to believe he was responsible for protecting her from Arnold. Arnold would beat Ollie, sometimes to the verge of death, and force Petitioner to watch. Ollie was so consumed by fear of Arnold, she became emotionally catatonic and distant from her children. When Ollie became pregnant with her fourth child, Arnold assaulted her in

[2] Ollie Mae Baxter Russ has also gone by the name Beth Webster. In Claim Fourteen, Ollie is referred to as Beth for consistency with the record.

hopes of causing a miscarriage. Ollie fled from Arnold, ultimately leaving David and his brother, Aarron, behind.

5. Aarron, less than two years older than Petitioner, was Petitioner's only consistent source of love. That, too, was taken from Petitioner when the boys were removed from Arnold's custody and placed in separate foster homes. Devastated by the loss of his brother, Petitioner fled from every foster placement he received and attempted to find Ollie, whom the foster system could not locate. The foster care agency nicknamed Petitioner "the runner" and placed him at the Okeechobee School for Boys— a juvenile residential facility notorious for allegations of child abuse.

6. When Petitioner was approximately 17, Ollie was successfully contacted and she consented to take custody of Petitioner. The relationship was tense, due to Ollie's mental illness, inadequate parenting, and financial instability. Ollie neglected Petitioner and focused all of her attention on her romantic partners. Feeling unloved and in an unstable environment, Petitioner moved out within a year and worked full-time in construction in order to keep a roof over his head.

7. When Petitioner was approximately 20 years old, Aarron introduced him to intravenous cocaine. Petitioner was instantly addicted and depended on cocaine to self-medicate. Petitioner soon progressed to snorting crack cocaine, because it was less expensive and Petitioner could buy more to feed his growing addiction to crack.

8. For the next 25 years, Petitioner's life revolved around crack cocaine. Petitioner began to lose construction jobs because he was constantly high. Even when he had periods of employment, his income could not sustain his drug habit. Petitioner began to deceive friends and family for money. Eventually, he began to commit burglaries and pawn the stolen items so that he could buy crack. Beginning in 1986, Petitioner was arrested no less than six times. His offenses were nonviolent and centered around drugs—either possession of controlled substances or burglary and theft for the purpose of purchasing drugs.

9. When Petitioner was incarcerated, he maintained sobriety and attempted to forge a successful future. He was regarded as a model inmate and paroled early. Aarron, who was recovering from his own addictions, tried to support Petitioner's efforts by finding him work, housing him during parole, and attending Twelve-Step programs with him. Each time Petitioner was released from prison, he began his re-entry with motivation and appeared to thrive – he enrolled in college and studied counseling at the preeminent Texas Tech Center for Study of Addiction and Recovery. He formed relationships and married. He excelled in construction and roofing, and was promoted to a supervisory position. His loved ones marveled at his enthusiasm for trying to live a successful, sober life.

10. But each time, Petitioner's mood eventually dropped, his self-confidence waned, and he fell back into his pattern of drug use. This cycle continued

until Petitioner, in a drug and trauma-induced state, committed the offense for which the State now wants to execute him.

11. On May 6, 2007, Petitioner passed out in his vehicle after consuming a large quantity of crack. He was approached by police, who startled him awake by shining a flashlight in his eyes. Petitioner fled, abandoned his car, climbed onto the roof of a residence, and passed out. When he came to on the morning of May 7, his car had been towed. He observed Madeline Leinen depart her house, and broke in for the original purpose of showering, cleaning his clothes, and stealing any items he could pawn for money to buy crack. But when Ms. Leinen returned home, Petitioner killed her, stole her vehicle, and fled to Texas, where he was later arrested.

B. Procedural History

12. On June 5, 2007, Petitioner was indicted in the Seminole County Circuit Court for First-degree Murder, Kidnapping with a Weapon, Carjacking with a Deadly Weapon, Robbery with a Deadly Weapon, and Burglary of a Dwelling with an Assault or Battery. *State v. Russ*, No. 07-02377-CFA (Fla. Seminole County Ct.). On July 10, 2007, Petitioner entered a plea of not guilty to the charges. *Id*. Less than seven months later, on February 6, 2008, Petitioner pleaded guilty to all charges, for no benefit and no agreement from the State to drop the death penalty. *Id*.

13. In April 2008, Petitioner's counsel informed the trial court that Petitioner intended to waive the presentation of mitigating evidence, and waive the

presence of an advisory jury (pursuant to Florida's pre-*Hurst* scheme) for his penalty phase. *Id*. In May 2008, the court relied on trial counsel's false representation that Petitioner had undergone a competency evaluation, and found Petitioner competent to waive mitigation and an advisory jury for his penalty phase. Transcript of 5/1/08 Hearing on Waiver of Mitigation at 4. Against Petitioner's wishes, the trial court appointed the Office of Criminal Conflict and Civil Regional Counsel for the purpose of presenting mitigation "in the public interest." 5/2/08 Order Appointing Special Counsel.

14. On January 8-9, 2009, Petitioner's penalty phase was conducted before the trial court. *See* Transcript of Penalty Phase Non-Jury ("TT"), Vol. I and II.. Although Petitioner's counsel was present, Petitioner reaffirmed that he did not want counsel to participate in either the presentation of aggravating or mitigating evidence. TT Vol. I, at 17. Special counsel appointed by the trial court conducted the penalty phase as to mitigation, in their view as "a lawyer for the Court." *Id*. at 76. On January 15, 2009, the trial court conducted a *Spencer* Hearing, in which the Petitioner made a brief statement of remorse. Record on Appeal ("ROA") at 609-16. . On May 13, 2009, the trial court formally sentenced Petitioner to death. *Id*.

15. In its May 13, 2009, sentencing order, the judge found the following aggravating circumstances for Petitioner's capital conviction: (1) the capital felony was committed while the Petitioner was engaged in the commission of a kidnapping;

(2) the capital felony was committed for pecuniary gain; (3) the capital felony was especially heinous, atrocious, or cruel ("HAC"); (4) the capital felony was committed in a cold, calculated, and premeditated manner ("CCP"). *See* Sentencing Order.

16. In mitigation, the trial court found no evidence of statutory mitigating circumstances under Florida law,[3] and the following circumstances from the "catch-all" provision of Fla. Stat. 921.141(6)(h) ("The existence of any other factors in the Defendant's background that would mitigate against imposition of the death penalty."): (1) the Petitioner had an abusive childhood; (2) the Petitioner suffers from a severe, long term addiction to drugs which he was been unable to conquer despite numerous attempts at rehabilitation. Sentencing Order at 9-11.. The trial court also found the following nonstatutory mitigating circumstances: Petitioner (3) is remorseful for the homicide; (4) suffers from multiple medical problems; (5) has the capacity to form and maintain loving and caring relationships with both family and non-family members; (6) had pursued high education and is skilled in the roofing trade; (7) had no violent criminal history; (8) behaved appropriately in the courtroom; (9) wrote thank-you notes to his scholarship donors at Texas Tech University in 1997. *Id.* at 11-14.

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[3] In its written order, the trial court noted that "[n]o evidence of any statutory mitigating circumstances . . . was presented or argued." Sentencing Order at 9, *State v. Russ*, No. 07-02377-CFA (Fla. Seminole County Ct.).

17. On September 22, 2011, the Florida Supreme Court affirmed Petitioner's convictions and death sentence on direct appeal. *Russ v. State*, 73 So. 3d 178, 200 (Fla. 2011).

18. On October 14, 2011, the Florida Supreme Court appointed Petitioner counsel from CCRC-M ""for his initial state post-conviction proceedings. Order, *Russ v. State*, No. SC09-923 (Fla. 2011). Shortly thereafter, on November 7, 2011, Petitioner filed a *pro se* motion with the trial court to dismiss counsel and waive initial state post-conviction review. . On December 1, 2011, the trial court held a hearing on Petitioner's *pro se* motion to dismiss, and ordered CCRC-M to meet with Petitioner and file a response to the *pro se* motion.. Following CCRC-M's response, and a hearing on January 19, 2012, the trial court issued a written order on February 9, 2012, finding Petitioner competent to waive, dismissing his post-conviction proceedings, and discharging his CCRC-M counsel. 2/19/12 Order Dismissing Proceedings.

19. On November 27, 2012, the Florida Supreme Court affirmed'. *Russ v. State*, 107 So. 3d 406 (Fla. 2012). The court held that, "[b]ased on the colloquy conducted and the answers provided by Russ, the trial court did not abuse its discretion in determining that Russ knowingly, intelligently, and voluntarily waived his right to postconviction counsel and proceedings." *Id*. at 406.

20. In June 2018, the CHU moved for appointment as Petitioner's federal counsel in order to ascertain the status of Petitioner's federal habeas rights and pursue federal remedies that might be available. ECF No. 1. This Court granted the motion, explaining that 18 U.S.C. § 3599 requires indigent death-sentenced state prisoners to be afforded federal habeas counsel.. ECF No. 10. With respect to issues of timeliness or procedural default, the Court explained that Petitioner should have a chance to file a petition and present equitable tolling and other arguments. *Id.*

21. This Court directed the CHU to file both a § 2254 petition and a memorandum of law discussing why the petition should not be dismissed on timeliness or exhaustion grounds, within 90 days of the date of the CHU's appointment. *Id.* On September 28, 2018, Petitioner filed an unopposed motion for an extension of time to file his petition, ECF. No. 12, which was granted on September 28, 2018, ECF No. 13.

IV. Grounds for Relief under § 2254

22. Petitioner's state custody and death sentence violate the Constitution of the United States. Under § 2254, Petitioner is entitled to federal habeas corpus relief from his state custody and death sentence. See 28 U.S.C. § 2254(a).

23. To the extent that the Florida courts adjudicated Petitioner's federal constitutional claims on the merits, those decisions were: (1) contrary to and/or involved an unreasonable application of clearly established federal law, as

determined by the Supreme Court of the United States; and/or (2) based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1)-(2).

24. To the extent that the Florida courts rendered non-merits decisions on Petitioner's claims, those decisions were erroneous as a matter of federal law, involved improper procedural bars, or can be overcome by Petitioner's showing of cause and prejudice, as Petitioner will describe in reply to any affirmative defenses Respondent may assert. As Petitioner will explain in reply to any timeliness, waiver, or procedural bar defenses that Respondent might raise, Petitioner has valid arguments of ineffective assistance of state post-conviction counsel to overcome such defenses. See *Martinez v. Ryan*, 132 S. Ct. 1309 (2012); *Trevino v. Thaler*, 133 S. Ct. 1911 (2013); *Christeson v. Roper*, 135 S. Ct. 891 (2015); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992).

25. As will be described further in Petitioner's memorandum of law, a federal evidentiary hearing on his § 2254 claims is permissible and appropriate. *See* §§ 2254(e)(1)-(2). To the extent that a factual basis for one or more Petitioner's claims was not developed in state court, a federal evidentiary hearing is not prohibited. With respect to claims that were not fully addressed and adjudicated by the state courts on the merits, a federal hearing is permissible. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (explaining that a federal evidentiary hearing is permissible when the state court did not adjudicate the claim on the

merits); *see also Williams v. Alabama*, 791 F.3d 1267, 1273, 1276-77 (11th Cir. 2015) (remanding for evidentiary hearing on § 2254 claim after determining that state court did not adjudicate the claim on the merits). In addition, to the extent that the record for a non-merits-adjudicated claim was not fully developed in state court, Petitioner was not at fault because he made reasonable attempts, in light of the information available at the time, to investigate and pursue his claims in state court. An evidentiary hearing will enable Petitioner to prove this petition's factual allegations, which will entitle Petitioner to federal habeas relief. *See Williams v. Taylor*, 529 U.S. 420, 432 (2000).

26. To the extent that any claims were fully addressed and adjudicated by the state courts on the merits, a federal hearing is nonetheless permissible because, among other reasons, (1) the state courts' rejection of the claim assumed the truth of Petitioner's facts, (2) the state courts' rejection of the claim rested on an antecedent unreasonable application of federal law, and/or (3) the lack of factual record is the fault of the state court. *See Pinholster*, 131 S. Ct. at 1412 (Breyer, J., concurring) ("If the federal habeas court finds that the state-court decision fails [Section 2254(d)]'s test (or if [Section 2254(d)] does not apply), then an [evidentiary] hearing may be needed."); *see also Madison v. Comm'r*, 761 F.3d 1240, 1249-50 (11th Cir. 2014) ("Nothing in *Pinholster*, or any other principle of habeas corpus, bars a District Court from conducting an evidentiary hearing where . . . (1) the federal claim

was adjudicated on the merits in state court; (2) there is a determination based only on the state court record that the petitioner has cleared the § 2254(d) hurdle; and (3) the habeas petitioner tried, but was not given the opportunity to develop the factual bases of the claim in state court within the meaning of 28 U.S.C. § 2254(e)(2).").

27. As will be demonstrated in Petitioner's substantive memorandum of law, his claims either (1) were not decided by the state court on the merits or (2) are not otherwise barred by § 2254(d). An evidentiary hearing should be conducted on all claims involving disputed issues of fact.

28. To the extent there is uncertainty over whether certain claims were adjudicated on the merits, a hearing is appropriate to resolve procedural issues arising from those claims, including procedural default and cause and prejudice. *See Amadeo v. Zant*, 486 U.S. 214, 219-220 (1988) (considering as appropriate a hearing on whether there was sufficient cause to excuse procedural default).

29. In addition, Petitioner can overcome any adverse state-court findings of fact by clear and convincing evidence.

30. Petitioner should be granted discovery and other relief as is necessary for a full and fair resolution of the claims in this petition.

V. Claims for Relief under § 2254

31. Petitioner's claims for relief and supporting facts are set forth below. Exhibits are included in the appendix.[4] Petitioner will file a separate memorandum of law addressing the legal arguments relevant to each claim.

32. As will be argued in Petitioner's memorandum of law, his claims are either properly exhausted or excused from the procedural default doctrine.

33. All facts, allegations, and claims set forth in this petition, its attachments, and the other submissions made in this litigation, are incorporated into each of the individual claims and allegations pleaded below.

Facts Relevant to All Claims

34. Petitioner was born in 1962 as the third child to James ("Arnold") Russ and Ollie Mae Baxter. Arnold and Ollie both had bipolar disorder—and Arnold had schizophrenia—but during Petitioner's childhood, they were undiagnosed and accordingly unmedicated. Petitioner's family summarizes David's childhood in one sentence: "he never stood a chance."

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[4] The appendix includes evidence uncovered by the CHU's investigation so far and is intended to be helpful to the Court in its initial review of Petitioner's claims. Petitioner "is not required by statute or Rules to attach to his petition or to file a state court record in order to avoid dismissal for facial insufficiency." *Bundy v. Wainwright*, 808 F.2d 1410, 1414 (11th Cir. 1987). Petitioner respectfully requests that Respondent be directed to electronically file the state-court record in this case. *See Guardado v. Jones*, No. 4:15-cv-256-RH, ECF No. 17 (N.D. Fla. April 26, 2016) (explaining why Respondent is required to file the state-court record electronically on the court's docket, rather than in paper or CD-ROM form).

35. Arnold fathered four children with Ollie (Debbie, Aarron, David, and Melissa), and one daughter with Johnnie Marie Jackson (Mickey). Debbie was born in 1958, Aarron in 1960, and Petitioner in 1962. Ollie and Arnold divorced in 1968, but briefly reconciled and Melissa was born in 1970. Despite a court order finding paternity, Arnold never recognized Melissa as his biological child and refused to pay child support. In 1975, Mickey was born after Arnold and Johnnie Marie had moved in together.

36. Arnold had been abused as a child, and perpetuated that cycle with his own children. He physically abused Ollie, for the duration of their marriage. He emotionally abused his eldest daughter, Debbie, causing her to develop severe obsessive-compulsive disorder. Although Debbie was not physically abused, she left the house around the time that Ollie left Arnold. She married young in order to get away from the family, but was physically abused by her husband until she died at a young age under mysterious circumstances giving rise to foul play on the part of her husband.

37. While emotionally abusive to all of his children and eventually physically abusive to Mickey, Arnold was always more inclined to physically abuse his sons than his daughters. Of his sons, Arnold was far more abusive to Petitioner than to Aarron. The Russ family credits this to a combination of factors. First, Arnold valued firstborn sons and saw them as the continuation of his bloodline and

namesake. Aarron's birth name was James, just like Arnold's, and as a result, Arnold valued Aarron in a way he never did not value Petitioner. Second, Petitioner formed an early bond with Ollie, which prompted Arnold to believe Petitioner was not his biological child. Third, Aarron had a social savviness about him that Petitioner never had. He was able to pacify Arnold and avoid much of the abuse Petitioner was subjected to.

38. Arnold began physically abusing Petitioner before Petitioner was out of the womb. Arnold, already having a son and daughter to pass on his bloodline, repeatedly assaulted Ollie, in the hopes of causing her to miscarry their third child. The beatings Arnold inflicted on Ollie while she was pregnant with Petitioner caused a deformity of Petitioner's ear—an injury suggestive of *in utero* brain trauma.

39. The first beating Petitioner can remember was at the age of four. Arnold became angry one morning after he saw Petitioner and Aarron playing with chickens. He whipped both boys until they could barely move, then forced them to stand against a wall from morning to night. For as long as the boys can remember, Arnold told Petitioner he was a "dumb ass", "stupid shit", and "wasn't ever going to amount to shit".

40. Arnold beat Petitioner with whatever he could reach, including switches, rake handles, hangers, baseball bats, garden hoses, pots and pans, belts, and items of furniture. When Arnold had nothing in hand, he used his fists, hitting

every area of Petitioner's body, including his head. Often, Arnold would pre-emptively beat Petitioner for mistakes he believed Petitioner might make during the day, such as failing to put the toilet paper on the roll correctly, failing to take the trash out, or failing to wash the dishes. At other times, Arnold would come home in the evening and beat Petitioner for things he imagined Petitioner had done during the day. "If the wind blew the wrong way" Arnold lashed out.

41. When Arnold beat Petitioner, Petitioner would curl into a ball and scream out, begging Arnold to stop. He would plead, and Arnold would respond with additional insults, like "I'm going to kill you," "You sorry son of a bitch," "Your mom is a whore," "You're not mine," and "You're worthless." The more Petitioner cried out, the more Arnold beat him.

42. After Petitioner's beatings, he retreated to his room and sat in a catatonic state for hours. Over the years, he became increasingly withdrawn and quiet. He was polite but kept to himself as a way to avoid attracting his father's attention.

43. Arnold placed unrealistic expectations on his wife and children, and intentionally created situations to set them up for failure. He then used that failure as an excuse for a beating. One prominently recounted instance occurred when the family drove across the country in furtherance of Arnold's work as a commercial migratory beekeeper. Arnold stopped the truck, opened the compartment where the

bees were kept so they would enter the vehicle, and threatened Ollie, "if any of these kids get stung, I'm going to beat the hell out of you." Arnold provoked the bees, which predictably stung Petitioner. Arnold grabbed Ollie by the hair, dragged her out of her seat to the rear of the truck, and repeatedly bashed her head against the steel bed prior to lashing her with his belt.

44. Arnold hid Petitioner's clothes, then blamed Petitioner for losing them and used that as an excuse to beat him. He withheld food from Petitioner for no reason.

45. Arnold terrorized his wife and children. Their "total existence was fear driven." They became so accustomed to abuse, they would flinch when Arnold coughed or sneezed. 12/18/18 Mickey Rodriguez Declaration. If Arnold saw Petitioner flinch, he would backhand him, drawing blood from the Petitioner's mouth and shouting "what are you jumping for?!" Petitioner was never able to control his fear-response, so he was consistently hit. To this day, Petitioner often jumps when he hears a loud noise.

46. When Petitioner was six or seven, he took a jar of change from his grandmother's house. Arnold forced Petitioner to run approximately four miles on a main road in the middle of the summer without water or walk breaks, carrying the jar of change. While Petitioner ran, Arnold followed him in a truck, screaming

insults and obscenities out the window at Petitioner. If Petitioner cried or showed emotion, he would be beaten.

47. When Ollie became pregnant with her fourth child, Arnold assaulted her in hopes of causing a miscarriage. Ollie fled from Arnold, initially bringing the boys with her but ultimately discovering she was unable to care for them. Ollie's house was filthy and unsafe, and she slept all day before going out with men all night. She failed to feed her children or clothe them. Unwilling or unable to provide a safe home, food, and clothing for the boys, Ollie terminated her parental rights and left Petitioner and Aarron in Arnold's custody. Petitioner became distraught at his mother's abandonment, and at the age of eight he began to self-medicate with alcohol.

48. Petitioner's beatings increased after Ollie's departure. Beatings Arnold would previously have committed on Ollie were redirected at Petitioner. The beatings occurred nearly daily, and would last from five to ten minutes. Arnold "was crazy as hell" and foamed at the mouth when he inflicted beatings. He threatened to kill Petitioner, saying he brought him into the world and he would take him out of it. The family speculates that Arnold only wanted custody of his sons to use them as free labor for his beekeeping business. When Arnold didn't believe Petitioner was performing beekeeping tasks correctly, he threw a hive full of bees at him.

49. Petitioner was forced to strip naked for beatings, even as he entered his teenage years. The forced nudity had always humiliated Petitioner, but became more traumatic after Petitioner—at approximately eight or nine—was sexually assaulted by an adult male in an orange grove. Compounding Petitioner's sexual trauma, around this time, the boys were subjected to sexual abuse by an adult relative. Neither of the boys reported the sexual abuse, out of fear that their father would punish them for it or use the information as "ammunition" to further psychologically abuse them.

50. Arnold coupled the physical abuse with mental torment, screaming that Petitioner was worthless and would never amount to anything, that Petitioner was not his son, and that he didn't care if Petitioner died from his beatings. Arnold broke Petitioner's bones. Arnold repeatedly hit Petitioner in the head, often him to lose consciousness or prompting seizures. Petitioner was left with black eyes and split lips. Petitioner bled from the nose and mouth, and it sometimes appeared as if the bleeding was internal. Petitioner did not receive medical treatment for most of these injuries because Arnold feared arrest for child abuse. Petitioner wore long pants regardless of the season to hide the injuries, and often missed school until he could hide the visible marks and move around properly.

51. When Arnold became angry with Aarron, he beat Petitioner. One beating took place when Aarron ran away and was apprehended in Ohio. Arnold,

furious, insisted that Aarron weed the garden as punishment for running away. Aarron refused. In response, Arnold forced Petitioner to hoe the garden while Aarron watched, until Petitioner's hands were blistered and bleeding. Then, claiming Petitioner was not working quickly enough, Arnold knocked Petitioner into the dirt, sat on him, pushed his head into the dirt, and beat Petitioner with a one-by-two-inch strip of wood filled with nails and spiked tacks that he had been using as a beanpole. When Aarron tried to intervene, Arnold said "if you move, I will kill you." Petitioner nearly died of suffocation.

52. Every year, Arnold moved the boys from Florida to South Dakota and back, as well as multiple travels to Texas. The children bounced around from school to school, never settling in one place long enough to make outside friends. They struggled in school as a result of their home life—they were often sleep-deprived, nursing injuries ranging from bruises to broken bones, and undernourished when food withholding was used as another of Arnold's punishments. As a result, Petitioner was evaluated for special education despite his brightness, which further isolated and demeaned him. The boys briefly found joy in a Little League baseball team, but Arnold often prevented them from attending because he believed the coach was suspicious that the boys were being abused.

53. Aarron and Petitioner believed the only escape was to kill their father, but could never bring themselves to do it. They believed no one at school knew about

their daily torment, because Arnold refused to allow them to go to school when his beatings left physical marks that couldn't be hidden. They also believed no one in their community cared, because Arnold kept them so isolated. They were wrong. Shortly after Petitioner was nearly killed in Arnold's garden, a local farmer reported the abuse. Petitioner and Aarron were removed to physical safety, but with devastating consequence: they were separated in the foster care system.

54. Petitioner was devastated by the loss of Aarron, whom he called his "life preserver." Aarron was placed in a foster home with some children he was friendly with at school. Petitioner was placed miles away on an isolated farm. He never adjusted to the separation from Aarron. He felt like he did not belong, and as though the only way to get help or attention was to act out. He ran away from every foster care placement he received, at one point nearly dying of alcohol poisoning after drinking eight coffee cups of Canadian Club whiskey. He was "crying out". Petitioner was nicknamed "the runner" and placed at the Okeechobee School for Boys, where he was exposed to further abuse.

55. When Petitioner was fifteen, the foster care system was able to locate Ollie and Petitioner was sent to live with her. By then, he had been uprooted so much, he struggled to assimilate back in his old surroundings. He tried to rebuild a relationship with his mother, but felt resentful and hurt that she had abandoned him by terminating her parental rights and leaving him with his abusive father. See Court

Order Terminating Rights. Unable to cope with these pressures, Petitioner dropped out of school during the tenth grade and worked full-time in roofing so he could move out of his mother's home.

56. When Petitioner was around 20 years old, Aarron introduced him to intravenous cocaine. Petitioner developed an instant addiction. He used cocaine to self-medicate and avoid the effects of his then-undiagnosed mental illnesses.

57. For the next 25 years, Petitioner's life revolved around crack cocaine. Petitioner began to lose construction jobs because he was constantly high. Even when he had periods of employment, his income could not sustain his drug habit. Petitioner began to deceive friends and family for money. He abandoned relationships and even his own infant daughter in order to keep using drugs.[5] Eventually, he began to commit burglaries and pawn the stolen items so that he could buy crack. Beginning in 1986, Petitioner was arrested no less than six times. His offenses were all nonviolent and centered around drugs—either possession of controlled substances or burglary and theft for the purpose of purchasing drugs. Records from various out-of-state incarcerations indicated that Petitioner suffered from "disorganized" thought processes. Petitioner's family and friends report hearing that Petitioner had been sexually assaulted during one of his early prison terms, possibly in the form of a gang rape.

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[5] See 12/1/18 Affidavit of Molly Sanchez.

58. Petitioner's only significant periods of recovery happened while he was incarcerated or under a court order. When Petitioner was incarcerated, he maintained sobriety and attempted to forge a successful future. He was regarded as a model inmate, and profiled on TV for his rehabilitation. He enrolled in college while in prison and maintained a 3.67 GPA on a 4.0 scale. He was often paroled early. Aarron, who was recovering from his own addictions and rebuilding his life with Petitioner's emotional support, tried to support Petitioner's efforts by finding him work, housing him on parole, and attending various Twelve-Step programs with him. Each time Petitioner was released from prison, he began his re-entry with motivation and appeared to thrive Upon his release, Petitioner received a scholarship to the preeminent Texas Tech Center for Study of Addiction and Recovery, where he studied counseling. He formed relationships and married. He excelled in construction and roofing, and was promoted to a supervisory position. But as soon as things began to look up, Petitioner cycled into self-destruction and began to use drugs again.

59. From years of abuse and neglect, Petitioner developed a "self-destructive mechanism" that caused him to panic "when things started getting good." He fell into a pattern: starting off a new job or relationship with fervor, beginning to excel, then self-sabotaging as soon as he started to feel successful. He suffered from low self-esteem, but portrayed confidence in order to mask his insecurities. He

frantically sought approval from employers, coworkers, friends, and romantic partners, but it was never enough. If he didn't receive the validation he sought, he emotionally crumbled. He was a serial monogamist who married multiple times after short, intense courtships, but emotionally distanced himself in each relationship when it failed to fill his sense of emptiness. He "sabotaged every opportunity [he] ever had because those negative messages [he] had heard as a child came to fruition."

60. No matter what happened in Petitioner's whirlwind adulthood, he always went back to crack. Aarron and other family members often recognized when Petitioner was relapsing, but Petitioner still tried to hide his drug use. He distanced himself from Aarron and anyone else who might recognize he was back to using. Petitioner spent an average of $500-$600 per week to buy crack. He relied on burglaries and deception to finance his habit. During his periods of sobriety, he vowed never to return to the shame of his addiction, but he had insufficient coping mechanisms to deal with his inner turmoil. Eventually, his anguish won out and he was back to a drug binge to dull his pain.

61. In another upward cycle in late 2006, Petitioner moved to Florida to cohabitate with Kimberly ("Kim") Williams. He had met Kim through his sister, Missy, but had never met her in person. He instantly took on the role of "perfect" boyfriend and father figure to Kim's son, Tanner. He cared for Kim's ill great-aunt,

who was living in the same house, and assisted Kim's parents with household tasks and yardwork.

62. By early 2007, Petitioner was back to using crack. One evening, he repetitively checked under the beds, in closets, and elsewhere around the house, believing police were pursuing him and hiding in the house. He slept for the next two days, and was filled with shame when he awakened and realized he had relapsed.

63. Petitioner attempted to get clean, but could not do it on his own. He began staying out all night, smoking crack and trying to hide it from Kim and his family. He lent his car to a drug dealer in exchange for more crack, and when he lost that car he took his sister's car without permission. He was laid off from his job because he was constantly high. His lips were burned and his eyes appeared empty.

64. Missy and Kim attempted to find Petitioner when he left home to use drugs. Most times when they found him, he would flee from them or cover his face and cry. In between drug binges, Petitioner was filled with remorse, but the cycle never ended. At the end of April, Kim caught Petitioner on another crack binge, and told him if he relapsed again, he shouldn't bother coming home. Less than a week later, Petitioner never came home and ceased to contact Kim and Missy. They believed he was dead until they were informed by the police that he had been arrested for murder.

65. After Petitioner's arrest, he exhibited several signs of mental instability during recorded phone calls. Each of the following statements was made prior to September 2007:

- "I just want to beat myself to death…if I go through with the trial, they are just going to paint me as this lifetime habitual screw-up for my whole life…that's not how I want you to look at me, that's not how I want you to remember me…"

- "It's been a year. Let's get this over with…But there is no getting it over with. It's a nightmare that's gonna be lived every day."

- "Depression is a hell of a thing."
- "It's depression that I am fighting. It's deep, deep rooted; I don't know if it will ever go away."

- "I'm on this emotional roller coaster where I'm happy one moment, I'm hopeful, and the next moment I'm hurting and beating myself half to death."

- "The only reason I want to keep living is you…The only reason I want to keep breathing is for you…that's it. This is a living hell right here."

- "I'm gonna go in there next week and I am going to go in there and plead guilty or whatever. I am just going to let them fucking hang me. I'm not gonna fight them. I'm not going to do a goddamn thing. I am gonna go ahead and fucking leave this world…that's what is going to happen."

- "I feel like I'm out in the middle of the ocean by myself here…I can't see land."

- "You're all I live for, Kim."

- "I am being selfish for wanting to leave this world right now."

- "The lesser of two evils is to be able to go ahead and get into the next life or whatever it is and not have to deal with this on a daily basis."

- "[Dr. Day] already told me that my judgment was impaired, that was my issue, my judgment, now why is my judgment the way it is…there are things in me that are blatant flaws and there's a reason for that and we need to figure out why."

- [after Kim threatened not to visit again] "If you jeopardize our visits…I don't know, I don't know, how do I deal with that, I don't know if I can…do you know how that devastated me…I didn't care anymore."

- "They are going to be trying to make me look like a piece of shit in that courtroom[.]"

- "Something is broken in me…I don't understand it."

- "They are trying to execute me and part of me is okay with that."

- "My attorneys and I have agreed that we don't really need to go to trial, trial is a big circus, where they really humiliate and degrade you, they really try to paint things into ways that they are not…so then I go ahead and plead regardless of what they do."

- "I know I am going to be humiliated, degraded, cussed at."

- "My attorneys have told me I'm coming home in a pine box…that's my attorney."

- "There's going to be a lot of people there really trying to turn me into Hannibal Lector."

- "I'm so damn depressed."

- "I can't, I can't…I don't want to live life without you, I can't."

- "[Tim Caudill] said, David, if you go to trial they are going to sentence you to death…it's not to your best interest to go to trial…I been instructed…to go ahead and plead and then six months down the road I'll have a sentencing hearing and then I'm vulnerable because there is no mitigation, because they're not trying to prove guilt, I've already pled guilty, so there is no

mitigation on my behalf, all the district attorney has the opportunity to go in and just paint me as a monster…"

- "Not only is [my mother] gonna abandon me, she is going to treat me like she is a vulture."

- "[My attorney] has told me one thing after another, after another, instilling false hope, trying to encourage me to be vulnerable, to go in and be vulnerable to the fiasco, the circus, to bring my family in and let them be humiliated and degraded, and all this crap and still get the death penalty, he already told me that if I went to trial that's what's going to happen…he said 'Dave I am not going to sit back and watch you roll over and let these son of a bitches kill you'…and I am like 'what do you mean? You already told me if I go to trial I am going to lose, so what am I supposed to do, what do you mean roll over?'"

- [Tim Caudill] is telling me one thing, telling me another, telling me another…"

- "Well I guess I'll go ahead and just plead out and then, uh, deny any appeals or anything like that, just waive 'em."

- "Missy and Mom have no desire to stay in touch with me anymore."

- "I just wanted to die."

66. By laywitness accounts, Petitioner's mental state continued to decline between September 2007 and his guilty plea, and further declined from then onward.

67. Petitioner exhibited signs of depression prior to his trial, and was placed on antidepressant medication – an improper course of treatment for someone with bipolar disorder.[6]

[6] As discussed *infra*, evidence uncovered in undersigned counsel's preliminary investigation indicates the Petitioner, like both of his parents and multiple other relatives, suffers from bipolar disorder.

68. In the months leading up to Petitioner's guilty plea, he became increasingly hopeless about his situation. His relationship with Kim had ended, and his only regular visitor was Donna Jenkins, whose son had been incarcerated with Petitioner. He became frustrated that Aarron was not writing or contacting him, and begged Donna to reach out to Aarron. Aarron, unable to handle the combination of anger regarding Petitioner's crime, grief for the loss of his brother, and guilt because Aarron had first introduced Petitioner to cocaine, attempted to minimize the emotions by distancing himself from Petitioner. The longer Petitioner went without hearing from Aarron, the more lonely, frightened, and depressed he felt.

69. Petitioner became consumed with remorse, and fixated on showing his family he was taking responsibility for his crime. He hoped that would induce his family to visit.

70. On February 6, 2008, Petitioner entered a guilty plea to all charges, in exchange for no benefit from the state. The trial court never ordered a competency evaluation, nor did trial counsel request one. The trial court relied solely on Petitioner's own assurances that his judgment was not impaired to find the defendant "intelligent" and to find the plea to be "freely and voluntarily made with knowledge of the consequences after advice of competent counsel[.]" ROA Vol 12 at 24.

71. On April 14, 2008, trial counsel informed the trial court that Petitioner wished to waive the presentation of mitigation. The *State* expressed that the court

would need to make a determination of Petitioner's competency to waive, ROA Vol. 12 at 472 ("One, is he mentally competent? And, two, is he legally competent to waive presenting any type of mitigation evidence, as well as waiving the jury?"). Petitioner responded that when he pled guilty, he "was found competent, vulnerable as should be the case…I have a desire to stand before you, vulnerable again, as should be the case." *Id.* at 473; *see also id.* at 476 ("I just ask that, you know, just as my pleas were accepted, and that I was found competent for that, that I'll be found competent to waive the jury and to waive mitigation"). He referenced his extensive drug abuse, childhood abuse, and head injuries, but the Court did not ask for details.

72. The court asked defense counsel whether there had been a competency evaluation and what the status of any such evaluation was. Trial counsel represented that they had retained Dr. Deborah Day, and that she had, as a feature of her initial evaluation, performed a competency evaluation. ROA Vol. 12 at 476. Counsel stated that Dr. Day "at that time, thought that Mr. Russ was competent. He has, of course, been deemed competent by two different courts, including you, to enter pleas. I have not had a recent update to that." *Id.* While counsel stated they believed Petitioner was making "a horrible decision" they did not seek any further evaluation or raise concerns about Petitioner's competency. *Id.* The court stated, "Well, I know there was no issue of competence at the time of the plea. We had addressed it." *Id.* at 477.

Trial counsel represented that they had seen nothing since that time to indicate a lack of competency. *Id.*

73. On April 30, 2008, the Court asked trial counsel if there had been any suggestions that Petitioner may be incompetent to proceed. *Id.* at 486. Counsel represented that although there were "indications that he has personality problems that interfere with his decision making capabilities," they did not feel there was any indication that Petitioner was not competent. *Id.* The court specifically asked counsel if a defense expert had found Petitioner competent to proceed, and trial counsel affirmed that Dr. Day had evaluated Petitioner shortly after Petitioner's arrest, and had found him competent. Trial counsel stated he hadn't had a follow-up examination "because I haven't seen any indications in my client as to…that he had in any way lost competency such that I needed to have an expert see him again to make another determination of the current state of competence." *Id.* at 486-87.

74. The trial court, despite finding Petitioner competent to waive his penalty phase rights, appointed special counsel for the purpose of advising the Court in its duty of weighing aggravating and mitigating circumstances. ROA Vol. 13 at 545. The court instructed special counsel that its responsibility "as special counsel is to present mitigation, **whatever mitigation there is**…in the same manner that you would present it in any capital trial" *Id.* at 552. The court made clear that special counsel was not relieved of their duty to do a full investigation and presentation. "It

would be just as if you were representing him and the Public Defender weren't here." *Id.* at 554. Pretrial hearings indicate that special counsel essentially ended their investigation a mere four months later in September 2008, seemingly out of frustration that Petitioner would not speak with the first expert they attempted to retain. *Id.* at 565.[7]

75. Prior to his sentencing, Petitioner became obsessed with self-loathing and martyrdom. He ruminated about concepts of victimization, and used the term melodramatically. Petitioner developed a self-deprecating fixation that he had been a victimizer. Petitioner called everyone who had ever cared about him a "victim" of the negative messages he had heard as a child which caused him to self-sabotage. He stated that, by stealing a jar of his grandmother's change at the age of eight, he had "switched roles" from being a victim to becoming "the victimizer" – and further stated that by entering a home without permission when he was in approximately the first grade, he proved that he had a "lack of morals and values" due to a "total disregard for another human being's privacy."

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[7] Petitioner's trial counsel expresses concern on the record that special counsel are only preparing for one to two days of penalty phase testimony. ROA Vol. 13 at 567 ("I'm still his lawyer…and I feel like being his lawyer and saying there's more than a day's worth of information here.") Special counsel improperly blames their curtailed investigation on Petitioner, saying "[the penalty phase] ultimately would have been longer, unfortunately, he's willing to undergo any testing for us." *See Rompilla v. Beard*, 545 U.S. 374 (2005) (holding that a defendant's lack of cooperation regarding mitigation is no excuse to abandon a thorough investigation).

76. On May 14, 2008, Petitioner wrote to the trial court in response to its order for a mitigation investigation. Petitioner stated that he did "not deserve or desire anyone to present mitigating evidence concerning my past." He referenced his childhood abuse, head injuries and over twenty years of drug abuse, and called himself self-destructive. He referred to the upcoming penalty phase as "this, the final sentencing[.]" He stated that he would make "no excuses" because he was "not a victim any longer." He stated that for the 10 days prior to the murder he was "24-7 non-stop getting high, smoking crack. No sleep, no food, no shower." He claimed to be a "cold-blooded killer on that day" despite several accounts from his family and friends indicating that he had never intended to kill anyone.[8] He made several prejudicial statements under the guise of assisting the judge to decide his fate "by facts. By truth." At no point did Petitioner's counsel or the trial court seek further evaluation of Petitioner based on the self-sabotaging nature of the letter.

77. On November 23, 2008, Petitioner again wrote the trial court, expressing his anger that the court appointed "new counsel on my behalf to present mitigation of which I waived." Petitioner claimed that the facts in his case are "very brutal" and that he didn't want his actions "on attorney Dowdy's conscious [sic]." Petitioner urged the trial court to "decide my fate based on the facts the state attorney's office will provide…I personally believe I belong on death row for my

[8] See 12/19/18 Aff. of Melissa Russ; 12/19/18 Kimberly Williams Decl.

actions…my future should be clear to all." Petitioner became inflammatory, stating, "if I do not receive the death penalty then all men on death row should be released off death row. Period!!! That is my sincere conviction." Again, neither the trial court nor defense counsel moved for a competency determination or any further evaluation based on Petitioner's quasi-suicidal letter.

78. Rather than investigate whether Petitioner's behavior was the result of decompensation in jail, or an indication of incompetency, Petitioner's lawyers praised him for "wanting the same justice that [he] gave the victim." One of his lawyers, a recovering alcoholic, filmed Petitioner for the purpose of sharing his story with members of Alcoholics Anonymous as a cautionary tale, and stated in that filming that he believed it was important not to present mitigating evidence on his "friend David's" behalf.

79. At Petitioner's trial, special counsel made a superficial showing as it pertained to mitigation, calling only three witnesses: an investigator who testified solely to introduce records, Petitioner's former stepmother, whom counsel hardly questioned, and Aarron, who was also hardly questioned. Although special counsel made no pretrial effort to obtain more time for its investigation, special counsel commented after its closing argument that they wished to have a *Spencer* hearing because "there may be a few last nuggets that we did want to present[.]" ROA Vol. 11 at 329.

80. Despite special counsel being "not sure at this point if [Petitioner was] technically our client" and believing themselves to be simply at the Court's direction, ROA Vol. 10 at 9, 76, they objected when Petitioner's counsel attempted to speak during the penalty phase. ROA Vol. 11 at 330 ("I'd object to Mr. Caudill interfering in any way with our penalty phase..."We have been appointed to represent him in the penalty phase. Mr. Caudill doesn't have a voice in it[.]")

81. On January 25, 2012, the trial court held a hearing pursuant to *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993). In finding Petitioner competent to waive his state post-conviction appeals, he trial court relied on its belief that "the defendant was at the trial stage found competent to proceed to trial after examination" Transcript of 1/25/12 *Durocher* Hearing at 5.

82. State post-conviction counsel mailed Petitioner a letter on December 4, 2012, informing him that counsel would not file a motion for rehearing or any other pleadings.

83. In October 2018, undersigned counsel retained Dr. Richard Dudley, M.D., for the purpose of evaluating Petitioner and identifying any issues affecting Petitioner's mental health and competency. Dr. Dudley's evaluation revealed that Petitioner suffers from multiple psychiatric and neuropsychiatric disorders, most if which not all predate his guilty plea and subsequent waivers. Petitioner meets the diagnostic criteria for Post-Traumatic Stress Disorder caused by years of physical

and emotional abuse at the hands of his caretakers, particularly his father. *See* Dudley Report at 2. Petitioner experiences dissociative episodes in the wake of events that trigger memories of the abuse. *Id.* As a result of his childhood trauma, Petitioner holds persistent and exaggerated negative beliefs about himself, and believes himself to be evil and personally irredeemable. *Id.* at 3. He fluctuates between negative emotional states such as fear, anger, shame, and detachment, and has a long history of self-destructive behavior. *Id.* at 3. He displays hypervigilance in encounters with perceived threats, and has exaggerated reactions to everyday events. *Id.*

84. Petitioner also manifests severe developmental difficulties consistent with a diagnosis of borderline personality disorder. *Id*. at 3. These developmental difficulties are the likely consequence of inadequate parenting—particularly physical and psychological abuse, and abandonment. He makes frantic efforts to avoid real or imagined abandonment, and undergoes profound changes in self-image, cognition, and affect when he anticipates impending rejection. *Id.* His relationships are marked with intensity and instability, and he may create self-fulfilling prophecies of abandonment by exhibiting excessive and unstable reactions within those relationships. *Id.* at 3. He struggles with guilt, shame, anxiety, restlessness, depression, unease, dissatisfaction, and chronic feelings of emptiness. *Id.* He is prone to impulsive and reckless behaviors, including sudden and dramatic

shifts in his goals, which coexist with feelings of self-loathing and dysphoria. *Id.* at 3-4.

85. Petitioner suffers from symptoms of a super-imposed mood disorder, most likely bipolar disorder. *Id.* at 4, 7-8. He experiences periods of profound depression, hopelessness, anhedonia, feelings of worthlessness and excessive guilt, and he has recurrent suicidal ideation. *Id.* at 5. He displays impairments in concentration, racing thoughts, pressured speech, and is distractible. *Id.* at 6-7. He has schizotypal features, such as cognitive and perceptual distortions including overelaborate thinking, suspicious and paranoid ideation, and inappropriate affect. *Id.* at 6. He presents indicators of psychosis. *Id.* at 8.

86. In addition to Petitioner's comorbid psychiatric disorders, Petitioner displays indicators of possible brain damage—the likely result of multiple head injuries and longstanding, severe stimulant use disorder. *Id.* at 9-10. His brain chemistry may be altered, causing frontotemporal lobe regulation and neuropsychological deficits with negative impact on logical judgments and decision-making. *Id.* at 10.

87. Each of Petitioner's brain and psychiatric impairments impacted and continue to impact Petitioner's ability to function in the context of his life in general, and his ability to function at each stage of his legal process. Each condition exacerbates the others, making their collective impact on Petitioner's functioning

greater than their individual impact. *Id.* at 11. Petitioner requires further evaluation in order to determine the severity and extent of his neurocognitive difficulties, as well as the precise nature and interplay of his myriad psychiatric conditions. *Id.* at 10. To this effect, Dr. Dudley recommended that Petitioner should be evaluated by at least four additional experts: a trauma expert, neuropsychologist, neurologist, and psychopharmacologist. *Id.* at 10.

88. Laywitness interviews conducted by undersigned counsel confirm and elaborate upon Dr. Dudley's findings.

89. Donna Jenkins, who visited Petitioner prior to his guilty plea, penalty phase, and into his time on death row, said the Petitioner believed he was evil. Donna Jenkins Statement at 3. Petitioner believed something supernatural had taken ahold of him when he was a child watching his relatives play with a Ouija board, and that Satan was appearing to him. He believed evil came to persecute him when he was in his cell. *Id.*

90. Donna stated that Petitioner displayed severe mood swings. He appeared mentally unstable. "He wanted to punish himself and hurt himself and make his life as hard as he could for himself because he felt that this was the only way he could atone for what he had done." *Id.* He felt abandoned by his attorneys, and believed they did not care about him or his case. He believed his situation was hopeless and decided to give up. *Id.*

91. When Petitioner arrived on death row, his depression continued. He was overwhelmed by feelings of guilt and shame. He believed his life had no meaning and no one cared about him. These feelings, coupled with his poor experiences with his trial attorneys, motivated him to waive his appeals. *Id.* Petitioner ultimately pushed Donna away, as he had done to countless other people who cared about him.

92. Petitioner's sister, Melissa ("Missy") Russ stated that mental illness is prevalent in the Russ family. Nearly everyone in the family suffers from mental illness or addiction, and many members suffer from both. Arnold has bipolar disorder and schizophrenia, and is on medication for it. 12/19/18 Melissa Russ Affidavit at 4; *see also* 12/18/18 Mickey Rodriguez Statement (indicating that Arnold receives disability benefits for mental illness and his symptoms are partially managed by medication). Ollie suffered from bipolar disorder, and was medicated for it until her death. She also displayed indicators of borderline personality disorder, particularly in her romantic relationships. Two of Petitioner's siblings have obsessive-compulsive disorder, and another of Petitioner's siblings likely has bipolar disorder, as well as Attention Deficit Hyperactive Disorder. Multiple other members of Petitioner's family display signs of bipolar disorder. So many of Petitioner's relatives have struggled with substance abuse, the family has lost count.

One of Petitioner's cousins died of a crack overdose at the age of thirty. All of Arnold's children have been damaged by his abuse or neglect.

93. Petitioner's substance abuse was of a greater severity than the rest of his family. Whereas most of the Russ relatives who used drugs were able to maintain jobs or relationships while using drugs, Petitioner was not. Petitioner would take one hit of crack and immediately be on a binge.

94. After Petitioner's arrest, his mental illness caused him to believe his family was abandoning him. When his mother or sister communicated with him, it was never enough for Petitioner. Petitioner attempted to force visits with his family, stating that it was "killing [him] inside to think [he] would never be an important part of [their] life again" and begging them to "hear [his] cry." However, when Petitioner's family did visit, he acted disinterested in them and focused on his current romantic partners.

95. Petitioner's moods fluctuated increasingly the closer it got to his guilty plea and penalty phase. If situations didn't go exactly as Petitioner wanted, he became upset. He was on a "roller coaster of emotions" and at times would seem profoundly depressed. At other times, he was anxious and paranoid. He wrote that demons had taken up residence in him. He overanalyzed communications from his family looking for hidden signs in the messages. He had bizarre thoughts and believed his family would visit again if he began "taking responsibility" for his

actions. Although Petitioner was genuinely remorseful for the crime, remorse was not the driving factor for his guilty plea and waiver. Instead, his family believed them to be the product of his mental illness. *Id.* at 10-13.

96. Petitioner's past and current visitors note that since Petitioner has been in prison, he has displayed numerous signs of hypervigilance. He is overly concerned with avoiding conflict, and isolates himself in order to do so. He works out obsessively and, despite his muscular stature, he repeatedly expresses fear of being "too small" and being victimized like he was as a child due to physical powerlessness. He has an intense gaze and overuses eye contact in an attempt to "read auras" and determine whether new people are friends or enemies. He displays trauma responses when he is placed in physically vulnerable positions, such as a reclining chair at dental appointments.

97. Significantly, undersigned counsel's preliminary investigation revealed that Dr. Deborah Day never conducted a competency evaluation of Petitioner. She was retained by defense counsel as a general mitigation expert, and asked to find potential mitigation for Petitioner's penalty phase. She did not conduct a competency evaluation, nor was she asked to. She does not recall conducting any formal psychological testing or other evaluation, and she generated no written findings.

98. The importance of this new evidence cannot be overstated. Despite Petitioner's extensive history of brain trauma, mental illness, substance abuse, and

childhood abuse; despite the fact that Petitioner displayed multiple red flags of incompetency prior to his trial, penalty phase, and post-conviction waiver; and despite the

Petitioner has never in the course of his litigation been evaluated for competency.

Claim One: Petitioner's State Conviction and Death Sentence Violate the Federal Constitution Because He Was Not Competent to Plead Guilty or Waive His Subsequent Sentencing and State Collateral Review Rights

99. Petitioner's state conviction and death sentence violate the federal Constitution because Petitioner was not competent to plead guilty or waive his subsequent sentencing and state collateral review rights. As the facts above demonstrate, Petitioner's psychiatric disorders, possible brain damage from drug use and head injuries, and trauma history rendered him incompetent to enter a guilty plea. Due to his incompetency during the plea and waivers, Petitioner's continued confinement on death violates the Fifth, Sixth, Eighth, and Fourteenth Amendments.

100. Criminal proceedings against an incompetent defendant violate due process. *Drope v. Missouri*, 420 U.S. 162, 171 (1975) ("[T]he prohibition is fundamental to an adversary system of justice."). This due process right cannot be waived. *Pate v. Robinson,* 383 U.S. 375, 384 (1966).

101. The test for assessing Petitioner's competency is whether he "ha[d] sufficient present ability to consult with his lawyer with a reasonable degree of

rational understanding—and whether he ha[d] a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). *See also Drope*, 420 U.S. at 171-72 (explaining that a person is incompetent when his "mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense).

102. Petitioner, "raising a substantive claim of incompetency, . . . must demonstrate . . . his incompetency by a preponderance of the evidence." *James v. Singletary*, 957 F.2d 1562, 1571 (11th Cir. 1992). It is "inherent[ly] difficult[]" for a court to make a retrospective, or *nunc pro tunc*, determination of a defendant's competence; thus, when a defendant establishes by a preponderance of the evidence that he was in fact incompetent when he waived her rights, the court must vacate the sentence and order new proceedings. *Drope*, 420 U.S. at 184.

103. Petitioner was incompetent when he waived his constitutional rights and pleaded guilty. *See supra*, Facts Relevant to All Claims. A waiver of constitutional rights that is not knowing, intelligent, and voluntary is void and violates due process. *Boykin v. Alabama,* 395 U.S. 238, 243-44 (1969). Petitioner's guilty plea cannot withstand constitutional scrutiny.

104. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The

facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Despite counsel's diligence and best efforts, the constraints of time have rendered counsel's investigation cursory and inadequate. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a complete and thorough investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Two: Petitioner's Federal Constitutional Rights Were Violated When Neither the Trial Court Nor Defense Counsel Ensured That He Was Competent When He Pleaded Guilty

105. Petitioner's state conviction and death sentence violate the federal Constitution because the trial court and defense counsel failed to ensure Petitioner was competent to plead guilty and waive his subsequent sentencing and state collateral review rights. This violated Petitioner's the Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

106. Once a genuine doubt has been raised as to a defendant's competency—by the court or defense counsel—the court must conduct a competency hearing.

Pate, 383 U.S. at 384. *See also* Fla. R. Crim. P. 3.210(a-b).[9] The defendant cannot waive the hearing. *Pate*, 383 U.S. at 384.

107. Where there is sufficient doubt of the defendant's mental capacity to stand criminal proceedings, such an inquiry includes, at a minimum, a hearing to determine the competency of a defendant. *Pate,* 383 U.S. at 387 (explaining that a hearing is constitutionally guaranteed when the record contains "sufficient indicia of incompetence" to doubt the defendant's competency). *See also Medina v. California*, 505 U.S. 437, 448 (1992) ("If a defendant is incompetent, due process considerations require suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him.").

108. Despite the numerous red flags detailed above, *see supra*, Facts Relevant to All Claims, that Petitioner was not competent to plead guilty and waive his rights at the sentencing phase, no inquiry was conducted regarding his competency.

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[9] Rule 3.210 of the Florida Rules of Criminal Procedure states the procedure to determine whether a defendant is competent at material stages of a criminal proceeding. Fla. R. Crim. P. 3.210. Defense counsel may file a written motion asking for the defendant to be examined by experts if counsel has a reasonable ground to believe their client is not mentally competent to proceed. Fla. R. Crim. P. 3.210(b)(1-3). The court, too, may, of its own accord, set a time for a hearing to determine the defendant's mental condition. Fla. R. Crim. P. 3.210(b).

A. The Trial Court Failed to Conduct a Proper Inquiry Into Petitioner's Competency at the Time of His Guilty Plea

109. The trial court failed to conduct a proper inquiry into Petitioner's competency at the time of his guilty plea, despite being presented with numerous red flags detailed above that Petitioner was not competent.

110. On February 6, 2008, Petitioner entered a guilty plea to all charges, in exchange for no benefit from the state. The trial court never ordered a competency evaluation, nor did trial counsel request one. The trial court relied solely on Petitioner's own assurances that his judgment was not impaired to find the defendant "intelligent" and to find the plea to be "freely and voluntarily made with knowledge of the consequences after advice of competent counsel[.]" ROA Vol 12 at 24.

111. "[A] petitioner may allege that the trial court denied him or her due process by failing *sua sponte* to hold a competency hearing. This is . . . a substantive incompetency claim with a presumption of incompetency and a resulting reversal of proof burdens on the competency issue." *James*, 957 F.2d at 1571-72. Under this standard, after Petitioner "establish[es] that the trial court should *sua sponte* have held a competency hearing," the burden shifts to the State to prove that the error was harmless. *Id.* at 1570 (explaining that there is a "presumption of incompetency upon a showing by a habeas petitioner that the state trial court failed to hold a competency hearing on its own initiative despite information raising a bona fide doubt as to the petitioner's competency").

112. A court must *sua sponte* inquire into a defendant's competency when there are reasonable grounds to doubt her competency. *Pate v. Robinson,* 383 U.S. 375, 385 (1966); *Scott v. State,* 420 So.2d 595, 597 (Fla.1982) ("[I]t is the responsibility of the trial court to conduct a hearing for competency to stand trial whenever it reasonably appears necessary to ensure that a defendant meets the standard of competency."); *Caraballo v. State*, 39 So. 3d 1234, 1252 (Fla. 2010) ("[R]ule 3.210(b) provides that, if the court 'has reasonable ground to believe that the defendant is not mentally competent to proceed,' it shall immediately schedule a hearing to determine the defendant's competency and may appoint experts to evaluate the defendant."); *Fallada v. Dugger*, 819 F.2d 1564, 1568 (11th Cir. 1987) ("[W]hen a court has a 'bona fide doubt' as to a defendant's competence, it must *sua sponte* conduct a hearing on his competence to stand trial."); *see also In re. Commitment of Reilly*, 970 So. 2d 453, 454 (Fla. 2d DCA 2007) (explaining that a six-month-old report was "stale" and could not speak to the defendant's present competency).

113. The trial court failed Petitioner, and his guilty plea cannot withstand constitutional scrutiny.

B. Trial Counsel Rendered Deficient Performance for Failing to Investigate and Present Evidence That Petitioner Was Incompetent at the Time of His Guilty Plea, and Petitioner Was Prejudiced

114. Despite numerous red flags that Petitioner was not competent to plead guilty, *see supra*, Facts Relevant to All Claims, trial counsel failed to conduct a thorough investigation into Petitioner's mental state and competency, and accordingly failed to raise the issue of Petitioner's incompetency to the court.

115. If trial counsel had competently investigated, they would have seen that Petitioner was not competent to plead guilty or questioned his competency enough to require an evaluation. Petitioner had thousands of pages' worth of medical records from his past and present incarceration diagnosing him with mental health concerns and placing him on psychiatric medication. Further, counsel was on notice that Petitioner had a longstanding drug history, and that drugs impact brain chemistry long after physical withdrawal is complete.

116. Petitioner suffers from multiple psychiatric and neuropsychiatric disorders, most if which not all predate his guilty plea.

117. In Florida, failure to raise a defendant's potential incompetency can be the basis for a claim of ineffective assistance of counsel. *Coker v. State,* 978 So. 2d 809, 810 (Fla. 1st DCA 2008) (recognizing the failure to raise a defendant's alleged incompetency as a ground for asserting ineffective assistance of counsel); *Schultheis v. State,* 12 So. 3d 811, 812 (Fla. 1st DCA 2009) ("A narrow argument that counsel

was ineffective for failing to raise the competency issue . . . is cognizable in the postconviction posture.").

118. Ineffective assistance of counsel is analyzed under the two-pronged standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner must show that trial counsel's representation fell below an objective level of reasonableness and that, but for counsel's deficient performance, there is a reasonable likelihood an evaluation would have found him not competent. *Id.* at 688.

119. Counsel was obligated to investigate Petitioner's competency by retaining an expert to conduct a competency assessment of Petitioner or by requesting the court appoint an expert for such purpose. *Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1994) (holding counsel ineffective for failing to investigate the defendant's mental state prior to a waiver of constitutional rights); *Wiggins v. Smith*, 539 U.S. 510 (2003) (discussing counsel's need to thoroughly investigate).

> It must be a very rare circumstance indeed where a decision not to investigate would be "reasonable" after counsel has notice of the client's history of mental problems. . . . Where a condition may not be visible to a layman, counsel cannot depend on his or her own evaluation of someone's sanity once he has reason to believe an investigation is warranted because, where such a condition exists, the defendant's attorney is the sole hope that it will be brought to the attention of the court.

Bouchillon v. Collins, 907 F.2d 589, 597 (5th Cir. 1990). In Petitioner's case, his attorney stated on the record that he was relying on his own determination that there

were no indicators of incompetency since Dr. Day's supposed evaluation shortly after Petitioner's arrest.

120. Counsel has a duty to ensure his client is "capable of making a rational choice 'among rationally understood probabilities.'" *Galowski v. Berge,* 78 F.3d 1176, 1180 (7th Cir.1996) (internal citation omitted). Accordingly, counsel should request a competency evaluation whenever he has a good faith doubt as to his client's competence. *U.S. v. Boigegrain*, 155 F.3d 1181, 1188 (10th Cir. 1998) (holding that defense counsel has "a professional duty" to bring the issue of competency to the court's attention when there is a substantial doubt as to the client's competency); *Jermyn v. Horn*, 266 F.3d 257, 283 (3rd Cir. 2001) (explaining that counsel's representation is objectively unreasonable when he does not have his client evaluated despite indications of incompetence).

121. Adequate safeguards must be observed upon a doubt as to a defendant's competency, including the suspension of proceedings pending an evaluation and hearing. *Drope*, 420 U.S. at 171. Counsel has a duty to inform the court when there is "reasonable doubt" as to the defendant's competence. *Kibert v. Peyton,* 383 F.2d 566, 569 (4th Cir. 1967).

> Of all the actors in a trial, defense counsel has the most intimate association with the defendant. Therefore, the defendant's lawyer is not only allowed to raise the competency issue, but, because of the importance on the prohibition on trying those who cannot understand proceedings against them, she has a professional duty to do so when appropriate.

Boigegrain, 155 F.3d at 1188–89.

> If counsel fails . . . to alert the court to the defendant's mental status, the fault is unlikely to be made up – particularly where a [waiver] removes the accused from the observation of the court and decreases the probability that counsel will deem it necessary to do further research in pursuit of a defense.

Bouchillon, 907 F.2d at 597.

122. In this case, defense counsel had "no justification for ignoring the uncontradicted testimony of [Petitioner]'s history of pronounced irrational behavior" even if counsel believed their client might be incompetent. *Pate*, 383 U.S. at 385-86. "[T]he existence of even a severe psychiatric defect is not always apparent to laymen." *Bruce v. Estelle*, 536 F.2d 1051, 1059 (5th Cir. 1976); *see also Lokos v. Capps,* 625 F.2d 1258, 1267 (5th Cir. 1980) ("One need not be catatonic, raving or frothing, to be [incompetent]."); *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001) ("[Defense counsel] is not a trained mental health professional, and his failure to raise petitioner's competence does not establish that petitioner was competent.").

123. ("[T]o demonstrate prejudice from counsel's failure to investigate his competency, petitioner has to show that there exists 'at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial.'" *Alexander v. Dugger,* 841 F.2d, 371, 375 (11th Cir. 1988) (citation omitted). *See also Futch v. Dugger*, 874 F.2d 1483, 1487 (11th Cir. 1989).

124. As a result of counsel's deficient performance in this regard, and as a result of counsel's deficiencies cumulatively, Petitioner was prejudiced within the meaning of *Strickland*. If counsel had conducted a competency evaluation, there is a reasonable probability that Petitioner would have been found incompetent to plead guilty. His guilty plea therefore cannot withstand constitutional scrutiny.

125. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Despite counsel's diligence and best efforts, the constraints of time have rendered counsel's investigation cursory and inadequate. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a complete and thorough investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Three: Petitioner's Guilty Plea Was Not Knowing, Voluntary, and Intelligent in Violation of His Federal Constitutional Rights

126. Petitioner's state conviction and death sentence violate the federal Constitution because Petitioner was not of a rational mind to plead guilty. The trial court and defense counsel failed to conduct a proper inquiry into Petitioner's mental state at the time of his guilty plea, despite being presented with numerous red flags detailed above regarding Petitioner's impairments. Even if Petitioner's impairments did not rise to the level of incompetence, Petitioner was still substantially impacted by his cognitive impairments and unable to plead knowingly, voluntarily, or intelligently. Petitioner's plea violates his Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

127. Guilty pleas, as a "mode of conviction [are] no more foolproof than full trials to the court or to the jury. Accordingly, [courts must] take great precautions against unsound results." *Brady v. United States*, 397 U.S. 742, 758 (1970). A guilty plea that is not knowing and voluntary is void and violates due process. *Boykin v. Alabama,* 395 U.S. 238, 243 n.5 (1969); *Brady,* 397 U.S. at 748 (1970).

128. A "guilty plea is a grave and solemn act," and the Constitution mandates that a guilty plea "be the voluntary expression of [the defendant]'s own choice." *Id.* at 758. *See, e.g.*, *Henderson v. Morgan*, 426 U.S. 637, 644 (1976) ("[A] plea cannot support a judgment of guilty unless it was voluntary in a constitutional sense.").

129. Determining whether a defendant's guilty plea was voluntary is not an easy task, because "[t]he notion of 'voluntariness' is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes." *Culombe v. Connecticut*, 367 U.S. 568, 604-05 (1961). At its core, voluntariness is a defendant's "state of mind as it bears on his will, purpose, and choice of action." *Mitsugi Nishikawa v. Dulles*, 356 U.S. 129, 141 (1958).

130. To evaluate the voluntariness of Petitioner's guilty plea, this Court must assess the "totality of the circumstances," including Petitioner's individual characteristics, the complexities of the charges he faced, and the severity of the sentence to which a guilty plea would expose him. *Gaddy v. Linahan*, 780 F.2d 935, 944-46 (11th Cir. 1986). In effect, the Court must ask "why" he pleaded guilty. *Harrison v. U.S.*, 392 U.S. 219, 223 (1968).

A. The Trial Court Failed to Conduct a Proper Inquiry Into the Impact of Petitioner's Mental Health on His Guilty Plea

131. The trial court failed to conduct a proper inquiry into Petitioner's mental state at the time of his guilty plea, despite being presented with red flags detailed above that Petitioner was not of a rational mind to plead knowingly, voluntarily, and intelligently.

132. On February 6, 2008, Petitioner entered a guilty plea to all charges, in exchange for no benefit from the state. The trial court never ordered a competency evaluation, nor did trial counsel request one. The trial court relied solely on

Petitioner's own assurances that his judgment was not impaired to find the defendant "intelligent" and to find the plea to be "freely and voluntarily made with knowledge of the consequences after advice of competent counsel[.]" ROA Vol 12 at 486-87. The trial court never had Petitioner evaluated for competency. Nor was Petitioner evaluated for any other mental health issues. Even if such an evaluation found Petitioner was competent, there is a reasonable probability it would have found his ability to knowingly, voluntarily, and intelligently plead was compromised by his cognitive and mental impairments. In the absence of any evaluation into Petitioner's competency, Petitioner entered an unknowing, involuntary, unintelligent guilty plea.

B. Trial Counsel Rendered Deficient Performance by Failing to Investigate and Present Evidence That Petitioner's Mental Health Rendered His Plea Not Knowing, Voluntary, and Intelligent, and Petitioner Was Prejudiced

133. Petitioner's plea is constitutionally invalid under the Fifth, Sixth, Eighth, and Fourteenth Amendments because trial counsel performed deficiently by failing to conduct an adequate investigation into Petitioner's mental health. Trial counsel was further deficient in failing to adequately investigate mitigation and aggravation, including the likelihood that Petitioner's mental state and drug use had rendered him incapable of forming the aggravated intent necessary to support a finding of premeditated murder.

134. Even if competent to stand trial, Petitioner was operating under substantial mental and cognitive impairments. These impairments themselves

rendered Petitioner's plea unknowing, unintelligent, and involuntary. And these impairments, combined with and exacerbated by the ineffective assistance of counsel Petitioner received, rendered Petitioner's plea unknowing, unintelligent, and involuntary.

135. Once Petitioner announced his desire to plead guilty, trial counsel ceased their investigation as it pertained to Petitioner's guilt phase. By failing to conduct a thorough investigation into Petitioner's mental health as it pertained to the guilt phase of a potential trial, counsel was deprived of the information detailed above regarding Petitioner's mental health, and therefore unable to offer informed advice regarding Petitioner's plea.

136. Petitioner was constitutionally guaranteed "the guiding hand of counsel" before waiving the panoply of constitutional rights associated with a trial. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). *See generally Santobello v. New York*, 404 U.S. 257, 264 (1971) (J. Douglas, concurring) ("[A] guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt.") (internal citations omitted).

137. A knowing and voluntary plea can only occur if the defendant receives reasonably competent assistance of counsel. *McMann v. Richardson,* 397 U.S. 759,

770-71 (1970). A defendant can attack the voluntary and intelligent nature of his guilty plea by showing she received ineffective assistance of counsel. *Hill v. Lockhart,* 474 U.S. 52, 56-57 (1985). To provide effective assistance, counsel must give their client professional, educated advice as to whether he should accept a plea offer or contest the charges as trial. "[A]n accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies,* 332 U.S. 708, 721 (1948). *See also Wofford v. Wainwright,* 748 F.2d 1505, 1508 (11th Cir. 1984).

> It is the lawyer's duty to . . . actually and substantially assist his client in deciding whether to plead guilty. It is his job to provide the accused an understanding of the law in relation to the facts. . . . [I]f the quality of counsel's service falls below a certain level, the client's guilty plea cannot be knowing and voluntary, because it will not represent an informed choice. And a lawyer who is not familiar with the facts and law relevant to his client's case cannot meet that required minimal level.

Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974)

138. "Counsel must be familiar with the facts and the law in order to advise the defendant of the options available. The guilty plea does not relieve counsel of the responsibility to investigate potential defenses so that the defendant can make an informed decision." *Scott v. Wainwright*, 698 F.2d 427, 229 (11th Cir. 1983); *American Bar Association Standards for Criminal Justice*, The Defense Function,

4.1 (1st ed. 1971) (hereinafter *ABA Standards*) ("The lawyer's duty to investigate is not discharged by the accused's admission of guilt to him or by his stated desire to enter a guilty plea.").

> [B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it *cannot* be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. Providing this understanding of the law in relation to the facts is the function of the accused's appointed counsel.

Walker v. Caldwell, 476 F.2d 213, 218 (5th Cir. 1973) (explaining that counsel must "actually and substantially *assist* his client in deciding whether to plead guilty") (emphasis in original).

139. "[I]n a capital case, counsel must consider in conjunction both the guilt and the penalty phases in determining how best to proceed." *Florida v. Nixon*, 543 U.S. 175, 192 (2004). Consequently, it is impossible to isolate counsel's deficient performance as pertaining solely to either phase of Petitioner's trial. *Finch v. Vaughn*, 67 F.3d 909 (11th Cir. 1995) (setting aside a guilty plea, because the defendant "needed accurate sentencing advice to enter an informed guilty plea" and his attorney did not provide such advice); *Magill v. Dugger*, 824 F.2d 879, 888 (11th Cir. 1987) (explaining that, "[a]lthough the guilt and penalty proceedings are considered 'separate proceedings,' [the court] cannot ignore the effect" that counsel's failures during one phase have on the other phase).

140. Ineffective assistance of counsel during the plea process is generally analyzed under the two-pronged standard of deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *Hill*, 474 U.S. at 56-57. . Had trial counsel conducted an adequate and independent investigation, obtained timely a competency and mental health evaluation of Petitioner, and properly advised Petitioner, there is a reasonable likelihood Petitioner would not have pleaded guilty.

141. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a more complete investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Four: Petitioner Was Incompetent at the Penalty Phase and Incompetent to Waive His Constitutional Rights in That Proceeding

142. Petitioner's state conviction and death sentence violate the federal Constitution because Petitioner was not competent at the time of his penalty phase and was incompetent to waive his sentencing rights. As the facts above demonstrate, Petitioner's psychiatric disorders, possible brain damage, drug use, and trauma history rendered him incompetent to waive his penalty phase rights to present mitigation and rebut aggravating factors presented by the State. Due to his incompetency during the penalty phase of his trial, Petitioner's death sentence stands in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

143. Criminal proceedings of an incompetent defendant violate due process. *Drope*, 420 U.S. at 171. This due process right cannot be waived. *Pate,* 383 U.S. at 384; *see supra* Claim 1. Whether Petitioner was competent hinges on whether he "ha[d] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he ha[d] a rational as well as factual understanding of the proceedings against him." *Dusky*, 362 U.S. at 402.

144. To prevail on this claim, Petitioner must demonstrate by a preponderance of the evidence that she was incompetent at the time of his penalty phase waivers. *James*, 957 F.2d at 1571; *Drope*, 420 U.S. at 184.

145. Any finding that Petitioner was competent at the time right after arrest, or even at the time of his guilty plea, does not mean Petitioner was competent over a year later at the time of his penalty phase. *Bishop v. United States*, 350 U.S. 961 (1956). *See also Brockman v. State,* 852 So. 2d 330, 333-34 (Fla. 2d DCA 2003) (holding that assessments from four and eleven months prior to trial "were simply too old to be relevant to a determination of [the defendant's] competency to stand trial" as they did not indicate the defendant's competence at the time of trial); *In re. Commitment of Reilly*, 970 So. 2d 453, 454 (Fla. 2d DCA 2007) (explaining that a six-month-old assessment could not speak to the defendant's present competency and that such a competency assessment was "stale"); *LeWinter v. Guardianship of LeWinter,* 606 So. 2d 387, 388 (Fla. 3d DCA 1992) discussing how a report filed six weeks before the competency proceeding did not accurately reflect the subject's *present* mental state and abilities).

146. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Despite counsel's diligence and best efforts, the constraints of time have rendered counsel's investigation cursory and inadequate. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a complete and thorough investigation and

exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Five: Petitioner's Federal Constitutional Rights Were Violated When Neither the Trial Court Nor the Defense Ensured He Was Competent at the Penalty Phase

147. Petitioner's state conviction and death sentence violate the federal Constitution because the trial court and defense counsel failed to ensure Petitioner was competent at the time of his penalty phase. This violated Petitioner's the Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

148. Despite the numerous red flags detailed above that Petitioner was not competent to stand trial during the penalty phase and to waive rights at the penalty phase, no inquiry was conducted regarding his competency.

149. Petitioner's state conviction and death sentence violate the federal Constitution because the trial court and defense counsel failed to ensure Petitioner was competent at the time of his penalty phase and when he waived penalty phase rights. This violated Petitioner's the Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

150. Where there is a doubt as to the defendant's mental capacity to stand criminal proceedings, there must be a competency inquiry that includes, at a minimum, a hearing. *Pate,* 383 U.S. at 387 (explaining that a hearing is constitutionally guaranteed when the record contains "sufficient indicia of incompetence" to doubt the defendant's competency). *See also Medina v. California*, 505 U.S. 437, 448 (1992); *see, supra,* Claim 4. A doubt can be raised by defense counsel or the court. Fla. R. Crim. P. 3.210(a-b); Fla. R. Crim. P. 3.851(g).

151. The defendant cannot waive a competency assessment. *Pate*, 383 U.S. at 384.

152. A competency assessment must be made within a reasonable time of the proceeding. *Drope*, 420 U.S. at 181 ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence . . . ."); *Bishop v. United States*, 350 U.S. 961 (1956) (explaining that, while the defendant had no mental disorder a month prior to trial, a hearing on his sanity at the time of trial was required); *Lane v. State,* 388 So. 2d 1022, 1025 (Fla. 1980) (discussing that a finding of competence made nine months prior to a hearing does not control when evidence of potential incompetency was presented at the hearing). *See supra* Claim 2.

153. In this case, both the court and defense counsel erred by failing to have Petitioner's competency assessed at a juncture close in time to the penalty phase.[10]

A. The Trial Court Failed to Conduct a Proper Inquiry Into Petitioner's Competency at the Penalty Phase

154. The trial court failed to conduct a proper inquiry into Petitioner's competency at the time of his penalty phase, despite being presented with red flags detailed above that Petitioner was not competent.

155. "[A] petitioner may allege that the trial court denied him or her due process by failing *sua sponte* to hold a competency hearing. This is . . . a substantive incompetency claim with a presumption of incompetency and a resulting reversal of proof burdens on the competency issue." *James*, 957 F.2d at 1571-72. Under this standard, after Petitioner "establish[es] that the [] court should *sua sponte* have held a competency hearing," the burden shifts to the State to prove that the error was harmless. *Id.*

156. A court must *sua sponte* inquire into a defendant's competency when there are reasonable grounds to doubt his competency. *Pate,* 383 U.S. at 385. *See*

[10] Rule 3.851 of the Florida Rules of Criminal Procedure lays out the procedure to determine whether a defendant is competent during capital collateral proceedings. Fla. R. Crim. P. 3.851(g). Collateral counsel may file a motion for a competency determination if they believe that their client is incompetent to proceed. Fla. R. Crim. Pro. 3.851(g)(2). Similarly, if the court finds reason to believe that a death-sentenced prisoner is incompetent to proceed, a judicial determination of incompetency is required. *Id.* at 3.851(g)(3-5).

also Scott, 420 So. 2d at 597 ("[I]t is the responsibility of the trial court to conduct a hearing for competency to stand trial whenever it reasonably appears necessary to ensure that a defendant meets the standard of competency."); *Caraballo*, 39 So. 3d at 1252; *Fallada*, 819 F.2d at 1568; *see supra* Claim 2.

157. The trial court failed to take these measures, despite indications detailed above that Petitioner was not competent to proceed with a penalty phase or to waive his rights at that phase of his trial. As a result, Petitioner's death sentence cannot pass constitutional scrutiny.

B. Trial Counsel Performed Deficiently by Failing to Investigate and Present Evidence That Petitioner Was Incompetent at the Penalty Phase

158. Despite numerous red flags detailed above that Petitioner was not competent at the time of his penalty phase, trial counsel failed to conduct a thorough investigation into Petitioner's mental state and competency, and accordingly failed to raise the issue of Petitioner's incompetency to the court. This was deficient performance.

159. Failure to raise a defendant's potential incompetency can be the basis for a claim of ineffective assistance of counsel. *Coker,* 978 So. 2d at 810 (recognizing the failure to raise a defendant's alleged incompetency as a basis for an ineffective assistance of counsel claim); *Schultheis,* 12 So. 3d at 812 ("A narrow

argument that counsel was ineffective for failing to raise the competency issue, however, is cognizable in the postconviction posture.").

160. Ineffective assistance of counsel is analyzed under the two-pronged standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner must show that counsel's representation fell below an objective level of reasonableness and that, but for counsel's deficient performance, there is a reasonable likelihood an adequate and timely evaluation would have found Petitioner not competent. *Id. See supra* Claim II.

161. Counsel's failure on this crucial matter constituted a dereliction of duty that fell below an objective standard of reasonableness. Counsel had "no justification for ignoring the uncontradicted testimony of [Petitioner]'s history of pronounced irrational behavior" even if counsel believed Petitioner might be competent. *Pate*, 383 U.S. at 385-86. *See also Bruce*, 536 F.2d at 1059; *Lokos,* 625 F.2d at 1267; *Odle*, 238 F.3d at 1089.

162. To show prejudice from counsel's ineffective assistance to thoroughly investigate his competency, Petitioner must demonstrate a reasonable probability that a timely and adequate evaluation would have concluded he was not competent. *Nelson v. State*, 43 So. 3d at 29; *Futch*, 874 F.2d at 1487. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. *See also Alexander,* 841 F.2d at 375 ("[P]etitioner has to show that there

exists 'at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial.'").

163. Had trial counsel conducted a reasonable investigation, including investigating Petitioner's mental health and trauma history, they would have uncovered readily available evidence detailed above that Petitioner was not competent to proceed with his penalty phase; there is a reasonable probability that a timely and adequate assessment would have concluded Petitioner was not competent to stand trial or waive his rights during the penalty phase.

C. Petitioner Never Received a Competency Evaluation Due to a Misrepresentation to the Court

164. On April 14, 2008, trial counsel informed the trial court that Petitioner wished to waive the presentation of mitigation. The *State* expressed that the court would need to make a determination of Petitioner's competency to waive, ROA Vol. 12 at 472 ("One, is he mentally competent? And, two, is he legally competent to waive presenting any type of mitigation evidence, as well as waiving the jury?"). Petitioner responded that when he pled guilty, he "was found competent, vulnerable as should be the case…I have a desire to stand before you, vulnerable again, as should be the case." *Id.* at 473; *see also id.* at 476 ("I just ask that, you know, just as my pleas were accepted, and that I was found competent for that, that I'll be found competent to waive the jury and to waive mitigation"). He referenced his extensive drug abuse, childhood abuse, and head injuries, but the Court did not ask for details.

165. The court asked defense counsel whether there had been a competency evaluation and what the status of any such evaluation was. Trial counsel represented that they had retained Dr. Deborah Day, and that she had, as a feature of her initial evaluation, performed a competency evaluation. ROA Vol. 12 at 476. Counsel stated that Dr. Day "at that time, thought that Mr. Russ was competent. He has, of course, been deemed competent by two different courts, including you, to enter pleas. I have not had a recent update to that." *Id.* While counsel stated they believed Petitioner was making "a horrible decision" they did not seek any further evaluation or raise concerns about Petitioner's competency. *Id.* The court stated, "Well, I know there was no issue of competence at the time of the plea. We had addressed it." *Id.* at 477. Trial counsel represented that they had seen nothing since that time to indicate a lack of competency. *Id.*

166. On April 30, 2008, the Court asked trial counsel if there had been any suggestions that Petitioner may be incompetent to proceed. *Id.* at 486. Counsel represented that although there were "indications that he has personality problems that interfere with his decision making capabilities," they did not feel there was any indication that Petitioner was not competent. *Id.* The court specifically asked counsel if a defense expert had found Petitioner competent to proceed, and trial counsel affirmed that Dr. Day had evaluated Petitioner shortly after Petitioner's arrest, and had found him competent. Trial counsel stated he hadn't had a follow-up

examination "because I haven't seen any indications in my client as to…that he had in any way lost competency such that I needed to have an expert see him again to make another determination of the current state of competence." *Id.* at 486-87.

167. Regardless of whether counsel's misrepresentation was intentional or negligent, Petitioner's rights were violated. Without the opportunity to conduct a full investigation, Petitioner cannot allege with specificity whether counsel's misrepresentation was intentional or negligent. If counsel intentionally misled the court, that was egregious professional misconduct that prejudiced Petitioner. If counsel's misrepresentation was negligent, it was unreasonable, deficient performance with the same prejudice to Petitioner as with intentional misconduct.

168. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Despite counsel's diligence and best efforts, the constraints of time have rendered counsel's investigation cursory and inadequate. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a complete and thorough investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion.

Following exhaustion, this Court should grant Petitioner's request to file a substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Six: Petitioner's Penalty Phase Waiver Was Not Knowing, Voluntary, and Intelligent

169. Petitioner's death sentence violates the federal Constitution because Petitioner was not of a rational mind to waive his sentencing rights, even if he was competent to stand for penalty phase proceedings. The trial court and defense counsel failed to conduct a proper inquiry into Petitioner's mental state at the time of his penalty phase waiver, despite being presented with numerous red flags detailed above that Petitioner was not able to plead knowingly, voluntarily, or intelligently due to the impact of his cognitive and mental health impairments.

170. A waiver of penalty phase rights, like a guilty plea, must be knowing and voluntary. under *Boykin*. Petitioner's cognitive and mental health impairments detailed above rendered his penalty phase waivers unknowing, involuntary, and unintelligent. His penalty phase waivers violated Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

171. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Despite counsel's diligence and

best efforts, the constraints of time have rendered counsel's investigation cursory and inadequate. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a complete and thorough investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Seven: Petitioner's Penalty Phase Waiver Was Not Knowing, Voluntary, and Intelligent as a Result of Trial Counsel's Ineffectiveness

172. Despite numerous red flags that Petitioner's cognitive and mental health conditions rendered him unable to knowingly, intelligently, and voluntarily waive his penalty phase rights, trial counsel failed to conduct a thorough investigation into Petitioner's mental state and competency. Trial counsel's deficient investigation resulted in uninformed advice to Petitioner regarding the availability of evidence to rebut the State's aggravators, and the availability of evidence to offer in mitigation – as well as the likely consequences of presenting or foregoing this evidence. Petitioner was prejudiced by this deficiency when he made an uninformed waiver of his penalty phase rights.

173. "Pretrial investigation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation." *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984).

174. "[E]ffective representation, consistent with the Sixth Amendment . . . involves 'the independent duty to investigate and prepare.'" *Id.* (citations omitted). This duty was unambiguous at the time of Petitioner's trial.

> The lawyer . . . has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant himself. Information concerning the defendant's background, education, employment record, emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. **Investigation is essential to fulfillment of these functions.** Such information . . . will be relevant at trial and at sentencing.

ABA Standards, at 4.1 (emphasis added).

175. In a capital case, trial counsel is obligated to conduct a thorough, diligent investigation into their client's background for potential mitigating evidence. *Wiggins*, 539 U.S. 510; *Williams v. Taylor*, 529 U.S. 362, 1515, 1524 (2000); *Brownlee v. Haley*, 306 F.3d 1043 (11th Cir. 2002); *Turpin v. Christenson*, 497 S.E.2d 216 (Ga. 1998). Counsel is also obligated to investigate matters that they know that the prosecution plans to present against the defendant as aggravating circumstances. *Rompilla v. Beard*, 125 S. Ct. 2456, 2465 (2005) (explaining that

both common sense and longstanding *ABA Standards* dictate that an attorney investigate aggravating matters that the prosecution has notified the attorney it intends to use).

176. "[A] defendant's desires not to present mitigating evidence do not terminate counsels' responsibilities during the sentencing phase of a death penalty trial." *Blanco v. Singletary*, 943 F.2d 1477, 1502 (11th Cir. 1991) (holding that counsel was ineffective for failing to investigate and present relevant, available mitigating evidence); *Hardwick v. Crosby*, 320 F.3d 1127, 1189 (11th Cir. 2003) (discussing that trial counsel's duty to investigate mitigation is not eliminated by statements by the defendant that he does not want to present such evidence).

177. Even when a defendant instructs his counsel to not investigate or present mitigating evidence, counsel cannot "blindly follow" their client's commands, because, "although the decision whether to use such evidence in court is for the client," the lawyer must first conduct a thorough investigation and then advise the client on potential defenses and potential mitigation. *Thompson*, 787 F.2d at 1451; (*ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, at Commentary to 11.4.1 (1989)).

178. Counsel must always investigate in order to fulfill his duty of offering his client informed advice regarding "which strategies offer the best chance of success." *Foster v. Dugger*, 823 F.2d 402, 408 n.16 (11th Cir. 1987) ("Uncounseled

jailhouse bravado should not deprive a defendant of his right to counsel's better-informed advice."). *See also Horton v. Zant*, 941 F.2d 1449, 1463 (11th Cir. 1991) ("[M]itigating evidence, when available, is appropriate in *every* case where the defendant is placed in jeopardy of receiving the death penalty.") (emphasis added).

179. In this case, the decision not to present mitigating evidence "was not a result of investigation and evaluation but was instead primarily a result of counsels' eagerness to latch onto [Petitioner]'s statements that he did not want any witnesses called." *Blanco*, 943 F.2d at 1503. "Counsel essentially acquiesced in [Petitioner]'s defeatism without knowing what evidence he was foregoing." *Id.* at 1501. Counsel's actions were deficient within the meaning of *Strickland*.

A. Trial Counsel Failed to Conduct a Thorough Investigation of Readily Available Mitigation Evidence

180. Trial counsel was deficient within the meaning of *Strickland* by failing to conduct a reasonable mitigation investigation and uncover readily available mitigation evidence. Petitioner was prejudiced by this individual failure, as well as by this failure viewed cumulatively with counsel's other deficiencies. *See Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988) ("[P]sychiatric mitigating evidence not only can act in mitigation, it also could significantly weaken the aggravating factors.") (quotations, citation omitted).

B. Trial Counsel Failed to Investigate and Prepare Evidence to Rebut an Aggravating Factor

181. Trial counsel was deficient within the meaning of *Strickland* by failing to conduct a reasonable investigation and uncover readily available evidence that Petitioner's mental health rendered him unable to form the necessary mental state for the State's proposed aggravator of cold, calculated, and premeditated murder. *See Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541, 561 (11th Cir. 2015) ("[W]ith respect to the CCP aggravator, had the jury known about [Petitioner's] longstanding mental health issues and substantial drug and alcohol-induced impairment at the time of the murder, they may indeed have attributed less weight to the State's assertion that the murder was the result of heightened premeditation"). Petitioner was prejudiced by this individual failure, as well as by this failure viewed cumulatively with counsel's other deficiencies.

C. Trial Counsel Could Not Properly Advise Petitioner

182. Based on trial counsel's inadequate investigation into relevant sentencing matters, including but not limited to Petitioner's mental and cognitive impairments, mitigating circumstances, and aggravating factors, counsel could not provide Petitioner with sound, informed advice as to waiving rights. Counsel could not advise Petitioner about the consequences, advantages and disadvantages, or odds related to different courses of action.

183. Petitioner could not knowingly and intelligently waive his rights when he did not know what those rights entailed and what counsel could have done had he exercised his rights. The lack of reasoned advice amounted to ineffective assistance of counsel that rendered Petitioner's waiver involuntary.

184. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Despite counsel's diligence and best efforts, the constraints of time have rendered counsel's investigation cursory and inadequate. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a complete and thorough investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Eight: Petitioner's Federal Constitutional Rights Were Violated by the Trial Court's Appointment of Special Counsel

185. The Sixth Amendment provides that a defendant has the right to the assistance of counsel. Nonetheless, "[t]he choice is not all or nothing: To gain

assistance, a defendant need not surrender control entirely to counsel." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018); *see also Weaver v. Massachusetts,* 137 S. Ct. 1899, 1908 (2017) ("[A] defendant must be allowed to make his own choices about the proper way to protect his own liberty."). Balancing a defendant's ability to control his own litigation and an attorney's duty to pursue diligently a client's best defense can certainly, in making isolated decisions at trial, be a challenging task and require nuance in management. *See, e.g., Gonzalez v. United States*, 553 U.S. 242, 1770 (2008) ("These matters [of trial procedure and strategy] can be difficult to explain to a layperson . . .").

186. However, the law is clear that while some decisions can be made by counsel alone on behalf of a defendant, the overall direction of a defendant's litigation is fundamentally a choice of the defendant. *See McCoy*, 138 S. Ct. at 1508 ("These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*."). Choosing the objective of the litigation is fundamental to a defendant's autonomy, and interference with a competent defendant's choice of objectives for his defense violates his Sixth Amendment rights. *McCoy*, 138 S. Ct. at 1510.

187. Included in this right to direct the course of litigation is the decision on whether or not to present mitigating evidence, or to rely on the trial court's sound judgment as to whether death is the appropriate sentence. *See, e.g., Hamblen v. State*,

527 So. 2d 800, 804 (Fla. 1988) (In the context of a capital defendant who waived mitigation at his sentencing: "In the field of criminal law, there is no doubt that 'death is different,' but, in the final analysis, all competent defendants have a right to control their own destinies."); *see also Ocha v. State*, 826 So. 2d 956, 964 (Fla. 2002) ("*Hamblen* and its progeny operate under the premise that a competent defendant may direct his own defense at trial."). Where a defendant is deprived of the ability to decide the main course of his litigation – even if that choice is ill-advised – his constitutional rights are violated. Such errors are structural, because they offend constitutional principles and thus implicate the constitutionality of the proceeding as a whole. *McCoy*, 138 S. Ct. at 1510.

A. The Trial Court's Appointment of Special Counsel Was Irreconcilable With the Objective of Petitioner's Defense and Thus Interfered With Petitioner's Sixth Amendment and Due Process Rights

188. On April 30, 2008, Petitioner and his counsel appeared before the trial court for a status conference concerning his penalty phase proceedings. Trial counsel indicated to the court that Petitioner intended to waive his right to a jury recommendation as to his sentence, and forgo the presentation of mitigating evidence. *See* Vol. 12, T. 485. Petitioner himself then asserted that he wanted to waive his right to a jury recommendation, *id*. at 489, and his desire that no mitigation argument by his counsel or witnesses be presented on his behalf, *id*. at 492. Petitioner did, however, agree that records, such as school or military records, which could be

mitigating, could be developed and presented to the court for the purpose of sentencing. Vol. 12, T. 494 ("The Court: So you're saying that if there are documents that could be introduced into evidence, you have no problem with that, but you don't want [your trial counsel] to make argument in conjunction with that? Mr. Russ: Right. That's fine. I mean, I would anticipate that's something that you would do anyway so that you could make a decision."). Petitioner agreed that his trial counsel had discussed with him how a penalty phase proceeding worked. Vol. 12, T. 495. Petitioner indicated he understood the trial court had a duty to address mitigation, *id*. at 537, and that he was agreeable to the review of mitigating, record based evidence, by the trial court if it needed to do so, *id*. at 535.

189. The following day, on May 1, 2008, the trial court held another status hearing concerning Petitioner's penalty phase proceedings. *See* Vol. 13, T. 544. At this hearing, the trial court announced that it would appoint special counsel "for the purpose of presenting any mitigation evidence that may exist," and directed that both the State and the Defense make any mitigating evidence in their possession available to that special counsel. *Id*. at 545. The trial court clarified that Petitioner's trial counsel was to continue to represent him, and that special counsel "is to act in the public interest." *Id*. at 546. Further, the trial court noted, "Mr. Russ has made it clear what his intentions are regarding [trial counsel] . . . [h]e's indicated that he did not wish to discharge you previously." *Id*.

190. On both April 30th and May 1, 2008, Petitioner made known the objective of his penalty phase: "Just as the victim stood vulnerable, I stand vulnerable. I do not wish any mitigation be presented on my behalf, any at all." Vol. 12, T. 492. Petitioner articulated clearly his desire that the objective of his penalty phase proceedings was to not further traumatize the victim's family, and to stand before the trial court to be considered for sentencing, without the formal presentation of mitigating evidence. Petitioner did not ask for an immediate imposition of the death penalty, and did not ask for the trial court to change its necessary procedures with regard to sentencing him. Indeed, Petitioner indicated affirmatively on several occasions that he understood that the trial court may believe it has duties to consider details about his background, and consented to the trial court's review of record-based material. In no way did Petitioner attempt to frustrate the court's process, or impair the court's ability to consider the mitigating evidence it was proffered by defense counsel, Vol. 12, T. 504-525, nor did he object when the trial court ordered a presentence investigation, *id*. at 535-36, or when the court ordered that defense counsel and the State make mitigating information available, Vol. 13, T. 545. Petitioner simply, and clearly, wanted no live mitigating evidence presented during his penalty phase proceedings, regardless of the trial court's duty and ability to review record-based materials.

191. Petitioner indicated affirmatively that he had been counseled about his decision, and understood the process before him. He maintained his counsel, and had the ability to question the process or his choices at any time. The trial court found him competent to make these choices. *See* Vol. 12, T. 544 ("First of all, [the court finds] that you're competent to waive the right to a jury recommendation . . . as to sentencing in the case. . . The Court, likewise, finds that you are competent to waive your right to the presentation of mitigating evidence[.]"). Petitioner's penalty phase objective to leave his future entirely to the trial court – even if inadvisable – was, in the trial court's view, competently made, and informed by the counseling of a qualified attorney. Indeed, it was a decision he had a constitutionally protected right to make.

192. The trial court's appointment of special counsel was *sua sponte*, and functioned only to preempt and frustrate Petitioner's objectives for his own penalty phase. The trial court admitted as much at the time she announced her intention to appoint such counsel. Vol. 13, T. 544-45 ("And certainly the case law indicates that if you are competent, you are able to [waive your mitigation.] However, the Court . . . has an independent duty to weigh the aggravating and mitigating circumstances . . . [t]herefore, the Court is going to appoint special counsel[.]"). In later hearings, the trial court reiterated that the special counsel's purpose was directly contradictory to Petitioner's waiver and objective. *See, e.g.,* Vol. 13, T. 552 ("The Court: Your

responsibility as special counsel is to present mitigation . . . [Petitioner] has indicated he does not want mitigation presented . . . [but] you would present mitigation, whatever that may be, in the same manner that you would present it in any capital trial.").

193. Further, the appointment of special counsel was only one day after Petitioner made his objectives known, and also preceded the presentence investigation or any other opportunity for the court to review record-based information about Petitioner to determine if that was sufficient for it to make a reasoned sentencing decision without the appointment of special counsel. A trial court can make a reasoned decision on mitigation without the appointment of such counsel. *See Hamblen v. State*, 527 So. 2d 800 (Fla. 1988). Additionally, the Petitioner had already consented to the record-based review of the trial court for mitigating evidence, in an effort to comply with the court's announced prerogative and duty to impose an individualized sentence. *See, e.g.,* Vol. 12, T. 494; 535. While Petitioner contends that the trial court's actions created a structural error, it is relevant that the trial court had reasonable alternative methods to perform its duty to impose an appropriate sentence without frustrating the Petitioner's objectives for his penalty phase.

194. The actions of the trial court in appointing special counsel for the purpose of formally and publicly presenting the very kind of information that the

Petitioner wished to be excluded from his penalty phase proceedings cannot be reconciled with the directive of *McCoy*, and the Sixth Amendment. Either the Petitioner was competent and able to direct the course of his litigation through waiver – as the trial court found he was – and thus the Sixth Amendment protects his right to do so, or he lacks a Sixth Amendment protection for this choice because he was incompetent to make it. The trial court cannot have it both ways.

B. The Trial Court's Appointment of Special Counsel Interfered With the Attorney-Client Relationship Between Petitioner and His Trial Counsel

195. Petitioner's Sixth and Fourteenth Amendment Rights were violated not only by the trial court's frustration of Petitioner's right to direct the objective of his defense, but also because the appointment of special counsel hindered Petitioner's attorney-client relationship with his defense attorneys.

196. After the trial court appointed special counsel to present mitigating evidence for the Court's benefit, the trial court ordered Petitioner's trial counsel to turn over mitigation evidence in their possession to aid special counsel's presentation. This evidence included a plethora of information regarding Petitioner's longstanding substance abuse history, which Petitioner did not wish to present to the trial court as mitigation.

197. Courts have long recognized that the presentation of substance abuse information is often harmful rather than helpful. *Pace v. McNeil*, 556 F.3d 1211,

1224 (11th Cir. 2009) ("[P]resenting evidence of a defendant's drug addiction to a jury is often a 'two-edged sword': while providing a mitigating factor, such details may alienate the [factfinder] and offer little reason to lessen the sentence."); *Tompkins v. Moore*, 193 F.3d 1327, 1338 (11th Cir. 1999) ("[A] showing of alcohol and drug abuse…can harm a capital defendant as easily as it can help him at sentencing.").

198. By forcing Petitioner's trial counsel to divulge their work product to special counsel, the trial court forced Petitioner's counsel to hand over potentially harmful evidence to individuals not functioning as Petitioner's attorneys – and, to individuals acting directly in contravention of Petitioner's stated interests.

199. This was not harmless. Special counsel presented potentially damaging information above Petitioner's stated objections, and admitted aggravators used by the trial court as justification for Petitioner's death sentence.

200. The error was also harmful at Petitioner's post-conviction proceedings, as Petitioner believed he could not trust the legal system or his lawyers to act in his own interest and protect his confidentiality. This, individually and combined with Petitioner's pervasive psychiatric disorders and possible brain damage, induced him to waive state post-conviction review.

201. For these reasons, Petitioner's death sentence must be vacated due to structural error.

C. Trial Counsel Performed Deficiently by Failing to Object to the Appointment of Special Counsel, and Petitioner was Prejudiced

202. Trial counsel did not object to the appointment of special counsel, or to the requirement that trial counsel turn over to special counsel the confidential work product from trial counsel's penalty phase preparations. This was professionally unreasonable, and constitutes deficient performance.

203. Petitioner was prejudiced by trial counsel's failure. Trial counsel did not object and, against the wishes of their client, disclosed portions of their confidential work product. This created an atmosphere of distrust between Petitioner and his trial counsel, who were no longer in a position to fulfill the basic duty of confidentiality. It created an atmosphere of conflict and role confusion between trial counsel and special counsel, as trial counsel did not turn over all information within their possession to special counsel. Special counsel, who were "not sure at this point if [Petitioner was] technically our client" and believed themselves to be simply at the Court's direction, ROA Vol. 10 at 9, 76, relied on trial counsel's investigation rather than conducting their own reasonable investigation. As a result, special counsel failed to present a plethora of mitigating information to the court. And, special counsel admitted to the existence of aggravating factors in direct contravention of Petitioner's desire to remain silent as to aggravating evidence. *Id.* Vol. 10 at 78-79, Vol. 11 at 317.

204. Additionally, trial counsel failed to preserve the issue of appointment of special counsel for direct appellate review. These individual failures, plus the cumulative effect of counsel's failures, deprived Petitioner of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Petitioner was prejudiced.

D. Direct Appeal Counsel Performed Deficiently for Failing to Raise as Fundamental Error the Issue of Special Counsel's Appointment, and Petitioner was Prejudiced

205. Petitioner had a constitutional right to the effective assistance of counsel for the purpose of presenting his direct appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). Appellate counsel has the "duty to bring [] such skill and knowledge as will render [the appeal] a reliable adversarial testing process." *Strickland*, 466 U.S. at 688. To establish that counsel was ineffective, *Strickland* requires a defendant to demonstrate: (1) appellate counsel's performance deviated from the norm or fell below any objective standard of reasonableness and (2) the deficiency compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. *Id.* at 694. *See also Heath v Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991).

206. Petitioner was denied the effective assistance of counsel on direct appeal when direct appeal counsel failed to raise as fundamental error the trial court's appointment of special counsel in contravention of Petitioner's objectives for

his penalty phase defense. This ineffective assistance violated Petitioner's Sixth Amendment rights.

207. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a more complete investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Nine: Petitioner's Federal Constitutional Rights Were Violated as a Result of Ineffective Assistance of Special Counsel at the Penalty Phase

208. Once special counsel were appointed, they had a duty to perform in a professionally reasonable manner. They failed to do so, and Petitioner was accordingly prejudiced."

209. The appointment of counsel alone does not satisfy a defendant's rights when the appointment occurs "at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

210. Attorneys simply cannot be effective defense counsel if they are expected to report to the court as special counsel were. *See, e.g., Anders v. California*, 386 U.S. 738, 744 (1967) (explaining that the Constitution requires that defense counsel must function as an advocate for the defendant as opposed to functioning as a friend of the court). *See also ABA Model Code of Professional Responsibility*, at 58 n.3 (1969-83) (hereinafter *Model Code of Prof. Resp.*) (explaining that it is of utmost importance for a criminal defense attorney to represent his client with "undivided allegiance and faithful service").[11]

211. Petitioner had a right to counsel who would investigate, protect, and advocate for his best interests. *Model Code of Prof. Resp.*, at 33, EC 4-1 ("Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of [his client]."); *Strickland*, 466 U.S. at 656 (describing "the duty of loyalty [as] perhaps the most basic of counsel's duties").

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[11] The full text of these cannons is on the website of the American Bar Association's Center for Professional Responsibility: (http://www.abanet.org/cpr/ethics/mcpr.pdf).

212. Special counsel were constructively absent, since they did not act as Petitioner's "active advocate, rather than a mere friend of the court assisting in a detached evaluation" of Petitioner's desires for his sentence. *Evitts v. Lucey*, 469 U.S. 387, 395 (1985); *Penson v. Ohio*, 488 U.S. 75, 87-88 (1988) ("The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client.") (citation, quotations omitted). Indeed, special counsel made clear that their duty was to the court, not Petitioner.

213. Additionally, the duration special counsel was on this case was simply not enough time to conduct a thorough investigation into the aggravating circumstances Petitioner faced and into his life and mental health history. *Powell*, 287 U.S. at 60 (explaining that "a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare for his defense"); *Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989) (holding that counsel's neglect in failing to investigate mitigation until three days prior to the penalty phase rendered counsel ineffective); *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974) ([C]ounsel must devote sufficient time to ensure an adequate defense in order to render effective assistance . . ..").

214. Special counsel did not move conduct their own thorough evaluation of Petitioner's background. Instead, they curtailed their independent investigation and

primarily relied on trial counsel's investigation. This was professionally unreasonable and constituted deficient performance.

215. Petitioner was prejudiced as a result of special counsel's failures. The trial court heard only the tip of the proverbial iceberg regarding Petitioner's history of childhood abuse and neglect. Had special counsel performed reasonably, the trial court would have heard that Petitioner suffered tremendous abuse, multiple head injuries, and suffered from numerous psychiatric disorders that rendered the death penalty an inappropriate punishment. This failures of special counsel individually and cumulatively deprived Petitioner of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

A. Special Counsel Failed to Thoroughly Investigate and Present Readily Available Mitigating Evidence

216. Special counsel, having failed to conduct a thorough and reasonable investigation, was not aware of the wealth of mitigating information detailed above. As a result, they failed in their duty to fully inform the trial court. Counsel performed deficiently, which prejudiced Petitioner. Had the trial court been aware of the extensive mitigation detailed above, Petitioner would not have been sentenced to death.

B. Special Counsel Was Ineffective for Failing to Investigate and Present Evidence to Rebut an Aggravator

217. Mental health information is relevant to combat aggravating factors presented by the state. *See Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541, 561 (11th Cir. 2015) ("[W]ith respect to the CCP aggravator, had the jury known about [Petitioner's] longstanding mental health issues and substantial drug and alcohol-induced impairment at the time of the murder, they may indeed have attributed less weight to the State's assertion that the murder was the result of heightened premeditation"). Petitioner's psychiatric disorders and possible brain damage, combined with his longstanding drug use and the influence of drugs at the time of Petitioner's offense, rendered Petitioner incapable of forming the specific intent required for a finding of cold, calculated, premeditated murder.

218. Special counsel, having failed to conduct a thorough and reasonable investigation, was not aware of this information. As a result, counsel not only failed to present this information to rebut the State's proffer of an aggravating factor – cold, calculated, and premeditated murder – counsel also incorrectly admitted to the aggravating factor. ROA Vol. 10 at 78-79, Vol. 11 at 317. Counsel performed deficiently, which prejudiced Petitioner individually – due to special counsel's admission of an improper aggravator – and in the cumulative context of counsel's other deficiencies in his case.

219. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a more complete investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Ten: Petitioner's Federal Constitutional Rights Were Violated When a Member of His Post-Conviction Defense Team Acted Against Petitioner's Interests, Undermining the Validity of His Waiver and Frustrating His Right to Counsel and Due Process

220. Undersigned counsel's preliminary investigation into Petitioner's case has uncovered evidence that a non-attorney member of Petitioner's state post-conviction defense team exerted an undue influence upon Petitioner, which induced him to waive his right to state post-conviction review. Counsel need further time to

evaluate this claim, but preliminary investigation revealed the following factual basis.

221. Upon the conclusion of Petitioner's direct appeal, the Florida Supreme Court appointed state post-conviction counsel pursuant to Fla. R. Crim. P. 3.851(b). 10/14/2011 Appointment Order. Petitioner was visited by a non-attorney member of his legal defense team on October 25, 2011, who purported to conduct an intake interview. One week later, Petitioner sent out a *pro se* motion seeking to dismiss his counsel and waive all further appeals, and asking that the Court "allow [him] to honor [his] consequences of capital punishment." 11/7/2011 *Pro Se* Motion.[12]

222. The record, on its face, indicates that Petitioner's decision to waive counsel was unduly influenced by the October 25, 2011 legal visit with the non-attorney state post-conviction team member. Prior to the team member's visit, Petitioner never attempted to waive his right to the assistance of counsel. Although Petitioner pleaded guilty and waived rights at the penalty stage of his trial, he never attempted to dismiss counsel – in fact, he was explicit that he wished to keep his counsel. ROA Vol. 13 at 546. Similarly, throughout Petitioner's direct appeal, Petitioner never attempted to dismiss counsel.

223. Petitioner mailed his motion seeking to dismiss counsel only one week after his October 25 meeting – on the same day he wrote a detailed letter to the non-

[12] The motion was written on November 1, 2011.

attorney team member who had visited him, referring to a conversation in which the team member discussed visiting Petitioner "off the record" should he waive his appeals and made several comments of great distress to Petitioner. Petitioner references his desire to live and calls his decision to waive post-conviction review the hardest decision he will have ever made – but assures the defense team member that he understands the need to honor the victim.

224. On November 14, 2011, state post-conviction counsel attempted to set up a call with Petitioner. He refused. On November 19, 2011, Petitioner again wrote to the non-attorney defense team member, referencing her promise to visit him "off the record" and assuring her that he had filed a motion to waive his appeals and refused his attorney call. In this letter, he also referred to their continued contact being "off the record". Visitation requests and correspondence indicate that the defense team member did visit him for multiple years in a capacity outside of legal representation and after post-conviction counsel had been dismissed from Petitioner's case.[13]

[13] The correspondence becomes increasingly personal in nature throughout 2012 and 2013, including coded letters that appear to include declarations of love. Visitation request logs indicate that the defense team member used her professional status to visit Petitioner long after Petitioner had waived his post-conviction appeals and dismissed counsel.

225. Multiple letters from Petitioner to the defense team member were maintained in state post-conviction counsel's files, and those letters refer to regular correspondence from the former defense team member. However, very few of the referenced letters from the former defense team member are maintained in state post-conviction counsel's files. The limited correspondence that is maintained gives rise to concern: the defense team member spends a paragraph educating Petitioner on how to ensure a visit or call is from her, as opposed to his attorneys. On December 28, 2011, the defense team member received correspondence from Petitioner, assuring her that although his attorneys had attempted to visit with him, it was "to no avail."

226. Undersigned counsel's preliminary investigation has uncovered additional evidence that, during the October 25, 2011 visit, the abovementioned defense team member informed a despondent Petitioner[14] that the best thing he could do for his case and for the victim's family was to admit responsibility for the crime, honor the consequences of his death sentence, and allow everyone to move on by waiving his appeals.[15] During another visit, the defense team member begged

[14] The evidence suggests Petitioner had a panic attack during this conversation, and displayed signs of suicidal ideation.

[15] Other evidence uncovered by undersigned counsel revealed that the non-attorney defense team member believed that Petitioner was afraid to "take responsibility" for his crime, and that she had a duty to encourage him to do so, and that this individual has a pattern of undermining attorney-client relationships and

Petitioner "not to have anything to do" with the process and stated it was the safest way to avoid an execution warrant.

227. Undersigned counsel's investigation has also uncovered evidence that although the non-attorney state post-conviction team member purported to be investigating Petitioner's case, she generated no work product apart from visiting Petitioner, and she failed to take even the most rudimentary steps, such as ordering Petitioner's repository records from the State Archives of Florida. The state post-conviction team member's influence directly impacted Petitioner's decision-making from October 25, 2011, for several years and through the time of undersigned counsel's initial visits with Petitioner in 2018.

A. Petitioner's Waiver Was Not Knowing, Voluntary, and Intelligent

228. A waiver of constitutional rights must "be the voluntary expression of [the petitioner]'s own choice." *Brady v. U.S.*, 397 U.S. 742, 748 (1970). Voluntariness means that a waiver is the product of the petitioner's "free and completely unconstrained choice" and is "not produced by inducements engendering either hope or fear." *Culombe*, 367 U.S. at 602; *Bram v. U.S.*, 168 U.S. 532 (1897). If a petitioner waives his rights because his "will has been overborne and his capacity

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influencing her clients to drop their appeals. Undersigned counsel reiterate that further investigation is needed to confirm this, and request leave to amend this petition once that investigation can be completed.

for self-determination critically impaired," then his waiver is involuntary. *Culombe*, 367 U.S. at 602.

229. The U.S. Supreme Court has "made absolutely clear that the choice to plead guilty must be the defendant's." *Henderson v. Morgan*, 426 U.S. 637, 650 (1976) (White, Stewart, Blackmun, Powell, JJ. concurring) (citation omitted). The same mandate applies to other constitutional waivers, including the waiver of post-conviction proceedings.

230. When a waiver is not the result of the defendant's choice, such as in Petitioner's case, then the waiver cannot be considered voluntary. *Watts v. Indiana*, 338 U.S. 49 (1949) (explaining that a defendant's statement "by which life becomes forfeit must be the expression of free choice").

231. "Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality" of a waiver. *Boykin*, 395 U.S. at 242-43. A petitioner's will can be overborne by "ignorance, fear, or inadvertence." *Busby v. Holman*, 356 F.2d 75, 78 (5th Cir. 1966). "Eventual yielding" to a mental or psychological pressure … is "the reverse of voluntary." *Watts*, 338 U.S. at 53. As such, voluntariness "can be determined only by considering all of the relevant circumstances surrounding it." *Brady*, 397 U.S. at 749. "[T]he question of whether a particular criminal defendant's will has been

overborne and broken is one . . . that must be decided on the peculiar, individual set of facts of his case." *Culombe*, 367 U.S. at 622.

232. The advice a petitioner receives from his attorney as well as the petitioner's relationship with his attorney are factors that a court must consider when inquiring into voluntariness of a waiver. *Sorrenti v. U.S.*, 306 F.2d 236, 239 (5th Cir. 1962) (explaining that the "crucial issue" is whether, in the face of the surrounding circumstances and counsel's advice, the defendant's plea "was truly voluntary").[16]

233. When a court evaluates the voluntariness of a petitioner's waiver of constitutional rights, the court must consider both the objective factors, such as isolation of the petitioner, and the subjective factors, such as mental illness that induces susceptibility. *Fikes v. Alabama*, 352 U.S. 191, 197 (1957).

> The issue of whether the guilty plea was in fact voluntary . . . cannot be determined with mathematical precision. Of necessity, we deal in probabilities in deciding whether the defendant, at the time he pled guilty, had that free will essential to a reasoned choice either to continue with the trial or to enter a plea of guilty. Its determination involves an evaluation of psychological factors and elements that may be reasonably calculated to influence the human mind.

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[16] *See also Howard v. Arkansas*, 783 S.W. 2d 61 (Ark. 1990) (setting aside the guilty plea of a defendant who had a sexual relationship with her attorney, because "the extraordinary influence by [her] attorney, to her prejudice, proved instrumental" in her waiver); *Mosher v. Lavallee*, 491 F.2d 1346 (2nd Cir. 1974) (holding a waiver plea to be involuntary when the defendant justifiably relied on a misrepresentation by his attorney).

Busby, 356 F.2d at 78. This same analysis applies to the waiver of post-conviction proceedings.

234. The record and new evidence indicate that Petitioner's waiver of state post-conviction review was the result of undue influence exerted by a member of Petitioner's own legal team. As established *supra*, Section V and Petitioner's Appendix, Petitioner has a longstanding history of severe mental health and possible brain damage. Petitioner was also subject to the isolation of near-solitary confinement on death row, and had only one regular visitor in the years leading up to his state post-conviction waiver. These conditions, coupled with the non-attorney state post-conviction team member's actions, rendered Petitioner uniquely susceptible to undue influence by his legal team member. Petitioner was in fact unduly influenced by this "perfect storm" and as a result waived his right to post-conviction review. The waiver was not voluntary.

B. Post-Conviction Counsel Performed Deficiently and Petitioner Was Prejudiced

235. Post-conviction counsel performed deficiently by failing to properly supervise a member of their legal team. The record reflects that post-conviction counsel did not meet with Petitioner at any point prior to Petitioner's 2012 hearing regarding his state post-conviction waiver. 12/27/11 Report of Attempt to Meet Defendant. Counsel set a November 14, 2011 phone conference with Petitioner, which Petitioner refused. They attempted to meet with him once more – pursuant to

a court order – then presumably gave up after Petitioner refused a visit on December 20, 2011.

236. There is no indication in state post-conviction counsel's files that counsel were directing the visits of the abovementioned non-attorney defense team member, nor that they were monitoring or even aware of her visits with Petitioner. Although "[a]n attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment[,]" *Thompson v. Wainwright*, 787 F. 2d 1447, 1451 (11th Cir. 1986) (internal citation omitted), Petitioner's post-conviction counsel "instead exhibited signs of their own discouragement." *Blanco v. Singletary*, 943 F. 2d 1477, 1503 (11th Cir. 1991). Counsel should have made diligent efforts to communicate with Petitioner and investigate the status of his mental health as it pertained to his efforts to waive post-conviction review. Instead, counsel not only failed to make such an effort, they also failed to supervise or direct the member of their legal team who was visiting Petitioner.[17] This was deficient performance.

237. Petitioner was prejudiced within the meaning of *Strickland* and *Martinez* by his attorneys' inaction. Due to their failures, he was left vulnerable not

[17] *See Stewart v. Bee-Dee Neon & Signs, Inc.*, 751 So. 2d 196 (Fla. 1st DCA 2000) (discussing a lawyer's duty to supervise non-lawyer employees, including "reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer[.]") (internal citations omitted).

only to his own mental health and incompetency, but also to the improper influence of a member of his legal defense team. The harm of a mentally ill man receiving legal advice by a non-attorney member of his defense team – particularly when that advice was tantamount to suicide – cannot be overstated. Petitioner was harmed because he was induced to waive his post-conviction rights.

238. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Despite counsel's diligence and best efforts, the constraints of time have rendered counsel's investigation cursory and inadequate. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a complete and thorough investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Eleven: Petitioner Was Incompetent at the Time of His State Post-Conviction Waiver and Was Incompetent to Waive His Rights at That Proceeding

239. Petitioner's death sentence violates the federal Constitution because Petitioner was not competent to waive his state collateral review rights.

240. Petitioner was not competent to plead or waive his post-conviction rights. *See infra* Claims One and Three. Due to Petitioner's continued incompetency during the state post-conviction waivers, Petitioner's continued confinement on death violates the Fifth, Sixth, Eighth, and Fourteenth Amendments.

241. The trial court determined that Petitioner was competent based on the incorrect belief that Petitioner had been "at the trial stage found competent to proceed to trial after examination." Transcript of 1/25/12 *Durocher* hearing at 5.

242. Even if Petitioner had been competent at the time of his trial, too much time had passed to rely on a competency determination from multiple years prior. *See Drope*, 420 U.S. at 181; *Bishop v. United States*, 350 U.S. 961 (1956).

243. Petitioner was not actually competent to waive, as he was operating under all of the cognitive and psychiatric impairments detailed in previous claims. In addition to the impairments Petitioner had at trial, he was under stressors related to being incarcerated under a death sentence, isolated from family and other sources of emotional support, and his solitary confinement on death row. *Id.* at 9-10.

244. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Despite counsel's diligence and best efforts, the constraints of time have rendered counsel's investigation cursory and inadequate. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a complete and thorough investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Twelve: Petitioner's Federal Constitutional Rights Were Violated by the State's Failure to Disclose Material Exculpatory Evidence in Its Possession

245. Undersigned counsel have requested all files from the State Attorney's Office pertaining to Petitioner, but as of December 21, 2018, undersigned counsel have not received those files. At least two boxes in the State Attorney's Office have been withheld from Petitioner.

246. It is likely that a full investigation of this case will uncover violations of *Brady v. Maryland*, 373 U.S. 83 (1963). There may be material exculpatory evidence among the withheld files, including but not limited to information regarding Petitioner's incompetency and inability to form the requisite mental state for the aggravating factor of cold, calculated, premeditated murder. Given the short deadline imposed by this Court, Petitioner is raising this claim for preservation purposes, but requires additional time to investigate the claim and should be allowed to amend the factual allegations in this petition once counsel have received and reviewed all files from the State Attorney's Office.

247. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Despite counsel's diligence and best efforts, the constraints of time have rendered counsel's investigation cursory and inadequate. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a complete and thorough investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a

substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Thirteen: Petitioner's Federal Constitutional Rights Were Violated by Florida's Prior Capital Sentencing Scheme, Which Denied Him the Option of a Jury Determination of Each of the Facts Necessary to Impose a Death Sentence Under State Law

248. Petitioner's federal constitutional rights were violated when he was subjected to Florida's prior capital sentencing scheme, which denied him the option a jury determination of each of the facts necessary to impose a death sentence under state law. The scheme was later held unconstitutional by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Because Petitioner was sentenced to death after being given no opportunity for a jury determination of whether he met the statutory requirements for the death penalty, his continued confinement on death row violates the Sixth and Eighth Amendments to the United States Constitution.

249. The penalty phase of Petitioner's trial occurred in 2007. At that time, Florida's capital sentencing scheme provided for an "advisory" penalty jury. Under Florida's law, the advisory jury would not make any of the statutory findings of fact required for a death sentence. Instead, the advisory jurors would vote on whether to issue a non-binding death recommendation to the judge. The judge would then make the findings required for a death sentence. *See* Fla. Stat. § 921.141 (1995); *see also Hurst*, 136 S. Ct. at 620 (describing Florida's prior scheme).

250. Petitioner elected not to have an advisory jury for his penalty phase. The judge alone carried out her traditional role making the required state-law findings, which were: (1) the aggravating circumstances that had been proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify death; and (3) whether the aggravators were outweighed by the mitigation. *See* Fla. Stat. § 921.141(3); *see also Hurst*, 136 S. Ct. at 623; *Hurst v. State*, 202 So. 3d 40, 51-54 (Fla. 2016) (discussing required elements). Due to this judge fact-finding on the elements for a death sentence, which occurred only after Petitioner was given no option for jury fact-finding, Petitioner's death sentence violates *Hurst*.

251. As explained in Petitioner's procedural memorandum of law, ECF No. 17, Petitioner's federal constitutional *Hurst* claim must be exhausted before this Court can undertake review under § 2254. Any issues regarding the retroactivity of the *Hurst* decisions, and whether the *Hurst* error in Petitioner's case constituted harmless error, and the effect of Petitioner's waiver on *Hurst* relief, should be resolved by the state courts in the first instance during exhaustion. To the extent that the state courts may ultimately deny Petitioner *Hurst* relief on waiver grounds, for instance, Petitioner will amend this claim to challenge such a decision on federal habeas review. This Court should not reach those unexhausted issues in the first instance in a § 2254 petition.

252. Petitioner recognizes that the Florida Supreme Court has developed a state-law retroactivity doctrine that may serve as a barrier to *Hurst* relief as a matter of Florida law. After *Hurst*, the Florida Supreme Court created an automatic waiver rule for *Hurst* claims, whereby any defendant who declined an advisory jury under Florida's pre-*Hurst* scheme was automatically deemed to have prospectively waived their Sixth Amendment right to penalty-jury fact-finding under *Hurst*. *See Mullens v. State*, 197 So. 3d 16 (Fla. 2016). However, it would be premature for this Court to conclude that Petitioner's *Hurst* claim is futile on the grounds of Florida's waiver rule. Petitioner has significant arguments to make in the state courts against the application of the waiver rule as a matter of federal constitutional law. That is because pre-*Hurst* defendants could have only voluntarily, knowingly, and intelligently waived the right to an advisory jury with no fact-finding role pursuant to Florida's prior law, as Florida's courts did not even recognize a federal constitutional right to penalty-jury fact-finding until after *Hurst*. *See Halbert v. Michigan,* 545 U.S. 605, 623 (2005) (holding that state defendants cannot waive federal constitutional rights that were unknown to him and not recognized by the state courts at the time of the purported waiver). Moreover, as applied in this case, Petitioner's waiver of an advisory jury—as well as his plea of guilty and his later waiver of initial state post-conviction proceedings—was not competent, for the reasons described above in this petition.

253. The state courts should be afforded the opportunity, as § 2254 requires in its exhaustion provision, to address these federal constitutional issues in the first instance. If the state courts deny relief, based on waiver or other reasons, Petitioner can present challenges to those decisions in this Court that will satisfy the requirements of § 2254.

254. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Despite counsel's diligence and best efforts, the constraints of time have rendered counsel's investigation cursory and inadequate. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a complete and thorough investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Fourteen: Petitioner's Federal Constitutional Rights Were Violated by the Trial Court's Refusal to Inquire Further Into or Consider Significant Mitigation Evidence Relating to Possible Brain Damage and Mental Health Before Imposing a Death Sentence

255. Petitioner's federal constitutional rights were violated by the trial court's refusal to inquire further into or consider significant mitigation evidence relating to mental illness or possible brain damage before imposing a death sentence. The trial court's refusal to consider the full range of mitigation apparent from the face of the record violated Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, and had a prejudicial effect on the sentencing outcome.

256. Following Petitioner's advisory jury waiver, the trial court held a hearing at which defense counsel proffered all of the mitigation evidence that had been uncovered so far. The court also appointed special counsel to present the available mitigation evidence and ordered an extensive pre-sentence investigation report, which was to include "the issues of the Defendant's family background, any prior mental health or current . . . prior or current mental health problems will be addressed, including any prior hospitalizations, if there are any, [and] any school or military records." Vol. 12, T. 535-56.

257. However, after being alerted of the existence of significant additional mitigation that was not presented by special counsel, the trial court failed to inquire

further into or consider mitigation apparent from the record, violating its federal constitutional obligation to consider all mitigating evidence.

258. The pre-sentence report suggested that Petitioner had been diagnosed with and treated for mental illness, a fact corroborated by the Texas Prison Medical Records' statement that Petitioner suffered from "disorganized" thought processes. Vol. 8, R. 1405. The report also takes note of statements of Petitioner's mother, Beth Webster, who was not called as a witness by special counsel, noting suspected mental health issues arising from Petitioner being beaten severely by his father for years, which involved significant head trauma, loss of consciousness, and seizures. Supp. R. 638, 639. In addition, there is a proffer in the record regarding a 1978 psychological evaluation from the time Petitioner was 16, indicating a history of mental illness in his immediate family. Vol. 12, T. 507, 512-13. These details were not presented to the trial court, and the court did not inquire further.

259. Despite it being well-established that severe head trauma can produce possible brain damage that should be considered in mitigation, the court did not consider evidence that Petitioner suffered multiple head traumas. Nor did the court inquire as to the mental health issues noted by the pre-sentence report, the medical records, and defense counsel's proffer, in analyzing the mitigation in this case.

260. The trial court had been placed on notice by defense counsel, prior to Petitioner's waiver of his counsel's presentation of that evidence, of some twenty

areas of mitigation and expert rebuttal of potential aggravators, the vast majority of which were not presented by the court's special counsel, and were not inquired into by the court. The court should have been alerted to and inquired further into what it must have known was significant mental mitigation.

261. Among the evidence the court should have inquired into and consider as part of its mitigation assessment include critical witnesses such as Petitioner's mother, Beth Webster, and his sister, Melissa, who knew of Petitioner's horrific beatings as a child by his father for no apparent reason, and of the mother's beatings while pregnant with Petitioner. Neither Beth Webster nor sister Melissa were called to testify, despite their relevant knowledge.

262. The evidence also includes mental illness in Petitioner's family, none of which was presented or considered. There was also evidence of psychological torture of Petitioner by his father, which was attested to by Petitioner's half-sister, Mickey, who was not examined. There was a copy of a psychological evaluation from 1978 when Petitioner was 16 years old, which was not presented or considered. There was the testimony of various family members, including his sisters and his former wife, Amelia Austin, who was not presented or examined. There was also the testimony of Petitioner's former youth baseball coach, who knew that Petitioner's father would beat him for playing poorly. The Georgia prison records indicating that Petitioner suffered head injuries were not considered. There was the testimony of

psychologist Dr. Day, pertaining to the psychological impact of Petitioner's upbringing and his ability to function into adulthood, which was not presented, examined, or considered by the court. There were records from South Dakota regarding Petitioner's injuries and 10-day hospitalization following a car accident.

263. The above evidence and more, proffered by defense counsel to the court, was not investigated further, presented, or considered by the court. The evidence was directly relevant in determining the appropriateness of the death penalty in this case consistent with the Eighth Amendment.

264. In light of these errors by the trial court, Petitioner's right to individualized sentencing as required by the Eighth and Fourteenth Amendments was violated. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Kansas v. Marsh*, 548 U.S. 163 (2006).

265. The Florida Supreme Court's decision on this claim on direct appeal was contrary to, or at a minimum involved an unreasonable application of, clearly established federal law for purposes of § 2254(d)(1). The decision that the trial court needs to have considered the above mitigation before imposing a death sentence is inconsistent with the United States Constitution. *See Russ*, 73 So. 3d at 189-91. Where the existence of significant mitigation evidence relating to possible brain damage and psychiatric issues is known to the court but not inquired further into or

considered before a death sentence is imposed, there is a federal constitutional violation.

266. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Despite counsel's diligence and best efforts, the constraints of time have rendered counsel's investigation cursory and inadequate. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a complete and thorough investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Fifteen: Petitioner's Federal Constitutional Rights Were Violated by the Trial Court's Application of an Improper Aggravating Factor Based on an Analysis of His Mental State That Did Not Consider Significant Evidence of His Mental Illnesses

267. Petitioner's federal constitutional rights were violated by the trial court's application of an improper aggravating factor—the "cold, calculated, and

premeditated" ("CCP") factor—based on an analysis of his mental state that did not consider significant evidence of his mental illnesses.

268. Application of Florida's CCP factor is dependent on the defendant's mental state. *See Gorham v. State*, 454 So. 2d 556, 559 (Fla. 1984) ("[CCP] applies only to crimes which exhibit a heightened premeditation, greater than that required to establish premeditated murder."). However, in applying the CCP factor, the trial court failed to consider the evidence of possible brain damage and psychiatric conditions in the record, including evidence proffered by defense counsel, that would have rendered Petitioner unable to form the requisite mental state. Moreover, the court failed to adequately consider the impact of Petitioner's drug use in combination with his possible brain damage and psychiatric conditions with respect to the mental state required for the CCP factor. *See Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541, 561 (11th Cir. 2015) ("[W]ith respect to the CCP aggravator, had the jury known about [Petitioner's] longstanding mental health issues and substantial drug and alcohol-induced impairment at the time of the murder, they may indeed have attributed less weight to the State's assertion that the murder was the result of heightened premeditation").

269. The Florida Supreme Court's decision on this claim on direct appeal was contrary to, or at a minimum involved an unreasonable application of, clearly established federal law for purposes of § 2254(d)(1). *See Russ*, 73 So. 3d at 193-94.

There was not sufficient evidence to sustain the aggravator as a federal constitutional matter. Where the record indicates that a defendant suffers from possible brain damage and a multitude of psychiatric conditions as a result of early childhood trauma and other factors, but the trial court holds that Florida's CCP aggravator has been proven beyond a reasonable doubt without giving sufficient consideration to that evidence, the defendant's federal constitutional rights have been violated.

270. The Florida Supreme Court's decision also involved an unreasonable determination of the facts under § 2254(d)(2). The court relied on the trial court's erroneous finding that no evidence showed that Petitioner was under the influence of drugs at the time of the murder. Instead, the evidence shows that Petitioner was on at least a 10-day crack cocaine binge, smoking crack all day every day, immediately preceding the murder, and that effects of drug use do not stop as soon as the drug is not being used.

271. As a result of this drug use, coupled with his lifelong substance abuse addiction and the possible brain damage and psychiatric conditions that were apparent from the face of the record, the Florida Supreme Court's decision should not be sustained under §§ 2254(d)(1) or (d)(2). Based on the record, the trial court and the Florida Supreme Court unreasonably determined the facts and applied federal law in holding that the CCP aggravator had been proven beyond a reasonable doubt.

272. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Despite counsel's diligence and best efforts, the constraints of time have rendered counsel's investigation cursory and inadequate. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a complete and thorough investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Sixteen: Petitioner's Federal Constitutional Rights Were Violated by the Trial Court's Application of an Improper Aggravating Factor That is Unconstitutional on Its Face

273. Petitioner's federal constitutional rights were violated by the trial court's application of the "heinous, atrocious, or cruel" ("HAC") aggravating factor, *see* Fla. Stat. § 921.141(5)(h), which is unconstitutional on its face. The application of the HAC factor to Petitioner's case contravened the Fifth, Sixth, Eighth, and Fourteenth Amendments, and had a prejudicial effect on the sentencing outcome.

274. The purpose of the HAC aggravating factor, like all aggravating circumstances, is to narrow the class of individuals convicted of murder who are eligible for the death penalty. Although all murders could be reasonably classified by some as heinous, atrocious, or cruel, the HAC factor requires the State to establish beyond a reasonable doubt that the murder was *especially* heinous, atrocious, or cruel.

275. The HAC aggravating circumstance is unconstitutional on its face because it is vague and overbroad. The result has been that the HAC factor is applied in a disproportionate number of Florida cases, many of which do not meet the statutory criteria, resulting in a standard in search of a meaning. The HAC factor instructions in Petitioner's case were infected with substantially the same constitutional infirmities as the instructions held unconstitutional in *Espinosa v. Florida*, 505 U.S. 112 (1992); *see also Shell v. Mississippi*, 498 U.S. 1 (1990).

276. The trial court's application of the HAC factor apply was too vague to satisfy the Constitution's narrowing requirement, and relieved the State of its burden of proving the factor beyond a reasonable doubt, resulting in a denial of Petitioner's due process rights under the Fifth and Fourteenth Amendments, and undermining the reliability of Petitioner's death sentence within the meaning of the Eighth Amendment.

277. The Florida Supreme Court's decision on direct appeal upholding the application of the HAC factor was contrary to, or at a minimum involved an unreasonable application of, clearly established federal law under § 2254(d)(1). The court's decision also involved an unreasonable determination of the facts in light of the evidence within the meaning of § 2254(d)(2).

278. Because the HAC factor is invalid, and the application of that factor to Petitioner was an inexorable part of the result of the sentencing proceeding, this Court should grant relief and remand for a new sentencing.

279. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation, under a constricted filing deadline set by this Court. Despite counsel's diligence and best efforts, the constraints of time have rendered counsel's investigation cursory and inadequate. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a complete and thorough investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a

substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

Claim Seventeen: The Cumulative Effect of the Federal Constitutional Errors by the State Courts Undermine the Reliability of Petitioner's Conviction and Death Sentence Under the Eighth Amendment

280. The cumulative effect of the federal constitutional errors by the state courts, including those described above, undermine the reliability of Petitioner's conviction and death sentence, in violation of the Eighth Amendment. As a result of the errors, which had a substantial and injurious effect on determining the outcome of the proceedings, Petitioner's death sentence is not legitimate and does not carry the societal appearance of legitimacy required for the death penalty. *See, e.g.*, *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

281. Each of the claims in this petition individually warrant relief. However, even if the Court does not grant relief on any individual claim, it should consider the errors in the case cumulatively and grant relief on that basis. Considered cumulatively, the federal constitutional errors in Petitioner's case had a prejudicial effect on the outcome. But for the errors, Petitioner would not be on death row.

282. All other facts, allegations, and claims set forth in this petition, its attachments, and other submissions made in this litigation are incorporated. The facts pleaded above are the result of federal appointed counsel's initial investigation,

under a constricted filing deadline set by this Court. Despite counsel's diligence and best efforts, the constraints of time have rendered counsel's investigation cursory and inadequate. Based on the evidence counsel has uncovered so far, these federal proceedings should be stayed pending a complete and thorough investigation and exhaustion of the petition by state-court counsel. Petitioner's procedural memorandum of law, being filed separately with this petition, ECF No. 17, explains that all claims will satisfy the procedural requirements of § 2254 after exhaustion. Following exhaustion, this Court should grant Petitioner's request to file a substantive memorandum of law analyzing the facts alleged above, *see supra* at 9-11, review the claim on the merits, and grant relief.

VI. Conclusion

The Eighth Amendment commands heightened scrutiny of capital cases because death is different. *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976) ("The penalty of death is qualitatively different from a sentence of imprisonment, however long."). The Supreme Court has consistently recognized the need for heightened protections and fair procedures in capital cases. *Gardner v. Florida,* 430 U.S. 349, 360 (1977); *Eddings v. Oklahoma,* 455 U.S. 104, 111 (1982); *Ford v. Wainwright,* 477 U.S. 399, 411 (1986); *Lankford v. Idaho,* 500 U.S. 110, 125-27 (1991). Considering these principles, neither Petitioner's guilty plea nor his death sentence can pass constitutional muster.

The errors that occurred during Petitioner's trial and subsequent appeals deprived Petitioner of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Petitioner's case and individual frailties exemplify that which the law seeks to protect.

A writ of habeas corpus should be granted under § 2254, and Petitioner's conviction and death sentence should be vacated.

Respectfully submitted,

/s/ TERRI L. BACKHUS
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CERTIFICATE OF SERVICE

I hereby certify that this filing was served on all parties through the CM/ECF system, in compliance with this Court's electronic filing rules.

/s/ Sean T. Gunn
Sean T. Gunn

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID BYRON RUSS,

Petitioner,

v.

No. 6:18-cv-00994-RBD-DCI

JULIE L. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

CAPITAL CASE

Respondent.
_____/

APPENDIX TO 28 U.S.C. § 2254 PETITION

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EXHIBIT 1

DECLARATION OF DR. RICHARD DUDLEY, JR., M.D.

PURSANT TO 28 U.S.C. SEC. 1746 AND SEC. 92.525 OF TITLE VII, FLORIDA STATUTES

1. I, Richard G. Dudley, Jr., am a physician, who is licensed to practice medicine in the state of New York, and I am board certified in psychiatry by the American Board of Psychiatry and Neurology.

2. I obtained my medical degree in 1972 from Temple University School of Medicine, and I completed my residency in psychiatry at Northwestern University Medical Center in 1975. Since 1984, I have maintained a private practice in psychiatry which has been about equally divided between a clinical practice and a forensic practice. As a forensic psychiatrist, I have consulted and testified as an expert in psychiatry in hundreds of cases, in both state and federal courts, throughout the United States, including in Florida. These cases have included capital cases, at both the trial level and post-conviction. In addition, for decades I team-taught courses and seminars on expert evidence at New York University School of Law.

3. My curriculum vitae is attached to this declaration.

4. Pursuant to a request from the legal team for David Byron Russ, I conducted a forensic psychiatric evaluation of Mr. Russ. I was asked to identify any psychiatric or neuropsychiatric conditions impacting Mr. Russ in the past or present, including those relevant to sentencing matters and mitigation as well as those relevant to Mr. Russ's various waivers.

5. I met with Mr. Russ for a psychiatric examination at Union Correctional Institution ("UCI") on October 11 and 12, 2018, for a total of about five hours. I have also reviewed records, including statements from family members, friends, and romantic partners; jail

and prison records; school records; recordings from jail visitations; court transcripts; and police reports.

6. Based on my examination of Mr. Russ and my review of records and documents, it is my opinion that there are clinically significant indications that Mr. Russ has suffered and continues to suffer from multiple psychiatric and neuropsychiatric disorders, which will be described below. However, due to the time constraints and the need for additional information, I consider the results of my evaluation of Mr. Russ to be preliminary. More specifically, although I can state with a reasonable degree of medical certainty that Mr. Russ meets the diagnostic criteria for multiple psychiatric disorders, I believe further exploration is required to confirm these diagnoses and provide a detailed description of their combined impact on his ability to function.

7. Given Mr. Russ's history and clinical presentation, it is clear that he suffers from a trauma-related psychiatric disorder, most likely posttraumatic stress disorder ("PTSD"). Mr. Russ and multiple other sources indicate he was repeatedly, severely physically and emotionally abused by his father, beginning in early childhood and continuing without reprieve, to age 14. Mr. Russ was then removed from his father and placed in foster care. Mr. Russ has recurrent, involuntary, and intrusive distressing memories of these early traumatic experiences, and suffers from insomnia. He describes dissociative reactions to triggering events that should be furthered explored. Mr. Russ tries to avoid distressing memories and external reminders of his trauma, by doing such things as cutting off ties with his father and some family members. These symptoms have caused significant emotional distress and have impaired Mr. Russ's functioning for years, dating back to childhood.

8. Other signs and symptoms of Mr. Russ's trauma-related psychiatric difficulties include his persistent and exaggerated negative beliefs about himself and others. Statements of those who have been close to him show Mr. Russ has a long-standing belief he is "evil" and is personally irredeemable. They also report that Mr. Russ has experienced persistent, negative emotional states, such as fear, anger, and shame; he becomes detached and estranged from loved ones; and that, despite periods of success in sobriety, work, school, and personal relationships, Mr. Russ is unable to experience lasting happiness and satisfaction. He has a longstanding history of self-destructive behavior, impaired concentration, and hypervigilance to perceived threats, and he demonstrates an exaggerated startle response to everyday events, such as hearing someone sneeze.

9. Mr. Russ also evidences numerous indicators of severe developmental difficulties that are consistent with the diagnosis of borderline personality disorder ("BPD"). Symptoms of BPD include frantic efforts to avoid real or imagined abandonment as well as a pattern of intense and unstable relationships. A perception of impending rejection can lead to a profound change in self-image, cognition, and affect. People with BPD are also prone to abrupt, unstable and drastic changes of mood and their view of others. This can lead to anger and sudden outbursts, which then trigger situations for abandonment. Such expressions of anger and outbursts are often followed by shame and guilt. Records from the Florida Department of Corrections ("DOC") indicate Mr. Russ also has symptoms of irritability, restlessness, loss of temper, anxiety, and depression, all of which are characteristic of BPD. Family members and former romantic partners describe Mr. Russ reacting excessively, including heightened and repetitive expressions of shame and self-loathing.

10. The mood instability seen in individuals with BPD results in an almost constant dysphoria – a profound state of uneasiness or dissatisfaction – as well as chronic feelings of emptiness. In addition, individuals with BPD evidence a persistently unstable sense of self, including sudden and dramatic shifts of goals and career, and a belief one is innately bad or evil. Furthermore, impulsivity, such as substance abuse and other reckless behaviors, is also common.

11. As evidenced in accounts by Mr. Russ, his friends, partners, and family, Mr. Russ fits many of the diagnostic criteria of BPD. Even though Mr. Russ is frightened of being alone and abandoned, he has quickly switched from intense love and reverence for people in his life (including relatives and romantic partners) to feelings of intense anger, including a belief they do not love him or are not there for him enough. For example, while Mr. Russ was in jail awaiting trial, he expressed feelings that he could not live without his fiancé, but quickly pushed her away with his anger and resentment for her not visiting him enough. All of Mr. Russ's relationships prior to the offense escalated quickly and were quite intense, but then did not last more than a few years.

12. Individuals with BPD have childhoods characterized by inadequate parenting; most such individuals were psychologically and or physically abused by their parents; and many were virtually abandoned by their parents. Mr. Russ still harbors resentment for his mother who abandoned him as a young child and left him with his father when she knew firsthand that his father was abusive. There is documentation that Mr. Russ's father subjected Mr. Russ to severe physical and psychological abuse and neglect. The environment during Mr. Russ's early developmental years and the absence of parental attachment made him especially vulnerable to the development of emotional and

developmental difficulties. He has continued feelings of distrust and fear of abandonment, and modifies his behavior in anticipation of perceived future rejection by loved ones. He then explodes in anticipation of being abandoned. Afterwards, he apologizes profusely and expresses severe disappointment in himself. He still has not forgiven himself for his past drug use and his failure to previously achieve permanent sobriety.

13. Additional features associated with BPD include recurrent job loss, interrupted education, and multiple separation/divorces, all of which are present in Mr. Russ's history. Mr. Russ has held many roofing and construction jobs, dropped out of college twice, and been divorced three times. He also tried to switch careers by going back to school and has moved many times.

14. Mr. Russ's difficulty regulating his mood is so severe that it cannot be fully explained by his above-described trauma-related psychiatric difficulties and other developmental difficulties. Therefore, it is reasonable to suspect that he may also have a super-imposed mood disorder, such as a bipolar disorder or a major depression. There is considerable evidence that Mr. Russ has had multiple major depressive episodes, characterized by a profoundly depressed mood, feelings of emptiness and hopelessness, markedly diminished pleasure in daily activities, feelings of worthlessness and excessive guilt, and recurrent suicidal ideation. All of these symptoms are documented in his DOC records, and while being held by the DOC he was diagnosed as suffering from "bipolar I, manic episode, moderate." Therefore, further investigation into Mr. Russ's mood deregulation is clearly indicated.

15. Mr. Russ's DOC records also indicate that he was diagnosed as suffering from antisocial personality disorder ("ASPD"). However at this juncture, I do not believe the diagnosis of ASPD is appropriate. The finding that an individual has committed a crime and is being held by the DOC on death row is not enough to make the diagnosis of ASPD. There are other, equally critical diagnostic criteria that Mr. Ross does not meet, such as the associated childhood history criteria, and the other symptoms seen in persons suffering from ASPD that he does manifest are better explained by his other, above described psychiatric difficulties.

16. If Mr. Russ evidences symptoms of an additional personality disorder in addition to BPD, it would be schizotypal personality disorder. This personality disorder is characterized by a pervasive pattern of social and interpersonal deficits marked by acute discomfort with, and a reduced capacity for, close relationships. Additionally, schizotypal personality disorder is characterized by cognitive or perceptual distortions and eccentricities, such as overelaborate thinking, suspicious or paranoid ideation, and inappropriate affect, all of which Mr. Russ presents. However here, too, these difficulties are likely better attributed to his other above described psychiatric difficulties, but this is another question that must be clarified.

17. The DOC records from Mr. Russ's arrival death row in May of 2009 through the present further document symptoms of bipolar disorder. In November of 2009, Mr. Russ filed an official request indicating he was having problems because he had not taken medication since his transfer from county jail. Mr. Russ saw a DOC psychiatrist who noted that Mr. Russ had been experiencing bipolar symptoms, such as mood swings, periods of depression, insomnia, loss of appetite, poor concentration, restlessness, hypervigilance,

periods of anxiety manifested by periods of irritability, psychomotor agitation, racing thoughts, pressured speech, distractibility, and loss of temper. His behavior was described as guarded, defensive suspicious, manipulative, "silly," and "childlike." He was using words that sound similar but are not logically connected. He had inappropriate affect and fluctuated from irritability to euphoria. Having been diagnosed with bipolar disorder, Mr. Russ was prescribed Remeron but he said he stopped taking it because he did not like the effects.

18. Through 2014, Mr. Russ has sporadic DOC mental health evaluations that note similar symptoms. However, since 2010, Mr. Russ has consistently refused mental health care and has not been prescribed any psychotropic medicine because of his refusal to attend psychiatric sessions. Mr. Russ's continued refusal to participate in DOC mental health screenings or any type of psychiatric treatment is not uncommon for individuals with bipolar disorder, because they often want to maintain the euphoria of mania and lack insight into their mania's negative impact on their ability to function. In this regard, it should also be noted that refusal of psychiatric treatment is also common in PTSD and major depressive disorder, and especially common with persons who suffer from BPD.

19. Mr. Russ and his family also report a history of mental health issues and drug abuse. There are indications that both Mr. Russ's father and mother had bipolar disorder. It is important to note that the single greatest risk factor for developing bipolar disorder is having a parent with the illness. Additional investigation into the family medical history and genealogy is necessary to facilitate accurate diagnoses.

20. Given all of the above noted, it is reasonable to opine that Mr. Russ does, in fact, suffer from a mood disorder, superimposed upon his trauma-related psychiatric difficulties and

other developmental difficulties. It is also reasonable to opine that this mood disorder is best described as a bipolar disorder, characterized by swings between depression and mania, with a mix of euphoria and irritability. However, a clearer understanding of the course of his difficulties, how rapidly his mood swings, and the impact of his mood-related difficulties on his ability to function still needs to be developed. In addition, some of the symptoms reported in Mr. Russ's DOC records suggest his mood disorder is at least at times accompanied by psychotic symptoms, and so this needs further exploration as well.

21. In addition, Mr. Russ presents clear indications that he meets the diagnostic criteria for stimulant abuse disorder, which includes cocaine and crack. This diagnosis is supported by the DOC records that document Mr. Russ as being diagnosed with polysubstance use disorder. Statements from Mr. Russ and others indicate that Mr. Russ used crack and cocaine since he was 19 years old. The only sustained periods of sobriety were when Mr. Russ was incarcerated for offenses which he had committed to finance his drug dependency that was so severe that he could not finance it simply through a normal job. Mr. Russ and others report he tried numerous times to stop using cocaine substances, including rehabilitation programs and 12-step groups. Despite periods of success in his life and sobriety, such as returning to school and receiving a scholarship for former substance users in recovery, Mr. Russ continually relapsed. As is the case with individuals who suffer from substance abuse disorders, even though he knew continued use of drugs would negatively affect his personal relationships, his career and his overall ability to function, Mr. Russ could not stop using drugs. During his periods of substance use, Mr. Russ would abandon his romantic partners and disappear for days on drug

binges. He pawned his family's jewelry for money for his habit, stole from family members and acquaintances, and deceived family friends to get money to buy drugs.

22. Stimulant use disorder can be classified as mild, moderate, or severe. Mr. Russ displays more than six of the criteria for stimulant abuse disorder and thus would be classified as "severe," currently in "sustained remission in a controlled environment." The DOC records notate they diagnosed Mr. Russ with polysubstance dependence, in remission in a controlled environment, which is consistent with my findings. While Mr. Russ and his friends and family primarily speak of Mr. Russ' cocaine/crack addiction, the DOC records also mention cannabis, alcohol, and amphetamines; thus, other substance use disorders should be explored, especially because of the differing impact of these various substances on Mr. Russ's other psychiatric difficulties.

23. Importantly, all substance use disorders have high comorbidity with PTSD, bipolar disorder, and BPD. Drug use provides a coping mechanism for the uncomfortable, emotionally painful, and "negative" symptoms of the above-mentioned disorders, such as anxiety, feelings of emptiness, and restlessness. In addition, stimulant use is particularly common among individuals with bipolar disorder, who seek to return to the euphoria of their manic/hypomanic episodes. However, ultimately the use of stimulants such as cocaine can exacerbate the hypervigilance and over reactivity that is symptomatic of PTSD; the abuse of stimulants can make it all the more difficult to regulate one's mood; and the abuse of stimulants can make the instability associated with BPD all the more severe.

24. Further effects of prolonged stimulant use must also be explored. Prolonged stimulant abuse has the ability to temporarily as well as permanently alter brain chemistry, which

can cause many problems. These include, but are not limited to: mood changes, frontotemporal lobe regulation problems, and neuropsychological deficits and disorders, all of which impact on logical adult decision-making and judgment. The DOC records also report Mr. Russ has a history of head injuries, which also increases his risk for neuropsychological difficulties. It is my medical opinion that, for a complete and accurate assessment of Mr. Russ's mental health status and brain functioning, Mr. Russ must be evaluated by additional experts who can evaluate whether these effects were present at and subsequent to Mr. Russ's final arrest, and whether any lasting damage continues today.

25. In summary, based on the information currently available to this psychiatrist, it is reasonable to opine that Mr. Russ suffers from multiple psychiatric and neuropsychiatric disorders. These likely include trauma-related psychiatric difficulties, best described as PTSD; clinically significant developmental difficulties, best described as BPD, possibly mixed with schizotypal personality disorder; severe mood deregulation, best described as bipolar disorder; severe addiction to and abuse of stimulates, particularly cocaine substances, and possibly other types of substances; and quite possibly, given his history of drug use and trauma to his head, neurocognitive difficulties. However, further evaluation and investigation, such as that noted above, needs to be conducted to more precisely identify the nature and course of Mr. Russ's psychiatric issues. It is my professional opinion that Mr. Russ should be additionally examined and tested by at least a trauma expert, a neuropsychologist and a neurologist, and a substance abuse expert/psychopharmacologist. Such evaluations can help to properly and more fully diagnose Mr. Russ and may identify other issues which require further scrutiny.

26. In addition, in order to fully respond to the referral question, the impact of each of these disorders on Mr. Russ's ability to function and their collective impact on his ability to function must be elucidated. In fact, gaining a complete understanding of the collective impact of these disorders on Mr. Russ's ability to function is critical to the presentation of mental health evidence in capital proceedings. In this regard, the disorders that Mr. Russ has suffered from have overlapping symptoms, and even more importantly, they each exacerbate the others, thereby making their collective impact on his ability to function much more than simply the sum of their individual impact on his functioning. Therefore ultimately, an additional expert may be required to explore and then describe how each of Mr. Russ's psychiatric and neuropsychiatric difficulties have interacted with the others and collectively impacted on his ability to function throughout the course of his life, including at the time of the crimes for which he has been sentenced to death and during the course of his trial.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. Sec. 1746 and Sec. 92.525 of Title VII, Florida Statutes.

Richard G. Dudley

Richard G. Dudley, Jr., M.D.
NY Medical Lic # 125925

18 DECEMBER 2018
Date

CURRICULUM VITAE

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EDUCATION:

* Temple University School of Medicine Philadelphia, Pennsylvania
  M.D., 1972
* Northwestern University Medical Center Chicago, Illinois
  R6 Internship
* Northwestern University Institute of Psychiatry Chicago, Illinois
  Psychiatric Residency, completed 1975

LICENSURE AND CERTIFICATION:

* License for the Practice of Medicine, State of New York
* Diplomate, American Board of Psychiatry and Neurology

PAST ACADEMIC APPOINTMENTS:

* Visiting Associate Professor of Medicine, Department of Behavioral Sciences
  City University of New York Medical School at City College
* Adjunct Assistant Professor of Law, School of Law
  New York University

PROFESSIONAL EMPLOYMENT HISTORY:

* January '76 to Present: Private Practice of Psychiatry

At present, the practice includes a clinical practice primarily focused on adolescents and adults (evaluation, consultation, and both individual and family psychotherapy); a forensic practice (I regularly appear as a psychiatric expert in various types of legal proceedings throughout the United States); and consultation/education (the development and/or presentation of continuing medical education programs, as well as education programs for other health professionals, attorneys, and the public).

* September '85 to June '05: Associate Professor of Medicine
Behavioral Sciences
CUNY Med School at City College

From September, 1985 to August, 1992, I was Director of the Department of Behavioral Sciences, at which time my primary responsibility was to direct the full-year/required course in behavioral sciences. The goal of this course was to help students acquire knowledge, skills and attitudes which would assist them in becoming effective primary care physicians, for a range of persons from different cultural backgrounds, through the incorporation of contributions from the fields of psychiatry, psychology, social work, sociology, and anthropology. After I retired from the position of Director, I continued to teach in the course.

* September '84 to April '05: Adjunct Assistant Professor, then
Visiting Lecturer
School of Law
New York University

Initially, as an Adjunct, I team-taught full seminars on "Expert Evidence" and also team-taught Family Law. Then, I transferred to the Law Clinic, funded under a different mechanism, where I team-taught "Expert Evidence" with various law professors in connection with clinical seminars. Lectures included an exploration of the interface between the behavioral and social sciences and the law, and how lawyers might more appropriately work with psychiatric experts. In other settings I have lectured on various other aspects of law and psychiatry to judges, attorneys, law students and others.

* July '82 to June '94: Teaching Attending Physician
Department of Psychiatry
New York Medical College
Lincoln Hospital Division

Responsibilities included course, seminar and case conference teaching, as well as individual psychotherapy case supervision for psychiatry residents, and the direction of the psychotherapy group for psychiatry residents. Previously, through the department's Consultation and Liaison Service, I also taught as part of the Chairman's Rounds for the Department of Internal Medicine.

* January '79 to October '84: Assistant Director
Professional Services Dept.
Roche Laboratories, Div. of
Hoffmann-La Roche, Inc.

The principal responsibilities were to actively and creatively participate in the medical aspects of marketing Roche products and services, and to direct the activities of the Professional Services Product Group. As a participant on Marketing Teams, I helped to develop marketing strategies and plans, train Roche Field Representatives and implement various promotional programs. My responsibilities also included the coordination of Phase IV research efforts, and the development of scientific exhibits, medical education films, monographs, and symposia for physicians.

* April '76 to July '82: Psychiatric Consultant
Mental Health Programs
Children's Aid Society of
New York City

Responsibilities included teaching, diagnostic evaluations and treatment of selected cases.

* December '77 to December '78: Medical Director
Washington Heights-West Harlem
Community Mental Health Center

Responsibilities included the design, development and then day-to-day operation of a full, twelve service community mental health center. When I accepted this position, the center had just been funded, and every program element and support system had to be developed. Once the twelve service chiefs and other key administrative staff were hired, and basic support systems were developed and put into place, I supervised the chiefs, developed in-service training programs and

worked towards the development of program elements not covered by the original grant, for example, research programs, transitional housing programs, and vocational rehabilitation programs.

* January '76 to December '77: New York City Department of Mental Health, Mental Retardation & Alcoholism Services

Assistant to the Commissioner January '76 to November '76

June Jackson Christmas, M.D. - Commissioner

Deputy Commissioner February '77 to December '77

Primary responsibilities included the development of new clinical programs/services, as well as the ongoing monitoring, evaluating, and upgrading of the existing mental hygiene service system. This system included all of the medical centers, voluntary hospitals and agencies, and the municipal hospitals and public mental hygiene programs in all five boroughs.

November '76 to January '77: [On leave from the Department]

Coordinator/Team Leader
Carter-Mondale Transition Planning Group

The focus of this effort was to develop policy options in the areas of mental health, mental retardation, alcoholism, drug abuse and the developmental disabilities for the incoming administration.

* January '74 to December '75 Staff Psychiatrist
Lower North Community
Mental Health Center
Chicago Board of Health

Responsibilities included diagnostic evaluations, treatment and some supervision and teaching. In addition, there was primary responsibility for the Center's adolescent program.

PROFESSIONAL ORGANIZATIONS:

* American Psychiatric Association - Distinguished Life Fellow
Scientific Program Committee, 1998-2001
Delegate, APA Assembly 1979-1983

* New York County District Branch (APA)
  Committee of Black Psychiatrists 1984-1986
  Committee on Legislation 1980-1983
  Committee on Emergency Psychiatry 1978-1979
* American College of Psychiatrists Fellow
  Awards Committee 1993-2001
  Nominations Committee 1989-1992
* Black Psychiatrists of America
  Nominations Committee 1985-1987
  Program Committee 1980-1982
  President, Metropolitan New York Chapter 1978-1988
* National Medical Association
* New York Academy of Medicine - Fellow
* One Hundred Black Men 1977-1982
  Health Committee 1979-1981
* American Orthopsychiatric Association 1988-1991
  Program Committee 1989-1990
* American Society for Adolescent Psychiatry 1984-1988
* American Academy of Psychiatry & the Law 1984-1988
* American Medical Association 1970-1976
  Council on Long Range Planning and Development 1973-1975
  Council on Mental Health 1971-1975
* American Medical Student Association Foundation 1979-1980
  Board of Directors 1979-1980
* American Medical Student Association 1970-1973
  Director, Video Journal 1971-1973
  Board of Trustees 1971-1972
* Student National Medical Association 1969-1972

OTHER PROFESSIONAL ACTIVITIES:

* Consultant in creative approaches to medical education, using a variety of media
* Lecturer/speaker for professional health and/or law related organizations and groups, as well as non-professional groups throughout the United States and, to a limited extent, abroad -- frequent guest on various television programs, as well as host and guest on radio programs.
* City University of New York Institute for State and Local Governance, Advisory Board, 2015-present

* Executive Session on Policing and Public Safety, Harvard Kennedy School, sponsored by the National Institute of Justice, 2013-2015
* Commission on Safety and Abuse in America's Prisons, 2005-2006
* Housing Works, Inc., Board of Directors 2005-present
* Vera Institute of Justice, Board of Directors 1989-2014
* Hospital Audiences, Inc., Clinical Advisory Board
* Examiner in Psychiatry, American Board of Psychiatry & Neurology
* Highbridge-Woodycrest Center, Inc., Board of Trustees 1991-2004
* Co-Principal Investigator, Minority Education, Research & Training Institute [New York State Department of Mental Health] 1990-1994
* Public Member, Fatality Review Panel, Child Welfare Administration (formerly Special Services for Children), NYC Human Resources Admin. 1990-1992
* Family Court Advisory Committee, First Judicial Department 1987-1989
* Program Development Committee, NYU AIDS Mental Health Project (NIMH Contract No. 278-87-005) first 3 years
* Coordinator of Training for Volunteers Minority Task Force on AIDS 1986-1988
* Poison Control Advisory Committee, N.Y. City Department of Health 1980-1981
* Education/Training Consultant, N.Y. State Office of Mental Health 1979
* Consultant, Conference on Minority Mental Health Manpower, HEW-ADAMHA Minority Advisory Committee 1979
* Member, Mental Health Committee, Task Force on the New York City Fiscal Crisis 1978
* Chairperson, Task Panel on the Mental Health of Black Americans, The President's Commission Mental Health 1978
* Physician Resources, Inc. Board of Consultants 1977-1979
* Board of Directors, and Chairman of the Ambulance Committee, New York City Regional Emergency Services Council 1977-1978
* Task Force on Services to Emotionally Disturbed Adolescents, New York City Human Resources Administration 1977
* Advisory Board, Center for Physician Career Development, American Medical Student Association Foundation 1977
* American Bar Association -- Young Lawyer's Section Committee on Mental Health, Physician Member/Consultant, 1974-1975
* The Thresholds (rehabilitation program for young psychiatric patients) Board of Directors 1974-1975

OTHER SELECTED ACTIVITIES:

* Walter Nicks Dance Theatre Workshop
  Chairman, Board of Directors 1985-1994
* Amistad World Theatre
  Chairman, Board of Directors 1983-1989
* National Urban League
  Black Executive Exchange Program 1979-1981
  Committee on Mental Health 1976-1979
* National Association for the Advancement of Colored People Advisory Committee, Project Rebound 1977-1978
* National Advisory Committee on Ethics 1975-1978
* New York City Black Citizens for a Fair Media Psychiatric Consultant 1977-1978
* Young Life, Inc. 1968-1972
* Big Brothers of America 1970-1972

SELECTED HONORS:

* New Jersey Black Achiever of Business and Education 1982
* Award of Merit, Black Psychiatrist of America 1977
* "Who's Who in America" 1976–1977
* American Biographical Institute
  "Community Leaders and Noteworthy Americans" Ninth Edition
* Dictionary of International Biography – Cambridge, England
  "Men of Achievement" Fifth Edition
* Solomon Carter Fuller Institute
  Traveling Fellow 1975
* Outstanding Young Men of America 1972
* National Medical Fellowship Recipient 1969–1971

PUBLICATIONS:

Dudley RG: African Americans and the Criminal Justice System in Black Mental Health Patients, Providers, and Systems, Griffith EEH, Jones BE & Stewart AJ (eds), American Psychiatric Publishing, Inc., Washington, D.C. 2019

Dudley, Richard G. Jr., M.D. Childhood Trauma and Its Effects: Implications for Police. New Perspective in Policing Bulletin. Washington, D.C.: U.S. Department of Justice, National Institute of Justice, 2015, NCJ 248686

Davis PC, Chandler E, Dudley RG: The Place of Families in Juvenile Defense: Work After *Miller v. Alabama*. New England Journal on Criminal and Civil Confinement, 19 (No. 2):293-301, 2013

Dudley R.G.: Being Black and Lesbian, Gay, Bisexual or Transgender. Journal of Gay & Lesbian Mental Health, Volume 17/number 2/April-June 2013, pgs 183-195

Dudley R.G., Blume Leonard P: Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment. The Hofstra Law Review, 36 (No 3): 963-988, 2008.

Dudley RG: Offering Psychiatric Opinion in Legal Proceedings When Lesbian or Gay Sexual Orientation Is an Issue in Mental Health Issues in Lesbian, Gay, Bisexual, and Transgender Communities, Jones BE & Hill MJ (eds), APA Review Psychiatry. Vol. 21, American Psychiatric Publishing, Inc., Washington, D.C. 2002

Dudley RG: All alike but each one different: orphans of the HIV epidemic in Orphans of the HIV Epidemic, Levine C (ed) Unit Hospital Fund, New York. 1993

Dudley RG: Serotonin partial agonists in the treatment of anxiety and depression: Introduction. Journal of Clinical Psychiatry, 51:30, 1990.

Bing EG, Nichols SE, Goldfinger SM, Fernandez F, Cabaj R, Dudley RG, Krener P, Prager M, Ruiz P: The many faces of AIDS: Opportunities for intervention. New Directions For Mental Hea1th Services - Psychiatric Aspects of AIDS, 48:69-81, 1990.

Dudley R.G: Blacks in policy-making positions in Black Families in Crisis- The Middle Class, Coner-Edwards AF and Spurlock J (eds), Brunner/Mazel, New York, 1988.

Davis PC, Dudley RG: The black family in modern slavery. The Harvard Blackletter Journal - Harvard School 4:9-15, 1987.

Davis P, Dudley RG: Family evaluation and the development of standards for child custody determination. Columbia Journal of Law and Social Problems, 19 (No. 4):505-515, 1985.

LECTURES, PRESENTATIONS, AND EDUCATIONAL VIDEOTAPES

Described upon request

November/2018

EXHIBIT 2

STATE OF FLORIDA—DEPARTMENT OF CORRECTIONS

PSYCHIATRIC EVALUATION

This is the initial evaluation form to be used when the inmate is first fully evaluated by a psychiatrist in DC; intake screening and initial crisis contacts can be exceptions with that documentation on progress notes or other designated forms. This form would then be completed with the next scheduled encounter. A clean copy must be maintained for reference in any current volume of the patient's medical record. A new evaluation is to be done for each repeat incarceration following an EOS.

GUIDELINES
Use as Much Space as Needed for Each Topic.

IDENTIFYING DATA:

CHIEF COMPLAINT or REASON PATIENT REFERRED:

HISTORY OF THE PRESENT ILLNESS (Onset, Stresses, Symptoms [including vegetative functions], Current Treatment and Response):

CURRENT MEDICATIONS (All, not just Psychotropic):

PAST PSYCHIATRIC HISTORY (Hospitalizations, Outpatient Treatment, Suicide Attempts [including aborted attempts], Medications Used and Response, Substance Abuse History, Violence History [include relation to substance use if a factor]):

RELEVANT MEDICAL HISTORY (Hospitalizations, Surgeries, Acute or Chronic Illness, Head Injuries, Allergies):

FAMILY HISTORY (Psychiatric and Relevant Medical History):

DATE: 11/05/09 TIME: 1400

This 47 year old Caucasian male CM status inmate who received the death penalty for first-degree murder present with a history of 18 red dot regulation.

The inmate claims that periods of a depressed and anxious mood have been associated with insomnia, loss of appetite, poor concentration, restlessness, hypervigilance, and feeling "keyed up" or "on edge". Episodes of irritability can include psychomotor agitation, racing thoughts, pressured speech, distractibility, low level of frustration tolerance, and bouts of temper. Characterological tendencies have been toward reckless and impulsive actions, physical aggression, and criminal behaviors.

There have been several attempts at substance abuse treatment for dependence on cannabis, "crack", alcohol, amphetamines, hallucinogens, and intranasal as well as intravenous cocaine. While being held in county jail, the inmate was treated with Risperdal initially, but this created acute dyspepsia. Most recently, the inmate was treated with Seroquel 200 mgs QHS with positive response being quite positive.

Medical History is significant for: [1] Hepatitis C infection resulting in hepatic, renal and hematological complications; [2] Hypothyroidism resulting in the need for hormone replacement therapy; [3] Anal Fistula with Hemorrhoids scheduled for surgery in December 2009; [4] Peptic Ulcer Disease; [5] Head Trauma with loss of consciousness during motor vehicle accident in 1976; [6] allergies to dust and pollens.

The inmate claims that he was raised within the foster care system and that he was severely abused as a child.

11/5/09
R. Singletary SLPN
Florida State Prison

e: Pages two and six are for itional comments.

TE NAME: RISS, DAVID
358986 RACE/SEX W/M
E OF BIRTH 02-24-62
TUTION F.S.P.

This form is not to be amended, revised, or altered (except for the addition of lines) without approval of the Deputy Assistant Secretary for Health Services Administration

HIATRIC EVALUATION
155 (6/99) Page 1 of 6

GUIDELINES

The use of the MSE check sheet is optional. Pages four and/or six are for additional comments or for a written mental status examination.

DATE: 11/05/09 TIME: 1400

MENTAL STATUS EXAMINATION

Level of Consciousness: ☑ Alert ☐ Drowsy ☐ Lethargic

Behavior: ☐ Appropriate ☑ Inappropriate (describe) SILLY/CHILDISH WITH "CLANG" ASSOCIATIONS

Attitude: ☐ Cooperative ☐ Hostile ☑ Guarded ☑ Defensive ☑ Suspicious ☐ Oppositional ☐ Passive ☐ Apathetic ☑ Manipulative ☐ Pleasant

Orientation: ☑ Person ☑ Place ☑ Time ☑ Situation

Eye Contact: ☐ No ☐ Poor ☐ Fair ☑ Good

Appearance: ☑ Neat ☐ Disheveled ☐ Unkempt ☑ Well Groomed ☐ Younger ☐ Older ☑ Stated Age ☐ Other _____

Psychomotor Activity: ☐ Increased ☐ Decreased ☐ Normal ☑ Impaired (+) RESTLESSNESS

Immediate Memory (digit spans): ☑ Good ☐ Fair ☐ Poor

Recent Memory: ☑ Good ☐ Fair ☐ Poor
3 of three (3) objects remembered after five (5) minutes.

Remote Memory: ☑ Good ☐ Fair ☐ Poor

Concentration (Serial 7s, 3s, etc.): ☑ Good ☐ Fair ☐ Poor

Ability to Think Abstractly: ☐ Good ☑ Fair ☐ Poor
If Tested with Similarities and Differences: ☐ Good ☑ Fair ☐ Poor
If Tested with Proverbs: ☐ Good ☑ Fair ☐ Poor

Hallucinations: ☐ Acknowledges ☑ Denies ☐ Actively Hallucinating
Content: ☐ Auditory ☐ Visual ☐ Tactile ☐ Olfactory ☐ Gustatory
Describe: N/A.

Delusions: ☐ Present ☑ Absent
Nature/Content: Describe: N/A.

Speech: ☑ Coherent ☐ Loose ☑ Tangential ☑ Circumstantial ☐ Soft ☐ Loud ☐ Yelling ☐ Monotonous ☐ Slow ☑ Rapid ☑ Pressured ☑ Other LOW PRODUCTIVE + A? TONES HYPOMANICAL

Mood: ☐ Euthymic ☐ Depressed ☐ Sad ☑ Irritable ☑ Other ELEVATED ☐ Anxious ☐ Angry ☐ Hostile ☑ Labile ☐ Cheerful ☑ Happy ☑ Euphoric ☐ Fluctuating

PATE NAME: RISS, DAVID
358986 RACE/SEX W/M
E OF BIRTH 02-24-62
ITUTION F.S.P.

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CHIATRIC EVALUATION
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STATE OF FLORIDA—DEPARTMENT CORRECTIONS

PSYCHIATRIC EVALUATION

GUIDELINES

DATE: 11/05/09 TIME: 1400

MENTAL STATUS EXAM CONTINUED:

Affect: ☐ Appropriate ☑ Inappropriate ☑ Broad ☐ Constricted ☑ Congruent ☐ Incongruent ☐ Blunted ☐ Flat ☑ Feeling tone: (see feelings noted in Mood): ELEVATIONS FROM IRRITABLE TO EUPHORIC AND RAPIDLY TRIGGERED BY EVEN THE SLIGHTEST + MOST BENIGN COMMENTS

Suicide: Ideation: ☐ Yes ☑ No Intention: ☐ Yes ☑ No Plan: ☐ Yes ☑ No Describe: N/A.

Nonverbal Cues: ☐ Giving Away Property ☐ Goodbye to Peers/Staff/Family ☐ Sudden Mood Change ☐ Very Depressed ☐ Very Cheerful when previously depressed — N/A.

Homicide: Ideation: ☐ Yes ☑ No Intention: ☐ Yes ☑ No Plan: ☐ Yes ☑ No Describe: N/A.

Insight: ☐ Poor ☑ Fair ☐ Good

Judgment: ☑ Intact ☐ Impaired

Reliability of Patient's Information: ☑ Reliable ☐ Unreliable - explanation N/A.

Optional written/typed MSE (may be continued on page six):

APPEARANCE: OLD LINEAR SCARS ON RIGHT FOREHEAD
INTERPERSONAL: EVIDENCE OF INFLATED SELF-ESTEEM WITH A TENDENCY TO BRAG/BOAST AND EXAGGERATE OWN ACCOMPLISHMENTS AND ABILITIES

ATE NAME: ROSS, DAVID
358986 / RACE/SEX W/M
E OF BIRTH 02-24-62
ITUTION F.S.P.

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GUIDELINES	DATE: 11/05/09 TIME: 1400
ASSESSMENT	[1] AFFECTIVE INSTABILITY (MOOD SWINGS)
Problems:	[2] MALADAPTIVE / DISRUPTIVE CONDUCT PATTERNS
	[3] SERIOUS MEDICAL ISSUES
Differential Diagnosis	[4] HISTORY OF SUBSTANCE ABUSE
Axis I (with code):	[5] SEVERE PSYCHOSOCIAL STRESSORS
	AXIS I 296.4/2 BIPOLAR I DISORDER, MANIC EPISODE - MODERATE
Axis II (with code):	304.80 POLYSUBSTANCE DEPENDENCE - REMISSION IN CONTROLLED ENVIRONMENT
	AXIS II 301.7 ANTISOCIAL PERSONALITY DISORDER
Axis III:	AXIS III [1] HEPATITIS C (+) STATUS [4] PEPTIC ULCER DISEASE
	[2] HYPOTHYROIDISM [5] Hx OF HEAD TRAUMA
Axis IV:	[3] ANAL FISTULA + HEMORRHOIDS [6] ALLERGIES TO DUST + POLLEN
	AXIS IV INCARCERATION ON CONSTATOS WITH DEATH PENALTY
Axis V:	AXIS V GAF = 61

PLAN

1. Follow Up: ☐ Not Needed ☑ As Outpatient 14 days ☐ Admit to IMR ☐ Admit to CSU ☐ Admit to TCU
2. S Grade: ☐ S-1 ☐ S-2 ☑ S-3 ☐ S-4 ☐ S-5
3. Old Records: ☐ To Be Sent For ☑ Not Needed At Present
4. Labs (Refer to 15.05.19 for Requirements): ☐ CBC ☐ Chemistry Panel ☐ U/A ☐ TSH, Free T4 ☐ EKG ☐ Urine Drug Screen ☐ Pregnancy Test ☐ Blood Levels ☑ Other: NONE AT PRESENT

Other plans (as clinically indicated—to include patient education, consents, other testing, referrals, AIMS, psychotherapy, medication—with target symptoms):

[1] REMERON 15 mgs, PO, QHS TO ADDRESS DEPRESSION & ANXIETY
(NOTE: INMATE WILL ONLY ACCEPT ANTIDEPRESSANT TREATMENT AT THIS TIME, AND IT IS ANTICIPATED THAT IRRITABILITY, APPETITE, INSOMNIA, RESTLESSNESS, AND DISTRACTIBILITY WILL RESPOND WELL TO REMERON'S MORE SEDATING PROPERTIES.)
[2] REFERRALS HAVE BEEN MADE FOR OUTPATIENT PSYCHOTHERAPY SESSIONS
[3] PATIENT EDUCATION HAS BEEN PROVIDED AND CONSENTS OBTAINED
[4] RESULTS OF BASELINE LABORATORY STUDIES ARE AVAILABLE IN CHART

Emanuel Falcone
Emanuel Falcone, M.D.
Psychiatrist
FSP M.D.

TE NAME: RISS, DAVID
358986 / RACE/SEX W/M
OF BIRTH 03-24-62
TUTION F.S.P.
HIATRIC EVALUATION
55 (6/99) Page 5 of 6

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EXHIBIT 3

STATE OF FLORIDA)

)

COUNTY OF ORANGE)

Affidavit of Donna Jenkins

I, Donna Jenkins, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Donna Jenkins. I became friends David Russ through my son, Andy, who was in Seminole County jail with David right after David was arrested. Andy has since passed away.
2. After David Russ was arrested, I learned that he was at the same jail facility as my son, Andy, who was incarcerated at the Seminole County Jail for his drinking and substance abuse issues. I wrote David a letter telling him I would pray for him.
3. I began visiting David in the months leading up to his guilty plea and trial. From that, a friendship formed that lasted 6 years through his pretrial proceedings, plea and sentencing and a few years into his time on death row. I even became friends with his family, especially his mother, Beth, and his brother Aarron who thinks of me as being part of his family.
4. Once my son, Andy, got out of jail, he occasionally visited David at the jail with me. They got along well because they both had been in and out of jail

DD

and rehab facilities for much of their lives. Andy even received letters in the mail from David, discussing his struggles with his own addiction as well as giving his advice to my son about going down the wrong path that leads to nowhere. David also wrote me informative letters advising me about AA and Al-Anon and how to cope with my son's struggles, and I was grateful for his help and assistance.

5. David began to open up to me. Prior to his guilty plea and sentencing, he saw his situation as hopeless and he felt helpless. I was his only visitor at that time. He spoke about this often, and his brother Aarron was angry at David for committing this crime. Aarron was frustrated that David had been unable to recover despite numerous treatment attempts and periods of sobriety. Every time Aarron thought about visiting David or even communicating with him, he became anxious and nervous. I first reached out to Aarron because Aarron would not write to David or answer any of David's letters to him. Aarron was unable to handle the combination of emotions he was feeling. So he distanced himself from David along with his other family members. That made David feel even more alone and lonely and frightened and depressed.

6. David was very remorseful. He was fixated on taking responsibility for his crime. He believed he was evil and said he believed this ever since he was a child. He said something evil had taken ahold of him while his grandmother

DA

and mother were fooling around with a Ouija board. They called David to join them at the table. He was terribly frightened because he felt evil all around him, and this fear and belief has haunted him into his adulthood.

7. During one of our visits, David began acting strange and fidgety and nervous. Out of the blue he started shouting at Satan to get behind him and leave him alone. He also said he was bothered with the evil numerous times when he was in his cell. He finally told me that Satan had left, and we continued our conversation, but I could see that he was still on edge and upset. I was taken aback when this happened. It reminded me of the conversation I had with him when he told me that, as a child, he was told by his father so many times that he was no good and evil and worthless.

8. David was also coming off drugs. I know from my son's addiction counselor, who I spoke to regularly when Andy was in rehab, that your brain loses a lot of cells when you do heavy and repeated drugs and alcohol and that your brain never fully recovers. In my opinion, David was not thinking clearly during those first few critical years in prison. His emotions were all over the place. He had mood swings, and he did not appear mentally stable to me with his actions or with his behavior. He wanted to punish himself and hurt himself and make his life as hard as he could for himself because he felt that this was the only way he could atone for what he had done. David also told me that he

DJ

felt let down and was disappointed with his lawyers because they barely visited him and, when they did, they did not stay long enough to counsel him about his case. David believed they were not doing their job well and that they did not care about him or his case, and he felt abandoned.

9. David saw his situation as hopeless and thought it was pointless to put the victim's family and his own family through all of this. He gave up. I was present in the courtroom for his penalty phase and wrote a letter to the judge on his behalf. David had such a bad experience with his trial lawyers that he believed his post-conviction proceedings would be no different.

10. I believe David gave up on himself long ago. After his parents split up, his mother did not want him, and he was sent to live with his father even though his mother knew his father was an abusive man. He was also sent to a foster home and separated from his brother who he was close to and loved.

11. When David got to death row, his depression continued. He still had so much guilt and shame. He felt worthless. I think he felt everything his dad had berated him for was coming true.

12. David felt like his life did not have any meaning and that no one cared about his situation or about him. His feelings were shattered. Nothing mattered to him. So David waived his appeals, and he pushed me away, too. I was surprised and hurt about this. I think he was confused and depressed, and it

makes me sad because I don't think he was in a healthy state of mind to make those decisions.

13. My only child, Andy, has since died on August 17, 2017, at 38 years of age from an overdose.

FURTHER AFFIANT SAYETH NAUGHT.

Donna Jenkins

Donna Jenkins

Sworn or affirmed before me this 2 day of December, 2018 by, Donna Jenkins, who is personally know to me or has produced the following identification _____.

Notary Public, State of Florida

Seal:

EMMA IRIS DIANNA
Commission # GG 081445
Expires March 9, 2021
Bonded Thru Troy Fain Insurance 800-385-7019

EXHIBIT 4

DECLARATION OF JOHNNIE MARIE JACKSON

PURSANT TO 28 U.S.C. SEC. 1746 AND SEC. 92.525 OF TITLE VII, FLORIDA STATUTES

1. My name is Johnnie Marie Jackson. I go by Marie. I know David Russ because I was the girlfriend of his father, James "Arnold" Russ, for about eight years in the 1970s to 1980s. During that time, I lived with David, Arnold, and David's full-biological brother, James "Aarron" Russ. Arnold and I also had a daughter, Mickey Russ, in 1975.

2. David was about 11 or 12 years old when I first met him. His brother, Aarron, was slightly older. I got pregnant with Mickey early on in our relationship. Arnold wanted me to have an abortion, but I refused.

3. Arnold was absolutely horrible to me, Aarron, and especially David. He was extremely physically and verbally abusive to both me and his sons. He was a bully. He was someone who was hell-bent on making other people miserable. To sum it up, he terrorized us.

4. Arnold used David and Aarron as workers for his beekeeping business – he always had something for the boys to do. There is a lot of work that goes into caring for bees, such as feeding them, smoking them out of the hives, scraping off the honey, putting it through an extractor, and jarring it. I think Arnold wanted custody of his sons to use them as free labor. That is all they were to him. He never acted like a father towards them. He never praised them, never said thank you. I never once heard Arnold say "I love you" to them or ask them how their day at school went.

5. The boys' days consisted of going to school, coming home, changing, working, eating dinner, and going to bed. The boys would get home from school and then work with the bees and hives until 8 or 9:00 pm before we ate dinner. Dinner only lasted 15 minutes,

just enough time to eat. The boys immediately went to bed after finishing their work. There was no family time. Their only break from it all was when Arnold was out of town on business.

6. Arnold was a "migratory" beekeeper, so we would move to South Dakota for about three months each summer. Those summers we lived in a tiny town, Fairview, in the middle of nowhere. The house Arnold had for us wasn't fit to live in. It was falling apart. I remember Aarron and I got plastic from the hardware store to patch up the broken windows. Arnold didn't care about uprooting his sons each summer. He needed them to do work. While other kids their age could have fun on summer break, Aarron and David had to work all day.

7. Arnold would become enraged at the flip of a switch. When he ordered you to do something and didn't think you started on it fast enough, he would hit you upside the head. He would beat David simply for looking at him wrong. Arnold would say to David, "Why are you looking at me like that?" and then slap David. Arnold would come back from a business trip and beat David for all the things Arnold assumed David did wrong when Arnold was away.

8. Arnold was more abusive to David than to me or Aarron. Arnold told me he didn't think David was really his son, and I think this is why he would beat David more frequently and more severely than Aarron. To me, the words "whipping" and "beating" mean different things. "Whippings" are getting slapped or hit a few times. Most kids back then got whipped from time to time. But "beatings" are longer and severe enough to leave injuries like bruises and cuts. Arnold beat David horribly at least once a week. Those

beatings lasted five to ten minutes. In between those major beatings and a couple of times a week, Arnold would slap David around.

9. When Arnold beat David, David would scream out things like, "Please, Daddy, stop!" or "I didn't do it, I swear!" Arnold would yell things like, "I'm going to kill you," "You sorry son of a bitch," "Your mom is a whore," "You're not mine," "You're worthless." David would curl into a ball to protect himself. The more David cried out for Arnold to stop, the more Arnold would beat him. Arnold would literally foam from the mouth as he beat David. Spit would pool at the corners of his lips and would fly out of his mouth.

10. Arnold made David take his pants off for the beatings, even when David got older. Arnold would beat David with anything he could get his hands on – his belt, switches, pieces of wood, garden tools. If nothing was around, he'd use his fists. He drew blood and left bruises. Arnold didn't avoid hitting David in the head or face. Arnold hit and punched David wherever his fists or the switch or the tool fell. I remember David bleeding from the mouth and nose and having black eyes and busted lips from Arnold punching him in the face. I also remember David bleeding from his back from Arnold hitting him with belts or switches. I don't remember Arnold ever making Aarron bleed from beatings.

11. Many times, David's injuries were so visible that he would have to miss school, often for days at a time. Other times, David could hide the marks but couldn't move about properly because of the lingering pain. Arnold made David stay home while he healed to avoid the school getting involved or reporting Arnold to the police. David never wore shorts – he only wore pants – because he always had to hide bruises or welts from the beatings.

12. I remember one time Arnold, Aarron, David, and I were outside planting peas. We had to make rows for the planting. I can't remember what Arnold claimed David wasn't doing right, but the next thing I know Arnold has a garden hoe in his hand and is beating David with it.

13. Another time, all of us were harvesting honey. You had to cut the tops off the hives to smoke them. Arnold thought David wasn't doing it right and threw a hive full of bees at David. David got stung a bunch.

14. In South Dakota, near our house, there were some railroad tracks that crossed over a river. David liked to go there on the rare occasions that Arnold gave him a break from working. Once while there, David fell and cut his leg open. Arnold beat him for getting hurt and refused to take him for medical treatment.

15. With Arnold, the physical and verbal abuse wasn't enough – he also had to play mind games with us and torture us that way, too. Arnold often set up situations for us to "fail" at so he would have an excuse – in his head – to beat us. For example, Arnold knew David hated oatmeal. Arnold would make me cook oatmeal for David and would tell me that if David didn't eat it, he would beat David and me. I remember sitting with David and telling him he had to eat it. I had to make him eat it because I knew we would both be beaten if he didn't. This happened over and over. I did not tell David that I would be beaten, too, because I didn't want him to know that I was beaten for what he did. I thought that would make it worse on him.

16. I also remember Arnold telling me to hide David's clothes. Arnold would then blame David for losing them and beat him. He never told me to hide Aarron's clothes.

17. Sometimes after the beatings, when I had the courage, I told Arnold he should take David to the hospital. But Arnold said he couldn't do that because he would be arrested for beating David. Arnold knew what he was doing was wrong, but he continued to beat David. Even as David became a teenager, Arnold never let up.

18. After Arnold beat David, David would go into his room and sit there in a catatonic state. When Aarron or I tried to talk to David, David did not respond in any way. He just sat still and stared straight ahead. He would stay there for hours and only come out for dinner.

19. Many nights after beating David, Arnold withheld dinner from David. Arnold would often not let the boys eat dinner for whatever reason he came up with. After Arnold went to bed, I would get up and sneak food to the boys.

20. David never had any friends. Aarron had friends and he would sometimes have them over. But not David. Over the years, David became very withdrawn and always wanted to be alone. He kept to himself. He was very quiet. David was polite, and he did not talk back to me. The only times I ever heard David talk back were when he was a teenager and Arnold would attack him. David would try to stand up for himself by telling Arnold to stop. Arnold did not listen, and, when David said to stop, Arnold actually hit him more.

21. I wanted to protect those boys, but I was helpless. When Arnold beat David, I would scream the whole time – I would often yell out, "You're going to kill him!" and Arnold would scream back, "I don't care!"

22. Many nights after the boys went to bed, Arnold beat me in retaliation for sticking up for David or because he blamed me for whatever he thought David did. Arnold beat the hell

out of David for doing something wrong, then beat me for it, too. Arnold also slapped me around in front of the boys for other small things – like not having grits when he wanted them – but he waited until we were alone in our rooms to really go at me. Arnold beat me with his fists, busted my lips, and pulled out my hair. Once he broke three of my ribs.

23. Another time, I confronted Arnold about an affair he was having. He smashed my face up against the wall and left it bruised and bloody. He smashed my face up against the wall and left it bruised and bloody. I was afraid to ever go to the hospital because the law would get involved, and I knew Arnold would beat me and the boys worse.

24. My youngest son, Rick, was about 14 months old when I met Arnold. I left him with my mom. I didn't want Rick around Arnold because of how violent Arnold was. About once a month, Arnold beat me so badly that I had to avoid my mother's house because I didn't want her, my son, or my other family to know about the abuse. I tried very hard to hide it all.

25. One summer, I stayed behind in Florida while Arnold and David and Aarron went to South Dakota. When Arnold came back at the end of the summer, he didn't have the boys with him. He hadn't told me beforehand that they had been put in foster care. Arnold was never upset about his sons being taken away. He went on like nothing happened.

26. I say I stayed with Arnold for eight years because it took me eight years to leave him. A couple of times I tried to leave, and I went to my mother's house. Arnold came and begged me to come back. He promised it would be different when I came back, that he wouldn't beat me. I caved and went back to him, but Arnold never held to his promise.

27. One day, Arnold came home extremely drunk. He said he was going to get a German Sheppard, lock me in the closet with the dog, and let the dog sexually assault me. That is when I decided, no more, and I finally left for good.

28. Arnold threatened me many time after I left. For example, he told me he was going to drive his truck through my mother's house, which is where I stayed after I left him. One time when I was out, Arnold tried to break in through the door while my mom was at home with the grandkids. He smashed the glass in the window. If my mom hadn't had so many locks on the door, he for sure would have gotten in. We tried calling the cops a few times, but back then they didn't really care about domestic violence and never showed up. We gave up calling for help and were left to fend for ourselves. It was horrifying and we lived in constant fear.

29. One weekend, Arnold took Mickey on a Friday and was supposed to bring her back on Sunday. When she didn't come back, I went over to the apartment where he was staying. Arnold refused to give me Mickey. He called the police, and they wouldn't let me take her.

30. I fought for custody of Mickey, but Arnold was able to get custody of her because he had a good business going while I had injured my foot and was unable to work. The judge saw Arnold had more money than I did. Later, Arnold claimed he paid the judge off.

31. Arnold continued to try to convince me to come back so we could be a family again. I think the only reason Arnold wanted custody of Mickey is because he thought I would come back if he had her. I later found out that he also tormented Mickey.

32. At one point, Mickey was taken away for about 30 days and placed in a foster home. Arnold had been accused of messing with an under-aged girl. When the charges were dropped, Mickey was returned to him.

33. While Mickey was living with Arnold, Mickey called my mom and asked if she could move in with her, but Arnold would not let Mickey stay with my mom. Finally, in high school, when Mickey was about 16 years old, a teacher saw Arnold beating Mickey in the car in front of the school. The school called social services, and Mickey was taken away. She went to live with Angie, my niece. Mickey stayed with Angie until Mickey was 18 years old.

34. Even today, Mickey is scared of Arnold, but she still loves her dad, despite the terrible things he has done to her. He continues to criticize her and is still vicious. Mickey often will ask me to come along with her to see Arnold because she doesn't like to be alone with him. I say hello to Arnold but that is it. If I can't go, Mickey will get someone else to go with her because, if someone else is there, then Arnold isn't as mean to her.

35. Arnold is truly the worst human being I have ever met. I don't know why he treated his own children the way he did except for maybe he was treated that way, too. Arnold told me that his mother left when he was real young. His dad, James, couldn't take care of him and his siblings so they were put into foster homes. It was only when James remarried that Arnold and his siblings went back to live with his dad and new stepmom, Eva. James also beat Eva.

36. I recently reviewed the testimony I gave at David's proceedings. The lawyer who questioned me at the trial had told me to say that I was married to Arnold, even though I never was, because it would look better to the judge. When I was on the stand, the lawyer

didn't ask me very many questions. I wanted to say more, but he didn't give me the opportunity to say all I knew about David and his upbringing and his life. It was frustrating. I knew so much about the pain and torment David had experienced as a child at the hands of his father. I would have told the court all of this had I been given the opportunity.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. Sec. 1746 and Sec. 92.525 of Title VII, Florida Statutes.

Johnnie Marie Jackson

Johnnie Marie Jackson

12-13-2018

Date

EXHIBIT 5

STATE OF FLORIDA)

) ss

COUNTY OF POLK)

Affidavit of Molly Sanchez

I, Molly Sanchez, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Molly Sanchez. I dated David Russ from about age 16 to 21, which was about 1980 to 1985. He is older than me by one year. We had a daughter, Danielle, together.
2. David and I met at a game room when I was 16 years old and he was 17 years old. David did not have a stable home life. His mother could not provide for him. He was working full-time as a roofer – and had been for a while – and was living in a pay-by-the-week motel and also "house-hopping" with friends. Since he didn't have a stable family life or home, after one year of dating David moved in with me and my mom. When I turned 18, David and I moved into our own place together. We lived on our own for about another three years.
3. The David I knew for the first few years of our relationship was always very kind, considerate and dependable. He held down his a job as a roofer from the time I met him. He was never violent with me and was always respectful. We were young and had minimum wage jobs so it wasn't like we were

going out every weekend on dates. I do remember we went to a few concerts, like Cheap Trick and the Rock Superbowl, but most of our time together was spent at the house. I would cook dinner, and we would eat together most nights. Sometimes we had my family over.

4. David and I always spent a lot of time and the holidays with my family. We occasionally visited David's mom, but he seemed to have a resentment against her. He went through the motions of loving his mom, but it was always very tense. You could tell he had a resentment against her for abandoning him and his brother with his abusive father after his parents split up.
5. In 1983, I got pregnant with our daughter, Danielle. David was very supportive and affectionate towards me. He was very excited about being a father. But I think he may also have been nervous and a scared because of the abuse his dad had inflicted on him. He very much wanted to be different to our daughter than his dad had been to him. David was with me at the birth of our daughter. He cried the first time he held her.
6. David never used drugs in front of me or our daughter, so I didn't know he was using drugs during our relationship until after we broke up. It was in the middle of my pregnancy that David started acting weird. He would disappear. I remember waking up one night, and he wasn't there in the bed

beside me. I had no idea where he had gone. That is when the constant disappearing started. It was often in the middle of the night, but he would also not come home after work and come back late. I confronted him many times about where he would go. David would apologize for being late or disappearing, but he would say he was "just visiting friends." He would promise he wouldn't do it again. And then he would. Over and over. I began to think he was cheating with another woman, but looking back, I realized this was the beginning of David's drug use. He was cheating on me with drugs.

7. Because we were having our daughter together, I tried to put up with David's disappearances. Things started to really fall apart a few months before the birth of our daughter. He was still disappearing and coming home late. After all the excuses, apologies, and unfulfilled promises to change his behavior, I stopped trusting him. We started to fight more and more – really, it was me doing most of the yelling at him for disappearing, for being distant. David would just shut down. We would just go our separate ways, usually David into the bedroom, and then a few hours later, he would go on like nothing was wrong. This happened over and over. I realized I needed to leave David.

8. The day after our daughter turned one year old, I told David I was leaving. He didn't seem surprised at all, and he said he would leave instead. He didn't protest – there was no fighting, no yelling, no trying to convince me that we should stay together. He never tried to come crawling back and never even contacted me to get back together. It would have been easy to find me and Danielle because my mom lived in the same house that David and I lived in with her. He just left, and that was it.
9. Only once, when I married years later, my then-husband told me David came around looking for Danielle when I wasn't there. That was the only time David ever tried to contact me or our daughter. A few years after we broke up, I ran into a family member of David's who told me David was on drugs. It all made sense then. When I had told David I couldn't take his behavior anymore and had told him to leave, that is why he went so cooperatively – he was so addicted that he chose the drugs over me and his daughter.
10. For a long time, I didn't understand why David hadn't fought for me and Danielle. I knew he loved us, and it seemed so unlike him to just walk away. After learning about his addiction, I realized David had not tried to contact or visit me or Danielle because he was ashamed of his drug abuse.

11. When Danielle got older and was in her 20s, she eventually asked me about her father. I searched around for David, and that is when I found out he had been arrested and was awaiting trial for murder. I decided to reach out to him and wrote him a letter in jail. I offered to help him out, to be there for him. I told him I would like to be friends. But he didn't take me up on that. We wrote back and forth a few times but he said he wasn't able to tell me much. I haven't been in touch with him since prior to his trial.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. Sec. 1746 and Sec. 92.525 of Title VII, Florida Statutes.

FURTHER AFFIANT SAYETH NAUGHT.

Molly Sanchez

Molly Sanchez

Sworn or affirmed before me this 1st day of December, 2018 by, Molly Sanchez, who is personally known to me or has produced the following identification _____.

Emma Iris Dianna

Notary Public, State of Florida

Seal:

EMMA IRIS DIANNA
Commission # GG 081445
Expires March 9, 2021
Bonded Thru Troy Fain Insurance 800-385-7019

EXHIBIT 6

STATE OF FLORIDA)
COUNTY OF SEMINOLE)

AFFIDAVIT OF MELISSA RUSS

I, Melissa Russ, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Melissa Russ. My friends and family call me Missy. David Russ is my elder brother. We are full siblings. Our biological mother was Ollie May Baxter. She is now deceased. Our biological father is James (Arnold) Russ.

2. Arnold has never been willing to admit that I am his biological child, even though a court found paternity. He and my mother were divorced for the first time in 1968. They later reconciled, and my mom told me they got married again after that. My mom said she left Arnold for good while she was pregnant with me after he threw her through a wall trying to cause a miscarriage. She sued him for child support, and the court ordered it, but my mom said he never paid the child support.

3. I have three full siblings, although we didn't live in the same house growing up. I am eight years younger than David, ten years younger than our brother, James (Aarron), and twelve years younger than our eldest sister, Debbie. Debbie is now deceased. I also have a paternal half-sister, Mickey. She is five years younger than me.

4. Throughout the years, I've heard a lot of stories about how Arnold abused my siblings – especially my brothers. After our mom left Arnold, he moved my siblings out to a place in Polk County that they called "The Green Swamp." It was in the middle of nowhere. I think Arnold wanted to keep my siblings isolated – away from our mom and the rest of our family – so he could have complete control over them.

5. Arnold was psychologically cruel to all of my siblings, but I've heard he never beat Debbie. Even so, Debbie said she was terrified of him because of what she saw him to do my brothers, and she got married at a young age to escape Arnold.

6. Arnold beat my brothers for the tiniest things he believed they had done wrong. I heard stories about him beating David for putting the toilet paper on the roll the wrong way or beating him with a garden hoe because he didn't think David was planting seeds the right way. Many, many times, I heard that he told David he was worthless and would never amount to anything.

7. Arnold was always crueler to David than to Aarron. As little kids, David had bonded closely with my mom, and Arnold hated it. He viewed their close relationship as evidence that David wasn't his biological child. Aarron had bonded more with Arnold than our mom and was able to pacify Arnold in ways David didn't know how to do. Aarron could always walk into a situation and quickly figure out how to turn it to his advantage, but David just wanted everyone to like him, and David would be devastated and give up if that didn't happen. David always wanted to make Arnold love him, but he never succeeded.

8. I had the strongest relationship with David out of the rest of my siblings. Debbie was much older than me, and she got married at a young age to escape Arnold. She kept to herself a lot and is now deceased. I lived with Aarron for a while when I was about eighteen, and we are close, but I think he believes Arnold that I'm not really his sister. David and I had an instant bond as children, and he has always been the sibling I felt closest to.

MR

9. When David and Aarron were placed in foster care, David used to run away and try to get "home" to my mom. I remember my mom getting phone calls from David, begging her to pick him up. I've heard stories that the foster care coordinators called David "the runner" and that he got bounced around among different places. Eventually, so many of David's foster care placements failed that the foster care coordinators tried to send him to a juvenile residential center. He wound up at my mom's for a brief period of time after that but moved out quickly. I loved being around David. I could joke around with him and always felt comfortable with him. Of all my siblings, he was the one who most accepted me as family. When I was around him, I felt like I fit in.

10. Our mother was married five times – twice to Arnold, and then to three other men. She first married our father when she was fifteen years old, and he kept her so isolated that she didn't have a chance to figure out who she was as an individual. She was dependent on whomever she married for her sense of self. I once commented to my mother's fourth husband that she gets addicted to love, even if it causes ruin around her. I don't remember my mom taking care of me. She wasn't around much. I grew up in poverty, and we were often homeless or on the verge of eviction because my mom's husbands wouldn't or couldn't provide for us. One of her husbands robbed a bank, and we got dragged into a bunch of legal issues because of him. Another one of her husbands spent all of our money to feed his addiction to alcohol.

11. David reminds me of our mom because he, too, depends on his romantic relationships for his sense of self. When he gets into a relationship with a woman, she becomes his whole world.

MR

12. In order to survive living with Arnold, David had to be a chameleon, and that's how he's been his whole life. He put on a face to the world that he was happy and successful, and only people who really knew him well could see through that to how unstable he was.

13. Nearly everyone in our family has struggled with mental illness or substance abuse, and a lot of us have struggled with both. Our mother had bipolar disorder. She was treated with many prescriptions, and she took Zyprexa, Ambien, and Xanax for many years until she died. Our father has bipolar disorder and schizophrenia, and he is on medication for it. My son also has bipolar disorder and ADHD, and he is medicated for it. Even on medication, I have to watch my son closely – he goes through periods of suicidality. I suspect other members of my immediate family to have bipolar disorder, but do not know if they have actually been diagnosed. Debbie had severe obsessive-compulsive disorder, and I'm pretty sure Aarron has it, but just hasn't been diagnosed.

14. I have been diagnosed with ADHD, and I have really severe mood swings. One minute, I'm racing around, feeling excited and energized and accomplishing everything I set out to do and more – then suddenly, I'm so depressed I can't function or do anything for days. I've talked about going to see a doctor or getting counseling, but it's overwhelming to do that when just getting out of bed is difficult. I've seen David exhibit the same extreme mood swings I and so many other people in my family have experienced.

15. David wasn't the only addict in our family, but he was the most severely addicted. ~~Both of my parents had substance abuse issues.~~ I've heard stories from my aunt that my mom couldn't breastfeed me because she was drinking and partying so much that her milk was bad. Because my mom couldn't afford formula, my aunt, who was breastfeeding her own child at the time, also breastfed me. When I was a kid, my mom stopped drinking, and,

for as long as I can remember, my mom abstained from drinking. Aarron was addicted to alcohol and drugs from the time he was about fifteen until sometime around his early thirties. I was addicted to methamphetamine for over a decade, starting when I was eighteen. Two of my nephews have struggled with addiction – one to alcohol, and one to cocaine. So many of my cousins and extended relatives are addicted to amphetamines or cocaine, it's hard to keep count. Even my cousins who had healthy family dynamics have addictive personalities – I have one cousin whose mom was very loving, and he still died of a crack overdose at the age of thirty. But the love and support matter, too, because I know from my own experience that it is really hard to recover without it.

16. For a long time, I had no self-esteem because I had spent my whole life internalizing the pain of my father's rejection and believing the negative things he had said about me, especially telling others that I wasn't his daughter. I felt like Arnold wouldn't acknowledge me as his daughter because I wasn't good enough for him. It turned out that I was lucky Arnold didn't want me. My siblings were physically and mentally tortured by him, especially David, and I'm sure the same would have happened to me if he hadn't abandoned me. His absence and the neglect I felt damaged me, too, but not like the suffering he brought on David.

17. Like David, I turned to drugs to numb my pain. My addiction to meth started when I was about eighteen. When I was living with my brother, Aarron, I walked in on him making meth. I tried some, and I wish I could go back in time to that day in the late 1980s and stop myself. I know Aarron would have stopped me if he had any idea how addicted I was going to get – but he couldn't have known. Even though Aarron struggled with his own addictions for about fifteen years, he was able to recover and get back on track.

MK

18. My addiction to meth quickly became a mental and physical dependency. I used meth because without meth I was too depressed to get out of bed – I physically could not do it, and I did not have the motivation or wherewithal to eat or go about my other day-to-day activities. I'd get high, feel better, and be able to function. But then I would crash, and I'd have to get high again. I'd need more and more, and I'd think, "I need it NOW." I observed the same signs of physical dependency in David. He wanted sobriety and to resist drugs, but he craved it mentally and physically.

19. The difference between the way David used drugs and the way Aarron and I did is that we used drugs to help us function. Using made it possible for me to get out and bed and function, at least a bit. And Aarron always had a job and went to work when using. David wasn't like that. When David used, all he did was use. It didn't help him function – it prevented him from functioning. I think Aaron and I saw drugs as self-medication, but drugs completely consumed David.

20. When I think of David, I think, "There but for the grace of God go I." I could have easily ended up in prison. For about ten years, my life was in ruins as a result of my addiction to meth. I was powerless over my addiction. It controlled me. I was consumed by a need to get high, to chase any sort of fleeting happiness I could. I moved around a lot, thinking that I could run from my problems. Drugs made me mean, rebellious, and jealous. I was spending close to $700 a week on drugs, and I sold everything of value that I owned. I lied and stole to feed my addiction. I felt like such a failure. I kept making the same mistakes over and over again, succumbing to my addiction even though I had so many reasons – like my children – to pull myself out of it.

MR

21. When I was in the midst of my addiction, I knew I was disappointing the people I loved, and who loved me, but I still couldn't stop using. I hated myself for causing pain for them, and I wanted to change, to go back to the person I had been before drugs, but I couldn't figure out how to do it. I lost custody of my children due to drugs, and, even though I loved them more than anyone, that still didn't stop me from using. I lost my home due to drugs, and, even though I hated begging for a place to sleep or even to clean my clothes, that didn't stop me from using either. I lost educational opportunities and had to delay my dream of nursing school. I got into legal trouble when I got busted with drugs. I nearly died from overdosing, and still I couldn't stop using. The more I tried to stop and failed, the more depressed and hopeless I felt.

22. Many members of my family have dealt drugs as a way of making ends meet or as a way of funding their own use. As a child, I used to sell marijuana out of my bedroom window in order to buy food for myself. When I was an adult, my mom and her husband recruited my ex-husband and me to manufacture meth. My brother, Aarron, manufactured drugs like meth and grew pot from at least the time I was eighteen and for several years afterward. He figured that was a way to get drugs without paying for them. I heard stories that, when Aarron and David were kids, they would pick and sell "ditch weed," but, apart from that, David never dealt drugs. He wouldn't have been able to be a dealer – he would have done all of the drugs and had none left to sell.

23. During the periods when David was clean and sober, everyone who met him loved him. He was friendly and compassionate and would engage anyone in conversation. Around my other siblings, I felt like I had to be perfect. With David, I felt like I could be myself and he wouldn't judge me for it. But when David was on drugs, you couldn't trust him.

MR

When his daughter Danielle was just born, he used to come to my mom and beg for money, saying he needed to buy diapers for Danielle. My mom was a waitress and would give him her tip money for the diapers, but David would spend it on crack.

24. David has always been ashamed of his drug use. He tried desperately to hide it, and he fooled himself into thinking if he ran away when he was doing drugs, no one would realize what he was doing. It was like he was trying to maintain two different lives. On the outside, David would act like the perfect boyfriend, the perfect brother, the perfect father figure. He'd do anything for anyone, and all he wanted was to love and be loved. But on the inside, he was lonely and couldn't handle with the pressure of trying to be perfect. He'd always go back to using drugs to cope with those feelings.

25. David wasn't as good at hiding his drug use as he thought he was. His addiction was too strong. David's relapses came fast and hard. When he relapsed, he wouldn't start using a little. He'd take one single hit of crack, and he'd immediately be on a binge.

26. In 2006, I introduced David to my friend, Kim Williams. Kim and I worked together in the medical field and had been friends for years. David and Kim hit it off. After only talking on the phone for a few months, David moved from Texas to be with Kim. They immediately moved in together. I saw the same pattern of intensity as in David's past relationships.

27. Things between David and Kim seemed like they were going well until one night in February of 2007 when I got a phone call one night from Kim. She said David had come home out of his mind and was under the bed looking for police. She didn't know what to do to help him – he was so paranoid. I went to their place, and it took me and Kim hours to get him to calm down. After the crack had worn off, David was so disgusted with

MR

himself. He cried, apologized, and promised profusely that he wouldn't do any more drugs. I wanted to believe him, but I knew he was too addicted and wouldn't be able to stop on his own.

28. Over the next few weeks, Kim told me she thought David was cheating on her because he was lying and coming home late. I knew these signs and told her it wasn't another woman – it was drugs. I was right.

29. David started disappearing again – like he had done when he went on binges before. He had been laid off from work, and was using during the day. He'd take my car without permission. He would be gone all day and night. Kim and I tried to help him. We drove to all of the local spots we knew of where you could buy drugs, looking for David. Sometimes, we would find him, and he'd run away from us as though he thought avoiding us would make us forget what was happening. He would only be gone for a day or so at a time and then return to Kim. But in May 2007, he didn't come home at all. I thought he was dead until the police told me he'd been arrested for murder.

30. Shortly after David's arrest, my mom and I visited him. Because of my experience with addiction, I was able to understand David's actions in a way other people couldn't. He opened up to me in a way he couldn't to others. He told me he had never meant to kill anyone. He was sick with remorse. He knew the State was seeking the death penalty. MR He didn't want to die, but he didn't think he could live without drugs knowing what he had done. He was tired of trying to recover and failing. His addiction was severe, and he thought the only way he could stay clean was to die. I got really worried about his mental stability, but I hoped that, once he had time to adjust and get the drugs out of his system, he might start thinking more clearly.

31. About two months after David's arrest, he wrote to my mother and me, begging us to visit more. At that point, I wasn't visiting too often because I was juggling raising my kids and working a lot of intense hours, and I was overwhelmed by the fact that David was facing the death penalty. My mom was still seeing David pretty regularly. David started getting angry, writing to my mother and accusing her of abandoning him again, just like when he was a child. He said he wanted a loving supportive relationship with us, not a "part-time" relationship. He didn't think we were doing enough, even though we were writing some and my mom was visiting.

32. Kim visited David a ton after he was arrested and brought to Seminole county jail. For at least a couple of months, she saw him pretty much every week and talked to him on the phone. David wrote and compared me and my mom to Kim, saying "Kim is the only one on this earth who loves me enough to provide me with love and support." He tried to force us to visit more, writing that we needed to tell him what our decision was regarding our future relationship. He was needy, and it seemed almost melodramatic. He wrote, "It's killing me inside to think that I'll never be an important part of your life again. I need both of you. Hear my cry."

33. David's reactions didn't make sense because, when I did visit him, he seemed disinterested. He acted more interested in his romantic relationship than in visiting with me. Because of transportation logistics and the visit schedule, I could never go see him alone. I would have to see him with Kim or with my mom. David begged me to visit, but I didn't want to go with Kim because he would focus on her and not pay attention to me. I didn't want to go see David with my mom because my mom would start sobbing, and I couldn't bear to see my mom so upset.

MR

34. I wrote David a Christmas card to tell him that I still loved him and was trying to come to grips with everything that was happening. I explained that seeing him was hard, especially because I kept worrying that he could be executed and that I would never see him again. I explained that it was my own personal issue I needed to deal with and not a lack of love for him. I was going through a lot in my life right then. But David didn't understand. He wrote a letter back and included in the envelope the card I had written to him, like he didn't want it. He filled the card with comments, responding and arguing with the things that I had written. He begged me to include him in my life. He said I needed to visit him immediately. He didn't believe what I had written about loving him, because he said I wasn't showing it. He said he needed me to love him and implied that, if I didn't do what he wanted, he wouldn't be able to go on. He enclosed a note to my mom telling her he was "on this roller coaster of emotions that I can't even predict."

35. Many of David's letters from jail seemed like ultimatums – if me or my mother weren't going to be there for him exactly how he wanted, he didn't want us in his life. But he continued to write. As time passed, David's moods in his letters fluctuated more and more. Sometimes he would seem profoundly depressed. Other times, he would be overly anxious and paranoid. He wrote that demons had taken up residence in him. He also overanalyzed my communications with him. For example, he thought there was a hidden meaning in the fact that I sent him a card for his birthday a few weeks earlier than the actual day. In another letter, he worried that I thought he just wanted money, and he wrote several pages explaining that all he wanted was contact with me. It did not make sense because David had not once asked me to put money on his inmate account. It got harder for me to respond because his thoughts got more bizarre.

36. Most of David's letters were defeatist and negative, but every once in a while, seemingly out of nowhere, David's letters would convey that he was in great mood. He would write long letters surmising what my life must be like. He would call me his rainbow, talk about how much joy I brought him, and draw smiley faces at the end of sentences. But these letters were rare. The good moods never lasted long and were always followed by more depression and bad moods.

37. Sometime before his trial, David's relationship with Kim ended. My mother had stopped visiting him, and David's only regular visitor was a woman named Donna whose son had been incarcerated with David at Seminole County jail with David. Like he had done with Kim, it seemed like David was putting Donna up on a pedestal and comparing me and my family to her. He wrote me, calling her his "saving angel" and his closest friend. He'd say he didn't know what would happen without her. But it didn't feel like he was just complimenting her – it felt like he was using her to guilt trip us that we weren't as good as her. He used her as a messenger, and I got overwhelmed by how much she approached me on his behalf. Instead of being grateful for a regular visitor, David was more agitated than ever that the rest of us weren't visiting.

38. Around this time period, David started to internalize past conversations he had had with Aarron. When David was in the midst of his addiction, he lied to or stole from a lot of people we knew. It was always to get money for drugs. Aarron used to get angry with David because he thought David wasn't taking responsibility for his actions. Suddenly, David started talking about how much he needed to "take responsibility." He wasn't going to fight the death penalty because he was "taking responsibility."

39. David was genuinely remorseful for what had happened, but it didn't feel like remorse was the reason he was pleading guilty or refusing to let his lawyers put on evidence to spare his life. David had always been remorseful for what had happened, but he wasn't always willing to waive his rights. It was only after David had tried everything to get us to visit him – after he had gotten this idea in his head that we had abandoned him and didn't love him – that he gave up and refused to fight the death penalty.

40. After David received his death sentence, our mom visited him. I think this reinforced David's belief that the closer he got to death, the more we would visit him. But even when she visited, he couldn't accept that our mom loved him. After our mom visited David, he wrote to me saying he thought I was making her come and that she didn't actually want to visit him. David had been begging me and my mom to visit, and, when our mom finally did, he was upset. He continued to complain that I wasn't visiting or writing him enough, saying that without me his life was meaningless.

41. Whenever I opened a letter from David, I never knew what sort of mood it was going to show. They varied so much. But one thing was similar about all of his letters: they were desperate. He talked about how "time is ticking" until he dies, and he promised we wouldn't regret it if we came to see him. He'd give a play-by-play of what a visit would be like.

42. When our mother died about eight years ago, it was very hard on David. He and our mother had a complicated relationship, and he had not yet been able to reach closure with her. David always felt abandoned and neglected by our mom's decision not to seek custody of him or of Aarron when she left our father. I understand these feelings. Even though she raised me, she was more concerned with her husbands than taking care of me.

MR

I may have physically been with her, but she neglected me because she was so busy paying attention to her husbands.

43. Shortly before David waived his appeals, he wrote to me and said "I'm still alive though it appears I am dead to your heart. I love you and wish you wouldn't write me off as though my sin is unforgiveable." It's like he needs our validation that he deserves to live, and, when he doesn't get the attention or reassurance he wants, he crumbles. David has been like this throughout his life. Before he was in prison, he used to fish for compliments all the time. He was constantly asking if he looked good, if he'd done something well, if we loved him, and so on. It baffled me because he had so many amazing qualities, and I assumed he'd have good self-esteem. But I guess David was like me in that way. Arnold was always belittling him and telling him he was worthless. Eventually, he began to believe it, and he's never stopped believing it.

44. I know David's decision to plead guilty and waive his appeals was motivated by his belief that we, his family, abandoned him. But he also thinks that the closer he is to death, the more we will rekindle a relationship with him. Our mom visiting him shortly after David was sentenced to death only reinforced this. Having a relationship with David is hard because, no matter what I do, it is never enough for David. He doesn't understand the pain that I and our relatives go through for having lost him to death row. I wish he could understand how much we love him and think about him, and how much we grieve for him every time we are together and are reminded of his absence.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. Sec. 1746 and Sec. 92.525 of Title VII, Florida Statutes.

FURTHER AFFIANT SAYETH NAUGHT.

Melissa Russ

Sworn or affirmed before me this 19th day of Dec., 2018 by, Melissa Russ, who is personally known to me or has produced the following identification _____.

Notary Public, State of Florida

Seal:

NELS RODERWALD
Commission # GG 173439
Expires January 8, 2022
Bonded Thru Troy Fain Insurance 800-385-7019

EXHIBIT 7

DECLARATION OF KIMBERLY WILLIAMS

PURSUANT TO 28 U.S.C. SEC. 1746 AND SEC. 92.525 OF TITLE VII, FLORIDA STATUTES

I, Kimberly Williams, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Kimberly Williams. I was the girlfriend of David Russ beginning in approximately the fall of 2006. We continued our relationship when David was in jail, through approximately the fall of 2007.

2. David and I were introduced to each other in the fall of 2006 through his sister, Melissa "Missy" Russ. At first, we talked on the phone. We began to talk on the phone every day, multiple times a day. About two months later, David decided to move to Florida to be with me. He moved in with me and my son, Tanner, who was about five years old at the time.

3. Tanner's father had walked out on us when Tanner was six weeks old. David and Tanner immediately bonded right away. David was a big guy, but he was so gentle and caring with Tanner. He always doted on Tanner. David would read to Tanner and pick him up and carry him around, take him to the park, snuggle with him on the couch. David was like a gentle giant. All three of us often snuggled in bed on the weekends and watched cartoons. I would often wake up on a weekend morning to a note from David, saying that he had taken Tanner fishing so I could sleep in. I think David was being the father he wished he had.

4. David had a heart of gold. He would do anything for anyone. He was all about the little things. I would come home after work to find that he had already cooked dinner and done the laundry. He would call me to see what time I would be home, and I would arrive to a

bubble bath drawn for me. He would take Tanner to buy flowers for me. He gave me foot massages.

5. My great aunt, Margaret, was living with me when David moved in. She had helped raise me, and we were very close. We didn't know it at the time, but she was dying of lung cancer. David was so kind to her. She often joked with him and razzed him. Since Margaret couldn't get around very well, David would help carry her, like from her bed to the couch. David would come home at lunchtime from his job to check in on her.

6. Margaret always loved fishing, but it became impossible for her to do on her own. David would carry Margaret out to the car, take her to the lake, and set her up in a chair with a fishing rod and help her fish. He even brought along coffee for her.

7. David also helped my parents with things around their house. For example, David would move heavy things for them and help them in the yard. David helped my dad clear a huge area to put down a swimming pool. My parents really liked David.

8. I knew David's past issues with drug use and prison time, but I immediately fell in love with him. Even though it was fast, it felt right. David was selfless and caring. I would often say to friends, "How did I get so lucky?" It was like David was supposed to be in my life. Me, David, my aunt, and Tanner – we were a family.

9. David and I talked about the future, about growing old together. We even discussed David adopting Tanner. I always felt protected by David – not because of his size, but because of his heart.

10. David told me about the abuse he experienced at the hands of his father, Arnold. David told me Arnold would beat him and his brother Aarron for insignificant reasons. They

would get beaten for waking up five minutes late or for coming home five minutes late. Or, they would get beaten for no reason at all.

11. David told me how once he, Aarron, his mom, and his dad were in a truck going to check on some beehives. Arnold got out to check on the bees, and everyone else stayed in the car. A bee got in the car, flew up David's nose, and stung him. David said Arnold beat him for it and then beat David's mom for letting it happen.

12. David also told me about a time he cut open his leg badly on a train track. He said his dad wouldn't take him to the hospital and told him to "suck it up."

13. I look at my son, and I can't understand how a parent could do that to their child. David talked about his childhood with such pain in his eyes. He talked about how he was good at baseball but that his dad never cared. He said his dad was never proud of him. He never felt loved as a child.

14. I do not believe David ever mentally escaped the abuse and neglect in his childhood. It was like David believed he didn't deserve to do well in life, and didn't know how to handle it when he started doing well.

15. David's mom, Beth, also told me about the abuse she suffered from Arnold. Beth mostly referenced the abuse generally – that Arnold was a mean and horrible person. But I remember Beth did tell me that Arnold threw her up against the wall when she was pregnant with Missy. Beth voiced remorse about not taking David and Aarron after the divorce from Arnold, but Beth said she was pregnant with Missy and was scared of raising three kids on her own. Missy was so lucky to have had a step-dad instead of Arnold.

16. David's relationship with his mom was complicated. David loved Beth, but it was tense. He told me he felt rejected and abandoned by her. He felt she hadn't protected him and Aarron from their abusive father or from foster care. He told me he couldn't understand how she could give up her parental rights knowing how abusive Arnold was. That dug into his heart. David tried to have a normal relationship with his mom, but the past was always there.

17. David's downhill spiral happened fast. The first relapse David had – that I was aware of – happened in February of 2007. He came home at 2 or 3:00 in the morning and busted down the front door, even though he had a key. He made me go look in the mudroom, under the beds, and in the closets for cops, not just once but over and over. It looked like there was nothing behind his eyes; they were empty. He was completely paranoid and freaking out. I had to call Missy to come over to help me. I wasn't scared of David, but I didn't know what to do. It wasn't until 6 or 7:00 that morning that we calmed him down. Then, he slept for the next two days. When he finally woke up, David was extremely apologetic. He admitted he had been using drugs. He cried and promised never to do it again. Things went back to normal for a few weeks.

18. Around March of 2007, David started coming home late. Instead of coming home right after work, he would come home around 10 or 11:00 at night. In the morning, I would confront him and ask him where he had been. At first, he made the excuse that his step-father was sick and that he was with him. Then, he would tell me he was with friends. I suspected he was cheating on me but Missy warned me it was drugs.

19. I started to confront David when I knew he was lying. At first he would deny it, but he would eventually cave and admit he had been doing drugs.

20. On one occasion, David came home and was flipping out because he had lent his work SUV to a drug dealer. He begged me to help him get it back. But again, he apologized and said it would never happen again.

21. By April, David was disappearing two to three nights a week. By then I knew what he was doing – crack. He had been laid off from his roofing job. He was returning home at 2 or 3:00 in the morning. He would come home with his lips burned.

22. Missy and I would go into the seedy, drug-dealing areas of Apopka, searching for David. I grew up in Apopka and knew what areas to look in. We would knock on the doors of drug dealers, asking them if they had seen David. One time we found David parked on the side of the road in Missy's van, which he had taken without her permission. He saw us and ran off into the woods, abandoning the van.

23. Many nights I would sit in a parking lot of church that was across from a convenience store where the drug dealers would go, hoping to catch a glimpse of David. Once, I found him walking up. I drove towards him, ran him off the road, and started beating on him. David is a big guy – he could have protected himself, but he didn't. He didn't try to fight back. He merely covered up his face and then let me hit him, over and over. He was crying. He didn't defend himself, verbally or physically.

24. Throughout these disappearances, David always came home in the middle of the night or early morning. He would then sleep for a few days straight, only getting out of bed to use the bathroom. Instead of confronting him, I began to give David the cold shoulder, since my aunt and Tanner were around, and I didn't want them to witness us fighting all the time.

25. When I was off looking for David, I would lie to Tanner and my aunt, telling them I was working late. I managed a doctor's office, so it was believable that I had to work long hours. I wanted to preserve their love of David, because I knew he was a good person.

26. Every time David admitted to disappearing to do drugs, he would apologize and promise not to do it again. He was so remorseful. He would sob. He would be in disbelief that he had relapsed again. He would say what a bad person he was. For a few days after, he would be perfect – he would be the David I knew who was always taking care of me, Tanner, and my aunt. And then he would disappear again. The cycle kept repeating.

27. The last time I caught him in a crack binge, I felt like I was finished with him. I told him that, if he relapsed again, he shouldn't ever come back. About a week after I told him that, on May 2, David did not come home. I will never forget that day. Even though he disappeared a lot, he had always returned home in the middle of the night or next morning. I figured he had relapsed again and taken me at my word.

28. I called and texted David, but he did not answer or respond. We normally talked or texted four or five times a day. He wasn't responding to Missy either. I was really worried. I went looking for him like usual, but I couldn't find him. After a few days, I started to worry that David was dead. I went to his mother's home. We were both very scared.

29. A couple of days later, detectives showed up at my work. I asked if David was dead. One responded, "No, *he's* not." That is when I knew something was wrong.

30. When I learned David was wanted for murder, I was beyond shocked. I couldn't believe it. I thought it was a mistake. It wasn't David's nature to harm anyone. Even with all the drug abuse, David was *never* violent towards me, Tanner, my aunt or anyone else I saw him around.

31. I did not have any contact with David when he was on the run. When he was extradited to Florida, I went to visit him in Seminole County jail as soon as I could. In the visitation area, I mouthed through the glass, "Did you do this?" David hung his head and sobbed. David told me he did not plan to kill the victim and that she herself was not the target, only her possessions.

32. At first, I didn't explain David's absence to Tanner. Tanner kept asking me when his dad was coming home. After a few weeks, I told Tanner that David was in jail for drugs. Tanner is now 17 years old, and I still had never told Tanner that David was in prison for murder. I wanted to protect my son. I wanted him to keep the memories of the David that Tanner loved. I recently learned Tanner figured out why David really went to prison. We don't talk about David. It is too painful for Tanner; he lost the only dad he ever really had.

33. I visited David for about four or five months while he was in the jail. David's mom also visited, but she stopped seeing him after a couple of months.

34. I tried to visit David every Thursday and Saturday. We also wrote hundreds of letters and cards back and forth. David ended up giving back to me all of the photos, letters, and cards I sent him. He also gave me a Bible of his that meant a lot to him. David was afraid that when he was moved to prison, he would lose it all. This was in the fall of 2007. It was like he had already decided his fate.

35. When I visited David, he was extremely depressed. He was guilt-ridden. He constantly asked if God would forgive him. He was certain he was going to hell. He kept calling crack "the Devil's drug." He thought he was evil.

36. I tried to talk to David about his case. I wanted him to fight the death penalty, but somewhere along the way, David stopped listening. He told me he didn't want to put the victim's family or his family through a trial and sentencing. He told me he would switch places with the victim to bring her back. He had nothing left in him.

37. Every few visits, I brought Tanner to the jail to visit David. David was always so joyful to see him. Tanner still called him "Dad." At home, Tanner asked when his dad was coming home.

38. The one thing in Seminole County jail that made David happy was the young kids he spoke to while there. There was a program where troubled youth would be brought in during the weekends. I guess it was like a "scared straight" program. David would talk to the kids about his troubles and give them advice on how to avoid ending up like him. These talks with those kids really meant a lot to him. Even in jail, David had the capacity to do good.

39. David eventually started to do things to push me away. He would ask how me and Tanner were doing and lash out when I told him what we were doing in the "outside world." One minute he would be telling me that he couldn't go on without me and Tanner and the next he would be angry and shouting at me, telling me all the ways I wasn't helping him. He thought I should be seeing and supporting him more. I was a single mom taking care of my dying aunt – he knew I was doing the best I could. David said I didn't care about him. He seemed scared and frightened of being abandoned but he was rejecting my love … It didn't make sense.

40. One day, Tanner told me he didn't like seeing David in jail, chained up behind glass. I couldn't take David's mood swings anymore and Tanner did not want to visit. David and

I started to drift apart. I don't even remember the last time I visited him. At first, I still wrote David a lot, but then it was less and less. It wasn't like we said we weren't going to write or that I wasn't going to visit anymore. Our communication simply faded until it didn't exist anymore. Tanner stopped asking when his dad was coming home.

41. David's special counsel lawyers brought me to their office to read the letter David wrote to the judge. They left me in a room alone to read the letter. I started laughing in shock because I couldn't believe what I was reading. I told David's lawyers there was no way David had written that letter. I couldn't believe the words in front of me. I knew it was not true what David said about planning the murder. From the beginning, he had consistently said he never meant to kill the victim. When we started drifting apart, I saw David become weary and defeated. I knew this letter was an effort to self-sabotage.

42. For a long time, I was angry at David. I couldn't understand how he could give up the amazing life we had together for drugs. He was living in a beautiful condo with a loving family, and he threw it all away. We had talked about retiring in the mountains with our grandchildren running around. I mourned the loss of the life I thought we would have. I also saw David doing the same, tenfold. Addiction is a heartbreaking disease. It broke my heart, and it broke David's heart.

43. When I testified at the trial, David cried and looked beaten down. I tried not to look at him because it was so upsetting. The prosecution, not the defense, called me as their witness. I wasn't sure why the defense didn't call me because I had talked to them many times before and they knew the information I had. When David's defense lawyers cross-examined me, they didn't ask me many questions. I wasn't able to fully able to explain

everything. I wanted to say more. I would have told the court the above information at the time of the sentencing had I been given the opportunity during my questioning.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. Sec. 1746 and Sec. 92.525 of Title VII, Florida Statutes.

Kimberly A Williams

Kimberly Williams

12-19-18

Date

EXHIBIT 8

DECLARATION OF MICKEY RODRIGUEZ

PURSUANT TO 28 U.S.C. SEC. 1746 AND SEC. 92.525 OF TITLE VII, FLORIDA STATUTES

I, Mickey Rodriguez, having been first duly sworn or affirmed, do hereby depose and say:

1. My name is Mickey Marie Russ Rodriguez. I am the half-sister of David Russ. We share the same biological father, James "Arnold" Russ. I have three other half-siblings by Arnold – James "Aarron" Russ, Melissa "Missy" Russ, and our older sister Debbie Russ, who is now deceased.

2. I am thirteen years younger than David. I was very young when he went to foster care, so I don't have many memories of living with him. Later, when I was a little older and wanted to get to know him, my dad refused to talk about him. If I mentioned David's name or called him my brother, my dad would say "I've disowned him. Don't speak his name!" He always had it out for David.

3. My early childhood memories are mainly of the way my father treated my mother. I remember him beating her head into a doorframe and beating her with a frying pan. My mom left my father when I was about six or seven years old and took me with her. Eventually, she started letting my dad take me for visits during weekends.

4. One day, my dad picked me up from school when he was not supposed to. My mom got to the school and I was gone. She had to send the police to even find where I was, but my dad would not give me back. They had a custody fight and somehow my dad won. I don't know a lot of the details. I just remember going to the courthouse and my dad promising me that he, my mom, and I would all go home together as a family. That was a lie. He got custody of me and never let me see my mom for the next two years. After that, I only saw her on weekends. I don't know why my dad wanted custody of me. He

Mickey Russ-Rodriguez

never treated me like a father should treat a daughter. He never acted like he loved me. I think he was just looking for another way to torture my mom and taking me was a way to do it. I also think my dad thought my mom would go back to him if he had me as leverage.

5. Once my dad realized my mom wasn't going to come back to him, he stopped fixating on her and turned his abuse on me. He would punch me, slap me, and bash my head against hard objects. He choked me, threw furniture at me, and locked me in rooms. I became so afraid of him, whenever he would sneeze or cough, I would flinch. If he saw me flinch, he'd immediately backhand me. I dreamed of running away, but I didn't want to be a juvenile delinquent. Sometimes, when things were especially bad, I would see the pistol my dad kept on his nightstand and think how easy it would be to pick it up, shoot it, and permanently end his abuse. But I knew if I did that, I'd just be exchanging my current prison for an actual prison. It felt like there was no way out.

6. For a while, I thought if I made sure I was the best kid ever, and exceeded all of my dad's expectations, I wouldn't get hurt. I did everything I could think of to be perfect. I excelled in school, and rose to the top of my class. I became president of student organizations. I was the first-chair trombone in my school band. But that didn't work. If I made any tiny misstep, he'd punish me physically or emotionally. And if someone else did something to make my dad mad, he took it out on me.

7. As I got older, my dad added psychological abuse to the physical abuse. He had to have everything exactly the way he wanted it. He would fly into a rage if something wasn't perfectly right. For example, if his food wasn't cooked just right, he'd throw it. He'd get so angry that spit would literally foam at the corner of his mouth.

Micky Russ-Rodrigues

8. One time, he made me sit in a chair for three days facing a wall. I was a teenager at the time. I've blocked out what happened when I needed to go to the bathroom during those three days. It's like my brain is protecting me from remembering. There are other periods of time that I've blanked out like that. I've learned this is common in people who live through traumatic experiences.

9. Life with my father was very isolating because if people outside the family tried to do something nice for me, my father would retaliate. One Christmas, our neighbors got together and brought over a bunch of Christmas presents for me. I was excited to be getting Christmas presents but I never got to see what they were. My dad took the presents outside and set fire to them in plain view so that all of the neighbors could see. He yelled at the top of his lungs that we didn't need charity. I recently learned that he did the same thing when family members brought Christmas presents over for David and Aarron.

10. When I was twelve or thirteen, a neighbor called the police on my dad. My dad and I were sitting down to dinner and for some reason he got mad at me. I was wearing a necklace and he grabbed it and ripped it off my neck. He yanked it so hard he left a huge mark on my neck. Then he grabbed our dining table and threw it on top of me. There were no curtains on our windows so someone nearby must have seen this and called 911. My dad saw the police coming, and locked me in my bedroom. He told me, "If you make a peep, I'll kill you." I thought for sure the police would come into the house to investigate so I sat on my bed and stayed quiet. I thought, "Finally, I'm saved!" But the police never came in. I started to believe my dad was always going to get away with the

Nicky Russ-Rodriguez

abuse. I felt depressed and hopeless. I still had five or six years until I turned 18 and could move out. It seemed like a lifetime away.

11. One day, when I was sixteen, a teacher saw my dad beating me up outside of my high school while we were sitting in the car. I don't remember why he was upset but he was bashing my head into the window. The school called social services and I was taken away from my father. I went to live with my cousin, Angie, and finally I felt safe.

12. Just because I eventually got away from my father's control doesn't mean I was suddenly fine. I was still scared I'd have to go back to him. And the effects of that trauma linger with me to this day. I have recurring dreams that I'm my current age but that I had to move back in with my father, and I'm being treated like I was when I was younger. I wake up in a panic. Even though I have a good life now with an amazing husband and son, I have terrible anxiety, especially when I have to see my father.

13. For decades now, my father has been receiving Social Security disability benefits for mental health issues. I'm unsure of his exact diagnosis, but I know he is on a ton of medications for it, including medicines that sedate him. My father is very different on medication than before he took it but it hasn't changed all of his behaviors. He's still very controlling and manipulative. He's an old man, lives in an assisted living facility, has had colon and bladder cancer, and has to defecate in a bag. I have power of attorney over him yet I'm still frightened of him because of the past. I see him once or twice a month. I ask people to go with me because I hate being alone with him. I still jump out of fear whenever he coughs. I rarely let him see my son, because I don't trust him not to hurt him. My son doesn't even call him "grandpa" – he calls him "your father" and says he is mean.

Mickey Rivas-Rodriguez

14. I've decided to maintain a relationship with my father because I know if I harbor anger and resentment, I am the only one it will hurt – my dad doesn't care enough about me or anyone to have his feelings hurt. My dad thinks he was the best father ever. In my whole life, he has never apologized to me or my brothers about *anything*. My dad denies ever lifting a finger to any of us kids. It's so outlandish because it's not like it was just a few times – we all grew up in a constant state of fear because of what he did to us physically and emotionally. Aarron and I often ask ourselves if he really believes he's never hurt us, or if it's just a way for him to avoid taking responsibility for all of the abuse and lasting damage he inflicted upon us.

15. All of my father's kids have been affected in different ways. Some of us have survived his abuse, and some of us haven't. I know because I was a girl, I got it easier than the boys – my father never broke my bones like he did to them. I also had Aarron, who was fifteen years older than me and did what he could to minimize the impact of my father's abuse. He was the big brother who tried to protect me. Aarron would come over and convince my dad to let me spend weekends and summers with him. I didn't realize at the time how incredible it was that my brother, in his twenties, was partially raising me. I didn't realize how much he was saving me. But looking back, I would not have ended up much better off than David if I hadn't had Aarron to love me, support me, and give me a respite from my dad. Aarron says I saved him and that I became his will to stay alive. He says he was able to avoid going down a more destructive path because he was able to focus on helping me.

16. As much as my dad put Aarron through hell, it wasn't id didn't come close to what he put David through. Aarron always says that our father never gave David any love or respect,

Micky Russ-Rodriguez

whereas Aarron got some of that interspersed with the abuse. David never got anything but pain from our father. David was never encouraged and never praised by my dad. Instead, my dad always told David that he was worthless and wouldn't amount to anything. Aarron says David learned to survive by creating a "shell" persona of confidence, but that inwardly he was miserable and had no self-esteem. Whenever my siblings and I talk about David, we all say the same thing: he never stood a chance.

17. My dad is so twisted that another reason Aarron never had it as bad as David is that my father believes it is important to "carry on the bloodline." He revered Aarron, because Aarron was his eldest son and namesake – they were both "James. A. Russ." It seems like a trivial thing but it is very significant to my dad. Even today, my dad is really nice to Aarron's son, James "Austin" Russ, also a "James A. Russ." But he ignores Aarron's second son, Ryan. My dad also rejected Missy because he didn't believe she was his biological daughter. His rejection caused so much pain for Missy, but his disinterest spared her from the abuse the rest of us endured. I tell her how lucky she was that she didn't go through the abuse like we did – but I know abandonment causes emotional scars, too.

18. David's lawyers spoke with me but they didn't spend enough time with me to give me the opportunity to tell them everything I knew. I also wanted to write David but David's lawyers told me not to. I don't know why I wasn't called to testify – I would have told the Court everything I'm saying now.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. Sec. 1746 and Sec. 92.525 of Title VII, Florida Statutes.

Mickey Russ-Rodriguez Dec. 18, 2018

Mickey Rodriguez Date

EXHIBIT 9

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
FILE NO. JUV DEL 76-21

* * * * * * * * * * * * * * * * *

In the Matter of the Need of Supervision of

JAMES AARON RUSS and
DAVID BYRON RUSS,

Minor Children

ORDER

* * * * * * * * * * * * * * * * * * *

The Petition of Marilyn Pruitt for an Order declaring James Aaron Russ and David Byron Russ children in need of supervision having come on for hearing before this Court on this 13th day of December, 1976, and it appearing and due and legal notice of said hearing was waived by J. Arnold Russ, father of said children and who consented to the disposition and findings of the Court that such children are children in need of supervision; Marilyn Pruitt from the Office of Community Service, Department of Social Services, State of South Dakota and Richard Bogue, State's Attorney for Lincoln County, South Dakota and said minors appearing in person at the said hearing, and the Court having heard the evidence finds:

That said James Aaron Russ is a minor child being 16 years of age, that the father of said child is J. Arnold Russ residing in Lincoln County, South Dakota;

That said David Byron Russ is a minor child being 14 years of age, that the father of said child is J. Arnold Russ residing in Lincoln County, South Dakota;

That said minors are children in need of supervision, and that all the allegations of the petition are true and correct.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said James Aaron Russ and David Byron Russ be and they hereby are declared to be children in need of supervision and are hereby placed in the custody of the Department of Social Services and the Office of Community Services of the State of South Dakota, [illegible] Robert Leach, Program Administrator,

successor or assign is hereby appointed guardian over the person of such children, until further order of this Court.

Dated at Canton, South Dakota this 13th day of December, 1976.

BY THE COURT:

Judge

ATTEST:

Clerk (SEAL)

filed Dec. 13, 1976

Recorded by Microfilm

Clerk

By Deputy

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
FILE NO. JUV. 76-21

MOTION AND ORDER

and

children

* * * * * *

COMES NOW, the State's Attorney in and for Lincoln County, South Dakota, and moves that the Court herewith enter and change its ex Order without further notice hereto to grant custody of the above named juveniles to the mother of said children, Beth King at 219 Orange Street, Auburndale, Florida.

This motion is based upon the recommendations of the Department of Social Services, Division of Human Development, Office of Community Services, and in particular, Jan Bunkers, Social Worker III, Alternative Care Unit.

Dated this 19th day of September, 1977.

RICHARD BOGUE
State's Attorney
Lincoln County, South Dakota

* * * * * * * * * * *

ORDER

It is hereby ordered that James Aaron Russ and David Byron Russ be forthwith delivered into the custody of their mother, Beth King, to Orange Street, Auburndale, Florida, and that the previous Order of this Court is hereby cancelled and terminated. That should there be any expense in connection with delivery of said children, it shall be borne by the family of James Aaron Russ and David Byron Russ.

Dated this 19th day of September, 1977.

Judge of First Judicial Circuit
Lincoln County, South Dakota

Sept. 19, 1977

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
FILE NO. JUV DEL 76-21

* *

In the Matter of the Need of
Supervision of

JAMES AARON RUSS and
DAVID BYRON RUSS,

Minor Children

ORDER

* *

The Petition of Marilyn Pruitt for an Order declaring James Aaron Russ and David Byron Russ children in need of supervision having come on for hearing before this Court on this 13th day of December, 1976, and it appearing and due and legal notice of said hearing was waived by J. Arnold Russ, father of said children and who consented to the disposition and findings of the Court that such children are children in need of supervision; Marilyn Pruitt from the Office of Community Service, Department of Social Services, State of South Dakota and Richard Bogue, State's Attorney for Lincoln County, South Dakota and said minors appearing in person at the said hearing, and the Court having heard the evidence finds:

That said James Aaron Russ is a minor child being 16 years of age, that the father of said child is J. Arnold Russ residing in Lincoln County, South Dakota;

That said David Byron Russ is a minor child being 14 years of age, that the father of said child is J. Arnold Russ residing in Lincoln County, South Dakota;

That said minors are children in need of supervision, and that all the allegations of the petition are true and correct,

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said James Aaron Russ and David Byron Russ be and they hereby are declared to be children in need of supervision and are hereby placed in the custody of the Department of Social Services and the Office of Community Services of the State of South Dakota,

IT IS FURTHER ORDERED that Robert Leach, Program Administrator,

or his successor or assign is hereby appointed guardian over the person of such children, until further order of this Court.

Dated at Canton, South Dakota this 13th day of December, 1976.

BY THE COURT:

Judge

ATTEST:

Clerk (SEAL)

Filed Dec. 13, 1976
Recorded by Microfilm
Cfd No.
Clerk
By
Deputy

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
FILE NO. JUV. 76-21

* * * * * * * *

In the Matter of the Care of

JAMES AARON RUSS and
DAVID BYRON RUSS,

Minor Children

MOTION AND ORDER

* * * * * * * * * * * *

COMES NOW RICHARD BOGUE, the State's Attorney in and for Lincoln County, South Dakota, and moves that the Court herewith enter and change it to Order without further notice herein to transfer custody of the above named juveniles to the mother of said children, Beth King at 219 Orange Street, Auburndale, Florida.

This motion is based upon the recommendations of the Department of Social Services, Division of Human Development, Office of Community Services, and in particular, Jan Bunkers, Social Worker III, Alternative Care Unit.

Dated this 19th day of September, 1977.

RICHARD BOGUE
State's Attorney
Lincoln County, South Dakota

* * * * * * * * * * *

ORDER

It is hereby ordered that James Aaron Russ and David Byron Russ be forthwith delivered into the custody of their mother, Beth King, 219 Orange Street, Auburndale, Florida, and that the previous Order of this Court is hereby cancelled and terminated. That should there be any expense in connection with delivery of said children, it shall be borne by the family of James Aaron Russ and David Byron Russ.

Dated this 12th day of September, 1977.

Judge of First Judicial Circuit
Lincoln County, South Dakota

ATTEST:

(SEAL)

Sept. 12, 1977

EXHIBIT 8

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID BYRON RUSS,

Petitioner,

v. Case No: 6:18-cv-994-Orl-37DCI

SECRETARY, DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.
_____/

ORDER STAYING CASE

On June 25, 2018, Petitioner David Byron Russ ("Petitioner" or "Russ"), a death-sentenced prisoner of the Florida Department of Corrections, initiated this action through the Federal Public Defender for the Northern District of Florida by filing a motion to proceed as a pauper (Doc. 2) and a motion to appoint the Office of the Capital Habeas Unit ("CHU") for the Federal Public Defender for the Northern District of Florida as counsel under 18 U.S.C. § 3599 (Doc. 1). The CHU for the Federal Public Defender for the Northern District of Florida was appointed under 18 U.S.C. § 3599(a)(2) and was directed to review Russ's state-court file and, if appropriate, file a 28 U.S.C. § 2254 petition setting forth the bases of his federal habeas claims (Doc. 10). The CHU was also directed to file a memorandum of law discussing why the petition should not be summarily dismissed as time-barred, unexhausted, or both (*Id.*).

On December 23, 2018, Russ filed a 28 U.S.C. § 2254 petition (Doc. 16) and a supporting memorandum (Doc. 17). Some, but not all, of the claims in the petition were

exhausted in state court (*Id.*). On the same day, Russ moved for a temporary stay of his habeas petition pending a state-court decision on his planned motion for appointment of the Office of the Capital Collateral Regional Counsel- Middle ("CCRC-M") to raise his unexhausted habeas claims in state court (Doc. 18). The motion to appoint CCRC-M was filed in state court on January 29, 2019 (Doc. 21).

Analysis

The United States Supreme Court has noted that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them" and that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-18 (1976) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). Nevertheless, a district court may stay its hand in certain exceptional circumstances, such as when motivated by considerations of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation[.]" *Colorado River*, 424 U.S. at 817. Moreover, the Supreme Court has also recognized that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936).

Russ's failure to exhaust claims in state court would automatically preclude this Court's consideration of those claims. 28 U.S.C. § 2254(b)(1)(A). Therefore, the purpose of a stay would be to postpone consideration of Russ's federal penalty-phase claims until he has exhausted them in state court. In *Rhines v. Weber*, 544 U.S. 269 (2005), the United

States Supreme Court allows district courts to stay a habeas petition and hold the federal proceedings in abeyance pending exhaustion of claims. Moreover, should Petitioner receive relief in state court, this Court's time and resources devoted to the § 2254 petition would be wasted.

In the interests of the parties and of judicial economy, the Court determines that a stay is warranted pending the outcome of the litigation in the state courts. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (a federal court should abstain where resolution of an unsettled state law question would render unnecessary the need to decide a federal constitutional question). This case will be stayed until June 1, 2019, at which time the Court will consider whether a further stay is necessary.

ACCORDINGLY, it is hereby

ORDERED:

1. This case will be stayed until June 1, 2019.

2. In **SIXTY (60) DAYS**, and every sixty days thereafter until the stay is lifted, both parties shall file a report on the status of the Florida litigation so that this Court may consider whether to lift or extend the stay. If the Florida litigation is resolved at any time prior to June 1, 2019, the parties shall immediately file notice of such.

3. The **Clerk of Court** is directed to administratively close this file.

DONE and **ORDERED** in Orlando, Florida on January 31st, 2019.



ROY B. DALTON JR.
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties
OrlP-4

EXHIBIT 9

ORIGINAL

IN THE CIRCUIT COURT, EIGHTEENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR SEMINOLE COUNTY

STATE OF FLORIDA,

vs. HEARING ON WAIVER OF MITIGATION

DAVID B. RUSS, 2007-CF-2377A

Defendant.

_____/

BEFORE THE HONORABLE

MARLENE M. ALVA

JUDGE OF THE COURT

MARYANNE MORSE
CLERK OF CIRCUIT COURT
SEMINOLE COUNTY, FL
2009 JUN 19 AM 11:47

REPORTED BY:
SHANNON GREEN, RPR
101 Bush Boulevard
Sanford, Florida
May 1st, 2008

APPEARANCES:

GINO FELICIANI, ESQUIRE
Assistant State Attorney
101 Bush Boulevard
Sanford, Florida
Attorney for the State of Florida

TIMOTHY CAUDILL, ESQUIRE
JEFFREY LEUKEL, ESQUIRE
101 Bush Boulevard
Sanford, Florida
Attorneys for the Defendant

P R O C E E D I N G S

THE COURT: Need to address the matter of State of Florida versus David Russ, 07-2377-CFA. This is a follow up to the hearing that was conducted yesterday, April the 30th. The Court wanted to put some findings on the record based on what was placed on the record yesterday during the hearing that was conducted. First of all, the Court does find that you are competent to make the -- certain decisions regarding the case. First of all, that you're competent to waive the right to a jury recommendation as to -- as to sentencing in the case.

As to your requested waiver of the jury, the Court will allow the waiver, and allow the sentencing proceeding to proceed before the Court alone. The Court, likewise, finds that you are competent to waive your right to the presentation of mitigating evidence, and we went over in detail yesterday the evidence that the defense would offer, and you specifically addressed each item, and you indicated that you wished to waive the presentation of that evidence. Is that still true today, sir?

THE DEFENDANT: Yes, ma'am, it is.

THE COURT: And certainly the case law indicates that if you are competent, you are able to do that. However, the Court, as I indicated to you earlier, has an independent duty to weigh aggravating and mitigating circumstances in order to make a determination as to what is the appropriate sentence in this case given the facts and circumstances of the events, and your character and background. Therefore, the Court is going to appoint special counsel, the office of Regional Conflict Counsel, for the purpose of presenting any mitigation evidence that may exist. And I would direct the office of the State Attorney and the office of the Public Defender to disclose whatever information that you have regarding the case itself, and any mitigating evidence from the State, and likewise the Defense, to make that information available. Particularly the information that was outlined yesterday as to the proffer, mitigation, putting in witness names and addresses.

MR. CAUDILL: Yes, Your Honor. Question, clarification, now that you've appointed, are we --

THE COURT: You remain as counsel. This is a special counsel that is to act in the public interest --

MR. CAUDILL: Yes, Your Honor.

THE COURT: -- and to present mitigation. He's -- Mr. Russ has made it clear what his intentions are regarding you. You remain as his counsel. He's indicated that he did not wish to discharge you previously.

MR. CAUDILL: Yes, Your Honor. Thank you.

(THEREUPON, the foregoing proceedings were concluded.)

C E R T I F I C A T E O F R E P O R T E R

STATE OF FLORIDA)

COUNTY OF SEMINOLE)

I, Shannon Green, Registered Professional Reporter, DO HEREBY CERTIFY that I was authorized to and did stenographically report the foregoing proceedings; and that the transcript is a true record of my stenographic notes.

I further certify that I am not a relative employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 16th day of June, 2009.



Shannon Green, RPR
Registered Professional Reporter

EXHIBIT 10

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY
FLORIDA.

CASE NUMBER: 2007-CF-2377-A

STATE OF FLORIDA,

Plaintiff,

vs.

DAVID BYRON RUSS,

Defendant.
_____/



SENTENCING ORDER

On February 6, 2008, the Defendant, David Byron Russ, entered a plea of guilty to the charges of: Count I – First Degree Premeditated Murder, Count II – Kidnapping with a Weapon, Count III – Grand Theft of a Motor Vehicle, Count IV – Robbery with a Deadly Weapon, and Count V – Burglary of a Dwelling with an Assault or Battery. The State did not waive the death penalty, and the Defendant received no negotiated sentence consideration in exchange for his plea.

The Defendant waived a jury in the penalty phase, which was conducted on January 8 – 9, 2009. On January 15, 2009, the State and the Defendant were permitted to present additional evidence to the Court during a ***Spencer***[1] hearing.

The Court heard the evidence presented during the penalty phase of the trial, additional evidence presented at the ***Spencer*** hearing, arguments of counsel, and reviewed the presentence investigation report and sentencing memoranda from the State, the Defense, and Special Counsel, in favor of and in opposition to the death penalty.

This Court, pursuant to the requirements of Florida Statute 921.141, has considered and weighed the evidence presented as to the statutory aggravating

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

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circumstances and all mitigating circumstances, both statutory and non-statutory. The Court now finds as follows:

FACTS

Shortly before midnight on the evening of May 6, 2007, Longwood Police Officer Brad Tollas noticed a white Jeep Cherokee parked in the parking lot of a business on Bennett Road. He approached the vehicle and observed the Defendant, David Russ, asleep in the driver's seat. Russ had been on a ten day crack binge, and had cocaine and a crack pipe in the center console of the jeep.

Officer Tollas knocked on the darkly tinted window of the jeep and the Defendant responded saying he was "okay". When Officer Tollas asked him to roll down the window, the Defendant started the jeep and drove away at a high rate of speed. Officer Tollas pursued the jeep and caught up with it in the Meadows West subdivision. He observed the vehicle, which was traveling at 5 – 10 mph, come to an abrupt stop. No one was found in the vehicle, and the Defendant was not located after a search of the area was conducted. The jeep was abandoned about one block from the victim Madeleine Leinen's home at 104 Lea Avenue in Longwood.

After fleeing on foot, David Russ spent the night on the rooftop of a house adjacent to the victim's. Early the next morning, he observed Madeleine Leinen leave for work. It was at that precise moment she was selected as his victim.[2]

The Defendant entered Leinen's home where he ate, showered, and laundered his clothes. He went through the house packing jewelry, cash, and a credit card with what he believed to be a valid pin number. He remained at the house awaiting Leinen's return.[3]

Madeleine Leinen returned to her home shortly after 6:00 p.m. after stopping at Sam's Club in Casselberry. At Sam's Club, the victim purchased both perishable and nonperishable items. A Sam's Club sales receipt detailing the items purchased and noting a checkout time of May 7, 2007, at 5:35 p.m. was on the kitchen counter. Frozen

[2] As stated by the Defendant in State's Exhibit #2, his handwritten letter to the Court.
[3] State's Exhibit #2.

shrimp which were purchased were placed in the freezer and other items purchased were found on a box in the garage and on the kitchen counter.

After killing the victim, the Defendant took her Toyota Camry and drove straight to the Fairwinds Credit Union in Apopka. There he attempted unsuccessfully to withdraw money from her account at an automatic teller machine. His efforts were captured by a video surveillance camera. The Defendant then left Florida heading towards Texas.

Early on the morning of May 8, 2007, the victim's lifeless body was found facedown on the floor of her hall bathroom by a friend. The victim's hands and feet were tightly bound with rope and a rope ligature was around her neck.

The medical examiner observed injuries to the victim consistent with strangulation from the neck ligature. He also noted three lacerations to the victim's scalp which he attributed to blunt force trauma. Four stab wounds, three to the victim's back and one to the head were also found. Additionally, the victim suffered facial bruising, fractured ribs, and a dislocated clavicle in the attack. The cause of death was attributed to multiple injuries resulting from blunt force trauma, stab wounds, and strangulation with a ligature.

Enroute to Texas, the Defendant pawned various items of the victim's jewelry and continued his crack binge by purchasing drugs along the way. The victim's car was recovered in Gainesville, Texas. Items of her jewelry which had been pawned by the Defendant on May 11, 2007, were recovered at a pawn shop in Denton, Texas. The Defendant was arrested by the sheriff's department in Denton, Texas on May 16, 2007.

AGGRAVATING CIRCUMSTANCES

The capital felony was committed while the Defendant was engaged, or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb. Florida Statute 921.141(5)(d).

The Defendant pled guilty to the kidnapping of Madeleine Leinen as charged in Count II of the indictment. Crime scene photographs show the victim was confined in her hall bathroom with her hands and feet bound with rope. Investigator Jaynes testified that the absence of any signs of a struggle throughout the house indicate the murder occurred in the hall bathroom. Dr. Hermann, the medical examiner, testified the victim's hands were so tightly bound that the lack of circulation caused them to become puffy and discolored. He stated that due to the victim's girth, her clavicle was dislocated on both sides when her hands were pulled down and bound behind her back.

The Court finds that the State has established beyond a reasonable doubt that the capital felony was committed while the Defendant was engaged in a kidnapping. The Court gives this aggravating circumstance significant weight.

The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody. Florida Statute 921.141 (5)(e).

To support a finding of this aggravating circumstance where the victim is not a law enforcement officer, the State must prove that the sole or dominant motive for the murder was the elimination of the witness. *Zack v. State*, 753 So.2d 9 (Fla. 2000). Mere speculation on the part of the State cannot support this aggravator. *Connor v. State*, 803 So.2d 598 (Fla. 2001). The victim in this case was not a law enforcement officer and was unknown to the Defendant before May 7, 2007.

The State theorizes that the brutal manner of Leinen's murder and her lack of physical ability to resist shows the intent to eliminate her as a witness. The possibility that Leinen could have identified Russ is insufficient to support this aggravator. *Consalvo v. State*, 697 So.2d 805 (Fla. 1996). The facts simply do not establish witness elimination as the sole or dominant motive for the killing, although it may have been a factor. Here as in *Zack*, the evidence suggests only that Leinen's murder was part of the Defendant's plan to kill her and take her car and possessions so he could obtain the funds to continue his crack binge. Although the Defendant did not have to murder Leinen to achieve his monetary goals, this does not make avoidance of arrest the dominant motivation for the killing.

The Court finds the State has not established this aggravating circumstance beyond a reasonable doubt.

The capital felony was committed for pecuniary gain. Florida Statutes 921.141 (5)(f).

This aggravating circumstance exists where the evidence establishes the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain. *Hildwin v. State*, 727 So.2d 193 (Fla. 2003). The Defendant pled guilty to the robbery of Madeleine Leinen and the theft of her motor vehicle.[4]

After the victim left for work, the Defendant carefully went through her house gathering cash, jewelry, and a credit card. He awaited her return so he could take her car. Immediately after killing Leinen, he was caught on a video surveillance camera attempting to use her credit card to withdraw funds at a Fairwinds Credit Union ATM. He drove the victim's car to Texas and pawned items of her jewelry.

The Court finds this aggravating circumstance has been established beyond a reasonable doubt and gives it moderate weight.

The capital felony was especially heinous, atrocious, or cruel. Florida Statute 921.141 (5)(h).

In determining whether this aggravating circumstance has been proved the Court considered the means and manner by which the Defendant caused Madeleine Leinen's death and the immediate circumstances surrounding it.

Dr. Marie Hermann, the medical examiner, testified the victim suffered three lacerations to the head as a result of blunt force trauma. The lacerations caused the scalp to separate from the skull. The bleeding under the scalp indicated the victim was alive

[4] The Court recognizes that when a homicide occurs during the course of a robbery, both the felony murder aggravator and the pecuniary gain aggravator cannot apply. However, as in this case, if two or more enumerated felonies were committed during the course of a homicide, one of which does not involve the taking of money or property, it is not impermissible doubling to consider both aggravators. *Spann v. State*, 857 So.2d 845 (Fla. 2003).

when these blows were inflicted, although any one of the blows could have rendered her unconscious.

Four stab wounds were also indentified, three to the victim's back and one to her head. A weapon with two sharp edges, most likely a knife, was used to inflict all four wounds. Bleeding into tissue surrounding these wounds indicates the victim was alive when she was stabbed. The stab wounds could have caused a loss of consciousness, but Dr. Hermann was unable to establish a time parameter as to when such loss might have occurred.

The front, sides, and back of the victim's neck had abrasion furrows and scraped skin.[5] Petichial hemorrhaging in her eyes was also observed. These injuries resulted from the great pressure applied to the victim's neck with the ligature. The appearance of the abrasions indicated that these injuries were sustained while Leinen was alive. Dr. Hermann opined the victim was conscious for at least 10 – 13 seconds after the complete compression of her blood vessels, and would have suffered a significant amount of discomfort during the strangulation.

In addition to the injuries which contributed to Leinen's death, numerous less serious injuries were observed. Bruising, and a laceration to the brow ridge of the victim's right eye, were the result of a significant blow to the eye while she was still alive. Fractured ribs, contusions to both lips and the right cheek, as well as a chipped tooth were also noted.

Due to the victim's size, her clavicle was dislocated on both sides when her hands were pulled down and bound behind her back. While alive, her hands were so tightly bound that the lack of blood circulation caused them to become puffy and extremely discolored.[6] Dr. Hermann testified that these conditions would have been painful to the victim. In addition, being positioned on her stomach would have caused the victim to experience a suffocating sensation because her large abdomen and chest would have limited the ability of her diaphragm to move.

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[5] State's Exhibits #96, #97, #98, and #99.
[6] State's Exhibit #111.

A finding that the murder of Madeleine Leinen was especially heinous, atrocious, or cruel is supported by the following evidence:

1. The evidence proves the victim was beaten, strangled, and stabbed four times. The medical examiner, while unable to affix unconsciousness at any particular point, testified the victim was alive when the stab wounds, blows to the head, and strangulation occurred. *Willacy v. State*, 696 So.2d 693 (Fla. 1997). *Taylor v. State*, 630 So.2d 1038 (Fla. 1994). Indeed, it has been previously held that strangulation alone creates a prima facie case for this aggravating factor. *Orme v. State*, 677 So.2d 258 (Fla. 1996).

2. The evidence supports a finding that her hands and feet were bound while most of these painful injuries were inflicted.

3. Even if she was conscious only briefly, the terror the victim must have felt while tied up and powerless to stop her own murder, is almost unimaginable. *Beasley v. State*, 774 So.2d 649 (Fla. 2000).

For the above reasons, Leinen's murder falls well within the definition of the terms heinous, atrocious, or cruel, and the Court finds this aggravating circumstance has been established beyond a reasonable doubt and gives it great weight.

The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Florida Statute 921.141 (5) (j).

To establish this aggravating circumstance, the State must prove beyond a reasonable doubt that: (1) the murder was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage, (2) the Defendant had a careful plan or prearranged design to commit murder before the killing, (3) the Defendant exhibited heightened premeditation, and (4) the Defendant had no pretense of moral or legal justification.

In his letter to the Court[7], the Defendant stated that after eluding pursuit by Officer Tollas he spent the night on the rooftop of a house adjacent to Leinen's home. He wrote, "At dawn I awakened. I saw the victim leaving for work. I chose my victim at that exact moment." Further in the letter he states, "Was the murder premeditated? Yes your Honor it was. Did I believe I was capable of such a crime while on a drug crime spree? No, I did not. I was no doubt a cold blooded killer on that day."

The Defendant remained in the victim's home the entire day, waiting for her to return. Crime scene Investigator Ohlson found rope similar to the rope used to bind the victim's feet in the trash can and behind the washer and dryer in the garage. A different type of rope was used for the neck ligature and to bind the victim's hands using a complex series of knots.

The victim's home was neat and tidy and without any signs of a struggle. Blood droplets were found in the garage, but the actual killing appeared to take place in the hall bathroom. Common sense and the evidence at the scene indicate the Defendant likely first encountered the victim in the garage, subdued her with an initial blow, and walked her through the house to the hall bathroom.

The evidence indicates the victim's murder was not a spontaneous or impulsive act. Nor was it done in a frenzy or rage. While the evidence establishes the Defendant had been using crack cocaine heavily in the days preceding May 7, 2007, there was no evidence that the Defendant was under the influence of drugs at the time of the murder. Rather, Madeleine Leinen's murder was the product of the Defendant's prearranged design. He had selected her as his victim early that morning. He waited hours for her to return home. Prior to her murder he procured two types of rope and a knife to execute his plan. The absence of any signs of a struggle and the lack of defensive wounds on the victim indicate she offered no resistance. Once in the bathroom, the Defendant meticulously tied Leinen's hands and feet and used three different means to ensure her death. Undoubtedly, many of the victim's wounds occurred as she lay bound and helpless on the floor. No evidence of moral or legal justification was presented or argued.

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[7] State's Exhibit #2.

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The Court finds the above stated evidence[8] establishes this aggravating circumstance beyond a reasonable doubt, and it is given great weight.

MITIGATING CIRCUMSTANCES

STATUTORY MITIGATING CIRCUMSTANCES

No evidence of any statutory mitigating circumstances as set forth in Florida Statute 921.141(6)(a)(b)(c)(d)(e)(f) or (g) was presented or argued.

The existence of any other factors in the Defendant's background that would mitigate against imposition of the death penalty. Florida Statutes 921.141 (6)(h).

The Defendant had an abusive childhood.

After their parents divorced, the Defendant and his brother lived for a time with their mother, who was very neglectful. For the most part, she went out all night and slept all day, leaving the children to fend for themselves. In an effort to avoid further neglect, the boys elected to live with their father when he remarried.

The Defendant's older brother James Aaron Russ, and stepmother Marie Jackson, testified as to the verbal and physical abuse the Defendant suffered at the hands of his father. Physical beatings, at times using pots, pans, a baseball bat, a garden stake, and a garden hose, were routine for both boys, but worse for the Defendant.

When the Defendant was around thirteen, a neighbor called police after witnessing him receive a particularly severe beating. Both boys were removed from the home and placed in foster care. They remained in foster care because their mother could

[8] During the penalty phase, in support of this aggravator, the State introduced evidence of a residential burglary in Texas which occurred May 14, 2007, days after the Leinen murder. The Court has not considered that evidence in determining proof of the existence of this factor. Given the date of that offense, it is not relevant to prove heightened premeditation or prearranged design or plan to commit the murder in this case.

not be located. The boys were separated in foster care and had only limited contact with each other.

This abusive and neglectful treatment, and the resulting placement in foster care, negatively impacted the Defendant. He was very frightened of his father as a child and increasingly angry and rebellious as he got older. He remained estranged from both his father and his mother even after reaching adulthood.

The Court is reasonably convinced of this mitigating circumstance and gives it moderate weight.

The Defendant suffers from a severe, long term addiction to drugs which he has been unable to conquer despite numerous attempts at rehabilitation.

The Defendant states in his letter to the Court that he began his cocaine use at age twenty.[9] His drug use began "a progressive pattern of lying, cheating, and stealing, just to get more cocaine." The Defendant acknowledges committing over one hundred burglaries as an adult to finance his addiction. Some of these crimes resulted in jail or imprisonment.

In an effort to address his addiction, the Defendant has been in various treatment programs while both in and out of custody. He has been in inpatient and outpatient treatment, and both individual and group counseling. He even attended Texas Tech University's substance abuse counseling program to become a counselor, and was a member of the school's "Center for the Study of Addiction".

In early 2007, the Defendant had been living with Kimberly Williams and working as a roofer. He was earning a good income, and was a fully contributing member of the household. A few months before May 7, 2007, the Defendant relapsed and again began using cocaine.

Once reignited, his addiction escalated to the point where he exhausted his funds and again resorted to burglaries to support his $500.00 to $600.00 a week habit. For the ten days prior to the murder, he had been smoking crack cocaine nonstop. Late on the

[9] See State's Exhibit #2, which is the source of much of the content in this section.

evening of May 6, 2007, he had finally pulled over in his jeep to sleep, when he was approached by Officer Tollas.

No evidence was presented as to what effect, if any, the Defendant's prior cocaine use had on the Defendant's behavior on May 7, 2007. Nor was any evidence presented that the Defendant was using cocaine on the day of the murder.[10] However, the Defendant's long term addiction and bingeing in the days immediately prior to the murder no doubt motivated the Defendant's actions and behavior on May 7, 2007.

The Court is reasonably convinced of this single mitigator and gives it some weight.

NONSTATUTORY MITIGATING CIRCUMSTANCES

In the sentencing memoranda submitted by defense counsel and special counsel for the Defendant, overlapping mitigation which falls into various categories was argued. The Court will now address the evidence presented in mitigation.

The Defendant is remorseful for the homicide.

The Court recognizes that remorse, when genuine, should be considered as a mitigating factor. *Beasley v. State*, 774 So.2d 649 (Fla. 2000). The Defendant in this case has fully accepted responsibility for his actions. He elected to waive his right to a jury trial and enter a plea of guilty to the charges without receiving any sentencing benefit in exchange for his plea. He waived a penalty phase jury and requested no mitigation be presented on his behalf. He has repeatedly voiced his remorse and his desire to minimize any further suffering by the victim's family and friends.

The Court finds the Defendant's expressions of remorse through his words, actions, and demeanor are genuine. The Court is reasonably convinced of this mitigating circumstance and gives it moderate weight.

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[10] This fact, however, is not determinative of whether long time substance abuse is mitigating. *Mahn v. State*, 714 So.2d 391 (Fla. 1998).

The Defendant suffers from multiple medical problems.

Medical records from the John E. Polk Correctional Facility, Texas Department of Criminal Justice, and University Medical Center, in Lubbock, Texas, indicate the Defendant has in the past or currently suffers from various health conditions including: a thyroid imbalance, Hepatitis C, severe headaches, knee problems, vertigo, allergies, kidney stones, degenerative disc disease, head trauma, heart attack, dental problems, vision problems, asthma, chronic acid reflux, exposure to tuberculosis, and MRSA infection.

Upon being booked into the John E. Polk Correctional Facility in June of 2007, the Defendant was diagnosed with major depression and treated by the jail psychiatrist. There is no evidence any of these medical conditions affected the Defendant's actions on May 7, 2007, or played any role in the murder of Madeleine Leinen.

The Court, while reasonably convinced of this circumstance, gives it very little weight.

The Defendant has the capacity to form and maintain loving and caring relationships with both family and non-family members.

The Defendant's older brother, James Aaron Russ, testified he tried to act as the Defendant's protector during their abusive childhood. He stated he supported the Defendant as much as possible and the Defendant was "there for him too."

Kimberly Williams was the Defendant's girlfriend from November of 2006 through the time of his arrest. The two lived together along with her young son and her eighty year old aunt. He enjoyed a loving relationship with all the members of the household. During that time, the Defendant became a father figure to her son, whom he would often help with his homework. The Defendant also had a caring relationship with Williams' elderly aunt who had limited physical mobility. He would stay with her and lift her so she could fish and do other activities outside the home. Prior to the Defendant's relapse in early April of 2007, he fully contributed to the household financially, and by cooking, cleaning, and doing laundry.

The Court is reasonably convinced of this mitigating circumstance and gives it little weight.

The Defendant has pursued higher education and is skilled in the roofing trade.

The Defendant dropped out of high school, but subsequently obtained his G.E.D. in 1994. Between 1994 and 1997, he attended Western Texas College where he earned a GPA of 3.67. He was approved for admission to Texas Tech University in 1997, and received scholarship awards to pursue substance abuse studies there.

The Defendant also possessed roofing skills, and worked as a roofer in both Florida and Texas.

The Court is reasonably convinced of this single mitigating circumstance and gives it little weight.

The Defendant has no violent criminal history.

The Defendant's extensive criminal history spans over twenty years and contains numerous felony convictions for both property or theft related crimes and drug offenses. There is no evidence that the Defendant had previously been convicted of a violent crime.

However, while having a conviction for a felony involving the use or threat of violence to a person is an aggravating circumstance under Florida Statute 921.141 (5)(b), the absence of such convictions when viewed in the context of the facts in this case and the Defendant's lengthy criminal history is not strongly mitigating. The Defendant's life shows only relatively brief interludes between convictions and periods of incarceration.

The Court, while reasonably convinced of this circumstance, finds it to be of minimal mitigating value, and gives it little weight.

The Defendant behaved appropriately in the courtroom.

The Defendant, at all court proceedings in this case, behaved appropriately. The Court is reasonably convinced of this mitigator and gives it little weight.

The Defendant wrote thank you notes to his scholarship donors at Texas Tech University in 1997.

The Defendant wrote letters expressing his gratitude and appreciation to the two donors who funded his substance abuse scholarship at Texas Tech University in 1997. While both letters were well written, it appears they were academically mandatory, not spontaneously generated, and were required to follow a prescribed format.[11]

The Court, while finding this circumstance has been reasonably established, gives it very little weight.

Conclusion

Having reviewed and weighed all of the aggravating and mitigating circumstances, the Court finds the aggravating circumstances outweigh the mitigating circumstances for the murder of Madeleine Leinen. Accordingly,

IT IS THE JUDGMENT OF THIS COURT:

1. For the first degree murder of Madeleine Leinen the Defendant, David Byron Russ, is sentenced to be put to death in the manner prescribed by law.

2. For the crime of kidnapping with a weapon, the Defendant is sentenced to serve a term of imprisonment in the Florida Department of Corrections for his natural life.

3. For the crime of grand theft of a motor vehicle, the Defendant is sentenced to serve a five year term of imprisonment in the Florida Department of Corrections.

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[11] See Defendant's Exhibits #10 and #11.

4. For the crime of robbery with a deadly weapon, the Defendant is sentenced to serve a term of imprisonment in the Florida Department of Corrections for his natural life.

5. For the crime of burglary of a dwelling with an assault or battery, the Defendant is sentenced serve a term of imprisonment in the Florida Department of Corrections for his natural life.

6. The sentences are to run concurrent with each other and the Defendant is given credit for 704 days time served on each count.

7. The Court assesses all statutory costs and directs the clerk to enter judgment accordingly.

Ordered in Sanford, Seminole County, Florida, this 13th day of May, 2009.

Marlene M. Alva
Circuit Judge

Copies Furnished to:

Office of the State Attorney
Office of the Public Defender
Special Counsel/Dowdy and Nielsen

EXHIBIT 11

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO. 2007-CF-2377-A
(SC09-927)

STATE OF FLORIDA,

Plaintiff,

vs.

DAVID BYRON RUSS,

Defendant.
_____/

FILED IN OPEN COURT
MARYANNE MORSE
CLERK CIRCUIT COURT
12 FEB 10 AM 11:37
SEMINOLE CO., FLA.
BY DC

ORDER

THIS CAUSE, having come before the Court for hearing on January 19, 2012, pursuant to Fla.R.Crim.P 3.851(i), on the pro se motion of the Defendant, David Byron Russ, requesting that pending postconviction proceedings be dismissed, and that collateral counsel be discharged, and the Court having made inquiry of the Defendant and having heard arguments by counsel for the State, collateral counsel, and the Defendant finds as follows:

1. The Defendant was previously examined and determined to be competent. He is continued to be presumed competent, and there are no reasonable grounds to believe that the Defendant is not mentally competent to proceed for the purposes of this hearing.

2. After conducting an inquiry of the Defendant, the Court determines that David Byron Russ has freely, voluntarily, and knowingly decided to request the dismissal of pending postconviction proceedings and the discharge of collateral counsel.

It is therefore

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ORDERED AND ADJUDGED that all pending postconviction proceedings on the above styled cause are hereby dismissed and the Office of Capital Collateral Regional Counsel is discharged from further representation of the Defendant.

IT IS FURTHER ORDERED AND ADJUDGED that the Clerk of the Court shall forward copies of the Defendant's aforementioned pro se motion, this order, and the transcript of the hearing conducted on January 19, 2012, on the motion to the Clerk of the Supreme Court of Florida within 30 days of the date of this order.

DONE AND ORDERED this 9th day February, 2012, in Sanford, Seminole County, Florida.

Marlene M. Alva
Circuit Judge

I CERTIFY that copies of the foregoing were furnished by U.S. Mail to Barbara C. Davis, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Flr., Daytona Beach, Fl 32118, Office of the State Attorney, 101 Bush Blvd., Sanford, Fl 32773, David Hendry and James Driscoll, Assistant CCRC, CCRC-Middle, 3801 Corporex Park Dr., Ste. 210, Tampa, Fl 33619, and David Byron Russ, DC#35896, Florida State Prison, 7819 NW 228th St., Raiford, Fl 32026-1000, this 9th day of February, 2012.

Judicial Assistant

Copies Fwd to Supreme Court Clerk 2/21/12

EXHIBIT 12

FILED

2018 JUN 22 PM 1:10

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID BYRON RUSS,

Petitioner,

v.

Case No. **6:18-MC-45 ORL-40KRS**

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

CAPITAL CASE

Respondent.
_____ /

MOTION FOR APPOINTMENT OF COUNSEL

Petitioner David Byron Russ, a Florida prisoner sentenced to death, respectfully moves for the appointment of the Capital Habeas Unit ("CHU") of the Office of the Federal Public Defender for the Northern District of Florida as his counsel under 18 U.S.C. § 3599, so that the CHU may ascertain the status of Mr. Russ' federal habeas rights and pursue federal remedies that might be available. Mr. Russ is currently unrepresented by federal counsel and has never had representation in federal court.

I. Background

Mr. Russ pleaded guilty and was convicted of first-degree murder. *Russ v. State*, 73 So.3d 178, 183 (Fla. 2011). He waived his right to a penalty phase jury

and to present mitigation evidence and argument. The court imposed a death sentence. *Id.* at 184-88. The Florida Supreme Court affirmed. *Id.* at 200.

After the conclusion of Mr. Russ' direct appeal, the Capital Collateral Regional Counsel – Middle Office ("CCRC"), was appointed to represent Mr. Russ. However, on November 1, 2011, Mr. Russ filed a *pro se* motion seeking to discharge his state post-conviction counsel and terminate any further state post-conviction proceedings on his behalf. *See Russ v. State*, 107 So.3d 406 (Fla. 2012) (unpublished opinion). The state trial court granted the motion, and the Florida Supreme Court affirmed the trial court's decision. *Id.* Since then, Mr. Russ has been unrepresented by any counsel. He has never had a substantive 3.851 motion filed, nor any federal post-conviction filings.

II. Mr. Russ is indigent and needs counsel

Section 3599 provides that state prisoners who are or become "financially unable to obtain adequate representation" are entitled to appointment of counsel. Mr. Russ is currently indigent, and was previously granted indigent status and appointed public defender counsel at trial and on appeal by the state courts. He has had no legal representation since the Florida Supreme Court affirmed the trial court's decision terminating state post-conviction proceedings in 2012, *id.*, and has never had federal counsel. Mr. Russ qualifies for the appointment of § 3599 counsel to represent him in federal habeas proceedings.

III. The CHU is available and qualified to take the appointment, at no additional cost to this Court

The CHU is available and qualified for this appointment under § 3599. The CHU was established by the Administrative Office of the United States Courts, in concurrence with the Chief Judge of the Court of Appeals for the Eleventh Circuit and the Chief Judge of the Northern District, to help ensure that death-sentenced Florida prisoners receive competent and meaningful federal habeas representation. *See Banks v. Sec'y*, 592 F. App'x 771, 775 (11th Cir. 2014) (Carnes, C.J., concurring) ("We were of the view that the best way [to avoid inadequate assistance] probably would be to establish a capital habeas unit in Florida, the only state in our circuit that did not have one at the time."). As the institutional federal capital defender in Florida, the CHU has specialized expertise in capital habeas litigation. The CHU represents death-sentenced individuals in federal habeas proceedings, and also advises, assists, and trains counsel in capital cases. The CHU has a staff of attorneys and investigators who are available and qualified to provide effective defense services to Mr. Russ.

The CHU has been appointed to represent other Middle District habeas petitioners, including petitioners who have never pursued federal habeas relief and need counsel to investigate potential remedies that may be available, notwithstanding a failure to file for federal habeas relief or an earlier denial of habeas

relief. *See, e.g., Miller v. Sec'y Dep't of Corrs.*, No. 3:17-cv-00932-BJD-JBT, ECF No. 3 (M.D. Fla. Aug. 24, 2017) (Davis, J.); *see also Bowles v. Sec'y Dep't of Corrs.*, No. 3:08-cv-00791-HLA-MCR, ECF No. 33 (M.D. Fla. Sep. 27, 2017) (Adams, J.); *Bell v. Fla. Att'y Gen. Sec'y Dep't of Corrs.*, No. 3:07-cv-860-ODE, ECF No. 109 (M.D. Fla. Nov. 14, 2017); *Reese Sec'y, Fla. Dep't of Corrs.*, No. 3:09-cv-1145-J-25MCR, ECF No. 30 (M.D. Fla. Oct. 17, 2017).

In the Northern District, Judge Robert L. Hinkle appointed the CHU in a case analogous to the one at hand, in which a petitioner appeared in state court and "waived" both his right to an attorney for purposes of collateral review and his right to collateral review. *Rodgers v. Jones, Sec'y Fla. Dep't of Corrs.*, No. 315cv507-RH, ECF No. 3 (N.D. Fla. Nov. 11, 2016). Judge Hinkle specifically appointed the CHU to look into any available relief. *Id.* at ECF Nos. 3 and 9.

The CHU has obtained approval for an appointment in Mr. Russ' case from the Administrative Office of the United States Courts ("AO") and Defender Services Offices ("DSO"). Pursuant to the out-of-district appointment protocol, notice was provided to the Chief Judge of the United States Court of Appeals for the Eleventh Circuit.[1] Federal Public Defenders Donna Elm of the Middle District and Randolph

[1] Under the DSO out-of-district appointment protocol, the DSO must approve a Federal Defender's out-of-district request prior to an appointment, and DSO approval requires prior notification to the Circuit Chief Judge. Pursuant to the protocol, notification was provided to Chief Judge Ed Carnes.

Murrell of the Northern District agree that the CHU should be appointed. This appointment comes at no direct cost to this District Court.

The CHU consulted with CCRC-M counsel regarding this motion. The CHU also consulted with Mr. Russ. Mr. Russ wishes to have the CHU appointed as his federal habeas counsel. Mr. Russ has meet with CHU staff and authorized the filing of this motion. It is also appropriate to have active federal counsel in the event of a death warrant.

V. Conclusion

For the foregoing reasons, the CHU should be appointed as Mr. Russ' counsel under § 3599.

Respectfully submitted,

Billy H. Nolas
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301-1300
(850) 942-8818
billy_nolas@fd.org

CERTIFICATE OF SERVICE AND STATEMENT PURSUANT TO LOCAL RULE 3.01(G)

Petitioner's position is that the Respondent and Respondent's counsel, the Florida Attorney General, do not have standing on the issue of appointment under § 3599. However, as a courtesy, this motion is being served on June 21, 2018 to the Attorney General by email to the general address, capapp@myfloridalegal.com, since the Assistant Attorney General who previously entered an appearance in state court, Kenneth S. Nunnelley, is no longer with the Attorney General's office.

/s/ Billy H. Nolas
Billy H. Nolas

EXHIBIT 13

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID BYRON RUSS,

Petitioner,

v. Case No: 6:18-cv-994-Orl-37DCI

SECRETARY, DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.
_____/

ORDER APPOINTING COUNSEL

Petitioner David Byron Russ ("Petitioner" or "Russ"), a death-sentenced prisoner of the Florida Department of Corrections, initiated this action through the Federal Public Defender for the Northern District of Florida by filing a motion to proceed as a pauper (Doc. 2) and a motion to appoint the Office of the Capital Habeas Unit ("CHU") for the Federal Public Defender for the Northern District of Florida as counsel under 18 U.S.C. § 3599 (Doc. 1). Respondents oppose the motion (Doc. 6). The records before this Court demonstrate that Petitioner is entitled to proceed as a pauper. In addition, the CHU for the Federal Public Defender for the Northern District of Florida is appointed as counsel under 18 U.S.C. § 3599(a)(2) to the extent set forth in this Order.

I. Background

On February 6, 2008, Russ pleaded guilty to the May 7, 2007 murder of Madeleine Leinen. *Russ v. State*, 73 So. 3d 178 (Fla. 2011). Petitioner waived the presentation of all

mitigation during the penalty phase and he also waived a penalty phase jury. *Id.* at 184. On May 13, 2009, the trial court sentenced Russ to death for first degree murder. *Id.* at 187. The Florida Supreme Court affirmed Russ's conviction and sentence. *Id.* at 200.

After Russ's death sentence was affirmed on direct appeal, James L. Driscoll was appointed to represent Russ in his post-conviction proceedings. *Russ v. State*, 107 So. 3d 406 (Fla. 2012). However, Russ filed a pro se motion seeking to terminate post-conviction counsel and proceedings. *Id.* After a hearing, the circuit court found Russ competent and issued an order discharging Driscoll and dismissing Russ's post-conviction proceedings. Driscoll appealed the discharge, arguing that Russ's waiver was not fully intelligent or voluntary because he did not have a clear understanding of the claims he was waiving. The Florida Supreme Court found otherwise:

> The transcript reflects that Russ was fully aware of and understood the consequences of waiving postconviction counsel and proceedings. The colloquy provides that the trial court repeatedly stressed the implications of dismissing postconviction counsel and proceedings. Russ stated on the record that just like he waived his right to a jury trial, he wanted to take responsibility for his actions and was willing to face the consequences of those actions, including his death sentence. Russ also affirmed that his decision to waive postconviction proceedings was reached on his own, with no outside pressure. He affirmed that he was not coerced or threatened to make this decision, and that his decision was voluntary.
>
> . . .
>
> Russ's responses to the questions posed by the trial court demonstrate that he comprehended his legal options and the consequences of his waiver. Based on the colloquy conducted and the answers provided by Russ, the trial court did not abuse its discretion in determining that Russ knowingly,

> intelligently, and voluntarily waived his right to postconviction counsel and proceedings.

Id. at *2. Petitioner has filed no subsequent motions or post-conviction proceedings in either state or federal court since 2012.

II. Pleadings

In the motion for the appointment of counsel, Federal Public Defender Billy H. Nolas asserts that appointment of the CHU of the Office of the Federal Public Defender for the Northern District of Florida is proper under 18 U.S.C. § 3599, "so that the CHU may ascertain the status of Mr. Russ' federal habeas rights and pursue federal remedies that might be available." (Doc. 1 at 6). Nolas asserts that the CHU was established by the Administrative Office of the United States Courts, in concurrence with the Chief Judge of the Court of Appeals for the Eleventh Circuit and the Chief Judge of the Northern District "to help ensure that death-sentenced Florida prisoners receive competent and meaningful federal habeas representation." (*Id.* at 3). He states that the CHU has obtained approval from the Administrative Office of the United States Courts and Defender Services Offices for an appointment in Russ's case, and that "[t]his appointment comes at no direct cost to this District Court." (*Id.* at 4-5).

Nolas asserts that he consulted with Florida's Capital Collateral Regional Counsel ("CCRC") regarding this appointment, but he does not apprise the Court of CCRC's response (Doc. 1 at 5). Nolas also asserts that Russ wishes to have the CHU appointed as his federal habeas counsel and that he authorized the filing of this motion (*Id.*).

Respondents filed a response in opposition to the motion to appoint the federal public defender (Doc. 6). Respondents argue that Russ is not entitled to CHU representation after waiving all post-conviction proceedings and discharging post-conviction counsel (*Id.* at 3). Respondents explain that Florida provides post-conviction counsel to all capital defendants by statute and that "the U.S. Supreme Court has emphasized that § 3599 'provides for counsel only when a state petitioner is unable to obtain adequate representation.'" (Doc. 6 at 4) (quoting *Harbison v. Bell*, 556 U.S. 180, 189 (2009)). Finally, Respondents urge that the appointment of the CHU would be futile because "any claims Petitioner could bring are now procedurally barred or untimely." (Doc. 6 at 6).

In reply, Nolas contends that appointment under 18 U.S.C. § 3599 is required as a matter of right; that Respondents have no standing to oppose the appointment; and that the CHU has never been denied appointment in similarly postured cases (Doc. 9).

III. Analysis

Title 18 U.S.C. § 3599 provides in pertinent part:

> In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys[.]

§ 3599(a)(2). The Eleventh Circuit has interpreted § 3599(a)(2) to mandate that any indigent state inmate seeking to challenge his death sentence in federal court "is statutorily entitled to the appointment of counsel 'in any post conviction proceeding

under section 2254.'" *Chavez v. Sec'y, Fla. Dep't of Corr.*, 742 F.3d 940, 944 (11th Cir. 2014) (quoting 18 U.S.C. § 3599(a)). Moreover, because the inmate is entitled to "legal assistance in the preparation of a habeas corpus application," he would also be entitled to the appointment of counsel, "prior to the filing of a formal, legally sufficient habeas corpus petition." *McFarland v. Scott*, 512 U.S. 849, 855 (1994).

As noted, Respondents oppose the appointment of counsel on the grounds that "any claims Petitioner could now bring are procedurally barred or untimely." (Doc. 6 at 6). Indeed, notwithstanding that "a substantive merits assessment of [an actual or proposed § 2254 petition] is irrelevant to the appoint of counsel under § 3599," district courts are "not [precluded] from considering whether a proposed petition would clearly be barred for a reason unrelated to the merits of any substantive claim for relief, such as a statute-of-limitations bar." *Chavez*, 742 F.3d at 946 (first alteration in original) (citing and quoting *Weeks v. Jones*, 100 F.3d 124, 127 (11th Cir. 1996)). In other words, "[a] district court is not required to appoint new counsel to pursue wholly futile claims that are conclusively time barred or could not form the basis for federal habeas relief." *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1246, 1259 (11th Cir. 2014); *see also In re Hearn,* 376 F.3d 447, 455 (5th Cir. 2004) ("[P]otential procedural bars may be so conclusive that the right to counsel under [§ 3599] becomes unavailable."); *Cantu Tzin v. Johnson*, 162 F.3d 295, 298 (5th Cir. 1998) ("Appointment of counsel for a capital-convicted defendant would be a futile gesture if the petitioner is time-barred from seeking federal habeas relief.").

It is undisputed that Russ waived his right to state post-conviction review of his conviction and sentence and that he has filed nothing in state court for six years—almost

certainly rendering any potential 28 U.S.C. § 2254 claims both unexhausted and untimely. However, unlike the petitioners in *Chavez* and *Lambrix*, Russ has not yet filed a federal habeas petition. Therefore, he has had no federal review of any potential claims. Moreover, he did not expressly waive the appointment of counsel in federal court under § 3599. Russ should have a chance to argue that his one-year period for filing a federal habeas petition should be equitably tolled under *Holland v. Florida*, 560 U.S. 631 (2010), or that he is entitled to a later start date of the AEDPA limitations period under 28 U.S.C. § 2244(d)(1)(B)-(D). Accordingly, while Respondents' arguments are well-reasoned, they are premature. Respondents may oppose a petition or request for relief when it is actually filed.

The Court finds that Russ qualifies under 18 U.S.C. § 3599(a)(2) for the appointment of counsel for the purpose of filing a federal 28 U.S.C. § 2254 habeas petition. Considering the representations made by Nolas in the motion for appointment of counsel (Doc. 1), the Court further finds that the CHU is qualified to represent Russ in this matter.

ACCORDINGLY, it is hereby

ORDERED:

1. Petitioner's motion for leave to proceed as a pauper (Doc. 2) is **GRANTED**.

2. The motion for appointment of counsel (Doc. 1) is **GRANTED** to the extent set forth in this Order.

3. The Court appoints the Capital Habeas Unit for the Federal Public Defender for the Northern District of Florida to represent Russ for the sole purpose of pursuing a

28 U.S.C. § 2254 petition. 18 U.S.C. § 3599(a)(2). The attorney from the CHU who is assigned to this case shall enter a notice of appearance within five days.

4. Within **NINETY (90) DAYS**, Counsel shall review Russ's state-court file and, if appropriate, file both a 28 U.S.C. § 2254 petition setting forth the bases of Russ's federal habeas claims[1] and a memorandum of law discussing why the petition should not be summarily dismissed as time-barred, unexhausted, or both.

5. Respondent is directed to disclose to Mr. Russ or his attorney on request, any record in the Department of Correction's or the State's custody or control relating to Mr. Russ, including sealed documents, disciplinary records, Department of Corrections records, mental-health records, or other documents relating to his state criminal case.

DONE and **ORDERED** in Orlando, Florida on August 10, 2018.

ROY B. DALTON JR.
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties

[1] The Court recognizes that ninety days may be insufficient to file a detailed § 2254 petition in a death penalty case. However, it is sufficient time for Counsel to review the records, determine whether Russ can present any meritorious claims, and file a bare-bones petition setting forth the substance of the claims. Should the Court conclude that Russ's § 2254 petition is not procedurally barred or untimely, Counsel may, at that time, move for leave to amend the petition to more completely set forth the claims.

SA: OrlP-4

EXHIBIT 14

DECLARATION OF DR. RICHARD DUDLEY, JR., M.D.

PURSANT TO 28 U.S.C. SEC. 1746 AND SEC. 92.525 OF TITLE VII, FLORIDA STATUTES

1. I, Richard G. Dudley, Jr., am a physician, who is licensed to practice medicine in the state of New York, and I am board certified in psychiatry by the American Board of Psychiatry and Neurology.

2. I obtained my medical degree in 1972 from Temple University School of Medicine, and I completed my residency in psychiatry at Northwestern University Medical Center in 1975. Since 1984, I have maintained a private practice in psychiatry which has been about equally divided between a clinical practice and a forensic practice. As a forensic psychiatrist, I have consulted and testified as an expert in psychiatry in hundreds of cases, in both state and federal courts, throughout the United States, including in Florida. These cases have included capital cases, at both the trial level and post-conviction. In addition, for decades I team-taught courses and seminars on expert evidence at New York University School of Law.

3. My curriculum vitae is attached to this declaration.

4. Pursuant to a request from the legal team for David Byron Russ, I conducted a forensic psychiatric evaluation of Mr. Russ. I was asked to identify any psychiatric or neuropsychiatric conditions impacting Mr. Russ in the past or present, including those relevant to sentencing matters and mitigation as well as those relevant to Mr. Russ's various waivers.

5. I met with Mr. Russ for a psychiatric examination at Union Correctional Institution ("UCI") on October 11 and 12, 2018, for a total of about five hours. I have also reviewed records, including statements from family members, friends, and romantic partners; jail

and prison records; school records; recordings from jail visitations; court transcripts; and police reports.

6. Based on my examination of Mr. Russ and my review of records and documents, it is my opinion that there are clinically significant indications that Mr. Russ has suffered and continues to suffer from multiple psychiatric and neuropsychiatric disorders, which will be described below. However, due to the time constraints and the need for additional information, I consider the results of my evaluation of Mr. Russ to be preliminary. More specifically, although I can state with a reasonable degree of medical certainty that Mr. Russ meets the diagnostic criteria for multiple psychiatric disorders, I believe further exploration is required to confirm these diagnoses and provide a detailed description of their combined impact on his ability to function.

7. Given Mr. Russ's history and clinical presentation, it is clear that he suffers from a trauma-related psychiatric disorder, most likely posttraumatic stress disorder ("PTSD"). Mr. Russ and multiple other sources indicate he was repeatedly, severely physically and emotionally abused by his father, beginning in early childhood and continuing without reprieve, to age 14. Mr. Russ was then removed from his father and placed in foster care. Mr. Russ has recurrent, involuntary, and intrusive distressing memories of these early traumatic experiences, and suffers from insomnia. He describes dissociative reactions to triggering events that should be furthered explored. Mr. Russ tries to avoid distressing memories and external reminders of his trauma, by doing such things as cutting off ties with his father and some family members. These symptoms have caused significant emotional distress and have impaired Mr. Russ's functioning for years, dating back to childhood.

8. Other signs and symptoms of Mr. Russ's trauma-related psychiatric difficulties include his persistent and exaggerated negative beliefs about himself and others. Statements of those who have been close to him show Mr. Russ has a long-standing belief he is "evil" and is personally irredeemable. They also report that Mr. Russ has experienced persistent, negative emotional states, such as fear, anger, and shame; he becomes detached and estranged from loved ones; and that, despite periods of success in sobriety, work, school, and personal relationships, Mr. Russ is unable to experience lasting happiness and satisfaction. He has a longstanding history of self-destructive behavior, impaired concentration, and hypervigilance to perceived threats, and he demonstrates an exaggerated startle response to everyday events, such as hearing someone sneeze.

9. Mr. Russ also evidences numerous indicators of severe developmental difficulties that are consistent with the diagnosis of borderline personality disorder ("BPD"). Symptoms of BPD include frantic efforts to avoid real or imagined abandonment as well as a pattern of intense and unstable relationships. A perception of impending rejection can lead to a profound change in self-image, cognition, and affect. People with BPD are also prone to abrupt, unstable and drastic changes of mood and their view of others. This can lead to anger and sudden outbursts, which then trigger situations for abandonment. Such expressions of anger and outbursts are often followed by shame and guilt. Records from the Florida Department of Corrections ("DOC") indicate Mr. Russ also has symptoms of irritability, restlessness, loss of temper, anxiety, and depression, all of which are characteristic of BPD. Family members and former romantic partners describe Mr. Russ reacting excessively, including heightened and repetitive expressions of shame and self-loathing.

10. The mood instability seen in individuals with BPD results in an almost constant dysphoria – a profound state of uneasiness or dissatisfaction – as well as chronic feelings of emptiness. In addition, individuals with BPD evidence a persistently unstable sense of self, including sudden and dramatic shifts of goals and career, and a belief one is innately bad or evil. Furthermore, impulsivity, such as substance abuse and other reckless behaviors, is also common.

11. As evidenced in accounts by Mr. Russ, his friends, partners, and family, Mr. Russ fits many of the diagnostic criteria of BPD. Even though Mr. Russ is frightened of being alone and abandoned, he has quickly switched from intense love and reverence for people in his life (including relatives and romantic partners) to feelings of intense anger, including a belief they do not love him or are not there for him enough. For example, while Mr. Russ was in jail awaiting trial, he expressed feelings that he could not live without his fiancé, but quickly pushed her away with his anger and resentment for her not visiting him enough. All of Mr. Russ's relationships prior to the offense escalated quickly and were quite intense, but then did not last more than a few years.

12. Individuals with BPD have childhoods characterized by inadequate parenting; most such individuals were psychologically and or physically abused by their parents; and many were virtually abandoned by their parents. Mr. Russ still harbors resentment for his mother who abandoned him as a young child and left him with his father when she knew firsthand that his father was abusive. There is documentation that Mr. Russ's father subjected Mr. Russ to severe physical and psychological abuse and neglect. The environment during Mr. Russ's early developmental years and the absence of parental attachment made him especially vulnerable to the development of emotional and

developmental difficulties. He has continued feelings of distrust and fear of abandonment, and modifies his behavior in anticipation of perceived future rejection by loved ones. He then explodes in anticipation of being abandoned. Afterwards, he apologizes profusely and expresses severe disappointment in himself. He still has not forgiven himself for his past drug use and his failure to previously achieve permanent sobriety.

13. Additional features associated with BPD include recurrent job loss, interrupted education, and multiple separation/divorces, all of which are present in Mr. Russ's history. Mr. Russ has held many roofing and construction jobs, dropped out of college twice, and been divorced three times. He also tried to switch careers by going back to school and has moved many times.

14. Mr. Russ's difficulty regulating his mood is so severe that it cannot be fully explained by his above-described trauma-related psychiatric difficulties and other developmental difficulties. Therefore, it is reasonable to suspect that he may also have a super-imposed mood disorder, such as a bipolar disorder or a major depression. There is considerable evidence that Mr. Russ has had multiple major depressive episodes, characterized by a profoundly depressed mood, feelings of emptiness and hopelessness, markedly diminished pleasure in daily activities, feelings of worthlessness and excessive guilt, and recurrent suicidal ideation. All of these symptoms are documented in his DOC records, and while being held by the DOC he was diagnosed as suffering from "bipolar I, manic episode, moderate." Therefore, further investigation into Mr. Russ's mood deregulation is clearly indicated.

15. Mr. Russ's DOC records also indicate that he was diagnosed as suffering from antisocial personality disorder ("ASPD"). However at this juncture, I do not believe the diagnosis of ASPD is appropriate. The finding that an individual has committed a crime and is being held by the DOC on death row is not enough to make the diagnosis of ASPD. There are other, equally critical diagnostic criteria that Mr. Ross does not meet, such as the associated childhood history criteria, and the other symptoms seen in persons suffering from ASPD that he does manifest are better explained by his other, above described psychiatric difficulties.

16. If Mr. Russ evidences symptoms of an additional personality disorder in addition to BPD, it would be schizotypal personality disorder. This personality disorder is characterized by a pervasive pattern of social and interpersonal deficits marked by acute discomfort with, and a reduced capacity for, close relationships. Additionally, schizotypal personality disorder is characterized by cognitive or perceptual distortions and eccentricities, such as overelaborate thinking, suspicious or paranoid ideation, and inappropriate affect, all of which Mr. Russ presents. However here, too, these difficulties are likely better attributed to his other above described psychiatric difficulties, but this is another question that must be clarified.

17. The DOC records from Mr. Russ's arrival death row in May of 2009 through the present further document symptoms of bipolar disorder. In November of 2009, Mr. Russ filed an official request indicating he was having problems because he had not taken medication since his transfer from county jail. Mr. Russ saw a DOC psychiatrist who noted that Mr. Russ had been experiencing bipolar symptoms, such as mood swings, periods of depression, insomnia, loss of appetite, poor concentration, restlessness, hypervigilance,

periods of anxiety manifested by periods of irritability, psychomotor agitation, racing thoughts, pressured speech, distractibility, and loss of temper. His behavior was described as guarded, defensive suspicious, manipulative, "silly," and "childlike." He was using words that sound similar but are not logically connected. He had inappropriate affect and fluctuated from irritability to euphoria. Having been diagnosed with bipolar disorder, Mr. Russ was prescribed Remeron but he said he stopped taking it because he did not like the effects.

18. Through 2014, Mr. Russ has sporadic DOC mental health evaluations that note similar symptoms. However, since 2010, Mr. Russ has consistently refused mental health care and has not been prescribed any psychotropic medicine because of his refusal to attend psychiatric sessions. Mr. Russ's continued refusal to participate in DOC mental health screenings or any type of psychiatric treatment is not uncommon for individuals with bipolar disorder, because they often want to maintain the euphoria of mania and lack insight into their mania's negative impact on their ability to function. In this regard, it should also be noted that refusal of psychiatric treatment is also common in PTSD and major depressive disorder, and especially common with persons who suffer from BPD.

19. Mr. Russ and his family also report a history of mental health issues and drug abuse. There are indications that both Mr. Russ's father and mother had bipolar disorder. It is important to note that the single greatest risk factor for developing bipolar disorder is having a parent with the illness. Additional investigation into the family medical history and genealogy is necessary to facilitate accurate diagnoses.

20. Given all of the above noted, it is reasonable to opine that Mr. Russ does, in fact, suffer from a mood disorder, superimposed upon his trauma-related psychiatric difficulties and

other developmental difficulties. It is also reasonable to opine that this mood disorder is best described as a bipolar disorder, characterized by swings between depression and mania, with a mix of euphoria and irritability. However, a clearer understanding of the course of his difficulties, how rapidly his mood swings, and the impact of his mood-related difficulties on his ability to function still needs to be developed. In addition, some of the symptoms reported in Mr. Russ's DOC records suggest his mood disorder is at least at times accompanied by psychotic symptoms, and so this needs further exploration as well.

21. In addition, Mr. Russ presents clear indications that he meets the diagnostic criteria for stimulant abuse disorder, which includes cocaine and crack. This diagnosis is supported by the DOC records that document Mr. Russ as being diagnosed with polysubstance use disorder. Statements from Mr. Russ and others indicate that Mr. Russ used crack and cocaine since he was 19 years old. The only sustained periods of sobriety were when Mr. Russ was incarcerated for offenses which he had committed to finance his drug dependency that was so severe that he could not finance it simply through a normal job. Mr. Russ and others report he tried numerous times to stop using cocaine substances, including rehabilitation programs and 12-step groups. Despite periods of success in his life and sobriety, such as returning to school and receiving a scholarship for former substance users in recovery, Mr. Russ continually relapsed. As is the case with individuals who suffer from substance abuse disorders, even though he knew continued use of drugs would negatively affect his personal relationships, his career and his overall ability to function, Mr. Russ could not stop using drugs. During his periods of substance use, Mr. Russ would abandon his romantic partners and disappear for days on drug

binges. He pawned his family's jewelry for money for his habit, stole from family members and acquaintances, and deceived family friends to get money to buy drugs.

22. Stimulant use disorder can be classified as mild, moderate, or severe. Mr. Russ displays more than six of the criteria for stimulant abuse disorder and thus would be classified as "severe," currently in "sustained remission in a controlled environment." The DOC records notate they diagnosed Mr. Russ with polysubstance dependence, in remission in a controlled environment, which is consistent with my findings. While Mr. Russ and his friends and family primarily speak of Mr. Russ' cocaine/crack addiction, the DOC records also mention cannabis, alcohol, and amphetamines; thus, other substance use disorders should be explored, especially because of the differing impact of these various substances on Mr. Russ's other psychiatric difficulties.

23. Importantly, all substance use disorders have high comorbidity with PTSD, bipolar disorder, and BPD. Drug use provides a coping mechanism for the uncomfortable, emotionally painful, and "negative" symptoms of the above-mentioned disorders, such as anxiety, feelings of emptiness, and restlessness. In addition, stimulant use is particularly common among individuals with bipolar disorder, who seek to return to the euphoria of their manic/hypomanic episodes. However, ultimately the use of stimulants such as cocaine can exacerbate the hypervigilance and over reactivity that is symptomatic of PTSD; the abuse of stimulants can make it all the more difficult to regulate one's mood; and the abuse of stimulants can make the instability associated with BPD all the more severe.

24. Further effects of prolonged stimulant use must also be explored. Prolonged stimulant abuse has the ability to temporarily as well as permanently alter brain chemistry, which

can cause many problems. These include, but are not limited to: mood changes, frontotemporal lobe regulation problems, and neuropsychological deficits and disorders, all of which impact on logical adult decision-making and judgment. The DOC records also report Mr. Russ has a history of head injuries, which also increases his risk for neuropsychological difficulties. It is my medical opinion that, for a complete and accurate assessment of Mr. Russ's mental health status and brain functioning, Mr. Russ must be evaluated by additional experts who can evaluate whether these effects were present at and subsequent to Mr. Russ's final arrest, and whether any lasting damage continues today.

25. In summary, based on the information currently available to this psychiatrist, it is reasonable to opine that Mr. Russ suffers from multiple psychiatric and neuropsychiatric disorders. These likely include trauma-related psychiatric difficulties, best described as PTSD; clinically significant developmental difficulties, best described as BPD, possibly mixed with schizotypal personality disorder; severe mood deregulation, best described as bipolar disorder; severe addiction to and abuse of stimulates, particularly cocaine substances, and possibly other types of substances; and quite possibly, given his history of drug use and trauma to his head, neurocognitive difficulties. However, further evaluation and investigation, such as that noted above, needs to be conducted to more precisely identify the nature and course of Mr. Russ's psychiatric issues. It is my professional opinion that Mr. Russ should be additionally examined and tested by at least a trauma expert, a neuropsychologist and a neurologist, and a substance abuse expert/psychopharmacologist. Such evaluations can help to properly and more fully diagnose Mr. Russ and may identify other issues which require further scrutiny.

26. In addition, in order to fully respond to the referral question, the impact of each of these disorders on Mr. Russ's ability to function and their collective impact on his ability to function must be elucidated. In fact, gaining a complete understanding of the collective impact of these disorders on Mr. Russ's ability to function is critical to the presentation of mental health evidence in capital proceedings. In this regard, the disorders that Mr. Russ has suffered from have overlapping symptoms, and even more importantly, they each exacerbate the others, thereby making their collective impact on his ability to function much more than simply the sum of their individual impact on his functioning. Therefore ultimately, an additional expert may be required to explore and then describe how each of Mr. Russ's psychiatric and neuropsychiatric difficulties have interacted with the others and collectively impacted on his ability to function throughout the course of his life, including at the time of the crimes for which he has been sentenced to death and during the course of his trial.

I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. Sec. 1746 and Sec. 92.525 of Title VII, Florida Statutes.

Richard G. Dudley, Jr.

Richard G. Dudley, Jr., M.D.
NY Medical Lic # 125925

18 DECEMBER 2018
Date

EXHIBIT 15

DECLARATION AND FINAL REPORT OF DR. HARRY KROP
Pursuant to Fla. Stat. 92.525(2) and 28 U.S.C. § 1746

I, DR. HARRY KROP, hereby testify, affirm and declare as follows:

1. I am a licensed clinical psychologist in the state of Florida. My practice has included both clinical and forensic psychology. I have been qualified by courts in several jurisdictions across Florida and other states to testify as to my opinions as a forensic psychologist. Please see my attached vita which contains my professional experiences in more detail.

2. I have been retained by the Capital Collateral Regional Counsel, Northern Division, ("CCRC-N") to provide expert services and opinions related to the competency of the Defendant, David Russ, a death-sentenced inmate, at various stages of his legal proceedings, including his guilty plea, waiver of a penalty phase jury, waiver of the presentation of mitigation, and waiver of postconviction proceedings.

3. I have reviewed records from Mr. Russ' case provided to me by CCRC-N, including his record on appeal with transcripts of his plea, his waiver of a jury for his penalty phase, his waiver of the presentation of mitigation evidence, and his waiver of postconviction proceedings; letters written by Mr. Russ to this Court; his Texas and Florida Department of Corrections files; school and college records; social service records pertaining to Mr. Russ' childhood; police reports; the Presentence Investigation Report; various mental health reports, including documentation regarding failed attempts to evaluate Mr. Russ by trial and special counsel and the initial postconviction counsel; Florida Supreme Court opinions related to Mr. Russ, the federal habeas petition filed by his federal lawyers with supporting declarations from Dr. Dudley, family members, and acquaintances; and a mental health evaluation by the Florida Dept. of Corrections,

among other things. I also consulted with and reviewed the report and declaration of Dr. Jethro Toomer, who also evaluated Mr. Russ regarding mental health issues related to the severe physical and emotional trauma and abandonment suffered by Mr. Russ.

4. I met with David Russ at Union Correctional Institution on January 31, 2020 at which time I conducted a neuropsychological evaluation. Mr. Russ cooperated throughout the evaluation that lasted several hours. Based on the results of the neuropsychological testing, a review of the records provided by counsel and information provided by Mr. Russ, I have significant concerns about the factors influencing Mr. Russ' decision to plead guilty, to waive a penalty phase jury and the presentation of mitigating evidence, and to waive initial post-conviction review. In this regard, it is my opinion that Mr. Russ' judgment and decision-making at these critical times were based on irrational thought processes which were compromised resultant to a number of factors including organic impairment, his traumatic developmental history and mental health issues associated with the significant number of adverse childhood experiences (ACEs) when younger, which include among others physical abuse by his father and his perceived abandonment by his mother. These ACEs, which are known to contribute to both mental health and substance abuse issues include the recurrent paternal physical abuse, abandonment and neglect and moral instability in his life.

5. Mr. Russ' history of extraordinary childhood abuse and abandonment influenced his ability to make rational decisions in two distinct but compounding ways. First, Mr. Russ suffered several traumatic brain injuries due to egregious physical abuse by his father, a head injury received as a twelve-year-old in a car accident in South Dakota which resulted in a lengthy hospitalization and injuries he sustained from a fall and being struck in the head with a two-by-four board while he was incarcerated in Georgia. As a result of these injuries, which were exacerbated by his longstanding drug abuse, Mr. Russ suffered significant neurocognitive deficits as reflected in the

neuropsychological testing conducted by this examiner. These deficits appear to be primarily related to those executive functions associated with the frontal lobe which include judgment, problem-solving, impulse control and decision-making.

6. Based on the evaluations conducted by this examiner as well as Dr. Toomer, Mr. Russ has a number of unresolved family conflicts which likely contributed to his decision-making at the time that he pleaded guilty, waived a jury trial and presentation of mitigation at sentencing and waived his initial post-conviction proceedings. In this regard, Mr. Russ' decision making was the byproduct of his impaired cognitive functioning, intrusive thoughts from past trauma, a pathological fear of abandonment, and decompensation under extreme stress. As a result of Mr. Russ' preoccupation and acute fear of being abandoned, he risked dying by execution in a frantic attempt to keep his family close to him.

7. The results of the neuropsychological testing indicate Mr. Russ suffers from a Neurocognitive Disorder due to multiple etiologies (DSM-IV 331.83). This diagnosis is made when there is evidence of cognitive decline from a previous level of performance in one or more cognitive domains documented by standardized neuropsychological testing. Mr. Russ' neurocognitive functioning is currently at a higher level than one would expect it to have been at the time he entered his plea resultant to his cessation of illicit substances and the relatively structured and stable environment since his incarceration on death row.

8. Mr. Russ has a significantly lowered capacity to tolerate frustration. During my evaluation of him, he became easily frustrated with segments of the testing process (particularly the Wisconsin Card Sorting Test and WAIS IV) wherein he "blocked up," and had trouble completing portions of the tests despite his earnest efforts. These results, coupled with the records reviewed

suggest that Mr. Russ may decompensate under stress. This, in turn, likely hindered Mr. Russ' ability to communicate with and assist his counsel, and to rationally process their advice and weigh the consequences of his legal options. Despite his insistence to enter a plea and waive presentation of mitigation before a jury, given the stress he was experiencing, it is likely that his capacity to rationally appreciate the consequences of his waivers was compromised.

9. Based upon my review of the records provided to me and my own examination of Mr. Russ, it is my opinion within a reasonable degree of psychological certainty, that Mr. Russ' capacity to make rational decisions, effectively communicate with counsel, and assist counsel in the preparation of his defense at the times he entered his plea, waived a jury trial, refused to present mitigating evidence in his penalty phase, and waived initial post-conviction proceedings was compromised resultant to the afore-referenced factors.

Under penalties of perjury, I hereby declare, affirm, verify, state and certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. § 1746 and Fla. Stat. § 92.525 (2020).

Harry Krop Ph.D.
Dr. Harry Krop

8/20/2020
Date

EXHIBIT 16

DECLARATION OF DR. DREW EDWARDS
Pursuant to Fla. Stat. 92.525(2) and 28 U.S.C. § 1746

I, DR. DREW EDWARDS, hereby testify, affirm, and declare as follows:

1. I am the co-founder and Chief Clinical Officer for "The Neurogenesis Project". I am a behavioral health researcher, writer, clinical consultant, and forensic expert in the neurobiology of addictive disease. I currently reside in Jacksonville, Florida. I was formerly an Assistant Clinical Professor in the Department of Psychiatry at the Medical College of Georgia, where I served as Director of the Department of Psychiatry supervising the clinical activity of three inpatient departments, the clinical activity of all faculty psychiatrists, psychiatric residents, psychologists, licensed mental health therapists, and nursing staff within the hospital and faculty practice. I held a similar position at the University of Florida, as Associate Director of Psychiatry, where my appointment included clinical practice and clinical instruction for medical residents and post-doctoral fellows in the Division of Addiction Medicine. I hold a Bachelor of Arts degree from the University of Minnesota, a Master of Science in Health Science/Addiction Counseling from the University of North Florida, and a Doctor of Education from Nova Southeastern University. I have authored, co-authored, and published over 200 peer-reviewed articles, book chapters, and Continuing Medical Education (CME) programs in psychiatry and addiction medicine. I have developed and directed chemical dependency treatment centers in Minnesota, Indiana, and Florida. In addition, I was the Director of the Center for Health Outcomes and Improvement Research in the Department of Medicine at the University of Florida Health Science Center in Jacksonville.

2. In December 2019, I was retained by the office of Capital Collateral Regional Counsel, Northern Division (CCRC-N) to conduct an interview of Mr. David Russ. The purpose of my interview was to determine to whether Mr. Russ's use of intoxicants met the criteria of Substance Use Disorder, and to opine about any impact his drug use—and any associated cognitive and emotional impairment—may have had on Mr. Russ's competency to waive various legal rights.
3. Prior to my meetings with Mr. Russ, I reviewed records from his case provided to me by CCRC-N, such as his record on appeal including transcripts of his plea, waivers of a jury for his penalty phase, waiver of the presentation of mitigation evidence, waiver of his post-conviction proceedings, letters written by Mr. Russ to this Court; his Department of Corrections files from Florida and Texas; school and college records; social service records pertaining to Mr. Russ's childhood; police reports; various mental health reports, including documentation regarding failed attempts to evaluate Mr. Russ by trial and special counsel and initial post-conviction counsel; Florida Supreme Court opinions related to Mr. Russ; the federal habeas petition filed by his federal lawyers with supporting declarations from Dr. Dudley, Mr. Russ's family members, and acquaintances; and a mental health evaluation by the Florida Department of Corrections, among other things.
4. In addition to my record review and personal evaluation of Mr. Russ, I also consulted with Dr. Sean Orr, M.D., a clinical neurologist, clinical neurointensivist, and brain trauma expert. Dr. Orr was formerly the neurologist for the Jacksonville Jaguars, an NFL team. He has extensive practice experience with the impact of repetitive head trauma, and is well-versed in neuroimaging methodologies. In this case, I consulted with Dr. Orr to

determine which imaging modalities would be best suited to identify and elucidate the extent of any anatomical damage or functional changes to Mr. Russ's brain as a result of his multiple head injuries, emotional trauma, and addictive disease.

5. I met with Mr. Russ on February 26, 2020, and June 17, 2020, totaling approximately five hours. Mr. Russ actively participated in the evaluation and was cooperative and forthcoming during the interview. He discussed his life history with me without defensiveness and in adequate detail, including descriptions of physical and emotional abuse inflicted upon him by his father; abandonment by his mother; his extensive history of drug use; traumatic brain injuries; education and employment history; and his past criminal conduct and multiple incarcerations.

History of Abuse

6. Mr. Russ described his father, Arnold, as an angry, short-tempered, loud, unhappy, and violent man. Mr. Russ's observations and summations are corroborated by statements obtained by his sister, brother, and mother, which indicate that Arnold was abusive to everyone in his family, but much more so toward Mr. Russ. The consensus among Mr. Russ's family members was that Arnold did not believe Mr. Russ was his biological son—Arnold frequently expressed rage and verbal and physical abuse toward his wife and Mr. Russ, claiming Mr. Russ was the result of his mother's impregnation by another man. As Mr. Russ's sister, Melissa, explained after Mr. Russ's arrest in 2007, "David received most of the abuse and the criticism[.]"

7. For as long back as Mr. Russ could remember of his childhood, he endured verbal and physical abuse, degradation, and humiliation at the hands of his father. Arnold incessantly punched, slapped, shook, kicked, and threw Mr. Russ, often forcefully

striking Mr. Russ on his head and face, using his fists or any other items he could get his hands on. If Mr. Russ cried, Arnold would hurt him worse. Incidents that triggered Arnold's assaults were as simple as a perceived look on Mr. Russ's face, or any comment or action that displeased his father—such as asking a question or making a mistake while working for his father as a prepubescent boy.

8. From the time they were approximately 7 years of age, Mr. Russ and his brother, Aaron, were forced by Arnold to work long hours in the Florida summer heat doing hard physical labor. They were also forced to assist Arnold with his beekeeping. Mr. Russ described a particularly traumatic episode of abuse that occurred when he, Aaron, and his mother arrived at the place where Arnold's bees were being stored. The bees were swarming, and due to the heat, the windows of Arnold's truck were open. As Arnold exited the vehicle to investigate the bees, he angrily told his wife that if either of the boys were stung, he would "beat her ass." The boys were stung countless times, but tried not to cry or react to the pain in order to protect their mother from a beating. When Arnold returned and saw the large number of welts on the boys' faces, necks, and arms, he grabbed his wife by her hair and dragged her from the vehicle to a nearby stairwell, and threw her down the stairwell. He then proceeded to walk down the stairs, where he punched and kicked her repeatedly. Mr. Russ describes the experience as terrifying. He felt helpless and afraid that his father would seriously injure or even kill his mother. He also reported feelings of guilt that, as a small child, he could not help his mother.
9. This type of abusive behavior from Mr. Russ's father was common throughout Mr. Russ's childhood and early adolescence, with the worst of the attacks directed toward Mr. Russ himself. The violence toward Mr. Russ became even more pronounced after his

mother fled and left Mr. Russ and his brother, Aaron, behind. Years later, a neighboring farmer in South Dakota rescued Mr. Russ and Aaron. The farmer approached the boys and stated if they wanted to get away from their father, he would take them to the local authorities for protection. The boys agreed and were immediately driven to town, where they were processed, placed in the foster care system, and separated.

10. Mr. Russ's history of abuse at the hands of his father has significant implications for his brain function. To begin with, Mr. Russ suffered numerous head injuries during his father's beatings. Head injuries are the most common cause of death and disability in people aged 1-40 years in the United States and United Kingdom. Specifically, traumatic brain injury (TBI) is a non-congenital insult to the brain from an external mechanical force that causes damage to nerve tissue and neural circuitry. These injuries cause impairments of cognitive, physical, and psychological function, with diminished or altered states of awareness and mental ability. Unfortunately, many of these injuries cause persistent or permanent brain impairment.

11. Clinical management for individuals with head injury (concussion) varies in presentation, but is critical. Thus, it is recommended that patients with head injuries be brought to Emergency Medicine and evaluated. The clinical practice guidelines for Emergency Medical Care, particularly for children and adolescents, includes a mental status exam, brief cognitive testing, electroencephalogram (EEG) or computed tomography (CT) scan. Children with a head injury should be admitted for observation even if the CT scan does not reveal a hemorrhage or fracture, if the clinical examination reveals evidence of a blow to the face or head. This is because the risks of missing a severe condition, such as a small hemorrhage, white matter changes, or normal pressure hydrocephalus (NPH) are

too severe. Many severe, post-concussive conditions are not readily seen on a CT scan and develop after the acute trauma. For instance, the best available evidence reveals that for every single concussion someone suffers, there is a fivefold risk increase for major depressive disorder (MDD). Repetitive head trauma (as Mr. Russ experienced) is exponentially more damaging. Early diagnosis followed by rapid treatment can prevent further concussive damage and inflammation, and it is necessary to monitor for abnormal personality or behavioral changes, glymphatic draining of cerebral spinal fluid (CFS), test for functional impairment via electroencephalogram (brain mapping) and repeated cognitive testing.

12. Mr. Russ was never treated for the countless head injuries he received, except for one instance when he was in a car accident and lost consciousness for a prolonged period of time. The still-visible long vertical scar on his face and scalp indicate the severity of the injury. All of his childhood injuries at the hands of his father went untreated; injuries that would be harmful to any brain but were catastrophic to a developing brain, as in Mr. Russ's case. The human male brain does not fully develop until about age 30 and the frontal cortex is the final lobe to fully mature. Without follow-up treatment and cognitive therapy for Mr. Russ's injuries, he was literally walking wounded for years. Many of his impulsive decisions were undoubtedly influenced by his brain injuries—particularly in tandem with his chronic addiction.

13. In addition to Mr. Russ's head trauma, he experienced multiple adverse childhood experiences (ACEs). A seminal study conducted approximately 10 years ago revealed that adverse events and experiences that occur early in life have a negative impact on social, emotional, cognitive, and physical well-being throughout one's lifespan.

Examples of adverse childhood events include physical, emotional, verbal, and sexual abuse, verbal abuse; neglect; abandonment; loss of a parent or caregiver due to death, incarceration, or divorce; and exposure to, or witnessing, violence and substance abuse. Growing up in a dysfunctional family is damaging to the development of the frontal cortex where our executive function and motivational salience develop, and directs our choices and actions throughout life. Children like David Russ learn to survive by being in a state of hypervigilance—or "survival mode"—which is part of the primitive, hedonic area of the human brain, located just above the brain stem and which controls the autonomic nervous system (e.g., heart rate, respiration, sleep). Also known as the limbic system, the midbrain is where our hedonic and self-preservation activity is engaged, such as the "fight or flight" system in the face of a threat or fear.

14. Mr. Russ lived in a perpetual state of fear of being harmed by his father. When a threat such as this is sensed, the amygdala signals the brain to release adrenaline, cortisol, and many other neurohormones for self-preservation and survival. Without adequate protective factors (which Mr. Russ did not have) this conditioning of the brain under chronic threat lasts far longer than the actual threat of harm that triggered the responses. During adolescence, children who have suffered ACEs—particularly those without protective factors—are predisposed to either turn the resulting emotions inward, outward, or both. Those who turn fear and sadness inward often show symptoms of self-destructive behavior including depression, hyper-sexuality, suicidality, isolation, cutting, substance abuse, and post-traumatic stress disorder (PTSD). Others turn their fear, hurt, insecurities, and emotional pain outward in order to survive by minimizing their vulnerability and not letting others hurt them again. Aggression, substance abuse, juvenile delinquency,

running away, joining a gang, and violence overlay the underlying depression, attachment disorder, anxiety, PTSD, and social insecurities.

15. Only within the last decade have medical investigators and clinicians in the primary care setting fully begun to understand the extent of the impact of adversity in childhood, and its predictive value and impact on adolescent and adult health. It is well established in the scientific literature that ACEs are risk factors for substance use disorder, eating disorders, bed wetting, nightmares, juvenile delinquency, post-traumatic stress disorder, violence, cutting, STDs, incarceration, suicidality, and mortality. This correlation remains even after adjusting for confounding variables such as socioeconomic status, race, and zip code. ACEs are also dose dependent. The more events, the greater the risk. And, increased severity of the event is also correlated with greater risk. In Mr. Russ's case, where he was constantly exposed to multiple ACEs with severe presentation and with an absence of protective factors, his risk was maximal.

16. Mr. Russ was a victim of, and witness to, incessant degrading, violent, deplorable, and criminal abuse at the hands of his father. His mother abandoning the family was especially traumatic for Mr. Russ, as he had previously felt she was his advocate, protector, and comforter. After she left, the positive factors he associated with his mother were nullified, and she—through her abandonment—became a source of further insecurity, and feelings of inadequacy, pain, and worthlessness. Mr. Russ now, as a sober adult, understands why his mother left—she was fearful for her own life, could not cope with the physical and emotional torment, and felt helpless to save herself or Mr. Russ. Mr. Russ had no such agency as a child. He was abused physically, emotionally, and verbally the entire time he lived with his father. This, plus the wounds of abandonment,

manifested in Mr. Russ as drug dependence, non-violent juvenile delinquency, anhedonia, depression, and anxiety that in the absence of proper treatment escalated predictably throughout his life.

Drug Dependence

17. The association between untreated physical and emotional trauma during childhood and substance use disorder is nearly 100%--while not every untreated traumatized child becomes addicted, nearly all adolescents who are addicted have a trauma history. This is seen in Mr. Russ's addiction to drugs, which began in his preteen years and escalated in his late adolescence.

18. Current evidence has established that early onset drug use is predictive of addiction. To wit, initiation before age 16 is associated with a prevalence rate for addiction of 18-20% (as in the case of Mr. Russ). Those initiated after age 16 are less likely to become addicted, with a prevalence rate of 8-9%. In each of these age groups, as mentioned above, untreated traumatized children are at the highest risk for substance use disorder, psychopathology (e.g., depression, anxiety disorder, or post-traumatic stress disorder), self harm, unhealthy self-soothing behaviors, juvenile delinquency, criminal activity, and violence.

19. In earlier stages of Mr. Russ's addiction, Mr. Russ experimented with several drugs including marijuana, heroin, and crack cocaine. He states that when he first smoked crack, he "loved" the effect and it was like no other drug he had tried. This is termed as a "drug of choice" and when an individual has a significant preference for a particular drug, it can often be likened to a form of medication. In other words, we can

extrapolate—to a general degree—brain deficits based upon the addicted person's drug of choice, due to the desired effects.

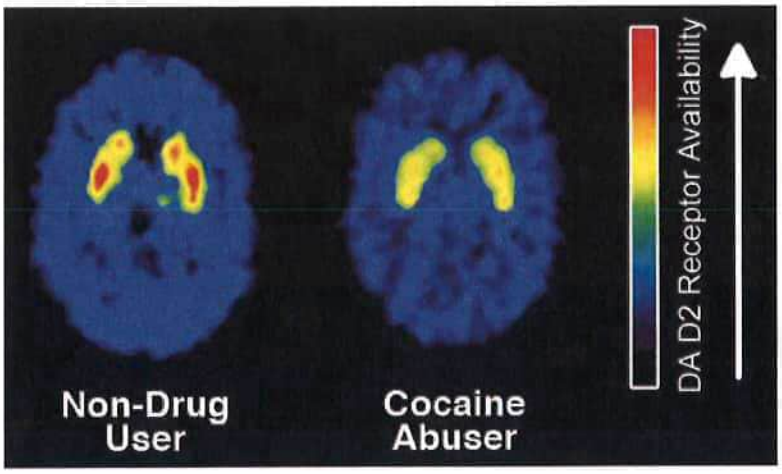
20. Cocaine is a stimulant with perhaps the most direct access to the brain's reward center. Cocaine abuse produces a rapid onset of addiction, and crack cocaine produces immediate euphoria followed by an acute stress, dysphoria, and agitated state. It works immediately, but only temporarily, and leaves the user feeling worse than before—and believing the remedy for these symptoms is more cocaine. Over time, neuroadaptations occur and the acute withdrawal symptoms become chronic. When this occurs, the new normal, or baseline mood, of the cocaine addict is one of dysphoria and anhedonia. Neuroinflammation of the nervous tissue occurs, resulting in high levels of the excitatory neurotransmitter glutamate, which manifests as agitation, depressive lethargy, and can be toxic, causing further brain damage and psychopathology—particularly in brains that are already inflamed due to traumatic brain injury.

21. Crack cocaine, which Mr. Russ most frequently used, is the crystalline free-base form of cocaine. It is hydrophobic (water insoluble) and thus ingestion is through volatilization and smoking. Smoking of crack results in an almost instantaneous "high" due to the rapid absorption through the lungs, into the heart, up the carotid artery, and into the brain in a matter of three to five seconds. This method, as opposed to snorting cocaine, averts the rapid metabolism associated with cocaine hydrochloride, where nearly 85% of the drug is metabolized in the blood and liver, and only 15% of the cocaine reaches the brain. In contrast, smoking crack is minimally metabolized as it does not pass through the entire circulatory system of the liver. Therefore, over 95% of the cocaine reaches the brain in about three seconds. The euphoria resulting from this method of administration is

estimated by users as 100 times more powerful than that produced by snorting cocaine—and far exceeding any natural human reward. But, that initial euphoria only happens once or twice when smoking crack, setting the user up to "chase the high" of previous ingestion and increase usage.

22. Crack cocaine has a disastrous effect on the brain. It constricts blood vessels, meaning less oxygen is available for healthy brain tissue and neurogenesis. Concurrently, cocaine use inhibits the initiation and conduction of electrical impulses along the dopaminergic reward circuitry. Specifically, cocaine blocks neurotransmission at the neuronal synapse (junctions) by altering the reuptake of dopamine, and the cascade of norepinephrine, serotonin, and acetylcholine. The consequent reactivation of the sympathetic nervous system produces an acute rise in arterial blood pressure, tachycardia, a risk for ventricular arrhythmias in the heart, and an increased risk for heart disease, seizures, and stroke. This can also present as severe physical anxiety that cannot be soothed.

23. The dopaminergic neuronal circuits are central in producing euphoria and addiction. In the short term, cocaine activates dopaminergic neurotransmission by blocking the reuptake of dopamine at the synapse. For crack cocaine, where the resulting high is approximately 100 times more potent and euphoric than snorting cocaine, persistent use causes a depletion of dopamine and a down regulation of dopamine receptors, most notably in the frontal cortex. This is shown in the following PET scan image, which takes a coronal view (looking down from the crown of the head at the level of just above the thalamus):



24. These images are striking. The red color indicates dopamine activity and receptor density in the prefrontal cortex (which serves to mediate and inhibit the hedonic urges of the survival-oriented limbic system of the midbrain, with the uniquely human values and virtues which are informed and animated in the frontal cortex). Cocaine addiction inhibits the function of the frontal cortex, leaving the primitive hedonic limbic brain in charge of decision-making, based on biological needs and potential threats. In other words, structural changes in the brain as a result of crack cocaine addiction prevent rational, abstract, or complex thought.

25. When the brain is hijacked by addiction to cocaine—which has the most direct access to the Mesolimbic Dopaminergic Reward Path—the drug artificially expends dopamine far beyond what the normal human brain's reward system can produce. As a result, the user experiences an intense euphoric state because the dopamine is elevated to a level far beyond normal human capacity. But the high is short-lived, as it depletes the bioavailability of central dopamine, which is intended to reward and provide salience for healthy survival-oriented and pro-social behavior.

26. Because so much dopamine is expended when first using crack, there is little in reserve. In the dopamine-depleted state (hypodopaminergia), the chronic user cannot experience

natural, non-drug induced rewards. As a result of this neuroadaptation and depletion with chronic use, a new dysphoric mood state called Reward Deficiency Syndrome is created due to deficits in the volume and accessibility of dopamine and related neurotransmitters that reward humans for pro-survival and pro-social activity. This causes dysphoria (a profound sense of unease and dissatisfaction) and anhedonia (the inability to experience pleasure or contentment).

27. This anhedonic state begins within an hour from the last use of crack cocaine. Without bioavailable dopamine neurotransmittal, the user has no means by which to attain a normal mood state, other than by further drug consumption. A life with limited dopamine availability has been likened to watching a 12-inch black-and-white television, while being high on crack is like watching a 60-inch HD color television. These neuroadaptive mechanisms redefine reward and pleasure for the user, exacerbating withdrawal symptoms.

28. The hippocampus, adjacent to the amygdala, processes and retrieves memory through an iconic filing and recall system. This can amplify craving and anxiety if the environment feels unsafe to the user. Craving results primarily from hypodopaminergia. The fastest way to raise dopamine levels is to use more crack. So, as time passes, the addicted person is craving dopamine, but experiences this sensation as needing more crack. Thus, the cycle continues. The irony was expressed eloquently by Mr. Russ:

> *When I first smoked crack, I was not expecting anything near the experience I had. When I first hit the pipe I was so high within 5 seconds and it was so unlike any experience I had ever felt before. It was a pleasure that manifested over my entire being. But within 5-10 minutes, the high was gone. So I'd spend a lot of money chasing that high again, but never achieving it...After the binge and consequence, sobriety would be forced upon me by jail time, or just trying to get my life together. All the while, your mind is fighting you, always drifting back to getting cocaine and getting high. It was Hell.*

29. Due to the short half-life of crack cocaine, which is the time required for half of the cocaine to be metabolized and cleared from the body (not the brain), severe withdrawal and craving for crack cocaine occurs within 90 minutes. This phase is called the "crash" following abrupt cessation of heavy cocaine use—as in the case of Mr. Russ, who had been on a multi-day crack binge, followed by abrupt discontinuation of use after he was approached by law enforcement and fled.

30. Acute crack withdrawal symptoms include generalized angst, distress, and even paranoia from the compensatory activation of the fight-or-flight response. The amygdala signals the brain to release cortisol and norepinephrine in preparation for fighting or running from a perceived threat. In acute withdrawal, the user experiences acute dysphoria and anhedonia, irritability. He becomes hypervigilant, anxious, and paranoid, while simultaneously exhausted.

31. A crack addict learns that a single rock of crack will alleviate all of these symptoms within seconds. If no crack is available, cocaine addicts will often use benzodiazepines, which activate gamma-aminobutyric acid (GABA), to inhibit the action of norepinephrine and glutamate, in order to calm the agitation and tactile anxiety that overwhelms some users. If these substances are also unavailable, the binge comes to an end. The user will crash and sleep if possible (as in Mr. Russ's case, where he passed out on a rooftop, reportedly during inclement weather).

32. Upon awakening, the user is dysphoric, anxious, agitated, and experiences bodily anxiety due to the bolus release of norepinephrine and hypodopaminergia. The user cannot experience any sense of happiness, pleasure, or reward. Thus, the user becomes singularly focused on attaining more cocaine—and, at the same time, feels a sense of

severe paranoia, that something or someone is after them. The fastest way to elevate this negative mood state, albeit temporarily, is to use more cocaine. It is a powerful drive.

33. When the cocaine is gone, the hedonic-driven midbrain overrides the impaired rational frontal cortex and will go to extreme lengths to attain and use cocaine. With this, we see individuals with no history of crime or violence commit impulsive crimes and become impulsively violent in order to get cocaine. The presentation is analogous to a starving or dehydrated person going to extreme lengths against their value system in order to survive, as cocaine usurps the reward system designed to reinforce survival oriented behavioral functions—e.g., food, hydration, or copulation (reproduction as species survival).

34. In Mr. Russ's case, he was going through this acute withdrawal at the time he entered the victim's home. The physical and mental symptoms of this withdrawal would have been amplified by the instability of Mr. Russ's physical environment (alone, without resources, having fled from law enforcement). The power of this condition should not be underestimated. As explained above, withdrawal after chronic use would cause Mr. Russ's midbrain to override his frontal cortex—meaning his primitive survival needs would have hijacked any higher level rational thinking or evaluation of consequences—and would in this situation have led to a singular focus on obtaining more cocaine at any cost.

Impact on Competency During Legal Proceedings

35. Chronic use of crack cocaine is associated with psychological and somatic complications including hypophagia, hyperphagia, insomnia, hypersomnolence, depression, anxiety, PTSD, impulsivity, agitation, and violence. Importantly, chronic use of cocaine—

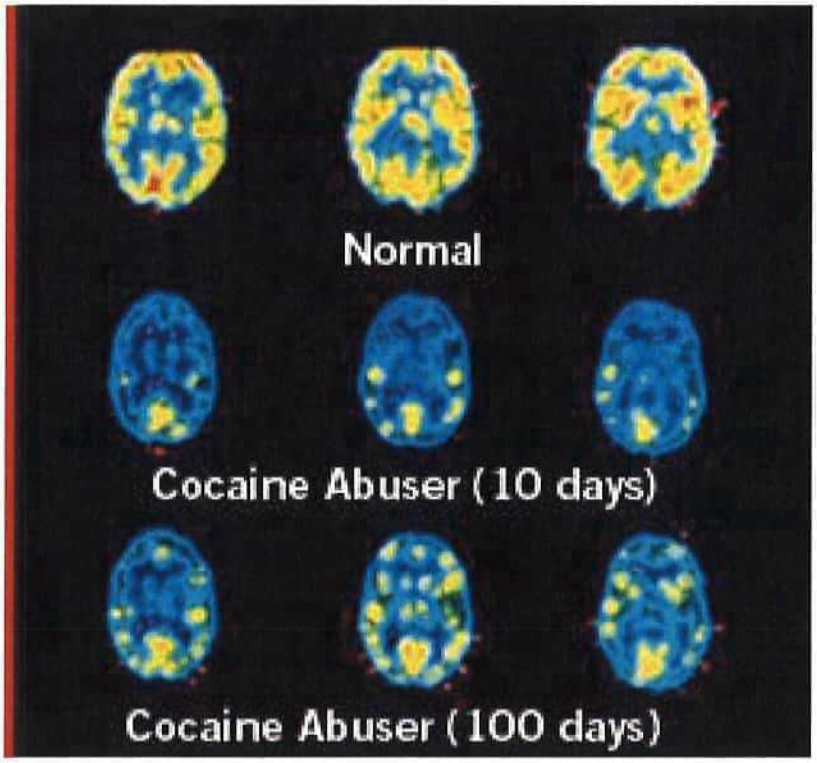
particularly crack cocaine—impairs the brain's neurocircuitry and function long after the last intake.

36. High resolution 3D Doppler imaging tomography is a technique developed at the Department of Biomedical Engineering at Stony Brook University in New York, in order to view and analyze the effects of cocaine on the brain. The Doppler neuroimaging technique provides evidence of how cocaine inhibits the blood supply in vessels and small capillaries within the brain, which parallel functional neuronal connectivity and activity. The resulting cerebral microischemia from chronic cocaine use is functionally associated with cerebral hemorrhage (stroke). Moreover, researchers from the National Institute on Drug Abuse concluded that sustained cocaine use causes neurotoxic effects and multiple neurological complications including the loss of impulse control, and a narrowing of interests so that their single focus and desire is to obtain and use more cocaine—similar to a person who has gone without hydration for an extended period of time focusing all energy and drive on procuring water.

37. Addiction to cocaine is a chronic disease state that creates a progressive psychopathology. That pathology remains active even after a sustained period of abstinence from cocaine use. Cocaine addiction is characterized by preoccupation with obtaining and using a drug, and neuroadaptive changes in brain structure and function. The extent and nature of these harmful consequences varies based on many factors including, but not limited to: age of onset (how old one was at first usage), level of toxicity (amount used), pharmacodynamics, pharmacokinetics, the drug user's genetic and epigenetic addiction risk, the amount and frequency of use, and the duration of the acute effects and level of emotional and cognitive impairment. Community and familial

environment, as well as pre-existing or co-occurring physical or mental conditions of the user, and presence or absence of community and social supports are all factors in the addicted person's unique profile.

38. As mentioned above, it is important to note that once cessation from cocaine occurs, the hypodopaminic state and other brain systems remain dysfunctional. These functional deficits can last several months to over a year. The PET scan image below was created at the Brookhaven National Lab, and shows a coronal view, which is looking down in the crown of the head at the level of the thalamus. These images were among the first to show the chronic debilitating effects of cocaine use on the functional blood flow and innervation of the human brain.



39. In this image, the yellow areas represent normal blood flow, innervation, and dopaminergic receptor density, particularly in the frontal brain (which is the top portion of each image). The images compare a computerized amalgamation of non drug-abusing

age matched controls (top row, or row 1) with a computerized amalgamation of cocaine-addicted persons after 10 days of supervised abstinence (middle row, or row 2). Lastly, the same persons from row 2 after 100 days of supervised and confirmed abstinence (bottom row). One can see that the frontal areas (which govern rational decision-making, impulse control, and ability to predict consequences) are most severely impacted by cocaine addiction, and the last part of the brain to recover.

40. Research reveals that after 10 days without cocaine use, less than 10% of regional blood flow and innervation of dopamine receptors has been restored. After 100 days (over 3 months) only about 20% of regional blood flow and innervation has been restored—which shows a nonlinear recovery period. In other words, it took ten times as long to get to 20% restoration of blood flow and innervation as it took to get to 10%. This indicates that further restoration would take a great deal longer.

41. This restoration does not occur evenly across the brain. Even as restoration occurs, it is concentrated more in the primitive portions of the brain, as opposed to the frontal cortex. This is significant for two reasons. First, the brain operates via interconnected networks. If one network is damaged or impaired, all networks are impacted to some degree. Thus, even if a certain percentage (say 20%) of restoration has occurred overall, if one area of the brain lags behind, it hinders the overall brain so that it will not be functioning at that 20% level.

42. Second, it is significant that the frontal cortex is the most extensively impaired area. The frontal cortex is the area of the brain is the last area of the brain to develop—full development is generally not attained until the mid-20s in females and late 20s in males—and is where our executive functions reside. Executive functions are the ability to

reason; think practically; organize our lives around a productive purposeful existence; and understand abstract concepts, moral codes, empathy, and consequences. It is the thing that makes us uniquely human. It is also where humans attach salience or importance to a person, activity, or state of mind. In other words, it is where decisions and priorities are assembled.

43. After crack addiction occurs, the brain's default network is no longer daydreaming or relaxed—it is preoccupied with how to get more cocaine, in spite of the knowledge that using cocaine is making one's life miserable and that the consequences for continuing are extremely high, including incarceration and death. In Mr. Russ's setting—incarcerated, under extreme stress, unable to use cocaine but also without structured treatment for his addiction—this default network state would cause profound agitation and hopelessness. As the images above show, the oxygenation and innervation of Mr. Russ's frontal cortex would have been impaired to the degree that it could no longer inhibit his hedonic survival drives from the primitive midbrain. This drive overrides all other priorities and domains, including safety, sleep, socially significant and intimate relationships, job performance, and acting upon one's higher virtues and values that operate in the frontal cortex. The great irony in Mr. Russ's case is that these same primitive survival drives overrode the mental processes that could have enabled Mr. Russ to defend himself against a death sentence.

44. Chronic cocaine exposure diminishes the user's ability to adapt behaviorally to negative consequences caused by their addiction. In Mr. Russ, these symptoms historically manifested in diminished employment and academic opportunities, failed relationships, multiple non-violent criminal behaviors and arrests primarily motivated by his craving

for cocaine. Mr. Russ's criminal history is highly correlated with his drug use. These maladaptive behaviors, when observed in an adult of normal intellect like Mr. Russ, is a strong indicator of corruption of the dopamine circuitry connecting the primitive midbrain and the frontal cortex. Put differently, Mr. Russ's brain circuitry was impaired in a way that prevented mediation of his decision-making and behavior.

45. Despite Mr. Russ appearing to possess average or above average intelligence, at the time of his arrest and subsequent criminal proceedings, he was still grossly impaired and had very little ability to cope or make objective decisions. He reverted to his Default Mode Network, which ponders, wonders, ruminates, thinks, and feels—but never initiates the frontal brain in order to engage in a positive action because it is too taxing to the impaired brain.

46. Mr. Russ's deep feelings of remorse, guilt, and shame have been consistent throughout his legal proceedings and to this day. However, whereas Mr. Russ can now—with 13 years of cocaine abstinence and removal from the environmental stressors he faced prior to his incarceration—productively work through that remorse, he did not have those capabilities at the time of his legal waivers at the trial and initial postconviction stages. Thinking about what he had done and how his crime was interwoven with his history of abuse and subsequent addiction was prohibitively distressful for him. It was too taxing for his brain, which was still operating under significant chemical and structural impairment. He had lost hope that he could ever redeem himself and concluded he deserved to be punished. Moreover, he believed even the ultimate punishment would be less overwhelming than having to go through the mental processes necessary to effectively communicate with his counsel and mount a defense to capital murder.

47. The best analogy from my experience is that—while Mr. Russ was using, undergoing withdrawal, and for years after while his brain was still operating under the neuroadaptive processes brought on by his crack addiction—he was like a car whose headlights only extend 10 feet. The headlights in this analogy represent Mr. Russ's forethought. A fully functioning adult of his intelligence could see the long term implications of one's actions and take appropriate or corrective steps. However, Mr. Russ was functionally impaired at the time he waived his rights, and this process of recognizing consequences and taking action toward a desired outcome was overly taxing, highly emotional, guilt-producing, and exhausting for him. His frontal cortex was essentially "off line" and he was unable to engage in these processes.

Other Areas of Concern

48. During the course of reviewing Mr. Russ's records, case history, and my interviews with Mr. Russ, I identified two additional areas of concern that, in my professional opinion, necessitate further investigation.

49. One area of concern is that many "facts of the crime" that were introduced as purported evidence of premeditation (such as the knots tied in the ligatures and other of Mr. Russ's behaviors inside the victim's house) have alternative explanations that are consistent with individuals in acute withdrawal. Although I was not retained to opine regarding Mr. Russ's criminal responsibility or the elements of his crime, my experience with individuals in acute crack cocaine withdrawal leads me to believe his legal team should further investigate this as a potential challenge to the cold, calculated, and premeditated aggravator used to secure a death sentence against Mr. Russ.

50. Another potential area of concern is the role that Mr. Russ's participation in Alcoholics Anonymous—particularly the meeting he attended in Texas after the crime—played in Mr. Russ's rhetoric before this court regarding "taking responsibility". Alcoholics Anonymous places strong emphasis on performing an accounting of one's transgressions and making amends. This is often phrased as "taking responsibility". This suggests a possibility that, in Mr. Russ's anhedonic and hypodopaminergic state during his legal process, his rational processes and any sense of hope for the future were overridden by sorrow, guilt, and self-hatred for taking someone's life. In the absence of higher level functions, with a brain that is overtaxed, it is entirely possible that Mr. Russ relied on rote language from Alcoholics Anonymous to justify his legal waivers, masking the level of his impairment and irrationality, and misleading the Court into believing Mr. Russ was making rational decisions when the opposite is true.

Conclusion

51. It is my professional opinion that Mr. Russ was impaired in his cognitive capacity and ability to assist his attorneys in preparing a defense. Specifically, Mr. Russ was unable to sustain appropriate focus and engage in the rational thinking processes necessary to go through the mitigation assessment process. He lacked the cognitive and emotional capacity to appreciate the gravity and consequences of his decisions to plead guilty and waive various legal rights. Based on my understanding of the legal competency standard, I strongly suspect Mr. Russ fell short of it at the time of his trial and waivers.

Under penalties of perjury, I hereby declare, affirm, verify, state and certify that the facts set forth are true and correct to the best of my personal knowledge, information, and belief, pursuant to 28 U.S.C. § 1746 and Fla. Stat. § 92.525 (2020).

DEdwards

Drew W. Edwards, Ed.D., M.S.

EXHIBIT 17

Declaration and Final Report of Dr. Jethro W. Toomer
Pursuant to Fla. Stat. 92.525(2) and 28 U.S.C. 1746

I, DR. JETHRO TOOMER, hereby testify, affirm and declare as follow:

1. The undersigned is a Clinical and Forensic Psychologist. I am licensed to practice in the State of Florida. I am a Diplomate of the American Board of Professional Psychology and a member of the American Academy of Board-Certified Psychologists. Board certification, in addition to recognizing the highest level of achievement and practice, grants practice reciprocity in all fifty states. My Ph.D. degree is from Temple University, Philadelphia, Pennsylvania and I completed a post-doctoral residency at Albert Einstein Hospital - Moss Rehabilitation Center (Philadelphia, Pa.).

Effective June 30, 2009, I retired from the teaching faculty as a tenured, full profession in the graduate program in mental health at Florida International University, Miami, Florida. For over 20 years I served as Director of the Graduate Training Program in Mental Health. My duties included internship site management and supervision of graduate students completing their internships at the Veterans Administration Hospital, Post Traumatic Stress Disorder Unit, in Miami, Florida.

In addition to my private practice, I serve as a consultant in forensic mental health in the Immigration and Human Rights Clinic at Florida International University, College of Law. I have been engaged in the private practice of clinical and forensic psychology for over twenty-five years. I have significant experience testifying in proceedings involving the death penalty and non-death penalty cases. I have been retained as an expert in criminal cases throughout the United States and have testified as an expert witness in the assessment of developmental trauma and culture on behavior. I have been appointed and qualified by courts in such cases and have testified in civil and criminal proceedings in state and federal court. My private practice also includes work as a treatment consultant with the National Football League and the National Basketball Association. I have experience in my private private practice in judicial proceedings and in

association with my past directorship of the Graduate Training Program in Mental Health (where we established a training unit in traumatology), evaluating and treating adolescents and adults who suffered abuse, mental illness and impaired cognitive behavior secondary to trauma exposure.

2. I have been retained by the Capital Collateral Regional Counsel, Northern Division, ("CCRC-N") to provide expert services and opinions related to the competency of the Defendant, David Russ, a death-sentenced inmate. Specifically, I was asked to conduct an evaluation of Mr. Russ, to address the impact of developmental trauma on his overall functional capacity, as it relates to his case.

3. I have reviewed records from Mr. Russ's case provided to me by CCRC-N, including his record on appeal with transcripts of his plea, his waiver of a jury for his penalty phase, his waiver of the presentation of mitigation evidence, and his waiver of postconviction proceedings; letters written by Mr. Russ to this Court; his Texas and Florida Department of Corrections files; school and college records, and social service records pertaining to Mr. Russ's childhood; police reports; various mental health reports, including documentation regarding failed attempts to evaluate Mr. Russ; Florida Supreme Court opinions related to Mr. Russ, the federal habeas petition filed by his federal lawyers with supporting declarations from Dr. Dudley, family members, and acquaintances; and a mental health evaluation by the Florida Dept. of Corrections, among other things.

4. In December 2019, I evaluated Mr. Russ at Union Correctional Institution in Raiford, Florida. Mr. Russ was very cooperative and evinced a desire to go forward with court proceedings. This is a significant change from Mr. Russ's desires prior to his guilty plea and sentencing in 2008-2009, and his postconviction waiver in 2012. I was retained, in large part, to explore this divergence, and to opine not only on Mr. Russ's present competency, but also his competency at

the time of his guilty plea, waiver of a jury at the penalty phase, waiver of the presentation of mitigation evidence, and waiver of his postconviction proceedings.

5. Following my initial records review and clinical interview with Mr. Russ, I recommended that a complete neuropsychological evaluation be administered. Such an evaluation was necessary to confirm and expand on my initial findings, as Mr. Russ's history (which I have detailed below) is rife with risk factors for organic brain damage. Dr. Harry Krop conducted this evaluation on January 31, 2020, and I have consulted with Dr. Krop regarding his findings. I also believed that the extreme nature of Mr. Russ's drug use necessitated evaluation by a professional specializing in substance abuse issues, in order to further explore the behavioral impact of Mr. Russ's crack cocaine intake. Dr. Drew Edwards completed this evaluation of Mr. Russ in June of 2020, and I am aware of his conclusions.

6. From the various documents I have reviewed; the evaluations of Drs. Dudley, Edwards, and Krop; and my evaluation of Mr. Russ, I have concluded to a reasonable degree of psychological certainty that Mr. Russ's horrific childhood has contributed to significant impairment in his overall functioning. Poverty, nurturance deprivation, abandonment, persistent and unrelenting physical and emotional abuse, and ongoing instability were prominent features of his development, as was parental indifference. Stability, predictability, sameness, and structure were lacking. These toxic factors led Mr. Russ to experience symptomatology reflective of a variety of mental illnesses and neuropsychological deficits.

7. Mr. Russ's early experiences have served as a model for vacillation, inconsistency, unpredictability and discontent. The cumulative effect of this trauma adversely impacted his cognitive, behavioral and affective functioning. Cognitive deficits are reflected in Mr. Russ's poor abstract reasoning, difficulty in weighing alternatives, projecting consequences, apperceptive ability and managing conflictive data. Behavioral deficits include impulsivity, anxiety, substance

abuse, chronic anxiety and an elevated and easily-triggered survival reflex. Affective (emotional) deficits include mood lability, depression, hypervigilance, phobias of unknown precipitance, and vulnerability to stressors, real and/or perceived. Early onset or persistent trauma, as experienced by Mr. Russ, portends life-long maladjustment.

8. Despite Mr. Russ's prior assurances, the totality of data indicates, to a reasonable degree of psychological certainty, that Mr. Russ's capacity to make competent decisions was impaired at the time of his trial-level and postconviction waivers. Specifically, as a result of the combined effects of Mr. Russ's traumatic developmental history; undiagnosed mental illness; and the repeated physical and chemical assaults on his brain from head injuries and chronic drug abuse, Mr. Russ's cognitive processing skills and ability to engage in logical, intelligent decision-making were significantly compromised.

9. Mr. Russ's drug use, developmental psychopathology, history of head trauma and symptomatology linked to numerous psychological deficits and disorders all had a deleterious impact on logical, adult decision-making and judgment. Although Mr. Russ is able to respond in superficial fashion to concrete questions and situations, he remains significantly impaired in his ability to reason abstractly and discriminatively, or to utilize secondary thought processes, necessary for reasoned participation in the legal process.

10. Mr. Russ was severely abused emotionally and physically by his father, Arnold, beginning in early childhood and continuing until Mr. Russ was removed from his father's care around the age of 14 or 15. Mr. Russ observed his father's abuse of his mother, Ollie Mae, and at least one sibling.

11. By multiple accounts, Arnold was creative and ruthless in his abusive tactics. He beat Mr. Russ on all areas of his body, and caused potentially hundreds of head injuries of varying severity.

Arnold beat Mr. Russ with his fists, switches, rake handles, clothes hangers, baseball bats, garden hoses, pots, pans, belts, and pieces of furniture. He paired demeaning insults with the beatings, and often forced Mr. Russ to strip nude. It appears from these accounts that Arnold cultivated the abuse to inflict maximum humiliation.

12. In addition to suffering and witnessing overt abuse at the hands of his father, Mr. Russ was abandoned by his mother, who fled while pregnant after Arnold beat her in an attempt to cause a miscarriage. Ollie Mae left Mr. Russ behind, despite knowing Arnold would continue to abuse him. Numerous studies reflect that neglect and abandonment are two of the most profound adverse developmental experiences impacting subsequent functional capacity of children. The key ingredient of this process, experienced by Mr. Russ, includes the existence of ego deficits related to family generated trauma, insecure attachment, and abandonment. The structural organization and functional capability of the mature brain, develops throughout life, with a vast majority of the critical structural organization taking place in childhood. Due to the sequential development of the brain, disruptions of normal developmental processes early in life alter the development of cognitive, behavioral, and affective functioning.

13. As noted above, Mr. Russ has a longstanding history of exposure to violence, physical abuse, abandonment, emotional deprivation, and lack of nurturing. These exposures negated the stability and predictability of life necessary for him to develop a consistent pattern of behaving and thinking. In other words, Mr. Russ's myriad childhood exposures hindered his ability to properly respond to internal and external stimuli as an adult. For instance, Mr. Russ's father would beat him savagely not only for small mistakes and transgressions--he would also beat Mr. Russ preemptively for mistakes he assumed Mr. Russ might make later. It is well-known that physical abuse has devastating emotional and developmental consequences. However, when the abuse occurs not just as excessive punishment, but for no discernable reason whatsoever, it is even

more disruptive to a child's ability to project consequences and learn from experience. And, the harm is especially pronounced when abuse or neglect occurs at the hands of the child's caretakers, and is most harmful at the hands of the child's primary caretaker (in this case, Mr. Russ's parents).

14. Another example of destabilization was Mr. Russ's abandonment by his mother. As a young child, Mr. Russ witnessed firsthand the abuse Arnold inflicted upon Ollie Mae, and witnessed his mother remaining in the home and in the marriage for several years. Family accounts indicate that Ollie Mae and Arnold divorced at one point, then remarried; later, Ollie Mae permanently left the relationship and left Mr. Russ behind in the process. This all occurred while Mr. Russ was very young, so he had no ability to comprehend the complexities of domestic violence and the decision-making that governs whether one continues or ends a relationship. As a result, Mr. Russ had no framework through which to understand why his mother left the home, and why she did not take him with her. Adding to this confusion was the fact that Ollie Mae was pregnant when she left, and herself raised that child (Mr. Russ's full sibling, Melissa). Maternal abandonment is considered profoundly traumatic. Those having experienced such abandonment reflect that if your mother, who "carried" you for nine months abandons you, then your worthlessness is confirmed.

15. The pervasive inconsistency and unpredictability in Mr. Russ's developmental history negated the stability and predictability of life necessary for acquiring a consistent pattern of behaving and thinking. Energy that would be normally utilized in a predictable, supportive environment, to develop higher order thought processes, (e.g. weighing alternatives, projecting consequences, etc.) is instead geared towards survival. Mr. Russ's survival mentality is reflected in a developmental immaturity characterized by deficits in the acquisition of a repertoire of mature social skills, deficits in impulse control, impaired cognition, and general inadequacy with respect

to normal ego functioning. This orientation and response pattern are typical of individuals like Mr. Russ, who have experienced a chaotic background, erratic parenting and nurturing, lack of appropriate acculturation to significant social norms and inconsistent treatment by their immediate environment. His overall behavior is not based upon a logical thought process, but motivated primarily by unresolved cognitive and psychological deficiencies. Mr. Russ's overall behavior has included periods in which mood variability, irrational impulses, lack of apperceptive ability and impaired thought, are exhibited, which impact behavior. These deficits in functioning are reflected in his behavior relative to his case. His record on appeal, including transcripts of his plea, waiver of jury for penalty phase, mitigation evidence and post-conviction proceedings reflect his deficiency motivation. His behavior has been characterized by impaired decision making, secondary to irrational altered associations, emotional lability, attribution of malicious intent by others, mis-interpretation of the intentions of counsel and others, belief of being a victim of unfair treatment, and betrayal. He has been at times receptive to and has refused attempts at evaluation. This behavior is manifest in the context of negative thought processes, mood lability, pressured speech and micro vs. macro assessment of facts.

16. The Adverse Childhood Experiences Scale (ACES) identifies ten factors that suggest trauma and adverse environment. If a person encounters just one of these factors, that person is considered significantly more at risk for psychological and mental problems. Furthermore, the more factors applicable, the higher the risk. Mr. Russ's history reflects that he has experienced at least eight of the ten factors. This portends an individual who is neurologically, cognitively, and psychosocially underdeveloped in later life.

17. Mr. Russ appears to re-experience the residuals of certain aspects of his traumatic development. This manifests in recurrent and distressing recollections of past traumatic episodes upon experiencing an external cue or situation that resembles or symbolizes an aspect of the past

episode. Mr. Russ went through repeated patterns of attempting to avoid such cues and recollections; but when he cannot avoid them, he becomes terrified and exhibits a number of symptoms of intense anxiety. Mr. Russ grew up in a situation where he and family members were victims of long-term abuse. Given his circumstances, Mr. Russ constantly felt "on-edge", likely suffering the effects of a Post Traumatic Stress Disorder. His drug use can be traced to childhood trauma, serving as a mechanism to feel comfortable, reduce his constantly elevated anxiety and relieve an ongoing state of psychic distress.Mr. Russ's heightened emotionality associated with predispositional factors, recall of victimization, abandonment, and a deep sense of loneliness and isolation suggest that Mr. Russ suffers from severe post traumatic stress disorder.

18. Unlike individuals whose post traumatic stress disorder arises from a single event, or isolated series of events, Mr. Russ's presentation is the result of repetitive trauma spanning his entire childhood and well into his adolescent years. This type of complex, repetitive trauma is exponentially more harmful to a developing brain than simpler or more isolated traumas. Another way to describe this is as "toxic stress".

19. Toxic stress exposure elicits the most severe reponses, particularly when combined with other risk factors or brain damage, such as an injury and substance abuse. It catastrophically disrupts executive function, and results in anatomical changes in the brain that are precursors to later impairment in learning behavior and cognitive processing. This results in functional differences in learning, memory, and aspects of executive function. In many cases of toxic stress, the first thing to suffer is an individual's sense of self-worth or self-validation. This is seen in Mr. Russ's history by his myriad attempts to seek external validation; yet, even when he received validation in certain adult relationships, it was not enough. He was constantly trying to fill a void, and drug use appears to have been one method of doing that. When someone's sense of self-worth is chronically eroded by toxic stress and trauma, a sense of self-hate and loss of self-esteem

persists. At a certain point, the individual's impairment, secondary to the aforementioned thought processes, serves to compromise any functional capacity. Vacillation and mood variability, such as in the case of Mr. Russ, reflects an inability to adapt internal thought processes, the psychological roots of which have never been addressed.

20. As a result of this condition of toxic stress and severe post-traumatic stress disorder (especially when compounded by further brain damage from head injuries and drug use), Mr. Russ is likely to feel detached from others and have difficulty maintaining an appropriate affect based on his environment. He experiences mood lability distinct from what would be expected from his comorbid disorders (such as bipolar disorder, as is indicated from Dr. Dudley's evaluation, anecdotal accounts of Mr. Russ's mood and behaviors, and Mr. Russ's family history of the disease). He displays concentration difficulties, hypervigilance, and an exaggerated startle response. Significantly, consistent with a severe post traumatic stress disorder diagnosis, Mr. Russ has a sense of a foreshortened future. As a result of lifelong, compounded trauma, Mr. Russ learned not to expect to have a normal life or even a normal life span.

21. This is significant in the retroactive evaluation of Mr. Russ's competency at the time leading up to his guilty plea, waiver of a jury at his penalty phase, waiver of the presentation of mitigation evidence, and waiver of post-conviction proceedings. Mr. Russ, as a result of complex post traumatic stress disorder, was in a near constant state of hypervigilance, anxiety, and belief that he was doomed. Even before the occurrence of the crime for which he is on death row, Mr. Russ could not appreciate the possibility of a full life or normal life span. Thus, when presented with the gravest decisions of his life (namely, whether to plead and waive various legal rights) Mr. Russ was unable to rationally understand the consequences of those waivers. Put another way, because Mr. Russ already believed he was doomed, he was unable to functionally comprehend what it meant to give up legal rights that may have saved his life.

22. Mr. Russ has a limited tolerance for frustration and anxiety which stems from his poor self-esteem, mood lability, and need for acceptance. Given his history, the level of perceived stress, the more pronounced is Mr. Russ's impaired cognitive, behavioral and emotional functioning. His pressured speech, fluctuating behavior, lack of trust, self-deprecation, variable pattern of interacting with counsel over time, and written correspondence to the judge, all reflect his deficits in cognitive processing and rational decision-making resulting in self-defeating behavior.

23. I am also concerned by the extent to which Mr. Russ's impairments may have been masked by his coexisting strengths. Mr. Russ exhibits excellent verbal skills and is highly motivated. While this has resulted in some impressive achievements such as receiving an admission and scholarship to an external drug counseling college program (even while Mr. Russ was still incarcerated), it also likely served as a barrier to proper recognition of Mr. Russ's incompetency during trial and post-conviction proceedings. Because of this, it was especially critical for counsel to have had a thorough competency evaluation performed at the time Mr. Russ attempted to waive his rights. However, counsel did not do this.

24. Mr. Russ's background reflects his developmental history in a crucible of despair. The predispositional factors in his history were substantial and debilitating, and resulted in an individual suffering from interrelated emotional, psychological, and cognitive impairment. This has caused lifelong, substantial problems in all areas of his life, including relationships, abstract thought, and decision-making. In the context of Mr. Russ's legal proceedings, his decisions were primarily motivated by underlying psychological and cognitive deficits and not based upon the exercise of abstract thought processes (i.e. weighing of alternatives, projection of consequences, management of conflictive data, and apperceptive ability). His overall performance reflects deficits in higher order thought processes indicative of an inability to imagine alternatives, responses or potential solutions to problems. Under stress, pressure to perform, and stressors, real or

imagined, he would also have difficulty conceiving or perceiving the steps leading from one's intention to a desired end, or in weighing the consequences which one's alternative decisions or solutions might have. Poor integrating and synthesizing ability is indicated, with mental confusion and difficulty managing stress, combined with poor frustration tolerance. Mr. Russ's functioning, instead of being based upon a process of logical reasoning, is based upon his being a victim of the aforementioned deficits, resulting in behavioral and cognitive responses that are maladaptive, impulsive and self-destructive.

25. To a reasonable degree of psychological certainty, based upon the defendant's history, evaluation and totality of the data and behavior, I am of the opinion that Mr. Russ's plea and waivers were tainted by his impaired patterns of perception, thought and action.

Under penalties of perjury, I hereby declare, affirm, verify, state and certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, pursuant to 28 U.S.C. § 1746 and Fla. Stat. § 92.525 (2020).

Jethro W. Toomer
Dr. Jethro W. Toomer

8-13-20
Date