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IN THE SUPREME COURT OF FLORIDA

RICHARD ENGLAND,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC11-2038

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This case presents a post-conviction appeal after the Appellant was denied relief under *Florida Rule of Criminal Procedure* 3.851 (hereinafter "Rule 3.851" or "3.851") in the Circuit Court for Volusia County, Florida. The Appellant was convicted of first degree murder and sentenced to death in Volusia County in 2004. This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "England." Appellee, the State of Florida, was the prosecution below. This brief will refer to Appellee as such, the prosecution, or the State. The Appellant's defense attorneys at trial will be referred to by proper name and title or "trial counsel."

Unless indicated otherwise, bold-typeface emphasis is supplied. Cases cited in the text of this brief and not within quotations are italicized. Other emphases are contained within the original quotations.

STATEMENT OF THE CASE

On November 6, 2003, the grand jury in Volusia County, Florida indicted Richard England for First Degree Murder (premeditated and felony) for killing Howard Wetherell, and Armed Robbery with a Deadly Weapon. England's defense counsel, Gerard F. Keating, Esquire, was appointed on December 2, 2003. By January of 2004, Attorney Keating began filing substantive motions in this case to

include a request for a private investigator and a motion to dismiss for a speedy trial violation.[1] The request for an investigator was granted in late January of 2004 and the motion to dismiss was denied on February 12, 2004. The trial court held a status conference the following April 16 at which England—against the advice of his Attorney Keating—refused to waive speedy trial and allow more time for Mr. Keating to prepare his case. Trial was set for May 10, 2004. Mr. Keating requested and was granted the appointment of co-counsel and Attorney Robert A. Sanders, Esquire joined the defense team. Mr. Keating again filed a motion to continue on May 3, 2004, indicating that he needed more time to adequately investigate and prepare this case for trial. (DAR, V2, R280-284).[2] In his motion to continue, Mr. Keating provided a detailed explanation of the investigative steps he needed to take in order to properly prepare a capital murder case for both the verdict and penalty phases of trial; nonetheless, trial commenced on May 10, 2004. Despite being forced into a compressed trial schedule by England's demands, Mr. Keating and Mr. Sanders litigated over thirty pre-trial pleadings, to include a motion to dismiss,

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[1] England had been arrested in 2001 not long after the murder on unrelated violation or probation and escape charges. England was questioned about Mr. Wetherell's death but was never arrested for the murder in this case until 2003.

[2] Cites to the 3.851 appeal record will be V_, R _ for volume number followed by page number. Cites to the direct appeal record will be DAR, V_, R_.

a notice of alibi, motions to suppress statements, motions in limine regarding England's prior homicide and the autopsy photographs in this case, and a motion to admit "reverse *Williams*[3] Rule evidence" against the co-defendant. On May 24, 2004, the jury found England guilty of both first degree premeditated murder and felony murder, and robbery with a deadly weapon. (DAR, V11, R1807). At the conclusion of the penalty phase the jury recommended the death sentence by a vote of 8-4. (DAR, V12, R2074). A *Spencer*[4] hearing was held on July 9, 2004. On July 23, 2004, Judge S. James Foxman sentenced the Appellant to death for first-degree murder. (DAR, V13, R2256).

Following his direct appeal, this Court affirmed England's convictions and death sentence. *England v. State*, 940 So. 2d 389 (Fla. 2006). The United States Supreme Court denied England's Petition for Writ of Certiorari on October 4, 2010. *England v. Florida*, 549 U.S. 1325 (2007). England filed a Rule 3.851 motion on February 4, 2008. (V9, R1185-1297). The State answered England's motion on March 14, 2008. (V9, R1342-46). Following a Case Management

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[3] *Williams v. State*, 110 So. 2d 654 (Fla. 1959) (*superseded by statute* Section 90.404(2), Florida Statutes (2012).

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

Conference (*Huff*[5] hearing) on May 30, 2008, the court granted an evidentiary hearing on, among others, the claims raised in this appeal. The evidentiary hearing was held on September 15 and 19-20, 2008.[6] Prior to the trial court's order on the Rule 3.851 motion, for the next three years England filed numerous pro se pleadings with the trial court and this Court.[7] In September and October of 2011, the post-conviction trial court issued its orders denying all of England's claims for post-conviction relief.[8] In September and November of 2011, England, through counsel, filed notices of appeal in this case (SC11-2038). England continued to file pro se pleadings in the trial court in this case and a parallel case (SC11-2039) (see Appendix A). The parallel case, SC11-2039, was closed by this Court's dismissal order on October 20, 2012. England's additional pro se trial court pleadings we dismissed by the trial court on December 3, 2012. England attempted to have this

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[5] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

[6] The evidentiary hearing was originally scheduled for August 20-22, 2008, but was rescheduled.

[7] A detailed chronology of the various pro se pleadings, the State's responses, and the court's disposition on the pleadings is attached to this answer brief as Appendix A.

[8] In the trial court's September 6, 2011 order, the claims for which England did not request an evidentiary hearing were denied. In the trial court's October 20, 2011 order, the remaining claims that were heard at the evidentiary hearing were denied. A clarifying order was issued on October 25, 2011.

Court relinquish jurisdiction of this case (SC11-2038), which was denied on January 4, 2013. Counsel for England filed the initial brief in this appeal and a contemporaneous petition for a writ of habeas corpus on March 12, 2013. This answer follows.

STATEMENT OF THE FACTS

This Court summarized the factual and procedural history for this case in its opinion following the direct appeal:

FACTUAL AND PROCEDURAL BACKGROUND

> On July 2, 2001, after receiving a call from concerned neighbors, the City of Daytona Beach police found the body of Howard Wetherell in the shower of his master bathroom. Wetherell had been brutally beaten to death. He had multiple lacerations, fractures, and bruises over his body.[1] N. Leroy Parker, a Florida Department of Law Enforcement crime lab analyst and expert in the field of blood stain pattern analysis, analyzed the blood stain pattern in the upstairs master bedroom of Wetherell's condominium. He determined the pattern indicated that Wetherell was beaten while conscious and moving in different positions in several different locations in that room including on or near the floor, next to the door, near the dresser, and near the nightstand next to the bed.
>
> > FN1. Ultimately, it was determined that Wetherell died of a blunt force trauma cervical spine fracture that severed his spinal cord and vertebral arteries causing him to suffocate to death as his diaphragm muscles were paralyzed from the fracture.
>
> The State's investigation of the crime scene was impeded by a white, powdery substance that had been sprayed over the bloody floor and furniture to cover up and destroy any potential evidence underneath, including fingerprints. However, crime scene investigators noticed that the poker was missing from the fireplace tools in the living room.

They also recovered two cigarette butts from a second upstairs bedroom. Ultimately, Florida Department of Law Enforcement analyst Tim Pietre determined that the DNA on one of these cigarette butts belonged to Michael Jackson, and DNA on the other belonged to Richard England. Numerous items of value were missing from the condominium including antique guns, jewelry, silver, and the victim's green Mercury Sable automobile. Notably, a Rolex watch was found in the pocket of a pair of Wetherell's trousers.

Before the crime occurred, Michael Jackson lived with Wetherell trading sex for money and a place to stay. Several days after the murder, he was arrested in Walton County after wrecking Wetherell's green Mercury Sable. Shortly after his arrest, he gave a statement to State Attorney Investigator Shon McGuire implicating his friend, Richard England, in Wetherell's murder.

England was not immediately charged for this murder but was taken into custody within weeks of the murder for an unrelated violation of probation (VOP) charge.[2] While incarcerated, England was questioned about Wetherell's murder by Investigator McGuire. Prior to and after this questioning, England gave several inculpatory statements. He also made statements to a fellow inmate. Cumulatively, these statements revealed that England knew of Wetherell through Jackson and was at the condominium the night of the murder; that he and Jackson stole property from the condominium and took the stolen property to Reynaldo DeLeon, a friend of England's in Orlando, so that DeLeon could fence it; and that on their way to DeLeon's home Jackson disposed of a bag of bloody rags and the missing fire poker, which was later determined to be the murder weapon.

> FN2. England was arrested in August 2001 for violating his probation from a 1987 murder conviction. He later argued that the VOP arrest was subterfuge to take him into custody without the benefit of an attorney. England did, however, have an attorney on the VOP charge, and he insisted on negotiating with the State for release on the VOP charge in return for information regarding Wetherell's murder.

On December 21, 2001, Investigator McGuire executed a search warrant on England to obtain a blood sample in order to compare England's DNA to that recovered from one of the cigarette butts found in Wetherell's condominium. England asked to speak to McGuire alone. During this interview, England offered to help find the murder weapon if he could get some consideration on his VOP charge. He said that he had been at the victim's condominium on June 25 when Jackson got a rod and went upstairs. England said he heard the victim screaming and yelling, "Why are you hitting me?" England said he did not go upstairs and never touched the victim. Instead, he went outside to smoke a cigarette, and when Jackson came downstairs they left. As stated earlier, the DNA on one of the cigarette butts found in the second upstairs bedroom matched England's.

On November 6, 2003, a grand jury in Volusia County, Florida, returned a two-count indictment against England. Count one alleged that on or about June 25, 2001, England killed the victim either in a premeditated manner, during the course of a robbery or attempted robbery of the victim by the use of blunt force trauma, or "by aiding, abetting, counseling, hiring, or otherwise procuring such offense to be committed by Michael Jackson." Count two alleged armed robbery of the victim with a deadly weapon (a metal rod).

At trial, the State called several witnesses to testify regarding England's involvement in Wetherell's murder. DeLeon testified via a translator that England came to his house with Jackson. They brought antique guns, jewelry, and silver.[3] England told DeLeon that Jackson had hit a man, stolen the items, and then went to find England. England also said that he and Jackson went back to the man's house and found him alive, so England hit the man with a fire poker until he died.

> FN3. DeLeon paid England for the items in cocaine and cash and later sold some of them. DeLeon was arrested for drug trafficking on September 25, 2001. The same day, Karen Duggins, England's girlfriend, called and told him to dispose of the property England had given him because England had been arrested and detectives were looking for the property. DeLeon took the property to a hotel to hide it, but the police recovered the items when they arrested him. DeLeon was facing life imprisonment on the drug charges. In light of his cooperation in this case, DeLeon received a thirty-year sentence with twelve years suspended.

The State called Steven Diehl, a jail house informant, who testified that he met England in jail in mid-December and that he and England had several conversations about Wetherell's murder. England first told Diehl that he was innocent and that Jackson committed the murder. Later, England told Diehl that he bludgeoned "an old pervert" to death with a pipe and that the victim deserved it because he had been engaging in sexual relations with a young man. England said he and Jackson took items they had stolen from the man's house to a drug dealer friend of England's in Orlando and that England said he regretted leaving behind a Rolex watch. England also admitted that he left a cigarette butt at the house but planned to cover this mistake by saying that he had been partying at the house a few days earlier. England insinuated that he committed the murder alone but could beat the charges because the evidence was all circumstantial. England also told Diehl that he was going to have someone write a letter in Spanish to the drug dealer in Orlando, DeLeon, asking him not to testify. Finally, England asked Diehl to sign an agreement that he would not testify against him.

The State also called Jackson's brother, Samuel, to testify about what Jackson had told him about the murder. Samuel testified that Jackson told him that Jackson and England committed the crime together. According to Samuel, Jackson stated that he and England took their clothes off and went into the victim's bedroom. They gave the victim a "hellish" beating. The victim screamed, hollered, and begged for his

life; but Jackson and England told him to shut up and kept beating him until he died.

The State also introduced physical evidence into the record as well as testimony involving evidence that had been destroyed. The physical evidence included (1) crime scene and autopsy photographs used during the medical examiner's testimony to assist his description of the extent and nature of the victim's injuries, (2) a photograph recovered from the crime scene,[4] and (3) telephone records showing calls made from Wetherell's number on the night of the murder to friends of England's who did not know Jackson or Wetherell. The testimony involving evidence that had been destroyed was given by Ivy Evans, a long time friend of England's, and DeLeon. Evans testified about telephone calls received the night of the murder. She testified that England left a message on the answering machine for her husband. She had erased the message, so the tape recording was not available as evidence at trial. DeLeon testified about a letter he received asking him not to testify against England. DeLeon had destroyed the letter, so it also was not available as evidence at trial.

> FN4. The photograph found at the crime scene and entered into evidence had the words "Pervert, f—k with us" written across the face with an arrow pointing to the victim. Don Quinn, handwriting expert, examined the handwriting on the photograph and compared it to exemplars from England and Jackson. In Quinn's opinion, Jackson did not author any of the text, but England "very probably" did write the text.

The defense called Jackson to testify.[5] Prior to the trial, Jackson had made a number of statements to the police.[6] In those statements, Jackson said that England committed the murder. He said he and England decided to rob Wetherell, and while they were committing the robbery they heard a noise upstairs. England then stripped naked, picked up the fire poker, went upstairs, and hit Wetherell thirteen to fifteen times with the poker. Jackson said Wetherell was running around the room, hitting the wall, falling, and pushing things out of the way. After Wetherell died, they tried to get rid of any evidence connecting them to the crime. They put Wetherell's body in the

shower; England got in the shower and rinsed off; England spread white powder around saying it would take off the fingerprints; and England wiped everything down with white socks.

> FN5. Jackson had been scheduled to go to trial for Wetherell's murder on September 8, 2003. On September 7, Jackson took a plea to second-degree murder, armed robbery, and credit card theft. He agreed to testify against England based on a taped statement. At trial, Jackson became a defense witness and testified that he was trying to withdraw his plea.

> FN6. Jackson made three pretrial statements: two were made during interviews to investigators on July 31 and August 16, 2001, and one while sworn to the prosecution and defense attorneys on September 7, 2003.

At trial, Jackson recanted these prior statements. Jackson testified that he alone killed Wetherell with the fire poker because Wetherell was a pervert and that England did not assist. Jackson said that he gave the prior statements implicating England because he thought it was an easy way out. He thought that if he could give the police somebody else as a suspect, they would let him go.

Jackson also testified that England had smoked cigarettes in Jackson's second floor bedroom the night before the murder. He said that although England was at the condominium on the night of the murder, he left and they met up later. Jackson said that he returned to Wetherell's condominium around 3 a.m. intending to kill and rob Wetherell. Jackson said he then got the fire poker, went upstairs, and beat Wetherell until he was dead even though the victim yelled, struggled, and asked Jackson to stop. Jackson dragged the body to the shower, took his clothes off, and showered with the body. Jackson said he wiped things down in the house even though he lived there, sprayed fire extinguisher powder everywhere, went through the house looking for valuables placing them in the living room, and then passed out. The next day Jackson loaded the victim's car with the stolen items and drove to a Burger King where he threw away blood-soaked clothing and the fire poker. He testified that England did not become involved until after the murder but that England did help get rid of the

> stolen items by meeting with DeLeon on June 26. England also took Jackson to Titusville to meet Jackson's brother, Samuel. Jackson denied telling Samuel that he and England had committed the murder.
>
> When confronted on cross-examination with Samuel's testimony that he had told Samuel that he and England killed Wetherell together, Jackson said his brother was just trying to protect him. At one point during his trial testimony, when asked about the details of the beating, Jackson said, "No, I didn't do nothing; I just was there." He later said, "I did it all." Jackson further testified that he was changing his earlier deposition statements because the State was seeking the death penalty against England.
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> On May 24, 2004, the jury returned guilty verdicts against England for both first-degree premeditated murder and felony murder and robbery with a deadly weapon. During the penalty phase, England made several outbursts that led the trial judge to order him gagged. Following the penalty phase, the jury returned an eight-to-four advisory sentence recommending death. A *Spencer* [7] hearing was held on July 9, 2004. On July 23, 2004, England was sentenced to death on count I and to a concurrent life sentence on count II.
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> FN7. *Spencer v. State,* 615 So.2d 688 (Fla.1993).

England, 940 So. 2d at 393-96.

EVIDENTIARY HEARING

The following testimony and evidence was presented at an evidentiary hearing on September 15, 19, and 20, 2008.

Ines Fyffe

Ines Fyffe, England's mother, testified telephonically. (V1, R150-51). England's biological father, Richard Allen William, left Fyffe when she was eight months pregnant. Fyffe then married first husband Ronnie England, who adopted

England at eight months old. (V1, R152, 172). They lived together as a family for twelve years. (V1, R153). Ronnie was an abusive alcoholic. He mistreated England and his younger siblings, Barry[9] and Alison. (V1, R153). Occasionally Ronnie slammed the children against the wall. (V1, R154). Ronnie took custody of the children when they divorced. Ronnie eventually called Fyffe to come get the two youngest children while he retained custody of England (nicknamed "Willie"). (V1, R155). Fyffe said Ronnie "never, never, never wanted to give him back to me." (V1, R158).

Fyffe visited England between one and three times a month while he lived with Ronnie. (V1, R159). England was hyperactive and reacted quickly. (V1, R157). Fyffe was unsuccessful in her attempts to talk to Ronnie about England's behavior. (V1, R159). England was about 14 years old when he started having problems. He slept with people in exchange for drugs. (V1, R174). Ronnie banned England from the home when he misbehaved. (V1, R180).

Fyffe's marriage to her second husband, David Cline, "was a big mistake." She believed Cline was bisexual. (V1, R159-60, 173). At one point, Fyffe's friend accused Cline of molesting her daughter and Fyffe believed he also sexually abused her own children. (V1, R161, 163). She had no proof that Cline abused

[9] Barry England died of a heart attack in 2003. (DAR, V3, R465; DAR, V13, R2112).

England. (V1, R176). England only visited Fyffe twice when she was married to Cline. (V1, R174, 187). Fyffe also believed England was abused by a soldier in the army while England was living with Ronnie. (V164-65). Fyffe was not aware England had been convicted of his first murder at age 16 until after he was in prison. (V1, 179). After his release, but before murdering Mr. Wetherell, Fyffe saw England twice and they frequently talked on the phone. (V1, R181-82). She never saw England abuse drugs or alcohol. (V1, R183). Fyffe did not testify at the penalty phase because she claimed that defense investigator Jake Ross said she was not needed. (V1, R168-69).[10]

Alison England

Alison England testified that her father, Ronnie, was rough on all the children. (V2, R191-92). Ronnie was in the military and inflicted "military-style punishment" on the children. If they did not do what they were expected to do, he would beat them "almost every day, every other day." (V2, R110). At one point, he forced the children to eat too many sweets until they were sick. (V2, R194, 204). The punishments Ronnie inflicted coincided with his excessive drinking. (V2, R195).

Alison said Ronnie was an alcoholic. The military police frequently brought

[10] Although, Ines Fyffe did testify telephonically at the *Spencer* hearing.

him home after he was caught drinking and driving. He often got into bad accidents. (V2, R194). Notwithstanding, the children still loved him, "he was our dad." (V2, R195). Ronnie experienced flashbacks because he served in Vietnam. (V2, R193, 195). The children were afraid to approach him during these episodes. Ronnie would get up and throw England and Barry against the wall. (V2, R195, 204). She did not recall Ronnie being abusive toward her mother. But, he "controlled everything in our household." (V2, R196). Ronnie never sexually abused his children. (V2, R203).

Alison said England was always sweet and very protective of his siblings. He was fearless and "fun-going." (V2, R197). It was never explained why Ronnie retained custody of England while she and Barry went to live with their mother. (V2, R197). They hardly saw England after the divorce. (V2, R198).

After her mother married David Cline, Alison said he sexually abused her "almost every day." (V2, R198-99, 205). Cline told Alison he would hurt her mother if she told anyone. (V2, R206). Cline also abused Barry. (V2, R208). She did not recall if England was ever alone with Cline. (V2, R209).

Alison said defense counsel Gerry Keating asked the family to come to Florida for the trial. Although he asked them to testify, they never did. Alison testified that Keating said "he didn't need us." (V2, R210). Trial counsel and the family never discussed any abuse issues. (V2, R211).

Alison did not remember defense investigator Jake Ross nor did she recall speaking to Ross about mitigation witnesses for England's trial. (V2, R212-13). Ross never told her he had made flight arrangements for her to fly back to attend the penalty phase. (V2, R223). She denied telling Investigator Ross that she could not attend the penalty phase. (V2, R215). Alison claimed that it was never explained to her and her mother how important it would be to testify on England's behalf. (V2, R217, 220-21).

Alison testified telephonically at England's *Spencer*[11] hearing. With the exception of the sexual abuse she suffered by Cline, Alison agreed her testimony at the *Spencer* hearing was essentially the same as her evidentiary hearing testimony. (V2, R219, 220, 223).

Jason Diehl

Jason Diehl, currently incarcerated in a Kentucky prison, met England in the Volusia County jail prior to England's trial. (V2, R224-25). At one point, England told Diehl he was innocent of killing Mr. Wetherell. (V2, R225). While incarcerated, a "tall, Hispanic male" jail deputy[12] approached Diehl about "an offer to help yourself." (V2, R226, 233, 248-49). Diehl claimed at the evidentiary

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

[12] Diehl thought the deputy's last name was Martinez. (V2, R233).

hearing that he did not initiate contact with law enforcement; but he also said that he requested to speak with police, whom he spoke with a few days later. (V2, R234, 243, 244, 252-53). Diehl did not recall England's trial counsel asking him how he got involved in the case. (V2, R234).

Diehl spoke with Detective Session and Investigator McGuire. (V2, R234, 238). Diehl claimed that "it was made clear that if he helped law enforcement, they would help him out with his situation." (V2, R235, 242). At the first meeting, he met with Detective Session alone. She told him to keep his ears open and listen to see if England had anything important to say that they would want to hear about. (V2, R240, 247). He claims that he was told to keep a record of anything said that was important. (V2, R240). He was instructed not to ask England any questions and not to act as an agent of law enforcement. (V2, R240-41, 247-48, 254). Regardless of these instructions, there were times he asked England questions and would "fish" for information. (V2, R254, 256). After gathering what he considered to be important information, he said that he contacted the same jail deputy who contacted Detective Session and Investigator McGuire. Diehl gave them his notes. (V2, R245-46, 247, 256).

Diehl testified at trial that England admitted to the murder. (V2, R236). He did not testify he had been approached by a correctional officer but would have admitted that had he been asked. (V2, R251-52, 253).

The Defendant

Richard England, testifying on his own behalf, maintained his innocence. (V2, R260, 274). England met Jason Diehl at the Volusia County jail. (V2, R261). The two discussed their respective pending charges on several occasions. (V2, R262-63, 288). England learned his appointed attorney, Gerard Keating, shared office space with a good friend of the victim. It concerned him that there might be a conflict of interest. (V2, R265). England never told Diehl that he murdered Mr. Wetherell. (V2, R268, 271). Diehl told him he was from a "well-off family" and would get England a lawyer. England believed Diehl was talking to his own lawyers about helping England when in fact he was talking to detectives. (V2, R269).

England told Diehl he had been in Wetherell's home. He admitted to Diehl that after Wetherell was murdered, he helped co-defendant Jackson get rid of Wetherell's property. (V2, 272, 290, 291). Diehl took this information, "twist[ed] it around to make it look more detrimental to me." (V2, R272). Diehl never told him that he was in constant contact with law enforcement or that he was an agent for the State. (V2, R273). England had executed two "contracts" with Diehl but not for the purpose of preventing Diehl from testifying against him. (V2, R280).

England said he testified at his own penalty phase and maintained his innocence. He said then that he had never met Mr. Wetherell and had never been in

his home. (V2, R274, 275). England claimed that he never told Diehl the things Diehl testified to at trial. Diehl "made all that up." (V2, R283, 285, 289).

Dr. Richard Carpenter

Dr. Richard Carpenter, psychologist, evaluated England on June 12, 2007, August 1, 2007, and October 15, 2007, and prepared a summary of findings. (V3, R307, 328, 337, Def. Exh. 2). Dr. Carpenter was warned that England might not cooperate with him. (V3, R328). He gathered information about England's family background, education, employment, criminal history, and medical history. (V3, R328-30). England denied being homosexual or bisexual. (V3, R335, 372). He told Dr. Carpenter that when he was 11 years old, a friend he knew on the army base told him he could get gifts from a "coach" in exchange for sexual favors. (V3, R343). England met the coach and started receiving gifts. He said that he let the "coach" rub his stomach (although England did not report being the victim of any sexual abuse or additional inappropriate contact).[13] (V3, R343-44; V4, R491-92). England's ex-girlfriend Karen Duggins told Dr. Carpenter that England frequented homosexual bars with the co-defendant, Michael Jackson. (V3, R359-60).

In Dr. Carpenter's opinion, England suffers from Bipolar Disorder. (V3, R340). England also very likely suffered from Attention Deficit Hyperactivity

[13] Dr. Carpenter said this was an incident of homosexual behavior. (V3, R377).

Disorder ("ADHD") as a child, but it was not diagnosed. (V3, R340). England described himself as "an impulsive child who frequently felt compelled to act without thinking." He had "a tendency toward mood swings which vacillated between manic excitability and euphoric mood and depression." (V3, R341).

Dr. Carpenter said Alison England told him that David Cline sexually abused her and her brother, Barry. She said England was a frequent visitor when they lived with Cline. (V3, R342-43). England never reported being abused by Cline. (V4, R490). Both Alison England and Ines Fyffe told Dr. Carpenter that England was hyperactive and impulsive as a child. (V3, R342, 344). Sara Dullard, England's ex-wife, told Dr. Carpenter he was Bipolar. (V3, R357).

Dr. Carpenter opined that England exhibits sign of grandiosity, increased self-esteem, pressured speech and risky behavior. (V3, R360, 362-63). His conduct during the trial was impulsive. England thought he was smarter than everyone else. (V3, R360, 361). England claimed he has a problem with sleeping as well as "long-standing" problems with attention and concentration, high energy moods and bouts of depression. (V3, R361-62). Grandiosity is a symptom of Bipolar Disorder. (V3, R362).

In Dr. Carpenter's opinion, England was under the influence of extreme mental or emotional disturbance at the time of the crime. (V3, R365, 367; V4, R429). Dr. Carpenter reached this conclusion despite the fact England denied being

involved in the murder. (V3, R372).

England suffered a head injury as a child. Head injuries can cause brain damage or impulsivity. (V3, R395-96). Dr. Carpenter did not conduct any testing but would recommend neuropsychological testing in order to prove an allegation of brain damage. (V4, R430-31, 456, 493-94). Results from the Trail Making test indicated moderate impairment. (V3, R399-400). England's full scale IQ is 103. (V3, R398).

Dr. Carpenter said England used his sexuality to manipulate people to get what he wanted. (V3, R412). After his release from prison (after his first murder), England either became involved in homosexual activity or frequented areas of homosexuals. (V4, R420).

In Dr. Carpenter's opinion, England exhibited a homophobic rage when he murdered Mr. Wetherell. Dr. Carpenter acknowledged that homophobic rage is not a mental disorder. (V4, R467). Dr. Carpenter diagnosed England with (1) histrionic personality disorder with antisocial features and (2) Bipolar Disorder. (V4, R436-37, 477).

Edwin Seals

Edwin Seals met England in prison when they were teenagers. They became good friends and talked "about everything." England admitted to Seals that he was bisexual. (V4, R515-16). Seals claimed both he and Investigator McGuire framed

England for murder and that he coached England on what to tell police. (V4, R528, 529). Investigator McGuire interviewed Seals when he was institutionalized at Florida State Hospital in Chattahoochee. Seals had been administered psychotrophic drugs at that time. (V4, R530). Seals said he also implicated Michael Jackson as a participant in the murder. (V4, R531). During the criminal proceedings for co-defendant Michael Jackson, Seals implicated Richard England as Mr. Wetherell's killer. (V4, R533).

Attorney Gerard Keating

Gerard Keating and Robert Sanders represented England at trial. Sanders appeared as co-counsel three weeks before the trial started. (V5, R542-44). Gerard Keating has been an attorney in the State of Florida since 1981. (V5, R583). He began trying capital cases in 1989 and averaged about one per year since then. (V5, R584). He had tried about 25 murder cases at the time of the evidentiary hearing. (V5, R584). Early on, Keating reviewed the statutory aggravators and mitigators and got a general idea of England's family life. (V5, R546). He filed a motion to dismiss based on a theory of a violation of speedy trial. (V5, R545). Keating had informed England and the trial court he was concentrating on another first degree murder case and asked for the appropriate amount of time to prepare for England's trial. (V5, R545-46). Nevertheless, England refused to waive speedy trial. Keating felt his time was "cut short" because of England's demand for speedy trial. (V5,

R547). Keating visited England in jail and attended pre-trial hearings every month. England was "very closed mouth. He did not share much . . . about the facts of the case." (V5, R547, 590). England "was vehement that he was not a homosexual and homosexuality was not a part of the case." (V5, R466). Due to England's reluctance to provide any facts, Keating relied on the facts provided through discovery. (V5, R549). England never told Keating he was at the victim's home. In fact, he told Keating he was completely innocent. (V5, R591).

At the March pretrial hearing, the trial date was continued without a waiver of speedy trial.[14] (DAR, V1, R72). On April 16, 2004, England indicated that he did not want to waive speedy trial. (V5, R550, 557). After a colloquy with the trial judge, England signed a waiver, then almost immediately retracted it and unequivocally demanded a speedy trial. (DAR, V4, R670). The court set a trial date of May 10, 2004. Mr. Keating realized he could not be ready for trial and moved to withdraw because he could not be effective. (DAR, V4, R670; V5, R564, 585). England believed there was nothing to worry about. England did not give Keating a reason on his refusal to waive speedy trial. (V5, R592).

England was reluctant to tell Keating anything about his background. Although he claimed he was a victim of physical abuse, he gave no indication that

[14] The trial court took judicial notice of the record on appeal. (V2, R212).

he had ever been a victim of sexual abuse. (V5, R571, 578). There was no indication from England that any of his siblings suffered any sexual abuse as children. (V5, R603, 611).

Robert Sanders was appointed as co-counsel on April 21, 2004, three weeks before trial. (DAR, V1, R86-89). Keating and Sanders devoted all their time to England's case. Keating gave Sanders and Jake Ross specific directions on handling certain aspects of the case. There were daily updates amongst them. (V5, R572). England had given Keating an alibi, stating he was at an "after hours" party at a local bar. (V5, R593). However, the defense team was unable to locate any alibi witnesses. (V5, R594). Keating discussed "every important tactical decision" with England. (V5, R599, 601). England told Keating he did not want any aspects of homosexuality becoming part of the case. There were indications that England was in a heterosexual relationship. (V5, R607-08).

It was Keating's strategy to show Jackson was the perpetrator and England was not guilty. (V5, R574). Jackson recanted his deposition testimony and claimed England was not involved. On May 3, 2004, Keating moved to dismiss the charges based on this recantation. (DAR, V2, R285-288).

Keating had spoken with jail inmate Bradley Collins who said co-defendant Michael Jackson had confessed to the murder. (V5, R573). Keating did not call Collins to testify because Jackson himself confessed to the murder at trial. (V5,

R598).

Keating chose not to call Edwin Seals as a witness because Jackson took the stand and confessed to the murder. Seals could have said anything once he got on the stand. Keating was not willing to take a chance that Seals, a jailhouse "snitch," could hurt England's case. (V5, R595-96).

Keating testified that, after England was convicted, he did not believe he had adequate time to prepare a comprehensive mitigation defense. (V5, R552, 575). Nevertheless, Keating said he did "an excellent job in phase one and phase two." Compared to a reasonable attorney, "I did an outstanding job." (V5, R576).

Mr. Keating testified at the evidentiary hearing that there was no indication England had mental health problems. England seemed to be "**an intelligent man and I didn't see any indication of any mental health disorders**." (V5, R499). Nonetheless, Keating had Dr. Danziger appointed as a mental health expert after the penalty phase. (V5, R568, 580). However, Dr. Danziger's report indicated there might be additional **aggravating** factors. Further, Dr. Danziger was not able to provide any statutory or non-statutory mitigators. (V5, R581, 610).

Prior to trial, Keating explained the various phases of the trial to the England family. (V5, R604). Keating testified that he did **not** tell England's mother and sister to go home after the guilt phase. (V5, R602). In fact, after the conviction, he asked them to stay for the penalty phase. Alison told him she had started a new job

in Texas and could not remain in Florida. Fyffe stated she wanted to return home as "she didn't feel comfortable sitting in a courtroom alone." (V5, R603). Keating never told the Englands that their testimony was not important. (V5, R605). At the penalty phase, Keating used Jake Ross' testimony to summarize the information to which the Englands would have testified. (V5, R614, 633).

Attorney Robert Sanders

Robert Sanders testified that England's case was his first capital trial. He began working on the case three weeks before trial. (V5, R617-18). Due to England's refusal to waive speedy trial, the case became a "drop everything and go" priority case. Sanders' main role was to handle the penalty phase should it reach that point. (V5, R619, 620). Sanders also handled a few depositions, argued some motions, and examined a few witnesses. (V5, R538). Sanders would have preferred to have at least two years to work on this case. (V5, R622).

During a deposition of Steven Diehl, Sanders did not ask Diehl how he initially became involved in the case. (V5, R624, 648). However, he did ask Diehl when he first had contact with law enforcement personnel. (V5, R636).

Prior to the penalty phase, Sanders spoke with witnesses before they took the stand. (V5, R625). He did not recall requesting any school records or a Pre-Sentence Investigation ("PSI") report. (V5, R626).

Sanders was aware that England's first murder at age 16 involved the

murder of a homosexual, the same undertones as this case. (V5, R628-29). **England was adamant that he was not homosexual and had not ever been sexually abused**. (V5, R629, 643).

Alison told Sanders that she and her brother Barry had been sexually abused, but at a time when Richard was not living with them. (V5, R630, 641).

After England was convicted, Alison and her mother insisted they had to return to Texas. Sanders said the defense team "basically begged them to stay." (V5, R640). After their return, Investigator Ross informed them plane tickets had been purchased for them to return, but they refused. (V5, R632). Sanders did not tell either Fyffe or Alison that their testimony was not needed. (V5, R639). Fyffe and Alison ultimately agreed to testify telephonically at the *Spencer* hearing. (V5, R633-34).

England never told Sanders about the events surrounding Mr. Wetherell's murder. England did not tell Sanders what he intended to say until he took the stand at the penalty phase. (V5, R641-42). Sanders said they did everything they could to win this case, despite the time constraints. (V5, R645).

Dr. Jeffrey Danziger

The State called Dr. Jeffrey Danziger, psychiatrist. (V6, R659). Dr. Danziger explained that Bipolar Disorder is a mood disorder. People with this disorder experience mania or hypomania as well as episodes of depression. The mood is

"persistently high, euphoric, or elated." In addition, other symptoms include rapid, pressured speech, distractibility, a disorganized flow of thought, increased self-confidence or grandiosity, markedly increased energy in the face of a decreased need for sleep, and behavior that can be characterized as reckless, either in spending, sexual indiscretions, or business judgment. (V6, R663). In order to meet the DSM-IV-TR,[15] criteria for Bipolar I Disorder, an individual must have suffered at least one episode, lifetime, of mania or hypomania. Typically, the pattern is that an individual will have episodes during which they are either in a "high" phase or a "low" phase interspersed by long periods where their mood is relatively normal. Dr. Danziger described Bipolar Disorder as a "waxing and waning illness." (V6, R664).

In Bipolar II Disorder, individuals have only hypomania, or little mania. They may never get full-blown mania. (V6, R665). Those who suffer from full-blown mania often end up incarcerated or hospitalized. Hypomania sufferers do not have such severe consequences. Episodes of hypomania may last at least four days. Episodes of mania must last at least seven days. (V6, R663-64). Psychological symptoms that result from a depressive episode may include guilt,

[15] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

worthlessness, hopelessness, and recurrent thoughts of death. Motor behavior may be affected. Appetite, weight gain or loss, low energy, feelings of fatigue and impaired concentration, are other symptoms, as well. (V6, R664).

Dr. Danziger explained that "homophobic rage" is not a diagnosis found in the DSM-IV. (V6, R667-68, 670). However, individuals who experience a homophobic rage may be conflicted about their own sexuality or act out in a violent fashion against individuals who are homosexual. Nonetheless, this is not a diagnosis "that is generally and broadly accepted." (V6, R668).

Dr. Danziger examined England prior to his trial. (V6, R672-73). England told Dr. Danziger about his social history, education, work history, marital, military, religious, and medical history. England was very forthcoming about his alcohol abuse. (V6, R675). He told Dr. Danziger his "version of the facts" surrounding the murder of Mr. Wetherell. England denied any involvement and was adamant that he was not a homosexual. (V6, R676, 710). Dr. Danziger was aware that England's first murder was committed against a homosexual. (V6, R701).

England denied having any symptoms related to Bipolar Disorder. (V6, R676). Dr. Danziger did not notice any symptoms of anxiety, agitation, mania, depression or psychosis. Although he did not conduct any formal IQ testing, England seemed to be within the average range of intelligence. (V6, R676-77).

England "steadfastly" denied any past history of psychiatric treatment as well as any involvement in the murder. (V6, R678). England admitted to some abuse he suffered as a child as well as a "problematic life." (V6, R679).

In Dr. Danziger's opinion, England suffered from alcohol and drug dependence as well as Antisocial Personality Disorder. (V6, R681, 700). Dr. Danziger concluded that England does not suffer from Bipolar Disorder. (V6, R683, 704). In sum:

> Mr. England's flow of thought was completely logical and sequential. He denied any increased self-confidence or thoughts of grandiosity. He noted normal sleep, normal energy. There was nothing to suggest, either from his history or from him sitting in front of me, to show that he was in any sort of manic state. And similarly, he did not appear to be tearful, lethargic, morose, hopeless or miserable. He denied any thoughts of suicide, feelings of worthlessness or guilt.

(V6, R683-84). Further, "His mood appeared to be in a normal range, without any symptoms of pathology."

Dr. William Riebsame

Dr. William Riebsame, psychologist, evaluated England on July 3, 2008. (V1, R96; V6, R721-22).[16] He administered various tests, including the Wide Range Achievement Test ("WRAT"), Wechsler Abbreviated Scale of Intelligence

[16] England published a portion of a clinical interview administered to England by Dr. William Riebsame which was recorded on DVD. (V1, R97-143, Def. Exh. 1).

("WAIS"), Trail Making test,[17] and Minnesota Multiphasic Personality Inventory 2 ("MMPI-2"). England's full scale IQ of 103 is considered to be in the average to above average range. Dr. Riebsame said England "is a bright individual." (V6, R727).

Dr. Riebsame testified that the Hare Psychopathy Checklist, is a well-established tool in psychology to identify a psychopathic individual. The Hare indicated **England "has a significant probability of being a psychopathic person**." (V6, R731). England is self-centered, lacks remorse, and uses other people. He lived an unstable, antisocial, deviant lifestyle. (V6, R732). Dr. Riebsame diagnosed England with "an adjustment disorder with mixed anxiety and depressed mood." (V6, R736-37). In addition, England suffers from alcohol dependence, (in remission in a controlled environment) and polysubstance dependence. (V6, R738, 739). **England has an Antisocial Personality Disorder and, in all probability, is "a Psychopath**." (V6, R741, 743, 745).

After a review of various records, Dr. Riebsame saw there were periods in England's life where he suffered from abuse, lack of concentration, and depression. (V6, R761). However, periods of these types of symptoms do not indicate a Bipolar Disorder. (V6, R765).

[17] Dr. Riebsame did not consider the results from the Trail Making test to be valid as England selectively failed to answer 49 test questions. (V6, R726, 794).

England denied being a homosexual. (V6, R773). Although the beating of Mr. Wetherell was a "brutal beating," Dr. Riebsame believed England's behavior subsequent to the murder was not rageful or angry in any way. (V6, R778-79). **There was no evidence England suffers from brain damage**. (V6, R788).

William White

William White, formerly a corrections officer[18] at the Volusia County jail during the time that Richard England was incarcerated there; Mr. White had never met Richard England and did not recognize him at the evidentiary hearing. (V7, R803-04). White never contacted another inmate, Jason Diehl, to ask him if he wanted to help his own case if he spoke to police about England. (V7, R807). At the time that Diehl claims to have been approached by a corrections officer, the only officer who met the general description Diehl provided—hispanic male, about six feet tall and 180-190 pounds—would have been Officer David Torres. However, if inmates wanted to contact an outside agency, they would contact a sergeant within the jail facility who would then contact Mr. White. White would then place a call to the outside agency, stating an inmate wanted to speak with a representative and might have information to share. (V7, R804-805, 808).

Officer David Torres

Officer David Torres, recreations officer at the Volusia County jail, occasionally greeted England during his incarceration. (V7, R812-13). Officer Torres is about six feet and three inches tall. (V7, R733). He did not recall being approached by inmate Jason Diehl to discuss England's case. (V7, R816). If an

[18] Mr. White became a case manager with the Volusia County Department of Corrections after being disabled in a car accident. (V7, R803-04).

inmate approached Torres, he would notify his supervisor, who would then take over. (V7, R817).

Investigator Jake Ross

Jake Ross, certified criminal defense investigator, met with England shortly after he was appointed to England's case. Ross investigated potential mitigation, tried to locate alibi witnesses, and conducted interviews. (V7, R821-22, 823, 824, 826). Due to England's refusal to waive speedy trial, this case had an unusually short time frame before the start of trial. Capital cases can take up to two years before going to trial. (V7, R824, 826). Because England refused to waive his speedy trial rights, Ross did not have sufficient time to receive certain records that he sought. (V7, R835).

Ross spoke with England's family members and made arrangements for them to attend the trial. (V7, R828-29). Ross, Keating, and Sanders did not tell England's mother and sister to return to Texas after his conviction. To the contrary, **Ross informed them, "We are trying to save your son's life and your brother's life, so it will be very important that you be here**." (V7, R829). Keating's office made arrangements for the Englands to return to Florida for the penalty phase. (V7, R829). Jeff Fyffe, England's stepfather, informed Ross that Ines Fyffe would not return for the penalty phase. Alison England said she had started a new job and was unable to return. (V7, R831). Ross testified on behalf of the Englands at the

penalty phase. (V7, R832). Ines Fyffe and Alison England testified telephonically at the *Spencer* hearing, and relayed the same information that Ross testified to at the penalty phase. (V7, R832).

Ross did not recall Alison England and Ines Fyffe mentioning sexual abuse, only physical abuse. (V7, R835-36). However, one of Ross' reports given to trial counsel prior to the penalty phase, indicated Fyffe's second husband, David Cline, "attempted sexual battery on Alison." (V7, R838-39).

Sgt. Debra Session

Sgt. Debra Session, Daytona Beach Police Department, worked in the Homicide Investigation Unit of the State Attorney's Office at the time of England's trial. (V7, R841). Sgt. Session received a call from the Volusia branch jail that inmate Steven Diehl had information to relay regarding England's case. (V7, R842-43, 845). She did not tell Diehl to ask England any questions nor did she make him any promises about getting him back to Kentucky to see his family. (V7, R845, 849-50). She instructed Diehl not to ask any questions "and to just listen to what he says and - - take notes." (V7, R846). At a subsequent meeting, Sgt. Session and Investigator Shon McGuire taped a statement from Diehl. They told him, "You cannot go in there and ask him [England] any questions." (V7, R846).

Sgt. Session interviewed Edwin Seals after Seals said he had information

about England's case. Sgt. Session could not recall how that meeting came about. (V7, R848). She did not instruct Seals to elicit information from Richard England. (V7, R853). Sgt. Session was aware that Edwin Seals suffered from mental health issues. (V7, R854-55).

Investigator Shon McGuire

Investigator Shon McGuire investigated the murder of Howard Wetherell. (V7, R862-63). Sgt. Session told Investigator McGuire that Steven Diehl had approached a jail guard, saying that he had information about England's case. (V7, R864, 869). Sgt. Session met with Diehl first, followed by another visit with Investigator McGuire. (V7, R864). Diehl was told not to ask England any questions. If England talked, Diehl was to listen. Diehl was not made any promises. (V7, R865, 873). Investigator McGuire did not recruit Diehl to get information from England; "he called us." (V7, R871).

Neither did Investigator McGuire have any dealings with Edwin Seals. (V7, R866). He interviewed Seals at Florida State Hospital in Chattahoochee. (V7, R867). At that point, McGuire knew England was communicating with Seals. Although he did not know if Seals would be called as a witness, McGuire said he is "always willing to listen when it comes to a murder case." (V7, R867). Phone calls between Edwin Seals and England were recorded. (V7, R868). McGuire

considered Seals a State agent at that time. (V7, R869).[19] After co-defendant Michael Jackson was arrested for auto theft for Mr. Wetherell's car, Jackson told Investigator McGuire that England was involved. (V7, R875). Subsequently, Investigator McGuire began working the case against England. (V7, R876).

STANDARD OF REVIEW

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Claims of ineffective assistance of counsel are reviewed under the standards set forth by the United States Supreme Court in *Strickland v. Washington* and this Court's application of the *Strickland* standards to Florida law. To establish a claim for ineffective assistance of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). The prejudice prong is met only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

[19] Seals did not testify at England's trial.

probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694*; see also Porter v. McCollum*, 558 U.S. 30 (2009) (explaining that the Court does not require proof "'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'") (*quoting Strickland*, 466 U.S. at 693-94).

In evaluating counsel's representation under *Strickland*, there is a strong presumption that counsel's performance was constitutionally effective. 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential."). The defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. (*quoting Michel v. Louisiana*, 350 U.S. 91 (1955)). Moreover, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*.

Because a court can make a finding on the prejudice prong of *Strickland* without ruling on the deficiency prong, claims of ineffective assistance of counsel are subject to denial when the court can determine the outcome of the proceeding would not be affected even if counsel were deficient. *See Franqui v. State*, 59 So. 3d 82, 95-97 (Fla. 2011); *Troy, v. State*, 57 So. 3d 828, 833-835 (Fla. 2001); *See*

also Walls v. State, 926 So. 2d 1156, 1173 (Fla. 2006) (summary denial appropriate on ineffective assistance of counsel claim where evidence was cumulative); *Stewart v. State*, 801 So. 2d 59, 65 (Fla. 2001) (Because the *Strickland* standard requires establishment of both the deficient performance and prejudice prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong).

B. SUMMARY DENIAL OF POST-CONVICTION CLAIMS

The post-conviction courts must decide whether to grant an evidentiary hearing on a Rule 3.851 motion is ultimately based on the written materials before the court. The trial courts may summarily deny a post-conviction claim when the claim is legally insufficient, procedurally barred, or refuted by the record. *See Franqui v. State*, 59 So. 3d 82, 95-96 (Fla. 2011); *Troy v. State*, 57 So. 3d 828 (Fla. 2011) (*citing Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008)). A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. *Doorbal v. State*, 983 So. 2d 464 (Fla. 2008) (*citing Downs v. State*, 453 So. 2d 1102 (Fla. 1984)); *See also Moore v. State*, 820 So. 2d 199, 203 (Fla. 2002).

C. LEGAL SUFFICIENCY

Rule 3.851(e)(1)(D) requires a defendant to include a detailed allegation of

the factual basis for any claim for which an evidentiary hearing is sought. The burden is on the defendant to establish a legally sufficient claim. *See Franqui*, 59 So. 3d 82 (Fla. 2011) (*citing Freeman v. State/Singletary*, 761 So. 2d 1055, 1061 (Fla. 2000)); *Nixon v. State/McDonough*, 932 So. 2d 1009, 1018 (Fla. 2006). Conclusory allegations are not legally sufficient. *Franqui*, 59 So. 3d at 96.

The rule of sufficiency is equally applicable to claims of ineffective assistance of counsel. *See Knight v. State*, 923 So. 2d 387 (Fla. 2005); *Thompson v. State*, 796 So. 2d 511, 515 n.5 (Fla. 2001). The facial sufficiency of an ineffective assistance of counsel claim is determined by applying the two-pronged test of deficiency and prejudice set forth in *Strickland. Troy*, 57 So. 3d at 834, (*citing Duest v. State*, 12 So. 3d 734, 747 (Fla. 2009)). Allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for post-conviction relief. *Dennis v. State*, 109 So. 3d 680 (Fla. 2012) (holding counsel cannot be deemed ineffective for failing to make a meritless argument); *See also Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008).

D. NEW WITNESSES

When a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, the defendant is "required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have testified prejudiced the

case." *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004), *cited in Bryant v. State/Crosby*, 901 So. 2d 810, 821-22 (Fla. 2005) (concluding that a 3.851 claim of ineffective assistance was legally insufficient where the substance of the testimony was not described in the motion and the motion did not allege the specific facts to which the witness would testify). Stating that a witness could testify about a subject, without more, is insufficient to require an evidentiary hearing. *Franqui*, 59 So. 3d at 101.

E. MITIGATION

A defendant's claim that he was denied effective assistance of counsel because counsel failed to present mitigation evidence will be rejected where the [sentencer] was aware of most aspects of the mitigation evidence that the defendant claims should have been presented. *Troy*, 57 So. 3d at 835 (*citing Van Poyck v. State*, 694 So.2d 686, 692-93 (Fla. 1997)). Further, if the record demonstrates that counsel's decision not to present evidence "might be considered sound trial strategy" the claim may be summarily denied. *Franqui*, 59 So. 3d at 99 (*citing Michel*, 350 U.S. at 101). Also, as this Court explained in *Winkles v. State*, "an ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword." 21 So. 3d 19, 26 (Fla. 2009). S*ee also Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004).

F. TECHNICAL OMISSONS

If a claim is deemed *facially* insufficient because of a technical omission, the trial court should afford the defendant a reasonable opportunity to amend. *See Davis v. State,* 26 So. 3d 519, 527 (Fla. 2009).

G. PROCEDURAL BAR

In addition to legal insufficiency and refutation by the record as bases for denial, the trial courts must also summarily deny claims that are procedurally barred. This Court has consistently held that a claim that could and should have been raised on direct appeal is procedurally barred in post-conviction proceedings. *Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006); *Davis v. State*, 928 So. 2d 1089, 1116-1136 (Fla. 2005); *Duckett v. State*, 918 So. 2d 224, 231 (Fla. 2005); *Robinson v. State*, 913 So. 2d 514 (Fla. 2005). Further, it is inappropriate to use a different argument to relitigate the same issue. *Willacy v. State*, 967 So. 2d 131 (Fla. 2007). A procedurally barred claim cannot be considered under the guise of ineffective assistance of counsel. *Freeman,* 761 So. 2d at 1067 (holding that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel). *See also Rodriguez v. State/Crosby*, 919 So. 2d 1252, 1262 (Fla. 2005).

SUMMARY OF ARGUMENT

England's claim that Steven Diehl was acting as a state agent is procedurally barred, it was waived, and it has no merit. England's trial counsel moved to suppress Diehl's testimony alleging that Diehl was acting as a state agent. The trial judge denied the motion and made specific findings of fact that Diehl was not a state agent. England could have raised this claim on direct appeal, but did not. To avoid the procedural bar, England alleges ineffective assistance of counsel. Claims that could have been raised on direct appeal cannot be re-litigated under the guise of ineffective assistance of counsel.

England waived any claim of ineffective assistance of counsel when he demanded a speedy trial against his attorneys' advice. Even if counsel was deficient and there was prejudice, it was England's decision to go to trial before his attorney had a reasonable amount of time to prepare for both phases of a capital murder trial. The state did not solicit Diehl to gather information from England; Diehl was told "not to approach the defendant, not to initiate conversations, and not to act as the agent of the police." Furthermore, this Court has repeatedly observed that recantations are "exceedingly unreliable."

In preparing for trial, there was no evidence or indication that England had mental health problems. England was very reluctant to share anything with is attorneys and he seemed to be "an intelligent man . . . didn't see any indication of

any mental health disorders." Counsel is not deficient for failing to request a mental health evaluation if there is no reason to suspect mental health issues.

Nonetheless, counsel had England evaluated before the *Spencer* hearing and nothing good came from the mental health evaluation. Dr. Danziger was not able to provide any statutory or nonstatutory mitigation. In fact, his report indicated some things that would lead to additional aggravators. Furthermore, England has waived any deficiency caused by demanding speedy trial, despite Mr. Keating's warning that he had not prepared for the penalty phase. As Mr. Keating stated, there was no evidence of mental health mitigation; however, there was mental health evidence that could be considered negatively. Dr. Carpenter was not a credible witness. Dr. Carpenter's diagnosis of Bipolar Disorder is unsubstantiated and contradicted by Drs. Danziger and Riebsame. Furthermore, Dr. Carpenter's homophobic rage theory is more likely to be aggravating in the eyes of the jury, rather than mitigating.

Lastly, contrary to what England's mother and sister now claim, the evidence demonstrates that the defense team pleaded with England's family to stay and testify for him at the penalty phase, but they chose not to stay. There can be no deficient performance where mitigation witnesses made themselves unavailable. Furthermore, the testimony presented at the evidentiary hearing from Ines and Alison was cumulative to that presented at the penalty phase.

ARGUMENT

ISSUE I: WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO QUESTION STEVEN DIEHL ABOUT HIS RELATIONSHIP TO THE STATE

In his first claim, England argues that witness Steven Diehl was a State agent and that trial counsel was ineffective for failing to discover Diehl's agency. This issue is procedurally barred, this claim of ineffective assistance of counsel was waived by England when he demanded a speedy trial, and this claim has no merit.[20]

A. The Trial Judge's Order Denying Post-Conviction Relief

After an evidentiary hearing, the trial court made the following findings of fact and conclusions of law with regard to England's claim about witness Steven Diehl.

> Defendant asserts that Counsel was ineffective for failing to question Witness Stephen Diehl ("Witness Diehl") about his relationship with the State. Defendant argues that inmate, Witness Diehl, who presented testimony to the jury, was acting as a State agent when he elicited statements from Defendant. "Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." *Demps v. State*, 416 So. 2d 808, 809 (Fla. 1982). Further, the Florida Supreme Court found that an "inmate was

[20] The State argued in the court below that this issue is procedurally barred for failure to raise it on direct appeal. Notwithstanding, the lower court held an evidentiary hearing on the issue. The State continues to assert the issue is procedurally barred, but will address the issue of waiver and the merits. The State argues in the alternative: that the issue is procedurally barred, that it was waived, and that it has no merit.

not a state agent where the inmate approached the authorities on his own initiative and, after speaking with authorities, the inmate was neither encouraged nor discouraged from obtaining further information." *Dufour v. State*, 495 So. 2d 154, 159 (Fla. 1986); *but see Walls v. State*, 580 So. 2d 131 (Fla. 1991) (where a corrections officer was considered a State agent).

During the deposition of Witness Diehl, Counsel Robert Sanders ("Counsel Sanders") questions focused on Witness Diehl's communication with law enforcement. The following colloquy occurred:

> DEFENSE COUNSEL SANDERS ("Q"): Did - - were you given anything of benefit or were you - - did you benefit at all by agreeing to testify in this case against Richard England?
> WITNESS DIEHL ("A"): No, sir.
> Q: When did you first talk to law enforcement about this case?
> A: After I had - - was in the same cell block with Richard England. The date I'm uncertain of . . . .
> Q: What instructions were you given as far as contacting or getting information from Richard England?
> A: I was told at that point after contacting - - after having contact with the investigators that I could not act as an agent on their behalf, and that I wasn't to - - to delve into the matter any further unless it was brought to me in normal conversation by Mr. England, that I was not to go and actually be inquisitive on the matter.
> Q: Was there any talk between you and law enforcement about them trying to help get you out of jail early enough to be there when your baby was born?
> A: Not so much on their part. They informed me that they were not able to make any deals or promises with me, but I would be untruthful if I were to say that the thought didn't cross my mind, that it may - - that I may be able to get them to help me out so that I was able to get to that point so I could get out to be there when my daughter was born.

During Defendant's trial, the following exchange took place between Defense Counsel Sanders and Witness Diehl:

> DEFENSE COUNSEL SANDERS ("Q"): How is it that you came to meet with the police?
> WITNESS DIEHL ("A"): I requested to do so.
> Q: How did you request that?
> A: Through a sergeant of the corrections facility.

Lastly, the evidentiary hearing transcript reflects the following colloquy between Defendant's Counsel, James V. Viggiano, and Witness Diehl:

> COUNSEL []: While you were in Volusia County, in Volusia County jail, did a jail deputy ever approach you about an offer to help yourself?
> WITNESS DIEHL ("A"): Yes
> Q: While you were in the Volusia county jail, did a jail deputy ever approach you about some kind of an offer?
> A: Yes, he did.
> Q: . . . What did the jail deputy say to you?
> A: He had asked me if I was - - well, he didn't ask me. He informed me that he knew I was kind of buddying [sic] up with Richard England and asked me if I would be interested in speaking with anyone about what was told to - - you know, information that I heard from Richard England.

The Florida Supreme Court held that an inmate acted as a state agent where statements were "directly elicited by the State's stratagem deliberately designed to elicit an incriminating statement from [the defendant]." *Smith v. State*, 28 So. 3d 838, 858 (Fla. 2009) (emphasis original); *cf. Dufour*, 495 So. 2d at 159 ("inmate was not a state agent where the inmate approached the authorities on his own initiative and, after speaking with authorities, the inmate was neither encouraged nor discouraged from obtaining further information"). On May 17, 2004, the trial judge denied Defendant's Motion to Suppress the testimony of Witness Diehl. In the trial court's written order, the trial judge noted that "Investigator McGuire was entirely passive regarding the securing of information from defendant Diehl. McGuire told Diehl not

to approach the defendant, not to initiate conversations, and not to act as the agent of the police." The trial court's order on the Motion to Suppress centered on whether law enforcement procured Witness Diehl's assistance to determine whether he was a state agent. After consideration, the trial court held that Witness Diehl was not an agent of the state; and this Court agrees.

Further, this is a claim that should have been raised on direct appeal; and as such, it is procedurally barred. *See Topps v. State*, 865 So. 2d 1253, 1254 (Fla. 2004) ("The term 'procedural bar' is a very broad term essentially meaning that the case, claim, or issue is precluded in some manner from being considered on the merits."); *see also Everett v. State*, 54 So. 3d 464 (Fla. 2010) (where at the pretrial suppression hearing of a defendant's deposition the court denied a motion to suppress, and the Florida Supreme Court held that the defendant's claim was procedurally barred).

Even if Defendant's claim was not procedurally barred, Defendant's allegation that Counsel was ineffective for not discovering that Witness Diehl was a state agent, has not satisfied the requirements of *Strickland*. In order to prevail on a claim of ineffective assistance of counsel, the defendant must show: "(1) that his counsel's performance was deficient - i.e., unreasonable under prevailing professional norms; and (2) that the deficiency prejudiced the defense - i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Jones v. State*, 998 So. 2d 573; 582 (Fla. 2008) (*citing Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052). Further, "when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." *Evans v. State*, 946 So. 2d 1 (Fla. 2006) (*quoting Whitfield v. State*, 923 So. 2d 375, 384 (Fla. 2005)). **Moreover, passivity on the part of law enforcement is the critical factor in the analysis of the culpability of their conduct**. *Rolling v. State*, 695 So. 2d 278 (Fla. 1997). Additionally, **recantation testimony has been determined by the courts to be exceedingly unreliable**. *Lowe v. State*, 2 So. 3d 21 (Fla. 2008).

Here, Defendant has not met his burden to establish that Witness Diehl in fact was acting as a State agent through any solicitation of the

> correction officer. Although, the Deposition lacks any questions by Counsel Sanders about Witness Diehl's initial contact with the corrections officer, this, in and of itself, does not establish Counsel Sanders was deficient. Defendant failed to present the unidentified corrections officer at the evidentiary hearing as a witness to verify who initiated the contact. Further, the testimony provided by Investigator Michael McGuire ("Investigator McGuire") was that he was contacted by a corrections officer who stated that Defendant had requested to speak with law enforcement. Additionally, the Witness's testimony contradicts itself. During trial he testified that he requested to speak with the police through a corrections officer at the jail. However, at the evidentiary hearing he testified that the corrections officer initiated contact with him. Furthermore, even if the corrections officer offered whether Witness Diehl would be interested in speaking with law enforcement, his request was entirely passive. Defendant has not proved that Witness Diehl in fact was an agent of the state because of the alleged communication between Witness Diehl and the corrections officer. Therefore, Counsel could not have been ineffective for failing to discover that Witness Diehl was an agent of the state. Since Defendant has failed to demonstrate that Counsel's performance was deficient there is no need for this Court to address prong two.

(V20, R3127-31) (internal footnotes omitted).

B. Procedural Bar

This issue is procedurally barred. Trial counsel filed a motion to suppress the statement of Diehl, alleging that he was a State agent. The trial court held a hearing on that motion on May 13, 2004, after jury selection. The trial court made findings of fact that Diehl was **not** a State agent. If England disputed that ruling, he should have raised the issue on direct appeal. To avoid that procedural bar, England alleges ineffective assistance of counsel. Claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of

counsel. *See Rodriguez v. State*, 919 So. 2d 1252, 1280 (Fla. 2005).

C. Speedy Trial Waiver

At trial, Judge Foxman addressed England's refusal to waive speedy trial.

> THE COURT: First of all, let's deal with speedy trial. You're the one that makes the ultimate decision as to whether or not that's waived. And we provide you . . . we do the best we can. **We provide you with an excellent attorney. And you've got one**.
>
> THE DEFENDANT: **Yes, sir, I do**.
>
> THE COURT: Well, you ought to be listening to him, because he's very smart. He's very experienced. And he works his cases very well. And he doesn't sell his clients out. And I'm sure in good faith he thought that you all were prepared to waive speedy trial. And out of an abundance of caution, I asked him to get it in writing. And then you balked.
>
> Ultimately, you make that decision. You can say, No, I'm not going to waive, and we'll crank it up and we'll try the case. I think it'd probably be to your detriment. You ought to listen to your attorney and follow what he says. But you make that decision after consulting the attorney. We need to know now if you're going to –
>
> THE DEFENDANT: Yes, sir, I understand that.
>
> THE COURT: Well, let's talk a little bit further. So if you're going to . . . if you're going to refuse to waive, then I'm going to say let's crank it up and we'll take it to trial. Again, because it's your decision. I strongly urge you to listen to and evaluate the arguments of your attorney. You've got a good one. And you should never forget that. Appointing Jerry Keating was one of the best things that anybody could have done for you.

(DAR, V4, R661-662).

After this colloquy with the trial judge, England initially signed the waiver

of speedy trial. (DAR, V4, R669). Then, England abruptly withdrew his waiver and demanded to go to trial.

> THE DEFENDANT: Your Honor, I change my mind. I'm going to go to trial. I'm ready for the trial. I'm not going to wait anymore. I'm sorry.
>
> MR. DAVIS: The state's ready, Your Honor.
>
> MR. KEATING: I'm not.
>
> THE DEFENDANT: I've changed it. I'm going in.
>
> MR. KEATING: He's going without me. Your Honor, I'd like to withdraw from the case. I think Mr. England's making a mistake. He's making that mistake without me. I can't be ready for a May trial. And, unfortunately, I think I've got to get out of the case.
>
> THE DEFENDANT: I'm not going to wait another year. I've been locked up too long. I'm not guilty of this charge; simple as that.

(DAR, V4, R670-671).

When England then demanded speedy trial, Mr. Keating moved to withdraw several times, stating that he could not be prepared for trial and could not be effective. (DAR, V4, P666, 667, 670). Judge Foxman denied the motion to withdraw, stating:

> THE COURT: Well, the problem here is, it's his choice. And he makes it. You put him on notice. **As far as any 3.850 or 3.851, he asked for it. And he's going to get it, basically**. So that's where we are.

(DAR, V4, P672). The trial court set a trial date of May 10, 2004 and England personally agreed with that trial date.

THE COURT: . . . . Okay. Sir, you agree to the 10 May date;

THE DEFENDANT: That's correct. Thank you.

Therefore, even if counsel was deficient and there was prejudice, it was England's decision to go to trial before his attorney had a reasonable amount of time to prepare for both phases of a capital murder case.

D. Merits—Case Law Supporting the Trial Court's Findings That Diehl was not a State Agent and the Post-Conviction Court's Findings that Counsel was not Deficient

Trial counsel filed a motion to suppress the testimony of Diehl. (DAR, V2, P265-266). Judge Foxman held a hearing on the motion on May 13, 2004. (DAR, V8, P958-1006). Investigator McGuire was specifically questioned regarding his conversations with Diehl and instructions on eliciting information. (DAR, V8, P970-974, 978-83). Trial counsel argued that Diehl was a State agent. (DAR, V8, P994-998). The trial judge denied the motion to suppress on May 17, 2004, **finding specifically that the State did not solicit Diehl to elicit information from England, and that Diehl was told "not to approach the defendant, not to initiate conversations, and not to act as the agent of the police."** (DAR, V7, R396-97). These findings still stand. England claims his attorneys were ineffective for not "discovering" Diehl was a State agent. Yet, he admitted no testimony or

evidence to prove that Diehl was, in fact, acting as a State agent.

At the evidentiary hearing, Diehl testified that an unidentified corrections officer came to him and asked if he wanted to help himself out. Diehl described the supposed corrections officer, but presented no testimony from any officer. This testimony is not credible—that a corrections officer would insert himself in a murder case for no reason. The State tendered copies of the work logs (Def. ID M) to the witness for the dates in question (V7, R813-14) and presented testimony from two corrections officers that were in Diehl's area and met the description Diehl provided. (V7, R803-17). Not only did the corrections officers not know anything about this allegation, it became apparent that an officer contacting an inmate about giving information is outside the realm of reality.

Furthermore, Sgt. Session and Investigator McGuire testified that they were contacted by a corrections officer who contacted them and said **Diehl asked the officer to contact the State Attorney**. As soon as contact was made with Diehl, he was told **not** to solicit information from England. England does not dispute that claim.

England failed to meet his burden of proof under Rule 3.851. England relies on the testimony of Diehl, a convicted felon to the testimony of two corrections officers and two sworn investigators. The post-conviction trial court found that Diehl's evidentiary hearing testimony was not credible, and this Court has

repeatedly stated that it will not substitute its judgment for that of a trial judge who has viewed the witnesses. *See Archer v. State*, 934 So. 2d 1187, 1199 (Fla. 2006). *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001) ("We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact"). Add the fact that at Diehl's interview **he was specifically told not to elicit information**.

In order for England to prove Diehl was acting as a state agent, he would have to show that Diehl was acting in concert with the state and actively instigating a conversation specifically designed to elicit incriminating information. Diehl was specifically advised by Sgt. Session and Investigator McGuire **not** to initiate conversation. If an informant does not take an active role—he merely remains passive rather, and keeps his ears open for anything the defendant might wish to volunteer—then under the analysis in *United States v. Henry*, 447 U.S. 264 (1980), there is no agency relationship which would trigger Fifth and Sixth Amendment protections. *See Lightbourne v. State*, 438 So. 2d 380, 386 (Fla. 1983); *Phillips v. State*, 608 So. 2d 778, 781 (Fla. 1992) (claim that jailhouse informants were state agents had no merit because there was no showing the informants intentionally solicited information about the crimes). Thus, in addition to this issue being procedurally barred, it fails for lack of proof because England has failed to show Diehl was acting as a state agent.

In this case, England fails to establish either prong of *Strickland.* England tries to establish deficient performance by arguing that Attorney Sanders failed to uncover evidence that Steven Diehl was a state agent and trial counsel did not take Diehl's deposition until after the suppression hearing. (Initial Brief at 29-30). England has not proven Diehl was a State agent; thus, Mr. Sanders could hardly have "discovered" a fact that did not exist. To establish prejudice, England must show that (assuming *arguendo* that counsel was somehow deficient), had counsel discovered Diehl was acting as a State agent, Diehl's testimony would have been excluded at trial. As outlined above, trial counsel filed a motion to suppress, the trial court held a hearing on whether Diehl was acting as a State agent, and the trial court entered an order finding Diehl was **not** a State agent. Because this claim has no merit, counsel cannot be ineffective. *See Jones v. State*, 928 So. 2d 1178, 1183 (Fla. 2006); *Elledge v. State*, 911 So. 2d 57, 75 (Fla. 2005); *Davis v. State*, 928 So. 2d 1089, 1120 (Fla. 2005).

England bases his prejudice argument on the allegation that, had counsel taken Diehl's deposition before the motion to suppress and "asked the proper questions," Diehl's testimony would have been suppressed. (Initial Brief at 30). First, because of England's refusal to waive speedy trial, the motion to suppress was heard on the third day of trial and the deposition was taken on the seventh. Thus, the fact the deposition could not be schedule earlier was not due to any fault

of counsel; it was due to England's refusal to allow the time for counsel to conduct his investigation. Secondly, Attorney Sanders did ask Diehl about his relationship with the State at the deposition on May 17, 2004:

> Q: There's various – actually – okay. So you first met Richard England December '03 in the branch jail. Prior to that time had you had any conversations with law enforcement either from Debbie Session or Investigator McGuire or anyone else relating to this case?
>
> A: No, sir.
>
> Q: When did you first talk to law enforcement about this case?
>
> A: After I had – was in the same cell block with Richard England. The date I'm uncertain of. I want to say – I want to say it was January 5th, but I could be mistaken in that I believe there's a – on the notes that they recorded from our conversation I believe there's a date on there.
>
> Q: Okay. So January 5, '04, meeting with law enforcement –
>
> A: Yes.
>
> Q: -- would have been your first meeting?
>
> A: Yes.
> . . . .
>
> Q: Now, let me talk to you about your meeting with law enforcement January 5, '04. What were the instructions that you were given by law enforcement as far – well, let me ask you this. I apologize. Were there any conversations you had that were not on tape with law enforcement?
>
> A: No, sir.
>
> Q: Is it possible you had conversations with law enforcement before or after the taped interview?

> A: Just basic cordial conversation, nothing in regards to the – of any pertinent information.
>
> Q: Okay. What instructions were you given as far as contacting or getting information from Richard England?
>
> A: I was told at that point after contacting – after having contact with the investigators that I could not act as an agent on their behalf, and that I wasn't to – to delve into the matter any further unless it was brought to me in normal conversation by Mr. England, that I was not to go and actually be inquisitive on the matter.

(Deposition of Steven Diehl, May 17, 2004, pages 12-15).[21]

England fails to explain how the performance was deficient or how Mr. Sanders was supposed to "discover" Diehl was a State agent (which he was not). Mr. Sanders questioned Diehl about his first contact with law enforcement, whether any promises had been made, and the advice he was given by law enforcement. Investigator McGuire had testified at the hearing on May 13 before the May 17 deposition. (DAR, V5, P962- 998). McGuire testified there were no deals with Diehl, that Diehl was specifically told not to ask questions of England, and not to "actively pursue conversations." (DAR V5, P962-70). Mr. Sanders questioned McGuire extensively at the suppression hearing about Diehl's role, the meetings between Diehl and law enforcement, and documents Diehl provided to law enforcement. (DAR V5, P972-74). On cross-examination by the prosecutor,

[21] This deposition is attached as Appendix B for the Court's convenience. The State requested that the lower court take judicial notice of the deposition.

McGuire testified:

> Q: Investigator McGuire, you went to talk to Mr. Diehl on January 5th because Mr. Diehl had reached out to law enforcement saying he had some information about this particular case. Is that right?
>
> A: That's correct.
>
> Q: And when you got out there, you and Detective Sessions took a taped statement. Is that correct?
>
> A: That's correct.

(DAR, V5, P976).

The prosecutor also questioned McGuire extensively about the advice given to Mr. Diehl about soliciting statements from Diehl. (DAR, V5, P979-86). Mr. Sanders, even though McGuire had testified that there was no arrangement with Diehl and the advice given Diehl, still pursued the issue and set a deposition of Diehl. Diehl testified consistently with McGuire regarding his first contact with law enforcement and the advice he received. The fact that Diehl has now recanted that testimony does not mean Mr. Sanders was deficient. This Court has repeatedly observed that recantations are "exceedingly unreliable." *See Archer v. State,* 934 So. 2d 1187, 1196 (Fla. 2006); *Johnson v. State*, 769 So. 2d 990, 998 (Fla. 2000); *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999); *State v. Spaziano*, 692 So. 2d 174, 176 (Fla. 1997); *Robinson v. State*, 707 So. 2d 688, 691 (Fla. 1998).

E. Appellant's Case Law is Distinguishable

The Appellant cites *Stephens v. State* to the Court in support of his claims of

ineffective assistance of counsel. 748 So. 2d 1028 (Fla. 1999).[22] While this Court's opinion in *Stephens* provides a comprehensive outline of the standard for ineffective assistance of counsel claim under *Strickland*, the facts of that case are markedly different from this case.

In *Stephens*, the defendant was convicted of battery of a law enforcement officer and resisting arrest without violence. *Id*. at 1029. Stephens' sole defense was that he was the victim of police brutality and his resistance was in self-defense. Stephens filed a Rule 3.850 motion for post-conviction relief alleging that his attorney was ineffective because: he failed to point out that the State's rebuttal medical expert witness was testifying about Stephens' injuries based on photographs rather than his recollection of physically examining the wounds; and he failed to correct a witness as to the date when the photographs were taken, which effected the substance of the expert testimony. The trial court granted Stephens a new trial because of counsel's errors and this Court affirmed.

In this case, England forced his attorneys into going to trial before they had

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[22] Appellant also cites *Massiah v. United State*, 377 U.S. 201 (1964), *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), *United States v. Li*, 55 F.3d 325 (7th Cir. 1995), and *United State v. Henry*, 447 U.S. 264 (1980) to the Court. Those cases, however, address the question of whether a witness was acting as a state agent as a subterfuge for a custodial interrogation, not whether counsel was ineffective for failing to discover the witness's agency; assuming arguendo the witness was a state agent.

enough time to properly investigate the case, nonetheless, the attorney's provided reasonable and competent assistance under the circumstances. England's attorney's pursued an alibi defense, attempted to discredit the codefendant's testimony, attempted to suppress numerous admissions that England made to various witnesses, and creatively attempted to have the case dismissed on speedy trial grounds based on an arrest for separate offenses two years prior to the indictment in this case. Stephens' attorney failed in the fundamental task of pursuing his client's only defense to a third-degree felony and a first-degree misdemeanor with a simple fact pattern. England, on the other hand, hemmed his lawyers into a corner by demanding to go to trial on capital murder before they had sufficient time to investigate the case. Notwithstanding England's demands, Attorneys Keating and Sanders managed to provide constitutionally effective representation.

F. Prejudice

As to the prejudice prong of *Strickland*; even if Diehl's testimony had been excluded under a state agency theory, it would not have changed the outcome. There was ample evidence of England's guilt, and Diehl's testimony was only one piece of the puzzle. *See Van Poyck v. State*, 961 So. 2d 220, 226 (Fla. 2007); *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006). Telephone records indicated that on the night of the murder, several calls were made from Wetherell's home to England's friends, none of whom knew Jackson or Wetherell. One of the friends, Ivy Evans,

testified that England's voice was on her answering machine on a call from Wetherell's home the night of the murder. England originally denied ever being at Wetherell's house. Then England said he was at Wetherell's house, but that he was never in the upstairs bedroom where Wetherell was killed. He claimed that Jackson killed the victim and he was downstairs the entire time. Yet England's DNA was found on a cigarette butt in the upstairs bedroom where Wetherell was killed. A photograph of Wetherell recovered from the crime scene had the words "pervert, f—k with us," written on it. Expert testimony established that it definitely was not Jackson's handwriting on the picture and probably was England's. Witness DeLeon also testified that England admitted that he and Jackson killed Wetherell by beating him to death with a fire-poker. DeLeon also testified that England had written him a letter in which England asked DeLeon not to testify against him. Accordingly, England did not suffer prejudice from the admission of Diehl's testimony.

ISSUE II: WHETHER TRIAL COUNSEL'S PREPARATION FOR THE PENALTY PHASE, UNDER THE CIRCUMSTANCES, FELL WITHIN THE BROAD SPECTRUM OF REASONABLE AND EFFECTIVE REPRESENTATION

In his second claim for post-conviction relief, England alleges that his trial counsel was effective for failing to adequately prepare for the penalty phase and failing to challenge the State's case in aggravation. In his initial brief, England

focuses on two aspects of the penalty phase: that trial counsel did not have England evaluated by a mental health professional until after the jury's sentencing recommendation; and that trial counsel did not present mitigation about England's general family background and troubles he experienced during childhood.

A. The Trial Judge's Order Denying Post-Conviction Relief

After an evidentiary hearing on this issue, the trial court made the following findings of fact and conclusions of law with regard to England's claim about trial counsel's preparation for the penalty phase of trial.

> Defendant asserts that Counsel was ineffective for: (1) failing to adequately investigate and prepare for the penalty phase of the trial by failing to timely have Defendant evaluated by a mental health professional; (2) and failing to adequately investigate Defendant's background to provide statutory and non-statutory mitigators which were available for presentation to the judge and jury.
>
> As to the former part of this claim, when there is no reason to believe that mental health issues are present counsel cannot be deemed deficient for their failure to request a mental health evaluation. *Evans,* 946 So. 2d at 9. Further, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, *466* U.S. at 691. At the evidentiary hearing, Counsel Keating stated that he "didn't think [Defendant] had any mental health problems . . . . Defendant seemed to be an intelligent man and [Counsel Keating] didn't see any indication of any mental health disorders." Therefore, Counsel Keating could not be deemed deficient for failing to identify mental health issues which he was unaware existed.
>
> Further, even if Counsel would have suspected mental health issues, Defendant cannot establish that he was prejudiced by counsel's performance. "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and

rejected and counsel's decision was reasonable under the norms of professional conduct." *Kilgore v. State, 55* So. 3d 487, 499 (Fla. 2010) *(quoting Occhicone,* 768 So. 2d at 1048). Although, Counsel had Defendant evaluated by a mental health expert ("Dr. Danziger") after the guilt phase, the mental health expert did not find any statutory mitigators. However, Dr. Danziger did note the possibility of non-statutory mitigation due to Defendant's abuse during childhood, substance abuse, and ill treatment by his adoptive father. During the evidentiary hearing, Dr. Danziger stated that since he was not able to provide anything helpful to Defendant's case, Counsel Saunders felt it was not necessary that he testify. Further, **Counsel Saunders stated, during the evidentiary hearing, that he would not have had Dr. Danziger testify since his clinical opinion was not mitigating but actually could have been more harmful than helpful**. Particularly, in Dr. Danziger's report, Defendant's behaviors were depicted as being more consistent with antisocial personality disorder in which a person tends to violate societal norms and ends up being in substantial legal and interpersonal difficulty. *See Griffin v. State,* 866 So. 2d 1, 9 (Fla. 2003) ("Trial counsel is not deficient where he makes a reasonable strategic decision not to present mental mitigation testimony during the penalty phase because it could open the 'door to other damaging testimony'"). Although another mental health expert, Dr. Carpenter, examined Defendant and presented the theory that Defendant suffered from homophobic rage, Defendant himself presented a letter to the court indicating that he is not a homosexual. Dr. Danzinger testified that at his meeting with Defendant, he denied being a homosexual. Specifically, during the evidentiary hearing, Dr. Danzinger testified that Defendant "absolutely denied being gay. He said there was not anything gay about him. He rejected any such notion that the murder occurred for that reason." Further, Dr. Riebsame, a third mental health expert, who testified for the State, indicated that Defendant denied that he was a homosexual. Accordingly, Defendant has not demonstrated prejudice.

In the latter part of claim 6, Defendant asserts that Counsel failed to adequately investigate his background in order to provide statutory and non-statutory mitigators which were available for presentation to the judge and jury. Specifically, Defendant asserts that the "lead" that Alison England had been sexually abused by Cline merited further investigation. The Court disagrees with this contention.

Defendant's contention that Counsel Keating is ineffective for not having Defendant's family present to testify during the penalty phase of the proceedings is without merit. Counsel Keating indicated during the evidentiary hearing that he was not aware that Defendant was sexually abused by a stepfather until Defendant filed the instant 3.851 motion. Further, **Counsel stated that, he attempted to have Defendant's family testify for the penalty phase but that they indicated they needed to return home**. Counsel could not be deemed deficient since the witnesses were unavailable. *See Hartley v. State, 990 So.* 2d 1008, 1013 (Fla. 2008).

Further, Defendant is unable to establish prejudice. Counsel testified that he was unsure of the connection being raised that Defendant's sister was sexually abused since Defendant did not live at home during that time. The court in *State v. Larzelere*, 979 So. 2d 195 (Fla. 2008) pointed out that "ordinarily, counsel is not considered deficient where counsel has made a strategic decision. However, strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." The court concluded in *Larzelere* that counsel would have seen a reason to involve a mental health expert for defendant if he interviewed her family members. *Id* at 206. In the instant case, Counsel's performance was complete. Counsel interviewed family and had no reason to believe that Defendant was sexually abused. Further, as the State indicated, during the penalty phase of the proceedings there were four witnesses that testified for Defendant; and the trial judge made substantial findings of mitigation which supports that Counsel Keating adequately presented mitigators for consideration. The Court notes the State is correct that, "there is no reasonable probability that the balancing of aggravating and mitigating factors would have resulted in a life sentence." *See Hartley*, 990 So. 2d at 1013. As such, Defendant has not established prejudice.

Lastly, Defendant asserts that the instant case is analogous to *Larzelere.* In *Larzelere,* counsel did not spend adequate "time preparing for the penalty phase, never sought out Defendant's background, never sufficiently followed-up on the investigator's report outlining the abuse and family history, never interviewed

> Defendant's family members and Counsel did not obtain informed mental health evaluations of Defendant sufficiently in advance of the penalty phase." *Larzelere,* 979 So. 2d at 203. The decision to waive speedy trial rights is not a core function[,] a Defendant has a right to make that decision. "Honoring a client's wishes in this regard is not the same as an attorney allowing the defendant to perform a core function of the attorney's role in the defense." *Boyd v. State,* 45 So. 3d 557, 559 (Fla. 4th DCA 2010); *see e.g., Rose v. State,* 617 So. 2d 291, 294 (Fla.1993) ("When a defendant preempts his attorney's strategy by insisting that a different defense, be followed, no claim of ineffectiveness can be made.").
>
> In the instant case, Defendant waived speedy trial against his counsel's advice. The Court points out that at the onset of the trial, Counsel was adamant that he needed more time to adequately prepare for the trial but Defendant insisted that speedy trial not be waived.
>
> According to Counsel Keating's testimony, at the evidentiary hearing, when he realized that he was on "a short track for trial in three weeks, . . . [he] had investigator Ross on the case and Ross . . . was doing a general investigation, which would be phase one and phase two." When Counsel Keating was asked if he was satisfied with the penalty phase package he was going to present to the jury, he indicated that "I know we didn't have adequate time to present what I considered a full and comprehensive mitigation presentation, but . . . let's put on our best case." He further indicated, "I tried to talk my client into not having a speedy trial, to allow me to perform my job properly. And I think because he did not waive speedy trial, he impaired my ability to do a good job for him, to do the best job for him." Furthermore, the court spoke with Defendant about his decision not to waive speedy trial. The trial court informed the defendant to "listen to [Counsel] and let [Counsel] do it the right way." *Id.* The Court finds that *Larzelere* is distinguishable from the instant case for the reasons set forth above.

(V20, R3135-39).

B. Case Law Supporting the Trial Court's Finding

Mental health evaluation

England faults counsel for failing to have him evaluated by a mental health professional before the penalty phase. As stated above, England has waived any deficiency caused by demanding speedy trial, despite Mr. Keating's warning that he had not prepared for the penalty phase.

> THE COURT: I think the question is: Could you have done a better job had he waived speedy trial?
>
> MR. KEATING: **Absolutely, positively, that was my goal, that was my desire. I tried to talk my client into not having a speedy trial, to allow me to perform my job properly. And I think because he did not waive speedy trial, he impaired my ability to do a good job for him, to do the best job for him**.

(V5, R495). As the Supreme Court noted in *Strickland,* 466 U.S. at 691, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *See also Cherry v. State*, 781 So. 2d 1040, 1050 (Fla. 2000); *Peterka v. McNeil*, 532 F.3d 1199, 1206 (11th Cir. Fla. 2008).

Moreover, there was no deficient performance. Mr. Keating testified at the evidentiary hearing that there was no indication England had mental health problems. England seemed to be "**an intelligent man and I didn't see any indication of any mental health disorders**." (V5, R499). Keating did have Dr. Danziger appointed after the penalty phase; however **Dr. Danziger:**

> **[W]as not able to provide statutory or nonstatutory mitigators. And, in fact, his report indicated some things that would lead, perhaps, to additional aggravators.**

(V5, R499). Counsel is not deficient for failing to request a mental health evaluation if there is no reason to suspect mental health issues. *Evans v. State*, 946 So. 2d 1, 9 (Fla. 2006).

Neither was there prejudice. After Keating received Dr. Danziger's report, he made a strategic decision not to use the information at the *Spencer* hearing. As Mr. Keating stated, there was no evidence of mitigation; however, there was evidence that could be considered negatively. (V12, R, 1691-1778, Defense Exhibit #4). In Dr. Danziger's report, England was diagnosed with Antisocial Personality Disorder "a pervasive pattern of disregard for and violation of the rights of other." (V12, R1691-1778, Defense Exhibit #4). Dr. Danziger did not see evidence of any statutory mitigation, but outlined the potential non-statutory mitigation of childhood abuse, mistreatment by his adoptive father, and substance abuse. England was also diagnosed with Polysubstance Dependence.

It is not clear whether England is faulting trial counsel for failing to hire Dr. Danziger earlier and present his testimony at the penalty phase or for failing to call Dr. Carpenter. Either way, the *Strickland* standard is not what another attorney would do in hindsight or by second-guessing the trial lawyer, but what a reasonable attorney would do under the circumstances. *See Power v. State*, 886 So.

2d 952, 962 (Fla. 2004); *Johnson v. State*, 769 So. 2d 990, 1001 (Fla. 2000) (Counsel's strategic decisions will not be second-guessed on collateral attack); *Brown v. State/Crosby*, 846 So. 2d 1114, 1122 (Fla. 2003).

As Mr. Keating testified, he would not have presented the testimony of Dr. Danziger because it was not mitigating. Mr. Keating's objective was to "convince these jurors that [England's] life is worth keeping." (V5, R494). Dr. Danziger testified for the State at the evidentiary hearing and repeated that England is antisocial. Further, he disputed the diagnoses of Dr. Carpenter that England is Bipolar and homophobic.

Dr. Carpenter's theory of homophobic rage is also discredited by Mr. Keating's testimony that England was adamant that he was not a homosexual and that Mr. Keating should not make that a theme of the case. (V5, R525). Mr. Keating's credibility on this issue is supported by England's letter to the court below asking that Claim 6 be deleted because he is not a homosexual. (V11, R1566-69, State Exhibit #1). Dr. Riebsame, also called by the State, supports Dr. Danziger's opinion that England is antisocial and, even worse, is a psychopath. Further, England denied to Dr. Riebsame that he is a homosexual, further discrediting Dr. Carpenter's other theory that Mr. Wetherell was killed in a homophobic rage. Dr. Danziger testified that a diagnosis of "homophobic rage" is not a recognized diagnosis. Dr. Carpenter failed to explain how he could reach the

conclusion that England was under the influence of extreme emotional disturbance at the time of the murder when England denied being involved. (V4, R349). Neither could Dr. Carpenter explain his opinion on homophobic rage when England denies being a homosexual. (V4, R350). Dr. Carpenter did not deny that England had antisocial tendencies. (V4, R354).

England fails to explain how trial counsel could be ineffective for failing to present the damaging testimony of Dr. Danziger or, in the alternative, the testimony of Dr. Carpenter who would be significantly impeached and rebutted by both Dr. Danziger and Dr. Riebsame. Not to mention the fact that Dr. Carpenter's "homophobic rage" theory would not likely be mitigating in the eyes of a jury. Therefore, England cannot establish either of the Strickland prongs.

Investigation and presentation of mitigation

England claims counsel was ineffective for failing to investigate his background and present mitigation testimony. To support his claim, he presented the testimony of his mother Ines Fyffe his sister Alison England. Although these witnesses testified at the evidentiary hearing that they were told their testimony was not necessary at the penalty phase—so they went home—that testimony is thoroughly refuted by the testimony of Mr. Keating, Mr. Sanders, and Mr. Ross. Therefore, there can be no deficient performance where the witnesses made themselves unavailable even though the testimony shows that the defense team

pleaded with them to stay and testify.

Likewise, there was no prejudice. Investigator Ross testified to all the facts and details of England's life. The testimony presented at the evidentiary hearing was cumulative to that presented at the penalty phase.

Penalty Phase Testimony

Four witnesses testified for England at the penalty phase: Thomas Anderson, Shane Conner, Jake Ross, and Karen Duggins. The trial judge made the following findings as to mitigation presented:

> The Court finds no statutory mitigating factors to have been reasonably established by the evidence. The Court however will address all the statutory mitigating factors. The Court did find several non-statutory mitigators and will discuss them.
>
> 1. **Florida Statute 921.141(6)(a): The defendant has no significant history of prior criminal activity.**
>
> This factor was not established. To the contrary, Defendant murdered Mr. Ryland in 1987.
>
> 2. **Florida Statute 921.141(6)(b): The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.**
>
> Defendant denied committing the murder. There was some evidence of drug and alcohol consumption by the Defendant prior to the murder, but not enough to establish this mitigator.
>
> 3. **Florida Statute 921.141(6)(c): The victim was a participant in the defendant's conduct or consented to tire act.**
>
> This mitigator was not established.
>
> 4. **Florida Statute 921.141(6)(d): The defendant was an accomplice in the capital felony committed by another**

person and his or her participation was relatively minor.

There was much conflicting evidence presented on this issue. At the sentencing phase the Defendant took the stand and protested he did not participate in the murder, only the fencing of the stolen goods. Yet, there was substantial evidence he fully participated in the murder, including actually beating Wetherell with the poker. This Court specifically finds the Defendant was a full and actual participant in the murder, and together with Jackson actually beat Wetherell.

At the July 16, 2004 continuation of the *Spencer* hearing the defense argued that the testimony of Brian Merrill should be considered as evidence that Defendant was not a full participant in the murder. Likewise the defense argued the Court should consider the Co-Defendant's horrible beating of Frank Beamon as evidence indicating Defendant was not a full participant in the Wetherell murder. The Court rejects both arguments.

5. **Florida Statute 921.141(6)(e): The defendant acted under extreme duress or under the substantial domination of another person.**

This mitigator was not argued or established.

6. **Florida Statute 921.141(6)(f): The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.**

There was no mental health issue raised. There was some evidence of drug and alcohol use on the night/morning of the murder, but not enough to establish this factor. Additionally, Defendant's sister mentioned too much alcohol use, but the Court will address this under non-statutory mitigators.

7. **Florida Statute 921.141(6)(E): The age of the defendant at the time of the crime.**

The Defendant was 29 at the time of the crime. His sister testified Defendant was stuck at age 16 behavior wise. Additionally, defense counsel at the July 16, 2004 *Spencer* hearing argued the Court should

consider Defendant's disruptive trial behavior as evidence of emotional arrestment, and it should be used to support age as a mitigator.

This Court disagrees with both the above arguments. First, the testimony of Tom Anderson, Shane Connor, and Karen Duggins shows that after Defendant got out of prison for the first murder he behaved well. He was a good worker, dependable, socially appropriate, helped other people, a role model, etc.

As to Defendant's disruptive behavior, the Court finds it was intentional and calculated. After the Defendant was finally gagged by the Court he told the deputy assigned to him he finally succeeded in provoking the Court to gag him, and words to the effect it would help get a new trial.

This Court has carefully considered this mitigator and concludes Defendant's age of 29 was not a factor in this case, either in mitigation or otherwise.

8. <u>Florida Statute 921.141(6)(h): The existence of any other factors in the defendant's background that would mitigate against imposing the death penalty.</u>

Evidence was presented to reasonably establish the following nonstatutory mitigating factors:

a. <u>Disparate treatment of Co-Defendant Jackson.</u>

The State allowed Jackson to plea to second degree murder and other charges that could result in sentence up to life in prison, but not death. The State would make recommendation at sentencing based on his assistance (see Defense Exhibit 6). As this Court has found both England and Jackson equally culpable of the murder, a death sentence for England would be disparate. However, the Florida Supreme Court held in the case of *Kight v. State,* 784 So. 2d 396 (Fla. 2001), that it is not disparate sentencing where a co-defendant pleas to a lesser offense in exchange for his assistance to the State. So, legally it is not disparate.

Even from an equitable standpoint any disparity should not be a factor in mitigation. At England's trial Jackson repudiated many of

his prior admissions/statement and tried to exculpate his friend. He said England did not participate. England testified the same. The jury and this Court reject this testimony. England and Jackson chose this risky course and the fact that it results in one having a death sentence and the other not, should not be a mitigating factor.

b. Other Mitigators.

1. Testimony of Tom Anderson, tile contractor:

Defendant was a good worker; learned fast; hard worker; good personality; friendly; outgoing; trustworthy on job; trustworthy with Anderson's family; no violence or anger; clean cut; healthy; did not smoke or drink; good friend; good at tiling; life worth saving.

2. Testimony of Shane Connor, street metal sub-contractor:

Defendant was a good learner; good worker; dependable; trustworthy; professional; desired to learn; did not steal from wallet he left behind; socially appropriate; cheerful; no trouble; observed to be appropriate while with Duggins; helped other people if he could; life worth saving.

3. Family life as told by sister to Jake Ross, P.I.:

Never met father; father abandoned family; mother married Ronnie England; England in the service; much moving; England abusive to wife and children; England an alcoholic; England eventually run out of service; mother leaves and eventually goes to Texas; divorce; England gets kids; England sends sister and brother to mother but keeps Defendant (Defendant wanted to be with siblings); at age 11 Defendant learns from mother who real father was; mother marries third husband; Defendant and mother do not have a good relationship; Defendant starts getting into trouble at age 13; England very controlling; England's abuse physical as well a mental; England would come home drunk and scream at and assault children; Defendant was a good student; Defendant's brother recently died of a heart attack. Defendant was a good brother.

4. Testimony of Karen Duggins, girlfriend:

Defendant helped her escape from an abusive relationship; he got along well with her two children; was a role model for her daughter; he was never abusive; was warm, caring, made her feel good; he was compassionate; her dog Peanuts liked him; he worked every day; he contributed to household expenses; Defendant got along well with friends and co-workers; he loved and respected his sister and mother; he was devastated when his brother died; she trusts him; he would never hurt anyone; he helped her return her daughter to Kentucky; he would be a positive influence in prison; Defendant talked to inmates about The Lord. Defendant is religious.

5. Testimony of Richard England, Defendant:

He took advantage of programs during last imprisonment; studied religion; received his high school diploma in 1991; got a two-year degree in mechanical drafting; ran box factory in prison; tutored other inmates; was a training officer; learned to operate computer; started own tile company upon release; drank too much.

6. *Spencer* Hearing:

The defense called three witnesses to testify at the July 9, 2004 *Spencer* hearing. They also presented some documentary evidence as did the State.

a. Allison England: Sister of the Defendant testified by phone from Texas. Her testimony had previously been presented to the jury at the sentencing hearing, through defense investigator Jake Ross. **Much of the testimony was the same as presented by Ross**. She testified:

1. Family was split up when Defendant was 12 or 13;
2. Family lived in many states;
3. Ronnie England, Defendant's adoptive father, was bad alcoholic: a. he had Viet Nam flashbacks; b. it was dangerous to wake him—could be violent; c. was very strict with the boys; d. punished the boys with beatings; punished the boys military style; e. made the boys do push-ups, running; f. children were caught eating

cookies—when wakened he made them sit at table filled with junk food and eat until they were sick.

4. The Defendant was still respectful to Ronnie England.
5. The Defendant is a good person, is cheerful, smiling, and helps others;
6. Ronnie England abused the Defendant;
7. The split of the children's' custody was against their will and father did it intentionally;
8. She loves her brother; life cheated them out of a relationship;
9. She wishes her three children could know him;
10. Their mother gave more attention to children than father did;
11. Defendant could help other prisoners if given a life sentence;
12. Their mother is distressed about current situation and blames herself;
13. Richard is a wonderful brother;
14. He was well behaved;
15. He was willing to help with anything;
16. He sent his mother art work;
17. He is artistic;
18. He is good with his hands;
19. Defendant, now 32, but maturity frozen in time, never had a chance to grow up; he went to penal institutions early.

b. Inez Fyffe: Defendant's mother testified from Texas by phone.

1. English is her second language (she was difficult to understand);
2. Barry, her younger son, died of a heart attack last year;
3. She calls Defendant "Willie";
4. She met Ronnie England when Defendant was eight months old;
5. Defendant's biological father, Richard Williams, abandoned them while she was pregnant;
6. Ronnie England adopted Defendant;
7. Ronnie England had an alcohol problem;
8. Ronnie England had many drinking/driving offenses;

9. They lived in Panama then moved to Kentucky;
10. Ronnie England mistreated the kids: a. slapped them; b. threw them into a wall; c. wanted them to be perfect; d. son Barry was taken to a psychiatrist because of mistreatment; e. thinks Defendant needed psychiatric treatment after he lived with Ronnie England; f. Ronnie England discharged from the Army for too many DUI's and lost his military benefits; g. Ronnie England threatened to kill her with a gun; h. Ronnie England won custody of all three children in their divorce. He let her have custody of Allison and Barry, but kept custody of Defendant to hurt her. This severed communication between she and Defendant; i. Ronnie England brainwashed Defendant against her. She thinks things would have been different if she had custody of "Willie."
11. She and Defendant's relationship is better now;
12. Defendant could help other inmates;
13. Defendant is a good son and good with his sister, Allison.

c. Brian Merrill: Mr. Merrill is presently an inmate at the Volusia County Jail. State witness Diehl tried to get him to snitch on Defendant in exchange for a plea deal. Diehl said he would lie against Defendant.

1. Merrill was impeached by the State;
2. He is a good friend of Defendant's;
3. He has seven prior felony convictions;
4. He was found guilty of carjacking last month and faces a lengthy PRR sentence;
5. Mental health evaluations of Merrill show he is troubled, possibly malingering.

7. <u>Discussion of Mitigators:</u>

The Court found no statutory mitigators to be established. On the other hand, the Court finds the non-statutory mitigators to be strong, and entitled to substantial weight. The defense, despite not being allowed enough time by the Defendant to fully develop the sentencing phase, was able to portray the Defendant's other side. In stark contrast to being a brutal killer, they showed him to be intelligent, a quick learner, a hard worker. He is personable,

> trustworthy, a leader, a good friend, and capable of a loving relationship. He is all these things despite a terrible childhood full of abuse, uncertainty, and abandonment. This Court keeps coming back to the testimony of Defendant's mother, Inez Fyffe. Her abusive and alcoholic husband, just to spite and hurt her, kept his one non-biological child and let her take the other two children. The Defendant was torn from his siblings and raised by this abusive man. One cannot help but wonder what would have happened if the Defendant had a normal childhood. If the Defendant had a decent childhood this opinion may not have been necessary. The Court believes these mitigators, at least in part, explain the four jury votes for life. The Court gives these non-statutory mitigators great weight.

(DAR, V3, R461-469).

The trial judge's recitation of the mitigation presented by Mr. Keating shows that trial counsel did present the mitigation available and that even though Ines and Allison would not come back to testify at the penalty phase, their testimony was presented by Jake Ross and later heard telephonically by the judge at the *Spencer* hearing. It was no fault of trial counsel that Ines and Allison refused to return for the penalty phase and does not support a claim of ineffective assistance. *See Hartley v. State,* 990 So.2d 1008, 1013 (Fla. 2008); (counsel not deficient where witnesses "either unwilling or unavailable to testify" at the penalty phase of trial).

C. Appellant's Case Law is Distinguishable

In support of his claim regarding mitigation, England relies primarily on *State v. Larzelere*, 979 So. 2d 195 (Fla. 2008). In *Larzelere*, the defendant conspired to murder her husband in order to gain $3 million in life insurance proceeds and estate assets. This Court ruled that Larzelere had established both

prongs of Strickland because her attorneys failed to properly investigate the defendant's background and mental health and that the significant mitigation presented in post-conviction would have tipped the balance in favor of a life sentence. *Id*. at 202. As the court below indicated in its order, however, *Larzelere* is distinguishable from this case. Larzelere's attorneys never followed up on an investigator's report outlining abuse and family history, they never interviewed the defendant's family, and they never obtained an informed mental health evaluation in advance of the penalty phase (despite having ample time to do so). *Id*. at 203. Mental health experts definitively established that Larzelere was sexually abused as a child by her father and an uncle, that she was physically abused as an adult, and that she suffers from personality disorders that explained her relationship troubles and manipulative behavior. *Id*. at 206. Although there was some disagreement among the mental health experts about the specific diagnoses of Larzelere and which statutory and non-statutory mitigation was established, it was clear that Larzelere had been sexually abused as a child and that any reasonable juror would have found that to be significantly mitigating. *Id*. at 206-207.

In England's case, however, there was no evidence to substantiate that England had been sexually abused as a child. Despite speculation by his mother and sister, England himself flatly denied ever being sexually abused. The maltreatment by England's militant father was presented through the testimony of

the defense investigator based on the information he obtained from the family. The claim from the mother and sister that they were never asked to stay and testify for England was overwhelmingly contradicted by the entire defense team—it was clear they voluntarily absented themselves from the penalty phase. Lastly, the mental health evaluation by Dr. Danziger revealed nothing that would have helped England in the eyes of the jury. In fact, it is more likely that Dr. Danziger's testimony would have been aggravating. England's case is very different from Larzelere's.

England also cites *Wiggins v. Smith*, 539 U.S. 510 (2003), in support of his penalty phase claim, where the United States Supreme Court revisited ineffective assistance of counsel for failure to investigate. In *Wiggins*, the trial court denied defense counsel's motion to bifurcate the sentencing phase and counsel was faced with the tactical decision of whether to present evidence that negated his culpability for the crime or mitigated against him receiving the death penalty. *Id*. at 515. But Wiggins' counsel also failed to inquire into his background beyond the probation office's standard presentencing investigation. Despite having promised the jury that they would hear about Wiggins' difficult life, defense counsel failed to present any evidence concerning the defendant's dismal life history—mental health or otherwise—which would have included evidence of his limited intellectual ability and that he was physically and sexually abused at the hands of

his biological mother and by parents in foster care.

The attorneys in *Wiggins* made the fundamental mistake of promising something to the jury in an opening statement and then failing to deliver the evidence. England's attorneys, however, did everything they could to prepare for the penalty phase in a tightly compressed timeframe. The defense team pleaded with his mother and sister to stay and testify on his behalf but they left anyway. The attorneys presented a summary of England's troubled family background through their investigator. The mother and sister testified telephonically at the *Spencer* hearing. They presented evidence from some of his employers that England was a good, productive worker and England's girlfriend testified that he was good to her children.

England's case is also distinguishable from *Collier v. Turpin*, 177 F.3d 1184 (11th Cir. 1999). In *Collier*, the defendant was prejudiced by his attorneys' deficient performance in failing to call several witnesses who would have established a "stark contrast between Collier's acts on the day of the crimes and his history." *Id*. at 1203. The mitigation in Collier's case showed his actions on the day of the murder were out of character for him. England, on the other hand, has killed before and the circumstances of his previous murder are eerily similar to this case—both victims were older homosexual men who were beaten to death. (DAR, V12, R72-73, 89-104)

England cites *Rompilla v. Beard*, 545 U.S. 374 (2005) for an undisputed point of law, but makes no factual comparison to this case.[23]

England also cites *Williams v. Taylor*, 529 U.S. 362 (2000). In *Williams*, the attorneys failed to conduct an investigation that would have uncovered a "nightmarish childhood," organic brain damage, and "borderline mental retardation."[24] Id. at 395. England argues that the Court could substitute "borderline mental retardation" with "bi-polar disorder with ambivalent rage" and the "jury's appraisal of [England's] moral culpability would have been influenced in Mr. England's favor." (Initial Brief at 63-64). England's argument fails to

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[23] In *Rompilla*, the defense attorneys knew that the Commonwealth would seek the death penalty by establishing the defendant's violent criminal history through prior rape and assault convictions, with an emphasis on the transcript of the rape victim's trial testimony. 545 U.S. at 375. Despite being warned twice by the prosecution of their intention to use the criminal history and transcript and despite having access to the prior conviction file through public records and discovery, Rompilla's attorney failed to examine the file at all until the prosecutor's second warning, and afterwards still did not evaluate the entire file. *Id*. Rompilla's attorneys failed in the basic function of reviewing the prosecution's case in aggravation to anticipate what the prosecutor may emphasize and discover any mitigating evidence with which to counter. *Id*. In stark contrast, England's attorneys began attacking the prosecution's case from the beginning with motions to dismiss litigated three months before trial. Different from the lawyers in *Rompilla*, England's attorneys began their analysis of the prosecution's case from the beginning and attacked it with dozens of pretrial motions.

[24] The actual diagnosis for the terms "borderline mental retardation" is Borderline Intellectual Functioning, DSM-IV-TR at 684, which does not trigger the protections in *Atkins v. Virginia*, 536 U.S. 304 (2002).

account for the fact that two mental health experts disputed whether England suffered from Bipolar Disorder, the homophobic rage referenced by Dr. Carpenter is not a recognized disorder and would not likely be mitigating to a jury, and that England's penalty phase mental health evaluation proved to be more aggravating than mitigating.

England cites this Court's remand in *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995) as a basis to do the same in his case. In Hildwin's first post-conviction appeal, this Court remanded for resentencing due to counsel's ineffectiveness at the penalty phase for failing to investigate and present mental health mitigation. *Id*. at 109. Trial counsel was not even aware of Hildwin's psychiatric hospitalizations and suicide attempts, which could have been discovered through even a cursory investigation. In post-conviction, this Court noted that,

> Both experts testified that they found the existence of two statutory mitigators: (1) that Hildwin murdered Cox while under the influence of extreme mental or emotional disturbance; and (2) Hildwin's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Both experts also recognized a number of nonstatutory mitigators: (1) Hildwin was abused and neglected as a child; (2) Hildwin had a history of substance abuse; (3) Hildwin showed signs of organic brain damage; and (4) Hildwin performs well in a structured environment such as prison. In addition, Hildwin presented substantial lay testimony regarding mitigation which was not presented at sentencing.

Id. at 110. Unlike *Hildwin*, nearly all of the lay testimony that England presented in post-conviction is cumulative to what was presented at the penalty phase. Where

Hildwin's mental health mitigation was substantiated with more competent evidence, Dr. Carpenter's opinions about England are a bit dubious when juxtaposed with the opinions of Drs. Danziger and Riebsame. Paul Hildwin's cases do not help Richard England. Much of Hildwin's new mitigation was presented at a resenting penalty phase on remand by a new attorney who had the superior vantage point of reviewing the deficient penalty phase. Notwithstanding the newly presented mitigation, a jury still recommended that Hildwin be sentenced to death.[25]

England draws additional reference from *Orme v. State*, 896 So.2d 725, 732 (Fla. 2005). The distinguishing factor in *Orme*, however, is that counsel knew his client had been diagnosed with a major mental illness and he admitted such a defense would have been significant, yet he offered no reasonable explanation for not pursuing that lead. *Id*. at 735. In England's case, the attorneys had no reason to

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[25] On remand, Hildwin was again sentenced to death and this Court affirmed. *Hildwin v. State*, 727 So. 2d 193 (Fla. 1998). Hildwin has also had subsequent denials of post-conviction relief upheld by this Court. *See Hildwin v. State*, 951 So. 2d 784 (Fla. 2006); *Hildwin v. State*, 84 So. 3d 180, 188 (Fla. 2011) ("at resentencing, two mental health experts testified, both of whom diagnosed Hildwin with brain damage and mental illness. Further, testimony was presented as to the horrific conditions of Hildwin's childhood and the abuse inflicted by his father." Nonetheless, the jury recommended death by a vote of eight to four). Paul Hildwin remains on death row.

suspect England suffered from any mental illness and they were juggling multiple aspects of trial preparation after England forced them into an accelerated trial schedule that left them little time to prepare.

England also cites *Ragsdale v. State*, 798 So. 2d 713 (Fla. 2001). In *Ragsdale*, this Court noted that,

> No expert testimony was presented at the penalty phase regarding how the child abuse, the drug and alcohol abuse, and particularly the history of head trauma may have contributed to Ragsdale's psychological status at the time of the murder.
>
> . . .
>
> Counsel was appointed after various lawyers had withdrawn. Although counsel had experience in criminal defense work in Georgia and worked for several months as an assistant state attorney before entering into private practice, this case was his first and last capital murder case. . . . Indeed, the record reflects that counsel's entire investigation consisted of a few calls made by his wife to Ragsdale's family members. Counsel did not know who his wife contacted or the content of the conversations between his wife and the individuals contacted. Further, counsel did not talk to any family members himself; he only understood from his wife that Ragsdale's family was not particularly helpful or interested. *Id*. at 718-719. . . . we find no evidence that Ragsdale was uncooperative or that he precluded his counsel from investigating and presenting evidence in mitigation."

Id. at 717-719. *Contra Cherry*, 781 So. 2d at 1049-1050 (where the defendant would not provide defense counsel with names of witnesses who could testify on his behalf). Distinguished from *Ragsdale* and like *Cherry*, England was not coorperative with his attorneys in preparing his case for trial. England demanded a speedy trial despite Mr. Keating's warnings that more time was necessary to

adequately prepare for both phases of a capital murder trial. England would not share any details or facts with his attorneys. England wanted no mention of homosexuality in his trial, yet he presents as mitigation in post-conviction testimony from Dr. Carpenter that he "suffered" from a homophobic rage when he murdered Mr. Wetherell.

Finally, England cites *Rose v. State*, 675 So. 2d 567 (Fla. 1996). In *Rose*, penalty phase counsel was ineffective for failing to present a plethora of mitigation to include child abuse, learning disabilities, head trauma and organic brain damage, chronic alcoholism, and personality disorders, all of which contributed to statutory mitigation. *Id*. at 571. This Court held that "counsel's decision, unlike experienced trial counsel's informed choice of strategy during the guilt phase, was neither informed nor strategic. Without ever investigating his options, counsel latched onto a strategy which even he believed to be ill-conceived. Here, there was no investigation of options or meaningful choice." *Id*. at 572-573. Different from *Rose*, England's attorneys made reasonable and competent efforts to presented evidence of England's family history despite having an uncooperative client and uncooperative mitigation witnesses from the England family.

England's brief also goes on to suggest that if Dr. Danziger did not have a favorable opinion to offer England's case, his attorney should have kept looking kept looking until they found an expert that would testify consistent with post-

conviction counsel's theory of the case. (Initial Brief at 65). England's argument overlooks that fact that counsel is not deficient for relying on the opinion of a qualified expert, even if another expert comes along later with a more favorable opinion for the defendant's case. "This Court has established that defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire." *Rodgers v. State*, 38 Fla. L. Weekly S305, S307 (Fla. May 9, 2013) (*citing Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007)).

As a final point, England's brief makes an insinuating remark about Dr. Danziger's response to questions at the evidentiary hearing: ". . . one would presume that Dr. Danziger would want to deflate the 'damage' from his cross-examination testimony and remain in the **good graces** of the Office of the State Attorney." (Initial Brief at 65) (emphasis added). This remark was made in reference to Dr. Danziger answering a clarifying question from the assistant state attorney on re-direct examination. Whatever is to be taken from the comments in England's brief, counsel for the State will not presume, but it is worth noting that Dr. Danziger is frequently consulted and retained to testify on behalf of capital defendants. *See generally Zoomer v. State*, 31 So. 3d 733, 742 (Fla. 2010) (Dr. Danziger testifying for the defendant that he suffered from mental illness and depression); *Victorino v. State*, 23 So. 3d 87, 94 (Fla. 2009) (Defense expert Dr.

Jeffrey Danziger testified about the defendant's long history of emotional abuse, an incident of sexual abuse, and history of mental health problems); *Barnhill v. State*, 971 So. 2d 106, 111 (Fla. 2007) (Dr. Danziger appointed by the court at the request of the Public Defender).

D. Prejudice

There was no prejudice. Even if the testimony England presented at the evidentiary hearing had been presented at the penalty phase, "there is no reasonable probability that the balancing of aggravating and mitigating factors would have resulted in a life sentence." *Id.* The trial judge's summary shows that the testimony presented at the evidentiary hearing was cumulative to that summarized in the sentencing order. The Florida Supreme Court has repeatedly held that counsel is not ineffective for failing to present cumulative evidence. *See Darling v. State*, 966 So.2d 366, 377-78 (Fla. 2007); *Whitfield v. State*, 923 So.2d 375, 386 (Fla. 2005). The testimony of Dr. Carpenter was significantly impeached by two qualified and experienced mental health experts—Dr. Carpenter was not a credible witness. Additionally, Dr. Carpenter's homophobic rage theory is more likely to be aggravating in the eyes of the jury, rather than mitigating. Thus, the sum of what was presented at the evidentiary hearing was simply a little more detail from Ines and Allison which would not have changed the outcome. *See Lynch v. State/McNeil*, 33 Fla. L. Weekly S880, 888 (Fla. Nov. 6, 2008).

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death.

Respectfully submitted and certified,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL to: Richard Kiley, and Ali A. Shakoor, kiley@ccmr.state.fl.us, shakoor@ccmr.state.fl.us, support@ccmr.state.fl.us, CCRC- Middle on May 17th, 2013.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Time New Roman 14 point font.

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