Filing # 23592790 E-Filed 02/10/2015 03:14:34 PM

RECEIVED, 02/10/2015 03:18:36 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

JUSTIN CURTIS HEYNE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC14-1800

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

STACEY E. KIRCHER
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 050218

Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, Florida 32118
Primary E-Mail:
CapApp@MyFloridaLegal.com
Secondary E-Mail:
stacey.kircher@myfloridalegal.com
(386)238-4990
(386)226-0457 (FAX)
COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE#

CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

POSTCONVICTION PROCEEDINGS 24

SUMMARY OF ARGUMENTS 50

STANDARDS ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL 53

ARGUMENTS 55

CLAIM I: THE TRIAL COURT WAS CORRECT IN FINDING NO INEFFECTIVNESS WHERE COUNSEL STRATEGIZED AGAINST FILING A MOTION TO SUPRESS BASED ON A MIRANDA VIOLATION WHEN APPELLANT NEVER INVOKED HIS RIGHT TO AN ATTORNEY DURING DETECTIVE ESPOZITIO'S QUESTIONING. 55

CLAIM II: THE TRIAL COURT WAS CORRECT IN FINDING APPELLANT WAS ACCORDED EFFECTIVE COUNSEL WHEN COUNSEL DECLINED TO FILE A MOTION TO SUPRESS THE K-SWISS BOX APPELLANT ABANDONED IN ROXANN LARABIE'S ATTIC. 64

CLAIM III: THE TRIAL COURT WAS CORRECT IN FINDING APPELLANT WAS ACCORDED EFFECTIVE COUNSEL WHEN COUNSEL PUT ON EVIDENCE OF APPELLANT'S INTOXICATION THROUGH TWO EXPERT WITNESSES RESULTING IN A FINDING OF MENTAL DISTURBANCE MITIGATION. 76

CONCLUSION 93

CERTIFICATE OF SERVICE 93

CERTIFICATE OF COMPLIANCE 94

TABLE OF CITATIONS

CASES **PAGE#**

Abel v. United States,
362 U.S. 217, 80 S.Ct. 683 (1960) 68

Aguirre–Jarquin v. State,
9 So. 3d 593 (Fla. 2009) 91

Almeida v. State,
737 So. 2d 520 (Fla. 1999) 62

Asay v. State,
769 So. 2d 974 (Fla. 2000) 79, 83

Berghuis v. Thompkins,
560 U.S. 370, 130 S.Ct. 2250 (2010) 62

Branch v. State,
952 So. 2d 470 (Fla. 2006) 69

Brown v. State,
959 So. 2d 146 (Fla. 2007) 55, 78

Caraballo v. State,
39 So. 3d 1234 (Fla. 2010) 69

Card v. State,
497 So. 2d 1169 (Fla.1986) 84

Clark v. State,
35 So. 3d 880 (Fla. 2010) 81

Coleman v. State,
64 So. 3d 1210 (Fla. 2011) 79

Collins v. State,
4 So. 3d 1249 (Fla. App. 4th Dist. 2009) 61

Cummings-El v. State,
863 So. 2d 246 (Fla. 2003) 78

Darling v. State/McDonough,
966 So. 2d 366 (Fla. 2007) 83

Davis v. United States,
114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) 60, 61

Ferrell v. State,
29 So. 3d 959 (Fla. 2010) 59

Floyd v. State/McNeil,
18 So. 3d 432 (Fla. 2009) 83

Fotopoulos v. State,
838 So. 2d 1122 (Fla. 2002) 71

Franqui v. State,
59 So. 3d 82 (Fla. 2011) 77

Green v. State,
69 So. 3d 351 (Fla. 2005) 61, 62, 63

Green v. State,
975 So. 2d 1090 (Fla. 2008) 55, 77

Gudinas v. State,
816 So. 2d 1095 (Fla.2002) 84

Harich v. Dugger,
844 F.2d 1464 (11th Cir.1988) 79

Henry v. State,
937 So. 2d 563 (Fla. 2006) 79

Hester v. United States,
265 U.S. 57, 44 S.Ct. 445 (1924) 69

Heyne v. Florida,
133 S.Ct. 574 (2012)...8

Heyne v. State,
88 So. 3d 113 (Fla. 2012) ....passim

Jackson v. State,
648 So. 2d 85 (Fla. 1994) 70

Johnson v. Wainwright,
463 So. 2d 207 (Fla. 1985) 58, 59, 67

Jones v. State,
855 So. 2d 611 (Fla. 2003) 85

Kelly v. State,
77 So. 3d 818 (Fla. 4th DCA 2012)..70

Kilgore v. State,
55 So. 3d 487 (Fla. 2010) 84

King v. State,
79 So. 3d 236 (Fla. 1st DCA 2012) 70

Lambrix v. State,
39 So. 3d 260 (Fla. 2010) 55

Larkins v. State,
739 So. 2d 90 (Fla. 1999) 91

Lawrence v. State,
831 So. 2d 121 (Fla. 2002) 70

Lawrence v. State,
969 So. 2d 294 (Fla. 2007) 68

Melendez v. State,
612 So. 2d 1366 (Fla. 1992) 59

Michel v. Louisiana,
350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83 (1955) 77

Miranda v. Arizona,
86 S.Ct. 1602 (1966)...60

Nelson v. State,
850 So. 2d 514 (Fla. 2003) 89

Nixon v. State,
2 So. 3d 137 (Fla. 2009) 55, 77

Occhicone v. State,
768 So. 2d 1037 (Fla. 2000) ....passim

Owen v. State,
986 So. 2d 534 (Fla. 2008) 59

Provenzano v. Singletary,
148 F.3d 1327 (11th Cir. 1998) 78

Reed v. State,
875 So. 2d 415 (Fla. 2004) 77

Ring v. Arizona,
536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) 4

Robinson v. State,
95 So. 3d 171 (Fla. 2012) 78

Schofield v. State,
681 So. 2d 736 (Fla. 2nd DCA 1996)...55

Schwab v. State,
814 So. 2d 402 (Fla. 2002) 68

Silvia v. State,
60 So. 3d 959 (Fla. 2011) 91

Sochor v. State,
883 So. 2d 766 (Fla. 2004) 78

Spencer v. State,
615 So. 2d 688 (Fla. 1993) 2

State v. Lampley,
817 So. 2d 989 (Fla. 4th DCA 2002) 69

State v. Milligan,
411 So. 2d 946 (Fla. 4th DCA 1982) 69

State v. Miyasato,
805 So. 2d 818 (Fla. 2nd DCA 2001)...71

State v. Owen,
696 So. 2d 715 (Fla. 1997) 62

Strickland v. Washington,
466 U.S. 668 (1984) ....passim

Troy v. State,
57 So. 3d 828 (Fla. 2011) 77, 84

Twilegar v. State,
42 So. 3d 177 (Fla. 2010) 66, 69

Van Poyck v. State,
694 So. 2d 686 (Fla. 1997) 77, 84

Van Poyck v. State,
694 So.2d 686 (Fla. 1997) 77

Walder v. United States,
347 U.S. 62 (1954) 75

*Waterhouse v. Stat*e,
522 So. 2d 341 (Fla. 1988) 93

Wheeler v. State,
124 So. 3d 865 (Fla. 2013) 80, 86

White v. Singletary,
972 F.2d 1218 (11th Cir. 1992) 78

Wiggins v. Smith,
539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) 78

Zommer v. State/Jones,
2015 WL 175087 (Fla. Jan. 15, 2015)....................83

Zommer v. State,
31 So. 3d 733 (Fla. 2010) 90

STATUTES

Fla. State Stat. §465.003(13) 44

PRELIMINARY STATEMENT

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

Unless the contrary is indicated, 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.

RESPONSE TO STATEMENT OF THE CASE AND FACTS AT TRIAL

The State does not accept the statement of the case and facts set out on pages 1-16 of the *Initial Brief.*

STATEMENT OF THE CASE AND FACTS

Justin Curtis Heyne murdered his roommate Benjamin Hamilton, Benjamin's live-in girlfriend Sarah Buckoski, and the couple's five-year old daughter, Ivory Hamilton, on March 30, 2006. Heyne was found guilty of the first-degree premeditated murder of Hamilton, Buckoski, and Ivory, on August 4, 2009, following a jury trial. The penalty phase proceeding was held from August 5, 2009 through August 10, 2009 before the jury. On August 10, 2009, the jury returned a recommended sentence of life in prison without the possibility of parole for Hamilton, and a recommended sentence of death for the murders of Buckoski,

by a vote of eight to four, and Ivory, by a vote of ten to two. (DAR, V25, R3017-18).[1] A *Spencer*[2] Hearing was conducted on August 28, 2009. The trial court sentenced Heyne to life imprisonment for Hamilton and Buckoski, and sentenced him to death for the murder of little Ivory. (DAR, V3, R421, 422).

In aggravation, the court found the following: (1) prior violent felony (great weight); (2) the murder was especially heinous, atrocious, or cruel (HAC) (great weight); and (3) the victim was less than twelve years of age (great weight.)

The following thirteen non-statutory mitigating circumstances were found: (1) Heyne suffers from a mental illness (great weight); (2) Heyne has brain damage and brain deficits (great weight); (3) Heyne had a problem with substance abuse and dependence (moderate weight); (4) Heyne had an impaired capacity to appreciate the criminality of his conduct or conform it to the requirements of law (moderate weight); (5) Heyne was under the influence of a mental or emotional disturbance (little weight); (6) Heyne was a good, caring father to a handicapped son (very little weight); (7) Heyne cared for and helped elderly neighbors when he

---

[1] Citations to the direct appeal record are DAR, followed by "V" for volume number and "R" for page number. Citations to the postconviction appeal record are "V" for volume number followed by "R" for page number. Citations to the supplemental postconviction appeal record are "SRV" for volume number followed by "R" for page number.

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

was a child (very little weight); (8) Heyne gave his flannel jacket to a homeless person (very little weight); (9) Heyne protected younger, weaker children when he was a child (very little weight); (10) Heyne played football and other sports as a child and was devastated when he could no longer play (very little weight); (11) Heyne was recommended to receive in-patient psychiatric treatment at age five but did not receive treatment (moderate weight); (12) Heyne has a history of suicide attempts and self-destructive behavior (moderate weight); and (13) Heyne exhibited good behavior during trial (some weight). *Heyne v. State*, 88 So. 3d at 126-27.

Notice of appeal was duly given on December 17, 2009. (DAR,V3, R576-77). Appellant's Initial Brief was filed on or about August 23, 2010, in which Heyne raised five issues on direct appeal:

(1) The trial court erred in denying his motion for judgment of acquittal;

(2) The trial court erred in finding the HAC aggravator for the murder of Ivory;

(3) The trial court erred in assessing the mental health mitigating evidence;

(4) The death sentence was not proportionate.

(5) Heyne also claimed that his sentence was unconstitutional under *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).[3] Additionally, this Court reviewed the sufficiency of the evidence to support Heyne's conviction.

Each of Heyne's claims lacked merit and was denied, and this Court upheld Heyne's convictions and sentence of death. *Heyne v. State*, 88 So. 3d 113 (Fla. 2012) c*ert. denied*, 133 S.Ct. 574 (2012). This Court found that the evidence presented was sufficient to support the conviction, and that the death sentence was proportionate. In its opinion, this Court rendered the following summary of the procedural history and facts:

> On March 30, 2006, Sarah Buckoski returned to her home with her five-year-old daughter, Ivory Hamilton, to find Heyne and Ivory's father, Benjamin Hamilton, engaged in a verbal dispute. The dispute centered on money Heyne owed to Benjamin and took place in the master bedroom, a 12–by 13–foot room in which law enforcement later discovered drug paraphernalia and several pounds of marijuana. Heyne worked with Benjamin and was temporarily residing with Benjamin, Sarah, and Ivory in Titusville, Florida. Heyne was 24 years old. Benjamin and Sarah were 26 and 24, respectively.
>
> As the argument escalated, Heyne began to feel disrespected. He started to walk away when he heard Benjamin cock a 9–mm gun. Heyne left, retrieved a .38 Special from his room, and then returned to the master bedroom to continue the argument with Benjamin. The two argued while holding their respective guns but did not point them at

[3] The *Ring* claim was not argued independently as a numbered claim; however, it was argued throughout.

one another while arguing. Heyne pushed Benjamin onto the bed. At some point during the dispute, Ivory entered the room, prompting Benjamin to drop the 9–mm. Heyne picked up Benjamin's 9–mm. Benjamin told Ivory to leave the room, and she turned to walk out.

In its sentencing order, the trial court detailed the shootings as follows:

Benjamin Hamilton was shot at a distance of no more than four or five feet. At that point, Sarah Buckoski dove to the floor on the far side of the bed near the wall and started screaming. The defendant shot her next. She was shot one time, but the bullet passed through her arm before it entered the center of the back of the head. At that point, Ivory began to pull on the defendant's shorts and the defendant shot her one time in the head at point blank range.

When law enforcement arrived on the scene, Benjamin was struggling for air on the bed, Sarah was on the floor next to the bed in a fetal position screaming, and Ivory was lying on the floor without a pulse. An autopsy revealed that just prior her death, Ivory was slapped in the face in a manner violent enough to cause a rupture of the blood vessel beneath the skin. A bullet fired from Heyne's .38 Special was found in her skull.

After the shooting, Heyne ran out of the back door with his gun in a pillowcase and with marijuana and cocaine he took from the master bedroom. Heyne called a friend, Roxanne Larabie, and asked her to pick him up. Larabie testified that Heyne admitted to shooting Benjamin and Sarah and that when she asked about Ivory, Heyne "just looked at me and said she was gone." Larabie helped Heyne obtain new clothes identical to the ones he was wearing. When they arrived at Larabie's house, Heyne washed the new clothes in an effort to make them appear worn. He removed his old shoes and clothes, wrapped up his gun in the pillowcase, and put all of the items in a box in Larabie's attic. Law enforcement retrieved the items and discovered bloodstains matching Benjamin's DNA profile on Heyne's pants and the pillowcase.

Heyne was apprehended and questioned regarding the murder, and a videotape of the interrogation was played for the jury at trial. Initially,

Heyne denied that he was at the house at the time of the murder. But when an investigating officer interrupted the interrogation with news that Heyne's gun, bloodied clothing, and pillowcase were discovered in a box in Larabie's attic, Heyne confessed to shooting Benjamin and Sarah and acknowledged seeing Ivory "go down." At the time, Heyne could not remember shooting Ivory and repeatedly denied that he would have shot her on purpose. However, he acknowledged shooting both the 9–mm and the .38 Special and directed the interrogating officer as the officer drew a diagram of the room depicting the placement of Heyne and all three victims during the shootings. Heyne said that his argument with Benjamin began as a non-violent confrontation in which Benjamin never threatened him or pointed his gun in Heyne's direction.

At trial, Heyne advanced the theory that he shot Benjamin and Sarah in self-defense, specifically suggesting in closing arguments that Sarah may have been trying to access a shotgun under the bed. As for Ivory, Heyne argued that the evidence supported an accidental shooting. The prosecution attempted to foreclose the possibility of self-defense and accident, relying heavily on the diagram drawn during Heyne's interrogation to show that the relative positioning of Heyne and the victims precluded either scenario. Ultimately, the jury found Heyne guilty of first-degree premeditated murder of all three victims.

At the penalty phase, Heyne presented mitigation testimony from former educators, family members, and evaluating psychologists. His former educators attested to Heyne's status as a special education student, and his family members testified that he was a caring but difficult child. Dr. Joseph Wu testified that imaging from a PET scan showed damage to Heyne's temporal and parietal lobes, evidencing learning difficulties, causing problems regulating aggression and impulse, and making addiction to alcohol and drugs more likely. Dr. Wu also testified that imaging was consistent with a history of traumatic brain injuries and specifically noted two concussions Heyne suffered as a child, another head injury when Heyne was incarcerated in 2004, and a slow processing speed relative to his IQ score of 88. Dr. William Riebsame diagnosed Heyne with ADHD and possible bipolar disorder—one or both of which caused Heyne to have impulse control disorder—as well as cocaine and alcohol use and dependence

> at the time of the offense. Dr. Riebsame also discussed Heyne's history of impulsivity, including two documented suicide attempts. Dr. Riebsame revealed that Heyne had confessed to shooting Ivory, whom Heyne said was crying and pulling on his shorts after he shot Benjamin.
>
> The jury recommended life imprisonment for the murder of Benjamin, the death penalty for the murder of Sarah by a vote of eight to four, and the death penalty for the murder of Ivory by a vote of ten to two.
>
> The trial court followed the jury's recommendation of death for the murder of Ivory but sentenced Heyne to life imprisonment for the murders of Benjamin and Sarah. For the murder of Ivory, the trial court found three aggravators: (1) Heyne was previously convicted of a felony involving the use or threat of violence (great weight); (2) the murder was especially heinous, atrocious, or cruel (HAC) (great weight); and (3) the victim was less than twelve years of age (great weight). The trial court found the following mitigators: (1) Heyne suffers from a mental illness (great weight); (2) Heyne has brain damage and brain deficits (great weight); (3) Heyne had a problem with substance abuse and dependence (moderate weight); (4) Heyne had an impaired capacity to appreciate the criminality of his conduct or conform it to the requirements of law (moderate weight); (5) Heyne was under the influence of a mental or emotional disturbance (little weight); (6) Heyne was a good, caring father to a handicapped son (very little weight); (7) Heyne cared for and helped elderly neighbors when he was a child (very little weight); (8) Heyne gave his flannel jacket to a homeless person (very little weight); (9) Heyne protected younger, weaker children when he was a child (very little weight); (10) Heyne played football and other sports as a child and was devastated when he could no longer play (very little weight); (11) Heyne was recommended to receive in-patient psychiatric treatment at age five but did not receive treatment (moderate weight); (12) Heyne has a history of suicide attempts and self-destructive behavior (moderate weight); and (13) Heyne exhibited good behavior during trial (some weight).

Heyne v. State, 88 So. 3d 113, 117-119 (Fla. 2012).

The United States Supreme Court denied Heyne’s petition for a writ of *certiorari*

on November 5, 2012. *Heyne v. Florida*, 133 S.Ct. 574 (2012).

PENALTY PHASE FACTS[4]

On August 5, 2009 this case proceeded to the penalty phase. (DAR, V21, R2287). The State presented four witnesses and two rebuttal witnesses. Ron Larson, crime scene technician, collected fingerprints from Heyne on December 12, 2008, which matched those on a print card containing Heyne's prints from a previous conviction. (DAR, V21, R2371, 2373). Detective Arthur Esposito interviewed Heyne on March 30, 2006. (DAR, V21, R2376-77). A CD containing a portion of the interview was entered into evidence. (DAR, V21, R2377). Juanita Perez, Ben Hamilton's mother and Ivory's grandmother, read a victim impact statement to the court. (DAR, V21, R2383-88). Meredith Peacock, victim advocate, read a statement to the court, which was prepared by Debra Reed, Sara Buckoski's mother. (DAR, V21, R2390-92).

In mitigation, Heyne presented seven mitigation witnesses, including a forensic psychologist, a psychiatrist/neurologist, his sister, his father, and three teachers from elementary to high school to prison education. Heyne's mitigation

[4] The facts in this section are relayed as heard by the jury in the penalty phase and considered by the trial court in the *Spencer* hearing. Some of these facts are significantly different from the actual (and less mitigating) facts that were testified to and supported in the evidentiary hearing.

case spanned over 600 pages of the record. To establish his background and education, trial counsel called Lori Swaby, program specialist for Osceola County school system, who taught Heyne in elementary school where he was in special education classes. (DAR, V21, R2396, 2397). Heyne was athletic, well-liked, and respected. (DAR, V21, R2398). Next, counsel called Lauren Harvin, who taught at an alternative education high school where Heyne was a happy student who always completed his work. (DAR, V22, R2416-17). He was "kind of the leader" among students, "a good kid." (DAR, V22, R2418). Heyne had a good family background, and always tried to do his best. (DAR, V22, R2420). Finally, counsel called Bill Hottenstein, who has taught special education classes for over thirty years in both Florida and Louisiana schools and the Louisiana prison system. (DAR, V22, R2421-22). Hottenstein taught Heyne in high school. Heyne was classified as having special learning disabilities and emotional difficulties. (DAR, V22, R2422, 2434). Heyne was "the most positive student in the classroom." (DAR, V22, R2425). Heyne often broke up fights or protected other students. (DAR, V22, R2426-27). After Heyne ended up incarcerated in the Osceola County jail, Hottenstein taught him there, as well. (DAR, V22, R2428). Hottenstein and Heyne kept in touch after Heyne's release from Columbia Correctional Institution. (DAR, V22, R2430-31). They were supposed to meet for dinner the day of the murders. (DAR, V22, R2432).

Next, trial counsel called Dr. William Riebsame, a psychologist, who had evaluated Heyne over a three year period. (DAR, V22, R2435, 2442). He interviewed Heyne eight times and conducted comprehensive psychological testing. (DAR, V22, R2442, 2505). He reviewed a vast amount of records, including school records, medical records, jail records and police reports. (DAR, V22, R2442). In addition, he reviewed psychological evaluations of Heyne from 1998. (DAR, V22, R2451).

In Riebsame's opinion, Heyne has a long-standing history of emotional and behavioral problems dating back to the age of five. (DAR, V22, R2443). Riebsame said Heyne's mother reported that Heyne was born a month late. She had a difficult pregnancy. Heyne was slow in learning how to walk and talk. However, he was active and very aggressive. (DAR, V22, R2445-46). At five years old, Heyne's parents took him to see a child psychiatrist who recommended placement in a mental hospital. Heyne's parents chose not to hospitalize him and cared for him at home. (DAR, V22, R2446). He was placed in special education classes but continued to have behavioral problems. At age ten, Heyne saw another child psychiatrist and was diagnosed with attention deficit hyperactivity disorder. He was placed on psychostimulants such as Ritalin and Adderall. (DAR, V22, R2446). These medications lessened Heyne's impulsivity. (DAR, V23, R2626). Heyne performed well in school during his middle school years both academically and

behaviorally. (DAR, V22, R2446-47).

Heyne was less consistent with his medication when he entered high school. At age sixteen he started getting in trouble with police. (DAR, V22, R2447). A psychological report from 1998 (when Heyne was sixteen) indicated Heyne was diagnosed with attention deficit hyperactivity disorder as well as depressive disorder. (DAR, V22, R2451-52). Heyne told Riebsame about his alcohol and drug dependence that was occurring around the time of the murders. In Riebsame's opinion, Heyne was suffering from attention deficit hyperactivity disorder, and alcohol and cocaine intoxication at the time of the offenses. (DAR, V22, R2448-49).

Heyne had previously been treated for bipolar disorder in prison. Riebsame said "consideration should be given to the possibility of a bipolar disorder." (DAR, V22, V2449, 2450, 2510; V23, R2635). Heyne had made a few suicide attempts in prison and also had behavior problems. As a result, Heyne was administered Lithium and antidepressants to help stabilize his moods. (DAR, V22, R2450-51).

In March 2008, Riebsame spoke with Dr. Gebell, a neurologist, who had previously evaluated Heyne. Gebell identified "soft signs of a neurological disorder." (DAR, V22, R2452, 2486-87, 2504). With the exception of relying on Gebell's assessment of the "soft signs of a neurological disorder," Riebsame gave Dr. Gebell's assessment "very little" significance. (DAR, V22, R2492-93, 2501;

V23, R2617). Riebsame did not agree with Gebell's diagnosis of Asperger's Syndrome or with Gebell's finding that Heyne did not have head trauma. (DAR, V22, R2493, 2501; V23, R2617). Both Heyne and his mother reported numerous concussions. (DAR, V22, R2494). In Riebsame's opinion, the neuropsychological testing Riebsame administered to Heyne indicated some sort of brain abnormality or brain damage.[5] (DAR, V22, R2453). His IQ score was comparable to the 1989 IQ score. (DAR, V22, R2459). Results from the tests administered by Riebsame indicated Heyne was not malingering. (DAR, V22, R2458).

Riebsame also reviewed test data from Dr. Golden, a neurologist, who had previously been retained to evaluate Heyne. Golden's test data indicated Heyne had impulse control issues as well as childhood trauma. Both of Heyne's parents as well as Heyne denied any kind of abuse history. (DAR, V22, R2454). Golden indicated Heyne may be suffering from post-traumatic stress disorder as well as borderline personality disorder. (DAR, V22, R2454).

Riebsame spoke with Dr. Joseph Wu, M.D., who specializes in brain imaging. (DAR, V22, R2454-55). Subsequent to a PET scan conducted on Heyne on August 23 2008, Dr. Wu's report indicated "some sort of brain abnormality in

---

[5] Heyne suffered a concussion at age three when he fell off a dresser and another concussion when he was an adolescent. (V22, R2453).

the temporal and parietal lobes." (DAR, V22, R2455; V23, R2618, 2619, 2684).[6] These areas of the brain affect language development and impulse control. (DAR, V22, R2455-56). Prior to the murders, Heyne attempted suicide by trying to throw himself in front of a train. One of his siblings rescued him. Subsequent to that incident, Heyne spent time in a hospital. The murders occurred a few months later. (DAR, V22, R2456-57). Intelligence testing from 1989 indicated Heyne's IQ was 91, which is in the low-average to average range. (DAR, V22, R2457). Heyne scored an 88 on the WAIS IQ test[7] administered by Dr. Riebsame, which was consistent with his elementary school IQ score. (DAR, V22, R2470-71).

Riebsame said Heyne self-reported that he and Ben Hamilton had abused cocaine during the four days leading up to the murders as well as on the day of the murders.[8] (DAR, V22, R2462). In addition, Heyne self-reported smoking marijuana cigarettes with cocaine in them as well as drinking between ten and

---

[6] There was no record of Heyne having suffered a head injury in jail between his arrest on March 30, 2006, and the PET scan conducted on August 23, 2008. (DAR, V23, R2619, 2684).

[7] Heyne scored an 85 on the verbal IQ and a 94 on the performance IQ. (DAR, V22, R2471-72). Riebsame assessed Heyne's perception abilities, planning, foresight, problem solving skills, mental flexibility, and impulse control. A report by Dr. Wu indicated a brain deficit. (DAR, V22, R2475-76).

[8] There was no toxicological evidence of Heyne's intoxication. (DAR, V22, R2507).

twelve beers throughout the morning and into the afternoon during an eight-hour period. (DAR, V22, R2462, 2505, 2520). However, a toxicology report indicated Hamilton did not have any cocaine in his system at 5:00 p.m. on the day he was killed. [9] (DAR, V22, R2597). In addition, Riebsame noted that Heyne appeared to be unconscious or passed out on a jail cell floor after his arrest. (DAR, V23, R2629). This behavior is common to someone who has been on a drug binge. (DAR, V23, R2629).

Heyne told Riebsame that he and Hamilton had conflicts about selling drugs and money issues prior to the murders. (DAR, V22, R2463). Heyne admitted to Riebsame that he shot all three victims. (DAR, V22, R2464, 2505). On the afternoon of the murders, Heyne said both he and Hamilton were armed, and that at some point, Hamilton had "waived a pistol." After he shot Hamilton, Heyne told Riebsame that Buckoski came into the room "screaming." When she dived under the bed, Heyne thought she was "going for a gun" and he shot her. Heyne told Riebsame he recalled Ivory was crying and tugging on his pants, that he shot her, but that he could not recall how that shooting occurred. (DAR, V22, R2464, 2506,

[9] Riebsame testified on a proffer about the toxicology reports for Heyne and Ben Hamilton. (DAR, V22, R2572-2596). A toxicology report indicated Hamilton did not have any cocaine in his system at 5:00 p.m., which was several hours before his death at 8:57 p.m. (DAR, V22, R2582, 2597).

2561). In Riebsame's opinion, Heyne knew what he was doing when he shot the three victims, knew that it was wrong, and was able to appreciate the criminality of his conduct. (DAR, V22, R2561; V23, R2635). Riebsame was aware of the following: Heyne hid a gun in a pillow case and then ran out the back door of the residence after the shootings; called his ex-girlfriend to come and get him; went back to her home; showered; hid the gun and bloody clothing in her attic; and subsequently went to the mall to buy new clothing that was the same type that he had been wearing. (DAR, V22, R2562-65). Riebsame said "there is [sic] no intellectual issues ... in Heyne's case." (DAR, V22, R2566). Heyne's actions were logical. (DAR, V22, R2568).

At the time of the shootings, Riebsame estimated Heyne's mental or emotional maturity was that of a sixteen or seventeen year-old adolescent. (DAR, V22, R2467). However, if Riebsame utilized a math formula that calculated Heyne's mental age compared to his chronological age, then Heyne's mental age would be closer to nineteen years old.[10] (DAR, V22, R2473-74). Riebsame administered an executive function test which included a mazes subtest, judgment subtest, category subtest, and word generation subtest. (DAR, V22, R2477-78).

---

[10] Riebsame utilized the Shipley Institute of Living Scale to calculate Heyne's mental age. (DAR, V22, R2558).

The executive function test is designed to measure a person's ability to plan and perform logical problem-solving, and to measure a person's level of impulsivity, mental flexibility, and ability to perform complex decision-making. (DAR, V23, R2620-21). Heyne scored between the thirty-five to forty-eight range in these categories, which falls in the "mild impairment" to average range. (DAR, V22, R2478-80; DAR, V23, R2622). Heyne's overall score was in the twelfth percentile, which indicates mild impairment. (DAR, V23, R2622). Riebsame said a person who scores low on this test would not respond to situations in a logical and practical way. (DAR, V23, R2621).

In Riebsame's opinion, due to Heyne's mental impairment and in conjunction with being under the influence of drugs and alcohol when he shot the three victims, he was agitated, his judgment was impaired, and he reacted impulsively. (DAR, V22, R2465-66, 2507, 2511, 2513). Riebsame diagnosed Heyne with ADHD: "it does not go away. It changes across a person's life span." (DAR, V22, R2510, V23, R2627).

Riebsame administered the Personality Assessment Inventory test to Heyne which measures whether a person is exaggerating or minimizing their problems. Heyne completed the test in a reliable and valid way. (DAR, V23, R2623-24). He admitted his alcohol and drug problems have caused difficulty throughout his life, which includes a history of criminal activity. (DAR, V23, R2624). Heyne is

impulsive and gets involved in volatile and intense relationships. He is sensitive to criticism, but can come across "in a warm manner." However, if Heyne's mood changes, he can appear hostile and demanding. Others may not know how he would react. Heyne has potential for suicidal behavior. (DAR, V23, R2625).

Riebsame said there was no indication that five-year-old Ivory Hamilton criticized Heyne or was volatile with him. "To the contrary, they appeared to have a good relationship." The only sound Ivory made during this "emotionally charged situation"[11] was her crying. (DAR, V23, R2644).

Heyne was suffering from an extreme mental disturbance and was not able to conform his conduct to the requirements of the law. (DAR, V22, R2466, 2512; V23, R2635-36). However, Heyne's actions were driven by his voluntary substance intoxication and mental disorder. (DAR, V22, R2512, 2513). Heyne made "very impulsive moment-to-moment decisions with little or no consideration for the actions, unfortunately." (DAR, V23, R2643).

Trial counsel also retained Dr. Joseph Wu, M.D., an associate professor of psychiatry at the University of California Irvine College of Medicine, and clinical director for the University's Brain Imaging Center, to evaluate Heyne. (DAR, V23,

---

[11] Heyne told Riebsame that Hamilton called him insulting names and accused Heyne of owing him money while he was waving a gun at Heyne. (DAR, V23, R2645).

R2648-49). The brain imaging center assesses neuropsychiatric conditions by using PET scans. (DAR, V23, R2649). PET scans assess brain function. (DAR, V23, R2660). By utilizing PET scans, Wu specializes in assessing conditions such as traumatic brain injury, Alzheimer's disease, Parkinson's disease, schizophrenia, depression, and addiction. (DAR, V23, R2649). Wu said he "would never make a diagnosis from just looking at a person's PET scan by itself." (DAR, V23, R2673, 2683). A person's history and other tests must be taken into consideration to make a diagnosis. (DAR, V23, R2674).

Heyne's PET scan results indicated an abnormality in the temporal lobe and the parietal lobe. (DAR, V23, R2674, 2676). Wu compared the results with another scan of an age match male, normal control. (DAR, V23, R2674, 2676). There was a significant asymmetry in Heyne's left temporal area which indicated a history of brain trauma or some type of traumatic brain injury. (DAR, V23, R2676). Records indicated Heyne suffered a concussion at age 5. Neuropsychological testing administered to Heyne at age 7 indicated a perceptual speed of age 5 and a full scale IQ of 91. Since his processing speed was significantly lower than his IQ, this indicated brain trauma at a young age. (DAR, V23, R2677-78). He failed a speech language test at age 8 despite having an "almost normal IQ," which indicated cognitive impairment. (DAR, V23, R2678). Although Heyne was diagnosed with ADHD, people with this disorder generally do not have a slow perceptual speed as

Heyne does. (DAR, V23, R2678).

Wu said Heyne had poor impulse control at a young age. He started abusing marijuana at age 11, alcohol at age 14, and cocaine at age 15. Wu said patients with brain injuries are more likely to develop addiction problems because of their poor impulse control. At age 16, Heyne was sent to a rehabilitation program. At age 17, Heyne tried to choke another student in class. Heyne has cognitive and emotional processing deficits. (DAR, V23, R2679).

After Heyne was sent to prison, he attempted suicide on a number of occasions. He was treated with anti-depressants. (DAR, V23, R2679-80). Mood swings indicated a "bi-polar disease of some sort." (DAR, V23, R2680). Wu said brain-injured people are much more likely to develop mood disorders or depression. (DAR, V23, R2680). Heyne suffered another head injury in 2004. In 2005, Heyne was suicidal. Heyne's brother restrained him from jumping in front of a train. (DAR, V23, R2680-81). Wu said a person with a head injury is much more likely to suffer further head injuries and "to have even further catastrophic responses with subsequent injuries." (DAR, V23, R2681).

Wu reviewed voluminous records which included Heyne's school records and testing results, prison records, witness statements, and a DVD containing Heyne's confession. (DAR, V23, R2683-84). Since there was no record of any head injury subsequent to the shootings in March 2006, Wu concluded that the

August 2008 PET scan results indicated the state of Heyne's brain on March 30, 2006. (DAR, V23, R2685).

Wu testified that the temporal lobe is one of the two areas of the brain that controls impulse along with the frontal lobe. (DAR, V23, R2685). Heyne was significantly impaired in his ability to control aggressive impulse due to a neurological failure. (DAR, V23, R2690). Heyne's abuse of cocaine and alcohol the day of the shootings was "like pouring gasoline on a fire." (DAR, V23, R2692). Assuming the scenario that Hamilton pointed a gun at Heyne, and threatened him, Heyne would not have been able to control his aggression, his behavior, and his fear. (DAR, V23, R2697). In addition, due to "his injured brain and the substances on top of it," Heyne would not have had the ability to control his behavior and impulses with respect to Buckoski and Ivory Hamilton. (DAR, V23, R2704, 2705). Wu said a person who is a regular heavy drug-user would metabolize drugs at a faster rate. (DAR, V23, R2706). In Dr. Wu's opinion, Heyne was under the influence of an extreme mental or emotional disturbance at the time of the shootings. His capacity to conform his conduct to the requirements of the law was substantially impaired. (DAR, V23, R2705-06).

A PET scan does not provide a specific quantitative formula that predicts a specific behavior. (DAR, V23, R2711). Wu said the PET scan machine used on Heyne is a different model than the one he uses. The normals Wu used to compare

Heyne's results were from the machine Wu uses himself. (DAR, V23, R2710-11). Wu did not recall reviewing any of the neuropsychological test results Heyne obtained that had been administered by Dr. Riebsame. (DAR, V23, R2730). Wu and Dr. Golden reached the same conclusion with regard to Heyne's brain injury. (DAR, V23, R2740).

Jeanna Heyne, Appellant's older sister by two years, said she and Appellant have always had a special bond. They shared the same friends. (DAR, V24, R2815-16). When they were in high school, they smoked marijuana together in lieu of attending school. (DAR, V24, R2817). They smoked a "blunt"[12] every morning before school. (DAR, V24, R2818). Jeanna Heyne and Appellant were best friends, and he was protective of her. (DAR, V24, R2818). She also testified that Appellant was friendly with a few elderly neighbors. He helped them with yard work and sat and talked with them after school. (DAR, V24, R2819).

After Appellant's first incarceration, he changed. He was nervous and distant with the family. (DAR, V24, R2819). Nonetheless, Jeanna Heyne and Appellant always maintained a bond. (DAR, V24, R2820). Appellant referred to Ben Hamilton as "the brother that he never had." Ivory Hamilton "was like a niece

---

[12] A blunt is marijuana rolled into cigars. (DAR, V24, R2818).

to him." Ben Hamilton was Appellant's son's[13] godfather. (DAR, V24, R2823).

Darel Heyne, Appellant's father, said his wife had a difficult pregnancy with Appellant. Appellant was born a month late. (DAR, V24, R2825). Appellant also has an older brother, Jeremy. Both Jeremy and Jeanna progressed and developed while Appellant "was always behind. He was always slow." (DAR, V24, R2826). Disciplining Appellant "was extremely hard." Appellant was "tough but not smart." He was strong, big, and rebellious. (DAR, V24, R2827).

When Appellant was three and one-half years old, he spent a night in the hospital after suffering a concussion. (DAR, V24, R2829). At five years old, his pediatrician suggested his parents take him to a behavioral learning center, Laurel Oaks. Appellant was not listening, would not respond and was aggressive toward his parents. (DAR, V24, R2828). At age eight, Appellant was prescribed Ritalin and started playing football. (DAR, V24, R2830). The combination of medicine and sports helped with Appellant's demeanor. He was more calm, he studied, and got along with his peers. (DAR, V24, R2834). When Appellant was a teenager, he suffered a hard hit during football practice. He was dazed and "glassy-eyed." However, Appellant's father did not take Appellant to the hospital. (DAR, V24, R2835-36). Appellant stopped taking Ritalin in his teens as he did not like the

[13] At the time of trial, Heyne's son was three years old and suffered from severe birth defects. (DAR, V24, R2850).

effects. Consequently, his grades dropped and he was not allowed to play sports. (DAR, V24, R2837). Appellant helped elderly neighbors and worked in their yards. (DAR, V24, R2838).

Appellant was sent to prison for robbery and released when he was twenty-four years old. He isolated himself and did not want to be around people. (DAR, V24, R2839). Appellant started working construction jobs in his father's company. Appellant got Ben Hamilton a job with his father as well. (DAR, V24, R2840). Appellant and Hamilton "had a very tight bond." (DAR, V24, R2841). Appellant's father and his wife spoke to Appellant about his suspected drug use and suggested he live with them. (DAR, V24, R2844, 2846).

After Appellant's father heard about the shootings, he tracked Appellant down and sent his wife to get Appellant at Roxanne Larabie's home. Appellant's father noticed Appellant "was coming down. You could tell that he just -- it was like talking to him and he was staring at you but nothing would register." (DAR, V24, R2852). The Heynes brought Appellant back to the Moon Road home. (DAR, V24, R2852).

The state's two rebuttal witnesses were Officer Jeffrey Watson and Detective Arthur Esposito. Each law enforcement officer testified that he was trained and experienced in dealing with people under the influence of intoxicants and neither officer detected any signs that Heyne was under the influence of drugs or alcohol,

even in close, prolonged, proximity. (DAR, V24, R2898-99).

POSTCONVICTION PROCEEDINGS

Heyne's Rule 3.851 motion was timely filed on October 16, 2013. Heyne raised the following claims in his motion for post-conviction relief:

A. Heyne's counsel was ineffective for failing to file a motion to suppress the statement taken from Heyne on the basis that is was obtained in violation of the United States Constitution as Heyne invoked his right to counsel during custodial interrogation and requested that the questioning stop.

B. Heyne's counsel was ineffective for failing to file a motion to suppress the evidence found inside a box at Roxanne Larabie's attic on the basis that the evidence was seized without a search warrant in violation of the Fourth Amendment to the United States Constitution.

C. Heyne's counsel was ineffective in failing to discover, through expert witness testimony, that the fatal gunshot wound to Ivory Hamilton was not a direct shot, as was the State's theory at trial, but rather a re-entry wound that had passed through Sarah Buckoski before it entered Ivory Hamilton.

D. Heyne's counsel was ineffective during the penalty phase by failing to locate available lay witnesses to provide testimony that Heyne had taken very large quantities of cocaine and alcohol in close proximity to the homicides. Counsel was further ineffective by failing to hire a toxicology expert to testify as to the effects of extensive cocaine and alcohol use by Heyne in close proximity to the homicides.

On December 6, 2013, the State filed its Response to Defendant's motion. The court granted evidentiary development on each claim. An evidentiary hearing was held on April 21, 2014 and concluding on April 22, 2014. Heyne called nine witnesses: Dr. Ronald Wright, a forensic pathologist; Dr. Richard Carpenter, a psychologist; Dr. Daniel Buffington, a toxicologist; John Randall Moore, trial

counsel; Darren Wratchford, Christina Wratchford, Tammy Vick, lay witnesses; Joel Hunter, and Jeff Watson, former Titusville police officers. The State called four witnesses: Dr. Bruce Goldberger, forensic toxicologist; Shauna Collard, lay witness; Dr. Sajid Qaiser, medical examiner; and retired Titusville Detective Arthur Espozito. Closing arguments were presented in written form. The record is comprised of nine (9) volumes. The trial court denied Heyne's postconviction motion in an order dated August 6, 2014. (V3, R485-505). The pertinent testimony from that hearing is as follows.

Randall Moore

Randall Moore was Heyne's lead trial counsel. (SRV1, R113, 122). Moore had 31 years of experience and 20-plus years of that career having been in capital litigation. (SRV1, R120). He started defending capital cases full-time in 1993. (SRV1, R112). At the time he testified, he had retired with a career having defended 25 first-degree murder trials, 12 of which were capital trials tried to completion. (SRV1, R112).

Defending a capital case at the Public Defender's Office often took years. (SRV1, R121). Heyne's case took approximately two years before Moore was prepared for trial. (SRV1, R121). The Public Defender's office employed a department of investigators whose delegated duties included "finding witnesses, doing background checks, getting records." (SRV1, R121). Moore was primarily

responsible for defending this case, but was assisted by two other attorneys, Mark Lanning and Mike Pirolo. (SRV1, R113). This team of three lawyers was in addition to the team of investigators, research assistants, and other people at the Public Defender's Office assigned to help with capital cases. (SRV1, R122).

Moore personally collected and reviewed all of Heyne's records including medical, prison, and school records. (SRV1, R121). He attempted to contact "every doctor he's ever had contact with in his life; every family member, extended family member; try to get a family history; see if there's any indication of mental illness." (SRV1, R121). Heyne was evaluated by Dr. Riebsame, forensic psychologist. (SRV1, R121-22). Dr. Wu, M.D., evaluated Heyne and had a PET scan administered to him. (SRV1, R122). Heyne was also evaluated by Dr. Golden, a neuropsychologist. (SRV1, R122).

Moore had primary responsibility for the expert witnesses, the penalty phase, and reviewing records for possible motions to suppress. (SRV1, R113). He researched, prepared, argued, and filed the motion to suppress in this case. (SRV1, R113). Moore analyzed the recorded statement and made a determination on which grounds to file a motion to suppress. (SRV1, R115). Moore filed a motion to suppress challenging the voluntariness of Heyne's confession on several different theories. (SRV1, R125). The hearing on the motion lasted several hours. (SRV1,

R124). He did not file a motion to suppress on the basis of *Miranda*[14] because there was no "request by Mr. Heyne or a demand either for a lawyer or to terminate the interview." (SRV1, R115). Moore considered filing a motion to suppress the K-Swiss shoebox on the basis that Larabie informed police it belonged to Heyne. (SRV1, R115). He did not do so because Heyne had no standing to attack the search, and because it was abandoned property. (SRV1, R115-116). Larabie told Heyne to "get the hell out of here, you can't bring that gun in here" and yet, Heyne stowed the gun in her attic. (SRV1, R116). Heyne had no reasonable expectation of privacy in the box or in its contents. (SRV1, R116). It was reasonable that Larabie would do exactly as she did, and cooperate with the police. (SRV1, R116).

The defense team attempted to cultivate Heyne's use of drugs and alcohol "to his advantage as a mitigating circumstance." (SRV1, R116-17). Riebsame established drug and alcohol use as a basis for the mental mitigation. (SRV1, R116-117). Riebsame substantiated "both full statutory mitigators . . . and others as well." (SRV1, R126). Heyne was evaluated by Dr. Diebold, a neurologist. (SRV1, R125). An MRI was administered to Heyne which was evaluated by Diebold. (SRV1, R125). Diebold refused to testify on Heyne's behalf. (SRV1, R125).

Attempts were made to develop lay witness testimony as to Heyne's drug and

---

[14] *Miranda v. Arizona*, 384 U.S. 436 (1966).

alcohol use. (SRV1, R117). Moore kept notes of all witnesses he spoke to. (SRV1, R117). He specifically kept notes of any witnesses that "might be of potential use." (SRV1, R117). He deposed all of the primary witnesses and most of the other witnesses. (SRV1, R122). As reflected in his notes, only Amanda Hatchcock, indicated a drug issue with Heyne "in the general sort of way," and she was uncooperative with the defense. (SRV1, R117). Moore had enough experience to recognize potential witnesses who could testify to impairment, and Hatchcock was the only witness reflected in his notes. (SRV1, R123). She, as well as a number of potential witnesses, was uncooperative. (SRV1, R117). If Heyne or anyone else had provided the name of a potential witness, "that lead would have been tracked down and that person would have been talked to." (SRV1, R122). If Moore had had any other witnesses to support drug use, he would have "gladly called them." (SRV1, R117). Reports of Heyne's drug use came only from Heyne. (SRV1, R117). No other witnesses had any information about Heyne's alleged intoxication. (SRV1, R177).

For 20-plus years, Moore made a point of meeting with a capital defendant as quickly as he could. He would also get a blood draw to secure verifiable data about possible impairment. (SRV1, R118). In Heyne's case, by the time Moore was appointed, several hours had passed, and the blood draw was "thwarted" by the time that had gone by. (SRV1, R118). Moore decided that a blood draw would not

have been helpful in Heyne's case, because all that would have been left in his blood of the intoxicants would have been metabolites. (SRV1, R118). As soon as he knew about Heyne's case, Moore was at the jail talking to him. (SRV1, R118-119). He would routinely see if there was an indication of consumption of alcohol or drugs when he met with a defendant. (SRV1, R118-119).

A toxicologist was not hired because "you need hard evidence." (SRV1, R119). There was no "hard or soft evidence" to substantiate that Heyne was "screwed up on drugs at the time." (SRV1, R119). Moore always did a screening process of potential witnesses to determine whether or not he considered them reliable witnesses. (SRV1, R119). He could not speculate on whether or not he would have hired a toxicologist had witnesses attested to Heyne's drug use without first having assessed the value of the witnesses' testimony. (SRV1, R119).

In Moore's opinion, if voluntary intoxication was the only mitigating evidence he had, "you rely on what you have." (SRV1, R123). Although it is not his first choice, it "sometimes can be useful, and it relates to two of the statutory mitigating circumstances" so he is "more inclined to use it than [he is] to reject it." (SRV1, R123).

Joel Hunter[15]

---

[15] Prior to Joel Hunter, Dr. Ronald Wright, M.D. testified in support of a claim of

Joel Hunter is a former Titusville police officer. (SRV2, R159). Hunter was a police officer from 1989-2011. (SRV2, R159). Hunter spoke with Larabie at her residence, where she informed him Heyne had "come to her house with a shoebox, in an excited state," made a statement that he was going to Hell, and then went all over the house, and hid the box, possibly in the attic. (SRV2, R160-16, 163, 169). Heyne had gone into her attic after having taken a shower at Larabie's home. (SRV2, R163). Hunter located the K-Swiss shoebox in the attic. The lid was closed but was not locked or taped shut. (SRV2, R164, 171). Hunter found a handgun wrapped and taped in a shirt and some clothing inside the box. (SRV2, R164, 167).

Larabie consented to the search of her home so no search warrant was obtained. (SRV2, R169). Hunter had no reason to believe Larabie could not consent to the search of her residence, where she lived alone with her children. (SRV2, R170). Larabie was cooperative with Hunter and other detectives the entire time. (SRV2, R170). Larabie gave suggestions as to where Heyne may have stashed the box, and was helpful with Hunter and other detectives in trying to recover the contraband. (SRV2, R170). Larabie never expressed a desire to stop the

---

ineffective assistance of counsel that was denied, and has not been raised in Appellant's present motion. Because that claim has been abandoned, the substance of Dr. Wright's testimony, along with that of the State's witness against that claim, Dr. Sajid Qaiser, M.D., has been omitted.

search and never revoked consent. (SRV2, R171).

Hunter did not read the outside of the box prior to opening it. (SRV2, R166, 171). A photo of a receipt was entered into evidence. (SRV1, R168). Hunter did not remember "what the receipt was, or what it said, or the condition of it," and did not read it prior to finding the contraband. (SRV2, R167, 171). Heyne's name or personal information appeared nowhere on the box. (SRV2, R171). He did not know who had purchased the shoes. (SRV2, R171). When Hunter brought the box to the interrogation room, he did not say anything about the contents of the box. He did not show Heyne the contents or rifle through the box, he merely held the box with the lid propped open. (SRV2, R172). As soon as the box was presented, Hunter saw Heyne slump his shoulders and it appeared "that he knew the jig was up at that point." (SRV2, R172).

Jeffrey Watson

Jeffrey Watson is a former detective with the Titusville police department. (SRV2, R174). Watson had been a police officer for approximately 13 years. (SRV2, R178). He encountered Heyne on Moon Road after the murders. Heyne said he had been with Larabie that day. (SRV2, R175). Watson informed Heyne that Ivory, Ben, and Sarah were deceased, and Heyne appeared to be very shocked, "disproportionately upset," and exhibited "very flamboyant, physical behavior" in the case of the news of Ivory's death. (SRV2, R175).

Watson called Larabie, who advised him she had "information that would be pertinent" to the investigation, which she wanted to convey in person. (SRV2, R176). When Watson responded to Larabie's residence, she informed him that Heyne had confessed to her that he shot Ben and Sarah, and that he had seen Ivory "go down." (SRV2, R178). Larabie also advised him that she had gone to the mall with Heyne to buy clothes and returned to her home, where he had possibly stored "contraband evidence from the scene of the crime in her attic." (SRV2, R176, 177). Larabie told Watson that she was not comfortable with the gun and drugs in her home and wanted the contraband gone for the safety of her children. (SRV2, R184). Larabie also informed Watson about the K-Swiss shoebox. (V2, R177). Larabie gave express consent to Watson and other officers to search her home. (SRV2, R184). Larabie also signed a consent-to-search form at the police station. (SRV2, R184). Larabie never withdrew or limited that consent. (SRV2, R185). Watson had every reason to believe Larabie could consent to the search of her residence. (SRV2, R184). Heyne indicated that he lived with Hamilton, Buckoski, and Ivory at the Moon Road home, and not with Larabie. (SRV2, R185). There was no indication whatsoever that Heyne lived with Larabie. (SRV2, R185-186).

Watson searched Larabie's attic and found a brown box. (SRV2, R177). He also found the K-Swiss shoe box. Watson was aware Hunter had found the box because he made excited utterances about finding the box and jumped up and down

in the attic. (SRV1, R179). Watson did not direct, nor did he see, Hunter open the box. (SRV2, R179). Watson did not handle the contents of the box. (SRV2, R179). Watson did not recall any men's shoes having been in the box. (SRV2, R180-181).

Watson encountered Heyne the morning before the murders (during an unrelated investigation) and there was no indication of impairment, or the smell of impurities of alcohol on his breath. Heyne appeared to be in a normal, sober state. (SRV2, R183). Heyne appeared to be relaxed, helpful, and exhibited a calm demeanor, in addition to sober. (SRV2, R183). The morning after the murders, Watson observed Heyne to be nervous, sweaty, and having exaggerated physical reactions, in addition to being sober. (SRV2, R183). After the murders, Watson still noticed no indicia of impairment with Heyne, who did not appear to be under the influence of drugs or alcohol. (SRV2, R183). Heyne advised Watson that he had woken up around 8 a.m. the morning of the murders. (SRV2, R185). He gave no indication to Watson that he was sleep deprived. (SRV2, R185).

Darren Wratchford

Darren Wratchford was Heyne's friend. (SRV1, R127-128). He saw Heyne in the early morning hours of March 30, 2006, at Wratchford's residence where he lived with his wife Christina Wratchford, Charles Bolton, and Shauna Collard. (SRV1, R128). Wratchford did not remember his address. (SRV1, R128). Wratchford did not see Heyne imbibing any alcohol. (SRV1, R128). Wratchford

was not sure where Heyne went after he left his home but was “pretty sure [he] went back to Orlando.” (SRV1, R131, 1333).

Wratchford saw Heyne using cocaine. (SRV1, R129). It was not unusual for Heyne to have cocaine. (SRV1, R133). Heyne was known as a “coke dealer” who usually had drugs. (SRV1, R133). Wratchford and Heyne snorted cocaine together in the living room. (SRV1, R129). Wratchford did not remember how much cocaine Heyne used. (SRV1, R129). “[I]t may have been, like, two gram to a ball, somewhere around there I’m not really sure.” (SRV1, R129). Wratchford elaborated that “a ball” is an “8-ball,” but he did not know how much cocaine that entailed. (SRV1, R129).

Heyne abused “two-to three grams of cocaine.” (SRV1, R134). Wratchford did not measure the cocaine that Heyne used, so he was just “guesstimating” as to any amount he did. (SRV1, R 132). Wratchford and Heyne were up all night. (SRV1, R130). Wratchford’s memory of that night was “a little fuzzy.”(SRV1, R133). He was not able to drive Heyne. (SRV1, R130). Wratchford alleged that Heyne arrived at his home around 3 a.m. and left during daylight. (SRV1, R129). He “guess[ed] he found a ride.” (SRV1, R130). Heyne had not come to Wratchford’s residence prior to March 30, 2006. (SRV1, R131). Wratchford found out about the murders later that day when he saw it on the news. (SRV1, R130). No one from the Public Defender’s Office talked to him about his observations. (SRV1, R131). He would

have testified if he had been asked. (SRV1, R131).

Christina Wratchford

Christina Wratchford lived in Titusville on March 30, 2006. (SRV1, R135). She saw Heyne at approximately 3 a.m. the morning of March 30, 2006. (SRV1, R135). There was nothing abnormal about that night; it was a normal "night hanging out, partying." (SRV1, R139). She observed Heyne consume "at least two grams" of cocaine. (SRV1, R136). She saw him "go through two bags." (SRV1, R136). Seven-to-eight people shared the cocaine he brought. (SRV1, R139-140). She was not worried about Heyne. (SRV1, R139). He had "done a little more than [she] normally seen him" but he acted normally. (SRV1, R139). He planned to go to work that morning. (SRV1, R139). She could not say how long he stayed. (SRV1, R136). He left at a normal time in the morning because he had to go to work. (SRV1, R136). Heyne had come to her residence a "couple times a week, once a week, you know" and used drugs in the past. (SRV1, R136). She and her husband lived at that residence for about a year. (SRV1, R136-137).

Heyne did not consume alcohol at her house. (V1, R137). "It's really hard to remember" as it related to that evening's consumption versus the consumption of previous evenings. (SRV1, R137).

Wratchford worked at MJ's, a local bar, and Heyne drank there before he came to her house. (SRV1, R137-138). Heyne was "not a big beer drinker. He normally

was a whiskey drinker." (SRV1, R138-139). She did not know Heyne's whereabouts before coming to her house. (SRV1, R138). Shauna Collard took him to work from her house. (SRV1, R138). She would have testified if she had been asked. (SRV1, R138).

Tammy Vick

Tammy Vick worked with Heyne's sister, Gina Heyne. Her daughter, Amanda Hatchcock, had dated Heyne. (SRV1, R141).

Vick saw Heyne at Durango's Steakhouse in the early afternoon of March 30, 2006. (SRV1, R141-142). He had "a big baggy" of cocaine. (SRV1, R142). He was a local cocaine dealer. (SRV1, R144). It did not strike her as unusual or troubling for him to have a big bag of cocaine with him. (SRV1, R144). She had no concerns about getting in the car with him. (SRV1, R144). She got into his car with him "for a short little drive in the back." (SRV1, R142). She was in the car with him for "ten minutes, 15, if that." (SRV1, R143-144). He was driving and using cocaine in his car. (SRV1, R142). She could not give an estimate as to how much cocaine Heyne used. (SRV1, R142). She would have cooperated and given this information had someone contacted her. (SRV1, R143).

Shauna Collard

Shauna Collard was Heyne's friend. (SRV1, R148). She was a part of the group of friends including Ronnie Peterson, the Wratchfords, Gina and Justin

Heyne. (SRV1, R148-149). "The normal of the group" was partying with drugs and alcohol on "many nights." (SRV1, R149-150). She did not pick up Heyne for work the night before the murders. (SRV1, R150).

Dr. Richard Carpenter

Dr. Richard Carpenter, psychologist, testified about Heyne's mental and emotional state at the time of the murders. (SRV1, R37). One-hundred percent of his business comes from being an expert witness. (SRV1, R61-62). He has testified for the defense in six-to-eight postconviction proceedings. (SRV1, R61). He had not counseled in the last eight years. (SRV1, R62).

Carpenter met with Heyne one time in a 2-hour interview at Union Correctional Institution on September 10, 2013. (SRV1, R59). No psychological tests were administered to Heyne. (SRV1, R59). It was merely a conversational meeting. (SRV1, R59). There was no laboratory data to consult. (SRV1, R59).

In Carpenter's opinion, Heyne suffers from ADHD, attention deficient hyperactivity disorder; a provisional diagnosis of bipolar disorder not otherwise specified, polysubstance dependence, in remission in a controlled environment; and access to personality disorder not otherwise specified with borderline and antisocial personality traits. (SRV1, R40). In carpenter's opinion, Heyne's "mental infirmities in conjunction with cocaine, alcohol, and marijuana intoxication suggests that he was operat[ing] under extreme emotional disturbance at the time

of the commission of these crimes. All of which created a substantial impairment of Mr. Heyne's capacity to conform his conduct to the requirement of the law." (SRV1, R40-41). Carpenter would have the same opinion, supporting both statutory mental mitigators without any intoxication in this case, merely based on the diagnosis of ADHD. (SRV1, R60).

ADHD is a psychophysiological disorder that affects behavior and cognition. (SRV1, R41). "People with ADHD have difficulty controlling their impulses. Many of them suffer with quick temperedness, the inability to modulate their emotions, effectively modulate their behavior, to make good decisions, consider future consequences, this sort of thing." (SRV1, R41). When "individuals with ADHD get themselves in situations that are very highly emotionally charged or very conflictual, and in those circumstances are unable to modulate their emotions and behavior." (SRV1, R41). Heyne's situation was an example of that. (SRV1, R42). Heyne stated he "clicked." (SRV1, R42).

Heyne "briefly" mentioned drug and alcohol abuse. (SRV1, R43). Heyne self-reported being on a "binge, meaning that he had been up for two days with very little sleep." (SRV1, R43). Heyne reported that "two days before the murder, he said that he woke up around noon, he began to smoke marijuana cigarettes laced with cocaine, and he was also snorting cocaine. He said that around 5 pm, somewhere through there, he was drinking alcohol. He said he was drinking beer.

More cocaine. He was up all night that night till around he guesstimated around 5 am. He said he went to bed, got about two-hours sleep, showered, and then went to work with his father" where he worked all day. (SRV1, R43). Heyne used about 2 more grams of cocaine throughout the course of the day. (SRV1, R43-44). Heyne went to MJ's bar, where he was "up drinking at the bar, using cocaine." (SRV1, R44). Heyne then went to Ronnie Peterson's home. (SRV1, R44). Heyne and Peterson split about five grams of cocaine, with Peterson reporting Heyne consumed approximately two grams of cocaine. (SRV1, R44).

Carpenter relied on witness testimony from the Wratchford home that Heyne consumed approximately 3 grams of cocaine while at that location. (SRV1, R44). Heyne stated he left around dawn; showered, and had something to eat. (SRV1, R44). In a recorded audio interview of Vick, she described Heyne as "very high, in her opinion, fidgety, hyper, and sniffling a great deal." (SRV1, R45). Vick saw Heyne consume lines of cocaine while in her presence. (SRV1, R45). Heyne said he had been drinking during the morning, he guesstimated around nine beers. He consumed about a half of a gram of cocaine around that time, drank a couple of Captain Morgan rum drinks, then left and estimated that he had had another half gram, approximately, before the shooting.(SRV1, R47).

Self-reporting "is known to be sometimes less than accurate." (SRV1, R47). Defendants will overstate or underestimate. (SRV1, R47). Corroboration of a

defendant’s self-report of intoxication is “looked for” in more serious cases. (SRV1, R48). The drug and alcohol consumption would have acted as an “intensifying agent.” (SRV1, R48). In Carpenter’s opinion, these substances would have led Heyne “to be even more impaired, more unable to control his behavior, simply by virtue of the effects of the drugs and alcohol.” (SRV1, R48). Heyne’s actions after the crime, however, appeared to be steps to cover up the criminal activity. (SRV1, R49).

In Carpenter’s opinion, both statutory mental mitigators were not met when he testified, “I'm not saying that there was -- this was primarily a cognitive intellectual deficiency. This is more of a behavioral inability to conform a behavioral act. As far as the criminality, understanding the criminality, I'm not offering that as part of the mitigator. I don't think that that's the way I'm conceptualizing this. His cognitive ability was ultimately, I think, impaired, because of some of the steps he took. To me it was a crackpot, for lack of a better term, plan that he hatched when he could have done any number of other things that would have probably done a better job of concealing his guilt.” (SRV1, R54).

Carpenter opined that these steps did not negate the mitigating circumstances because “it’s not at all uncommon because they understand the criminality of their actions, that they take steps to try to cover their tracks.” (SRV1, R49-50). Carpenter stated that after a “cathartic release of all of that emotion that's driving

that inability to conform their behavior, they tend to have a subsiding of the arousal in the body and in the brain itself, and as a result of which, they are able to recognize what they've done and survival mode kicks in, and they take steps to try and conceal what they've done." (SRV1, R50).

Heyne slept in the interrogation room because he was "crashing from a drug binge." (SRV1, R51). "As soon as the drugs stop, it's almost impossible to keep your eyes open." (SRV1, R51). It was unusual for Heyne to have slept in the interrogation room, because "where people are not coming off a drug binge, they're in an opposite state. They're doing their best to look relaxed, but they're very keyed up … and that tends to keep most people from falling asleep, certainly. (SRV1, R51). However, Heyne could have been tired, sleep-deprived, or bored. (SRV1, R52).

Heyne claimed "I clicked." (SRV1, R52). None of the other witnesses in this case used the term "click" in this context. (SRV1, R52). Carpenter also testified for the defense in the case of Wydell Evans in 2004, where Evans had also used the term "click" to describe snapping, or going into a rage state. (SRV1, R52-53). The word was a colloquial term popular in 2004 in the African American community. (SRV1, R53). It was "more of an African American term" but he had heard "some white defendants use the term." (SRV1, R53).

Carpenter was aware of Heyne's actions to conceal evidence of the murders

began moments after the murders. (SRV1, R53). The steps Heyne took "moments" after the murders were "purposeful actions to conceal the weapon and the drugs and the evidence of the crime." (SRV1, R 55). Heyne's self-reported cocaine use of approximately 15 grams of cocaine over the two-day period leading up to the murders. (SRV1, R56). Lay witnesses' testimony only corroborate about five grams of cocaine over the two-day period. (SRV1, R56). On some points, Heyne "misremembered" the events. "There does seem to be a little bit of problem fitting all of it" but that "the picture that was painted seemed fairly close to his self-report." (SRV1, R57). Carpenter did not consider all the witness testimony in formulating his opinion. (SRV1, R57-58) He specifically dismissed Shauna Collard's report that drug use occurred on a prior day, because it did not comport with the evidence of drug use the night before the murders. (SRV1, R58). He only considered the witnesses who testified to Heyne's drug use "credible." (SRV1, R58).

In Carpenter's opinion, Heyne would have been under the influence of extreme emotional disturbance and would have been unable to conform his conduct to the requirements of the law, without intoxication, just based on the ADHD diagnosis. (SRV1, R59-60). Carpenter relied heavily on defense expert, Riebsame, who testified at trial. (SRV1, R59-60). However, people with ADHD can conform their conduct to the law. (SRV1, R61). There are "many millions of people who have

ADHD who don't commit any crimes or act in a violent fashion" and who are not under the influence of extreme emotional or mental disturbance so that they commit crimes. (SRV1, R61).

Dr. Daniel Buffington

Dr. Daniel Buffington, pharmacologist, testified as to the potential effects of cocaine, alcohol, marijuana, and sleep deprivation on Heyne. (SRV1, R66). Buffington considered the quantity of drugs and alcohol Heyne had consumed and formulate an opinion as to what, if any, impact that would have at the time of the homicide. (SRV1, R66). There was no way to calculate the quantity of any substance allegedly consumed by Heyne. (SRV1, R69-70). Buffington formulated his opinion after spending 1 hour with Heyne. (SRV1, R81). He also relied on Heyne's self-reports of drug and alcohol use and Heyne's friends' testimony of drug use. (SRV1, R67, 81). The reports of cocaine use was "well in excess of normal usage patterns." (SRV1, R67). Buffington assumed usage of "binge" amount of cocaine, marijuana, and alcohol in the 48 hours prior to the murders. (SRV1, R67). The "best [h]e could ascertain, it was multiple grams … " (SRV1, R70). Buffington relied on Heyne's friend Peterson who stated Heyne's usage of cocaine was higher than he had seen before. Heyne claimed he attempted to get more cocaine from Hamilton.

Cocaine, marijuana, and alcohol are all "impairing in nature." (SRV1, R71).

The only substance that could have been impairing Heyne at the time of the murders was cocaine. (SRV1, R71). Any alcohol would have been metabolized, degraded, or eliminated. (SRV1, R71). The effects of cocaine last an hour to two hours. (SRV1, R71). Heyne sleeping after the interrogation was consistent with "someone having used." (SRV1, R73). In Buffington's opinion, a person cannot look at something "that happens or transpires later and say that's reflective of what happened in the moment of the crime itself." (SRV1, R74).

Buffington did not agree that his area of expertise was toxicology and pharmacology and not psychology or psychiatry. (SRV1, R73). Buffington did not agree that Fla. Stat. 465.003(13) specifically prohibits anyone with a degree in pharmacy from rendering a diagnosis of a psychological or psychiatric disorder. (SRV1, R75). Buffington's degree is a pharmacy degree, not a medical degree, and there is nothing additional he is allowed to do under Florida law over and above that which a pharmacist may do. (SRV1, R78, 79). Buffington holds no board certifications. (SRV1, R78). Buffington was impeached at the hearing by his testimony that his consulting practice was balanced between prosecution and defense by his deposition statement that he worked a "smaller percent for the … state, and a larger portion for the defense." (SRV1, R81).

Buffington could not state what, if any, substances Heyne had consumed, only that "the behaviors and the actions were consistent with the effects you would see

from either single substance, multiple substances, or multiple polysubstance abuse, and sleep deprivation that was demonstrated or described in this case." (SRV1, R82). There was no test data to substantiate impairment. (SRV1, R84). Buffington would not answer a question of whether 15g of self-report was more than 5g of corroborated use. (SRV1, R82-83). Buffington testified that the fact that no one in contact with Heyne hours before, or directly after, the murders noticed any indicia of impairment did not affect his opinion as to impairment. (SRV1, R84). Buffington did not find a conflict in his opinion that Heyne was under the influence of extreme mental disturbance to the extent he couldn't conform his conduct to the requirements of the law, and the rational, and goal-driven actions Heyne took after the murders to conceal his guilt. (SRV1, R86). Buffington agreed that being sleepy on the video is just as indicative of Heyne being sleepy or bored. (SRV1, R87). Buffington admitted that to render his opinion, he had to assume sleep deprivation, stress, marijuana use, alcohol use, and cocaine use are all correct. (SRV1, R87-88).

Arthur Esposito[16]

Arthur Esposito is a retired detective from the Titusville Police Department. (SRV2, R222). Esposito was a detective with the New York City Police

---

[16] Dr. Sajid Qaiser, M.D. testified directly before retired Detective Esposito, see footnote 16 for an explanation of the omission of the substance of his testimony.

Department for twenty-two years, and worked as a private investigator for five years prior to joining the Titusville Police Department, where he worked as a detective for approximately thirteen years. (SRV2, R222). While in the New York City Police Department, Esposito worked in the Narcotic Division in Harlem and the South Bronx, where he was exposed to a lot of drug activity and drug users. (SRV2, R222-223). Esposito was comfortable with determining when an individual was under the influence of narcotics or alcohol. (SRV2, R223.). He was familiar with identifying the smell associated with the impurities of alcohol on an individual's breath. (SRV2, R224).

The influence of drugs or alcohol, while varied symptomatically by the individual, was "very easy to detect. You can pick up on it right away." (SRV2, R231). He would expect to see an individual that was under the influence of cocaine to be hyper, fidgety, talking fast, not focusing, have glassy eyes, and sometimes exhibit slurred speech. (SRV1, R223). He conducted an approximately three-hour-long interview with Heyne the day of the murders. (SRV2, R224). He was in close proximity to him and never smelled a smell associated with the impurities of alcohol on his breath. (SRV2, R224). Heyne was alert, talkative, and responded appropriately to his questioning. (SRV2, R225). Esposito never got the impression that Heyne wanted to cease conversation with him. (SRV2, R225). Heyne was "quite cooperative." (SRV2, R229). He never asked for counsel.

(SRV2, R225). Heyne continued to engage Esposito and ask him questions throughout the interrogation. (SRV2, R228-229). Heyne did not exhibit any of the signs of impairment, and that he "wasn't on anything as far as [Esposito] was concerned." (SRV2, R224-225). Heyne did not fall asleep during the interrogation, only upon completion of the interrogation, and after some time had passed. (SRV2, R231).

At one point, Esposito stated "Mr. Heyne, I want you to take a look at something," and opened the door of the interrogation room, to reveal Hunter holding the K-Swiss shoebox in his hands with the lid tilted open. (SRV2, R229-230). The box was not rifled through; the contents were not taken out, or discussed. (SRV2, R230). Esposito did not search the box. (SRV2, R233). At this point Heyne's head went down, and he confessed. (SRV2, R230).

Dr. Bruce Goldberger

Dr. Bruce Goldberger, Ph.D., is the director of toxicology at University of Florida. (SRV1, R89-90). He is also a professor of toxicology, and the chief of forensic medicine at the department of pathology, and the director of UF Health-Forensic Services. (SRV1, R90). He has testified as an expert in court approximately 250 times and has never failed to qualify as an expert. (SRV1, R90). He is licensed by the state of Florida Board of Clinical Laboratory Personnel, and he is board certified, a diplomat, and the current president of the American Board

of Forensic Toxicology. (SRV1, R90-91). His work includes clinical, academic, and forensic testimony. (SRV1, R91). He directs the laboratory at UF that serves seven medical examiner districts throughout Florida, and has performed about 2,500 "medical-length" death investigation cases for medical examiners requiring toxicology work. (SRV1, R91). Goldberger was accepted as an expert in the fields of pharmacology, toxicology, and forensic medicine. (SRV1, R91). He performs work for both the State and Defense. (SRV1, R952).

The standard in Goldberger's work calls for him to look at "hard evidence" that comes from the laboratory, to avoid speculation. (SRV1, R93). He has conducted many studies examining the validity of self-report, and that it is "notoriously not accurate," and "generally not correct." (SRV1, R93-94). He stated that to have accurate validation of a self or witness report, "Its best to have a laboratory measurement." (SRV1, R94). Goldberger testified that a blood or urine test would have easily detected marijuana, cocaine, and an alcohol metabolite in Heyne, had he been intoxicated. (SRV1, R95). There are many identifiable physical signs of intoxication as well. (SRV1, R95). These include "a staggered gait or slurred speech or someone who's incoherent or lethargic. Could be, also, measures of pupil size, heart rate, or blood pressure." (SRV1, R95).

There was no evidence on the video of Heyne's interrogation that he was "high" or otherwise impaired. (SRV1, R98-99), and "nothing struck [him] to be a

clue or evidence of impairment" in his speech or movements. (SRV1, R99). There was no toxicological evidence, whatsoever, of Heyne's alleged impairment. (SRV1, R96). There was nothing in Heyne's actions, directly after the murders as testified to by Larabie, that would support impairment. (SRV1, R97). Heyne's actions were "really quite deliberate and awful." (SRV1, R97). Heyne's actions were not indicative of someone under extreme emotional or mental disturbance at the time of the murders, or someone that could not conform his actions to the requirements of the law. (SRV1, R97-98). Heyne's actions after the murders were purposeful and goal-driven. (SRV1, R98). There was not enough information to substantiate any consumption of drugs or alcohol, and to assume any amount without verifiable data is mere speculation. (SRV1, R98). "[R]ely[ing] on self-report is dangerous." (SRV1, R100). In formulating his opinion, Goldberger also considered the fact that Larabie and officers in contact with Heyne noticed no indicia of impairment. (SRV1, R97, 100).

Goldberger testified that 15g of cocaine, as reportedly used by Heyne, is "a lot," and is a potentially lethal dosage of cocaine. (SRV1, R100-101). Furthermore, Goldberger opined that large amounts of cocaine, consumed with alcohol, formed "cocaethylene, which [was] more toxic" and "increase[d] the lethality." (SRV1, R101). Goldberger testified that a number as big as 15g would have led him to believe that Heyne had over-reported his alleged cocaine use, but "it's really just a

guess because there's no measure of it" in the record. (SRV1, R101). Goldberger testified that if Heyne reported doing 15 grams of cocaine, and eyewitnesses verified 5 grams of cocaine, that Heyne would be over-reporting his drug use. (SRV1, R110). There was no evidence of any intoxication or even use of cocaine and alcohol at the time of the murders. (SRV1, R101). Goldberger stated that he required scientific evidence of drug use to testify for the State. (SRV1, R103).

Heyne was "obviously exhausted" which was a reasonable assumption after everything "went down," which could account for his having slept at the end of the interrogation. (SRV1, R99). It could have also been due to his adrenaline surge related to the crime, lack of sleep, or anxiety, and that there were "[m]any, many different reasons for why he was sleepy and slept between the interviews with the police." (SRV1, R108).

The trial court denied Heyne's motion for postconviction relief on August 6, 2014. (V3, R485-505). He filed a notice of appeal on September 4, 2014. (V4, R964-86). This Answer follows.

SUMMARY OF ARGUMENTS

Argument I: The trial court was correct in denying Heyne's motion for post-conviction relief alleging that trial counsel was ineffective for failing to file a motion to suppress Heyne's confession pursuant to *Miranda* because there was no legal basis for him to have done so. Detective Esposito properly informed Heyne of his *Miranda* rights at the outset of the interrogation, and Heyne freely agreed to

talk. Trial counsel had studied the entire interrogation, and strategically moved to suppress the confession on the strongest legal grounds he identified in a thorough motion to suppress. After comprehensive argument, the trial court issued an order on that motion ruling that Heyne's confession was voluntary, and not the product of police coercion. Trial counsel was not deficient because not including a *Miranda* claim in his motion to suppress was a strategic decision supported by the law.

Furthermore, there is no reasonable probability that, had trial counsel filed a *Miranda* motion to suppress, that it would have led to an acquittal or conviction of a lesser offense in the guilt phase, or that Heyne would have a received a life sentence in the penalty phase, because had trial counsel included a *Miranda* claim in his motion to suppress. Even assuming, *arguendo*, it had been granted, the exclusion of the Heyne's statement and diagram would not have led to a life sentence recommendation for Heyne because it was still proven that Ivory had been slapped just before she was shot, and that her wound evidenced stippling and a close-range, direct shot at a downward trajectory, proving her proximity to Heyne and that she was not shot in the crossfire, as Heyne was alleging. This evidence would have also come in, anyway, to impeach Heyne when he alleged self-defense at trial, so there can be no reasonable probability of an acquittal or a conviction for a lesser sentence at trial, and also no prejudice in the penalty phase.

Argument II: The trial court was correct in denying Heyne's motion for post-conviction relief alleging that trial counsel was ineffective for failing to file a motion to suppress the K-Swiss box Heyne abandoned in Roxanne Larabie's attic because there was no legal basis for him to have done so. Officer Watson properly opened the box and discovered the evidence pursuant to Larabie's consent to search her home. The contents of the box constituted proper evidence discovered in accordance with abandoned property in which Heyne had no reasonable expectation of privacy.

Furthermore, there is no reasonable probability that, had trial counsel filed a motion to suppress the K-Swiss box, that it would have led to an acquittal or conviction of a lesser offense in the guilt phase. Even assuming, *arguendo*, it had been granted, the exclusion of the contents of the box would not have led to an acquittal or a lesser charge conviction for Heyne because his confession was a result of seeing the box in Officer Watson's hands, not a result of seeing the contents in question; and Larabie could have still testified to what she saw first-hand. Jury would have still heard the evidence it used to convict Heyne.

Argument III: The court was correct in denying Heyne's motion for post-conviction relief alleging that trial counsel was ineffective for failing to call mitigation witnesses Darren Wratchford, Christina Wratchford, and Tammy Vick; and Drs. Carpenter and Buffington. Counsel mounted a comprehensive and

thorough mitigation investigation with a specific interest in finding intoxication witnesses. None of these witnesses' names were provided, and none of them could testify to "binge" amounts of cocaine use. Additionally, they contradicted Dr. Riebsame's evidence that Heyne was under the influence of alcohol as well as drugs.

Furthermore, there is no reasonable probability of a life sentence recommendation had these witnesses' testimony, as presented in the post-conviction evidentiary hearing, been presented in the penalty phase. The judge and jury already heard evidence of Heyne's intoxication through Drs. Riebsame and Wu , and that Heyne's actions were goal-driven, purposeful, and contradicted a theory of intoxication. As such, the testimony of these intoxication witnesses would have been refuted by the evidence.

STANDARDS ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Before ruling on the claims of ineffective assistance of counsel, the trial court properly recognized *Strickland* as the controlling authority for claims of ineffective assistance of counsel:

> Under *Strickland v. Washington,* 466 U.S. 668 (1984), in order to establish a claim of ineffective assistance of counsel, a defendant must show 1) that his counsel's performance was deficient, and 2) the deficient performance prejudiced the defense.

(V3, R489).

According to the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), a defendant must meet a two-prong test to successfully allege ineffective assistance of 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.

466 U.S. at 687, 104 S.Ct. at 2064.

The Supreme Court further stated that:

> 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

466 U.S. at 689, 104 S.Ct. at 2065.

"Moreover, 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." *Occhicone v. State,* 768 So. 2d 1037, 1048 (Fla. 2000). "A Defendant bears the burden of

establishing both prongs of the *Strickland* test before a criminal conviction will be vacated." *Schofield v. State,* 681 So. 2d 736, 737 (Fla. 2nd DCA 1996).

When the postconviction court rules after holding an evidentiary hearing, this Court “review[s] the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence.” *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). Appellate courts do not “reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses.” *Nixon v. State*, 2 So. 3d 137, 141 (Fla. 2009) (quoting *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007)). “[W]e review the trial court's application of the law to the facts *de novo*.” *Green*, 975 So. 2d at 1100. *Lambrix v. State,* 39 So. 3d 260, 268-269 (Fla. 2010).

ARGUMENTS

CLAIM I: THE TRIAL COURT WAS CORRECT IN FINDING NO INEFFECTIVNESS WHERE COUNSEL STRATEGIZED AGAINST FILING A MOTION TO SUPRESS BASED ON A MIRANDA VIOLATION WHEN APPELLANT NEVER INVOKED HIS RIGHT TO AN ATTORNEY DURING DETECTIVE ESPOSITIO’S QUESTIONING.

Appellant argues that the trial court erred in finding his counsel effective for deciding not to file a motion to suppress his confession to Detective Esposito on the basis he invoked his right to an attorney, and the confession was in violation of his *Miranda* rights. (*IB*[17] at 19-28). Appellant asserts that, had a motion to suppress based on this *Miranda* "violation" been filed, his confession and the subsequent diagram drawn by Appellant, would have been excluded from trial. This assertion, however, fails to acknowledge both the well-reasoned strategy of defense counsel, and the trial court's definitive factual finding that Appellant never invoked his right to counsel, and that that finding is supported by competent, substantial evidence.

The exchange in question reads as follows:

> Q. So how are we going to handle this now-
> A. I don't know. Put me in a jail cell.
>
> Q " - - after you being accused?"
>
> A "I'll get a lawyer and [we'll] go through court. And spend thousands of dollars on an innocent man. So that's how [we're] going to handle it. And if I'm convicted, and they convict me, then I do my time and sit and they let me fry."

(DAR, SR, V6, R77; V3, R490).

[17] Appellant's Initial Brief shall be abbreviated as "IB."

MERITS—ARGUMENT SUPPORTING THE TRIAL COURT'S FINDINGS THAT COUNSEL WAS NOT INEFFECTIVE

The trial court correctly cited *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000) in applying *Strickland* to this strategic decision by trial counsel when it held:

> j. [Moore] made a strategic decision not to include a ground based upon the Defendant's invocation of his right to counsel and his right to remain silent in his Motion to Suppress Statements and Admissions. Moore decided that such a claim would be meritless and this Court agrees.

(V3, R492).

Counsel's decision not to file a motion to suppress based on *Miranda* was a reasonable trial strategy supported by competent, substantial evidence. Counsel testified at the evidentiary hearing that he examined Heyne's statement in the context of *Miranda*, but did not find a motion to suppress, based on *Miranda* to be a meritorious issue. It is apparent from the motions that counsel *did* file, that he had examined the three-hour interview in great detail and exhausted every reasonable legal basis for suppression. (*See* V2, R280). Trial counsel made a well-reasoned, conscientious decision not to pursue a *Miranda* claim because he had no basis to believe a *Miranda* violation had occurred.

Counsel filed an extensive Motion to Suppress Statements and Admissions on June 30, 2008, which alleged various ways in which the statements were violative of Heyne's rights and should be suppressed. The motion did not,

however, include the ground that the Defendant invoked his right to counsel and his right to remain silent. (DAR, V6, R864-868). The overreaching argument was, however, that Heyne's incriminating statements were involuntary. (DAR, V2, R302). The trial court held an evidentiary hearing on September 5, 2008, (DAR, V2, R273) and issued an order on October 3, 2008. (DAR, SR, V6, R919-925). In that order, the court held that "[t]he totality of the circumstances of [the] interview establish it as freely and voluntarily given. None of the police conduct complained of was impermissible … there was no causal connection between the conduct and the defendant's admissions." (DAR, V6, R925).

During the evidentiary hearing, trial counsel Moore testified that he decided not to include a *Miranda* ground in the Motion to Suppress Statements and Admissions. He testified that he did not believe the Defendant *was* requesting counsel or asking to terminate the interview. (SR, V1, R114-115). The trial court made a factual finding that "Moore made a strategic decision not to include this ground in his Motion to Suppress Statements and Admissions." (V3, R490).

Trial counsel is not ineffective for failing to file a specific *motion in limine* unless "the failure of counsel undermines confidence in the correctness of the outcome." *Johnson v. Wainwright,* 463 So. 2d 207, 209 (Fla. 1985). *Johnson* further states:

> [T]he issue before us is, first, whether the decision not to make the argument or the simple omission to do so constitutes a serious error or substantial deficiency and, second, whether the failure of counsel undermines confidence in the correctness of the outcome. Although the petition argues that relief should be granted because the omitted point of appeal, had it been argued, would have been found meritorious by this Court, the merits of that legal point is not before us.

Johnson v. Wainwright, 463 So. 2d at 209.

Trial counsel did not commit a "serious error" by not filing the *Miranda* motion to suppress. Even though the merit of the proposed *motion in limine* is not at issue, *per se*, trial counsel cannot be ineffective for failing to file a motion to suppress on meritless grounds or for failing to a pursue meritless argument. *Melendez v. State*, 612 So. 2d 1366, 1369 (Fla. 1992); *Ferrell v. State,* 29 So. 3d 959, 976 (Fla. 2010); *Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008). In this case, the proposed *motion in limine*, alleging a *Miranda* violation based on Heyne having invoked his right to an attorney during Detective Esposito's question, was a meritless argument. The trial court agreed with trial counsel that Heyne's statement was not a request for counsel or a request to terminate questioning. The court stated:

> … Detective Esposito asked the defendant how they were going to handle the situation. The Defendant responded by stating what would happen if he were arrested for a crime he did not commit. He stated that he would hire a lawyer, they'd go through court, thousands of dollars would be spent on an innocent man, and if he were convicted, he would do his time and fry. Defendant was not asking to have a lawyer present during the interview. Nor was he asking to terminate the interview. He was merely predicting what

> would happen in the future if he were arrested for the murders. A reasonable officer who heard the defendant make this statement would not believe he was invoking his right to counsel or his right to remain silent.

(V3, R491-92).

A confession must be a given subsequent to a knowing, intelligent, and voluntary waiver of a suspect's Fifth Amendment right to remain silent. *Miranda v. Arizona,* 86 S.Ct. 1602 (1966) requires that a suspect be informed of his rights so that he may know the rights he is waiving when he agrees to speak to the police. Here, it is clear that Heyne knowingly, intelligently, and voluntarily waived his *Miranda* rights when he agreed to talk to Detective Esposito. Esposito read Heyne his *Miranda* rights at the outset of the interview (DAR, SR, V6, R8-9; DAR SR, V7, R183-84). Heyne responded, "I'll tell you I got nothing to hide." (DAR, SR, V6, R9).

Having complied with *Miranda*, the next step in the analysis is whether Heyne ever invoked his *Miranda* rights after having initially waived them. In *Davis v. United States,* 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), the U.S. Supreme Court held that a suspect who wishes to invoke previously waived *Miranda* rights and to confer with an attorney "must unambiguously request counsel" in order for police officers to cease an interrogation already in progress. The Court held that only a clear, unequivocal, and unambiguous request for counsel will suffice: "If the suspect's statement [regarding the need for a lawyer] is not an **unambiguous or**

unequivocal request for counsel, the officers have no obligation to stop questioning him." *Id.* at 462 (emphasis supplied). The test for whether a request is unequivocal is whether the statement was sufficiently clear such that "a reasonable police officer in the circumstances would [have understood] the statement to be a request for counsel." *Id.* at 459.

In *Green v. State*, 69 So. 3d 351 (Fla. 2005), this Court clarifies that the statement invoking counsel must be a clear, blatant request for an attorney, stating "[h]owever, if 'a reasonable officer in light of the circumstances would have understood only that the suspect **might** be invoking the right to counsel,' the officer may continue questioning and has no obligation to clarify the equivocal statement." (quoting *Collins v. State*, 4 So. 3d 1249, 1250–51 (Fla. 4th DCA 20090; (*Davis v. United States*, 512 U.S. at 459)(emphasis supplied). Nothing akin to "I would like to have an attorney present" was uttered by Heyne at any part of his three-hour interrogation. The exchange Appellant cites, if an unequivocal invocation of his right to an attorney, would not require such vehement argument and interpretation (*IB* at 22-28), it would be clear on its face.

In *State v. Owen,* this Court explained:

> [a] suspect must articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent. If the statement is ambiguous or equivocal, then the police have no duty to clarify the suspect's intent, and they may proceed with the interrogation ...

Owen, 696 So. 2d 715, 718 (Fla. 1997).

Owen applies in cases such as this, where the suspect is questioned after validly waiving the right to counsel pursuant to a proper *Miranda* warning at the outset of interrogation. *Id.* at 719; *see Almeida v. State,* 737 So. 2d 520, 523 n. 7 (Fla. 1999). This case is also akin to *Berghuis v. Thompkins*, 560 U.S. 370, 388-389, 130 S.Ct. 2250, 2264 (2010), where the Supreme Court held that the defendant's statement was admissible, and not in violation of *Miranda*, stating; "[i]n sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police." Heyne did not invoke his right to remain silent and stop the questioning. Appellant, like Thompkins, understood his rights and waived his right to remain silent by making a voluntary statement to the police.

Heyne cites *Green v. State*, 69 So. 3d 351 (Fla. 2005) in support of his assertion his *Miranda* rights were violated; however, *Green* is easily distinguished from this case. In *Green*, the defendant stated that he would "like to have an attorney present during questioning," which was an unequivocal invocation of the right to counsel. However, instead of ceasing questioning until counsel was provided in that case, the detective continued with the interrogation and undermined Green's request for counsel by stating that there was a lot to talk about, that counsel could not be provided "right this minute," and that "it doesn't work

that way. *Green v. State*, 69 So. 3d at 353. Nothing remotely akin to "I would like to have an attorney present during questioning" was uttered by Heyne at any part of his three-hour interrogation, and certainly not in the exchange in question so there is no deficiency on the part of trial counsel for declining to file a *Miranda* motion.

PREJUDICE

Even still, to obtain relief, under *Strickland*, Heyne must also show that he was prejudiced by trial counsel's ineffectiveness. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052 ("[u]nless 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."). To demonstrate prejudice, a defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. As to this claim, the trial court did not specifically make a finding as to prejudice because it found that there was no deficiency – so Appellant's burden under *Strickland* could not be met. However, the second prong of *Strickland* must also fail because Heyne cannot demonstrate prejudice for counsel's declination to file the motion to suppress Appellant's confession and subsequent diagram based on a *Miranda* violation.

Had this motion to suppress been filed, there is no reasonable probability that the outcome of the trial would have been different. While Heyne's confession

was a significant piece of evidence, the proposed motion to suppress would not have been successful, so it would have still been presented. Trial counsel having filed a meritless motion to suppress would not have changed this balance, or the outcome, in the slightest. And even if we assume, *arguendo*, that the motion to suppress would have been granted, Heyne still would have been convicted and sentenced to death without the confession and the diagram based on eyewitness testimony and the physical evidence in this case.

The trial court was correct in its order that Appellant was accorded constitutionally effective trial counsel because there was no *Miranda* violation when Heyne confessed to Detective Esposito and drew a diagram of the victims' bedroom – and any decision not to file a *motion in limine* on those grounds was a thoughtful, reasonable strategy not subject to second-guessing. Appellant is not entitled to relief.

CLAIM II: THE TRIAL COURT WAS CORRECT IN FINDING APPELLANT WAS ACCORDED EFFECTIVE COUNSEL WHEN COUNSEL DECLINED TO FILE A MOTION TO SUPRESS THE K-SWISS BOX APPELLANT ABANDONED IN ROXANN LARABIE'S ATTIC.

Appellant argues that the trial court should have found trial counsel ineffective for failing to file a motion to suppress the K-Swiss shoe box located in Roxanne Larabie's attic because law enforcement officers opened the box without a warrant. (*IB* at 29-33). Appellant argues that Larabie had no mutual ownership of the box,

and asserts that the trial court was incorrect in finding the box was abandoned property. The trial court properly employed the abandoned property legal standard when it correctly found that the box was brought into Larabie's home against her wishes, abandoned in her attic, and when she asked police to find and remove it, Heyne had no standing to object. The trial court correctly found no ineffectiveness of counsel when it identified trial counsel's reasoned decision not to file a motion to suppress the K-Swiss box as reasonable trial strategy and applied the proper legal authority finding that such motion would have been unsuccessful because Heyne had abandoned the box.

THE TRIAL COURT'S ORDER

The evidence and the law support the trial court's ruling. The trial court found:

> l. The Defendant claims that he confessed to the crimes because the officers showed him the K-Swiss box. Therefore, he claims that had his attorneys filed a motion to suppress, not only would the contents of the box have been suppressed, his confession would have been suppressed as well. During the hearing on the Defendant's Motion for Post-Conviction Relief, Moore testified that he considered the possibility of filing a motion to suppress the contents of the K-Swiss box. He testified that he decided not to file the motion for two reasons. First, the Defendant lacked standing because he did not have an expectation of privacy in Larabie's house and second, because the Defendant abandoned the property. Moore pointed out that Larabie told the Defendant that he could not have a gun in her house and told him to leave. Despite this, the Defendant brought the gun into her attic and left it there, abandoning the property and any expectation of privacy. (See Exhibit "I", pgs.115-116). Moore made a strategic decision not to file a motion to suppress the K-Swiss box. "[S]trategic 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." *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). The Court finds that Moore's decision not to file a motion to suppress the contents of the K-Swiss box was reasonable under the norms of professional conduct because such a motion would have lacked merit.

m. There is no question that the Defendant lacked standing to object to the search of Larabie's attic because the Defendant did not own or live in the house. However, the Defendant claims that the K-Swiss box belonged to him, not Larabie, and that he was the only person who could give consent to open the box. Assuming that the K-Swiss box and all of its contents did belong to the Defendant, once the Defendant placed the box in Larabie's attic and left the house, he did not have an expectation of privacy as to the box or its contents. The Defendant abandoned his interest in the K-Swiss box and its contents when he left them in Larabie's attic against her will. Under *Twilegar v. State*, 42 So. 3d 177, 193 (Fla. 2010):

> The test for abandonment is whether a defendant voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search. No search occurs when police retrieve property voluntarily abandoned by a suspect in an area where the latter has no reasonable expectation of privacy.

The Defendant knew that Larabie did not want to have his gun in her house. She told him that he could not have the gun in her house and that he would have to leave. Knowing this, the Defendant placed the gun in the K-Swiss box along with the clothing he was wearing during the crime and left the box in Larabie's attic. Under these circumstances, the Defendant would have known that there was a good chance that Larabie would try to get the box, or at least the gun which was inside the box, out of her house. The Defendant assumed the risk that someone would remove the box from Larabie's house and possibly open the box when he left it there. The Defendant relinquished his interest in the box by leaving it at Larabie' s house and no longer retained a reasonable expectation of property in it. Therefore, it was proper for the police to open the box without first

> obtaining the Defendant's consent. Had Moore filed a motion to suppress the contents of the box, the motion would not have been successful. Moore's strategic decision not to file a motion to suppress was reasonable under the norms of professional conduct.

(V3, R493-95).

MERITS—ARGUMENT SUPPORTING THE TRIAL COURT'S FINDINGS THAT COUNSEL WAS NOT INEFFECTIVE

Trial counsel is not ineffective for failing to file a specific *motion in limine* unless "the failure of counsel undermines confidence in the correctness of the outcome." *Johnson v. Wainwright*, 463 So. 2d at 209.

Furthermore, the trial court was correct in its order, citing *Occhicone,* that well-reasoned, strategic decisions do not constitute ineffectiveness. *Occhicone v. State*, 768 So. 2d at 1048. ("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.") To prevail in this ineffectiveness claim, Heyne would have to show that no reasonable attorney would agree with counsel's assessment that the motion to suppress lacked merit. However, Appellant's only argument that counsel's decision was unreasonable is because he failed to exclude "key physical evidence" from being introduced at trial. (*IB* at 31).

Testimony presented at the evidentiary hearing established that counsel was aware of the facts surrounding the discovery of the contents of the box, and that he

considered, but ultimately rejected, filing a motion to suppress on Fourth Amendment grounds. The reasons he testified to were: that "[t]here was no Fourth Amendment Violation because Mr. Heyne did not have standing to attack the search of a house which was owned by her or occupied by Ms. Larabie …" and that "[Heyne] abandoned the property and any reasonable expectation of privacy." (SV1, R115-16). Moore further testified that it was a perfectly reasonable expectation that Larabie would do exactly as she did, and cooperate with the police, since she had told Heyne to "get the hell out of her house" and not to bring the gun into her home. (SV1, R116). Defense counsel's explanation demonstrates that his decision not to move to suppress the contents of the box was a well-reasoned strategic choice. *Occhicone*, 768 So. 2d at 1048; *Lawrence v. State*, 969 So. 2d 294, 309 (Fla. 2007); *Schwab v. State*, 814 So. 2d 402 (Fla. 2002). The trial court's conclusion that "Moore's decision not to file a motion to suppress the contents of the K-Swiss box was reasonable under the norms of professional conduct because such a motion would have lacked merit" is supported by competent, substantial evidence and should be affirmed.

Heyne had no reasonable expectation of privacy in the K-Swiss shoebox and no standing to object to the box being opened because he abandoned the box in Larabie's attic. Abandoned property is not subject to Fourth Amendment protection. *Abel v. United States,* 362 U.S. 217, 80 S.Ct. 683 (1960). Fourth

Amendment protection only extends to places and items for which a person has a reasonable expectation of privacy, and no person can have a reasonable expectation of privacy in an item that he has abandoned. *Hester v. United States,* 265 U.S. 57, 44 S.Ct. 445 (1924).

Courts have recognized that "[t]he test for abandonment is whether a defendant voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search *Caraballo v. State*, 39 So. 3d 1234, 1245 (Fla. 2010) (quoting *State v. Lampley,* 817 So. 2d 989, 991 (Fla. 4th DCA 2002)); *Branch v. State,* 952 So. 2d 470, 476, n. 4 (Fla. 2006). **No search occurs when police retrieve property voluntarily abandoned by a suspect in an area where the latter has no reasonable expectation of privacy.** *Twilegar v. State*, 42 So. 3d 177, 193 (Fla. 2010) (quoting *State v. Lampley,* 817 So. 2d 989, 990–91 (Fla. 4th DCA 2002); *State v. Milligan,* 411 So. 2d 946, 947 (Fla. 4th DCA 1982). Because this is an objective test, and is different than the question in a property law analysis, it does not matter whether the defendant harbors a desire to later reclaim an item, even though Heyne intended the box to stay hidden forever, not to retrieve it. In this case, under the totality of the circumstances, the defendant physically relinquished the box, and left it behind against Larabie's wishes, hidden behind insulation panels, in the attic of Larabie's

home. Thus, he not only had no reasonable expectation of privacy in Larabie's home, he had no colorable claim for a Fourth Amendment violation in the box either. There can be no deficient performance for failure to raise a meritless claim. *Jackson v. State*, 648 So. 2d 85, 90 (Fla. 1994); *see also Lawrence v. State,* 831 So. 2d 121 (Fla. 2002).

Heyne relies on cases espousing the legal standard under which law enforcement may search personal property under a theory of common authority and mutual usage. (*IB* at 30). The cases Heyne cites are easily distinguishable from the case at bar – for example, they are not capital cases and are not in a post-conviction posture – but more importantly, they all reflect the incorrect legal analysis for the case at bar.

For example, in *King v. State*, 79 So. 3d 236 (Fla. 1st DCA 2012), a possession of a firearm by a convicted felon case on appeal from a motion to suppress which Appellant cites in support of this claim, the wife was found not to have actual authority to consent to the opening of her husband's when she did not have a key and none of her own documents were inside. While it is true the court in this case held the contents of the safe should have been suppressed, it is also true that the husband had not abandoned the safe, and was using it and storing it in the couple's master bedroom closet.

Kelly v. State, 77 So. 3d 818 (Fla. 4th DCA 2012) is an armed sexual

battery, kidnapping, robbery, and impersonating an officer case where a live-in girlfriend lacked the authority to consent to a search of a backpack in the garage, which she specifically identified as belonging to the defendant. This case is not persuasive because here, Heyne was not a co-habitant of the house, or even an invited guest. He had no reasonable expectation of privacy in the home, or in anything he had abandoned there.

State v. Miyasato, 805 So. 2d 818 (Fla. 2nd DCA 2001) is a possession of marijuana case on appeal from a motion to suppress where defendant's mother lacked authority to consent to a search of a desk in defendant's bedroom. This case is nothing like the facts here. Defendant's mother was not cooperative with the investigation, Defendant was present in the house, and the mother did not consent to the search of Defendant's desk where the drugs were found. In the case at bar, Larabie was completely cooperative with law enforcement, asking their help to find and remove the repugnant items from her home after Heyne had already abandoned the property and left the premises.

This case is much more similar in facts and in posture to *Fotopoulos v. State*, 838 So. 2d 1122, 1131 (Fla. 2002), where this Court determined that there was no ineffectiveness of counsel for having failed to file a motion to suppress a videotape found inside a bag in homeowner's garage when the homeowner consented to a

search, and officers found the videotape in an unzipped bag belonging to defendant in the homeowner's garage because seizure was "entirely proper."

PREJUDICE

Next, under *Strickland*, Heyne must also show that he was prejudiced by trial counsel's ineffectiveness. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052 ("[u]nless 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."). To demonstrate prejudice, a defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. As to this claim, the trial court did not specifically make a finding as to prejudice because it found that there was no deficiency – so Appellant's burden under *Strickland* could not be met. However, the second prong of *Strickland* must also fail because Heyne cannot demonstrate prejudice for counsel's declination to file the motion to suppress.

Had the motion been filed, it would have been denied based on abandoned property and could not have changed the outcome of the trial. But assuming *arguendo*, the motion had been granted, and the contents of the box had been suppressed, there is no reasonable probability of a different outcome at trial based on the other evidence in the case. While it is true the box contained important physical evidence including a pair of men's black Dickie shorts stained with

Benjamin Hamilton's blood, a pair of Reebok black tennis shoes, a white t-shirt, and the gun that fired the bullet found inside Ivory Hamilton, suppression of these items would still not have changed the outcome of the trial. This is because Larabie was an eyewitness to Heyne's activity after committing the murders and her testimony would have been unaffected by the suppression of the box. The jury would have heard Larabie's testimony that Appellant called her to pick him up, with a gun in a pillowcase, in bloodstained clothes, after just having left Ben and Sarah's house. (DAR, V17, R159). Larabie would still have testified that Appellant was sweaty and irritated, and told her he was going to Hell. (DAR, V17, R159). She testified that he wanted to drive by the scene of the murders on Moon Road, and that he made her go into a store and buy an exact replica of his outfit for him to change into. (DAR, V17, R159) Larabie further testified that Heyne admitted to her that he shot Benjamin and Sarah and that when she asked about Ivory, he just looked at her and said she was "gone." She testified that Heyne washed the new clothes in an effort to make them appear worn. She witnessed him remove his old shoes and clothes, wrapped up his gun in the pillowcase, and put all of the items in a box, which he stowed in her attic. The jury would have still heard testimony about how Larabie and detectives found the shoebox where he had hidden the bloody clothes and the gun, inside her attic, thereby corroborating Larabie's rendition of events, even if the *contents* had been suppressed.

Furthermore, Heyne's confession was not a product of the *contents* of the box being presented during his interrogation. It is clear from the record through Officer Hunter's testimony that he stood in the doorway of the room where the defendant was being interrogated with the box itself, which would not have been excluded in limine. (DAR, V18, R1661-62). Therefore, his confession and subsequent diagram would not have been fruit of the poisonous tree, even if the contents would have been suppressed. The confession was as a result of seeing the box, not the contents. (DAR, V18, R1652, 1659). Both Hunter and Esposito denied that the contents of the box were taken out, discussed, or rifled through. Heyne, upon seeing the box, just began his confession. (DAR, SR, V6, R109-110). The trial court made the following factual findings:

> Officer Hunter testified that when he returned to the Titusville Police Department he stood by the door of the room where the Defendant was being interviewed holding the K-Swiss box and that he was within the Defendant's view. … At one point, Detective Esposito directed the Defendant's attention to something at the door and asked if he was familiar with it. The Defendant went to the door and nodded his head. The Defendant then began to confess to the crime.

(V3, R493) (internal citations omitted).

Thus, the evidence of Appellant's confession would not have been suppressed, if the *contents* of the box had been. Assuming *arguendo*, even if his confession and diagram drawn during that confession had been suppressed, with the overwhelming evidence of Heyne's guilt, the outcome at trial would have been

the same.

Finally, evidence seized in violation of the Fourth Amendment is still admissible as impeachment to impeach a defendant's testimony at trial. *Walder v. United States*, 347 U.S. 62, 65 (1954). Since Heyne relied on his interrogation video to lay a foundation for a claim of self-defense, had the confession been suppressed, Heyne would have had to have taken the stand at trial to lay the groundwork for this affirmative defense. This evidence could have then been used to impeach Heyne's testimony. For all these reasons, there is no reasonable probability of a different outcome at trial.

Heyne's defense counsel was not deficient for failing to file a motion to suppress the K-Swiss box because the discovery and search of the box was proper. There was no Fourth Amendment violation upon which to base a motion to suppress the K-Swiss box when Heyne abandoned it in Roxanne Larabie's attic – and any decision not to file a *motion in limine* on those grounds was a thoughtful, reasonable strategy not subject to second-guessing. Moreover, even if counsel had filed the motion and that motion was meritorious, the preclusion of the contents of the box would not have led to a reasonable probability of a life sentence, so the search of the box did not prejudice Heyne's case. Because Heyne failed to meet either prong of *Strickland* necessary to find ineffectiveness, this Court should affirm the decision of the post conviction court and deny relief on this claim.

CLAIM III: THE TRIAL COURT WAS CORRECT IN FINDING APPELLANT WAS ACCORDED EFFECTIVE COUNSEL WHEN COUNSEL PUT ON EVIDENCE OF APPELLANT'S INTOXICATION THROUGH TWO EXPERT WITNESSES RESULTING IN A FINDING OF MENTAL DISTURBANCE MITIGATION.

Appellant argues this claim in what are, essentially, two sub-claims. Appellant asserts, in the first sub-claim, that the trial court erred in finding trial counsel effective during the penalty phase for having presented evidence of intoxication through Drs. Riebsame and Wu, and argues that counsel should have bolstered their testimony with the lay witness testimony of Darren Wratchford, Christina Wratchford, and Tammy Vick.[18] Appellant assets that counsel's performance was unreasonable in not locating these witnesses because they could testify about Heyne's drug use leading up to the homicide. (*IB* at 37). Appellant argues that, had trial counsel presented additional evidence of his intoxication, the trial court would have found the extreme emotional disturbance mitigator.

In the second sub-claim, Appellant asserts that counsel was ineffective under *Strickland* by "failing to retain and present a toxicologist who could have testified more fully concerning the effects of the drug and alcohol use." Appellant makes the argument that, had Dr. Daniel Buffington – the pharmacist –testified at trial,

---

[18] Presumably, Dr. Carpenter is also included in this sub-claim, though it is not argued as such.

"Heyne, due to consumption of drugs and alcohol, qualified for both of Florida's statutory mental health mitigators." (*IB* at 38-39).

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 828, 835 (Fla. 2011) (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 v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). 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). *See also Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004).

When the postconviction court rules after holding an evidentiary hearing, this Court "review[s] the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). Appellate courts do not "reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Nixon v. State*, 2 So. 3d 137, 141 (Fla. 2009) (quoting

Brown v. State, 959 So. 2d 146, 149 (Fla. 2007)).

RULE GOVERNING FAILURE TO INVESTIGATE AND PRESENT MITIGATION CLAIMS

With respect to claims of ineffective assistance of counsel for failing to investigate and present evidence at the penalty phase, the United States Supreme Court stated in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2536, 156 L.Ed.2d 471 (2003) (as cited in *Cummings-El v. State*, 863 So. 2d 246, 250-51 (Fla. 2003)):

> [O]ur principal concern in deciding whether [counsel] exercised "reasonable professional judgmen[t]" is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence ... was itself reasonable. In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time."

Stated differently, an attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence, but not necessarily to run down every possible lead. *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004).

As stated in *Robinson v. State*, 95 So. 3d 171, 178 (Fla. 2012), in order to prevail on an ineffective assistance of counsel claim on this ground, Heyne must first show that his counsel's performance was deficient to the point it was unreasonable and no competent counsel would have performed that way. *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998); *See, e.g.*, *White*

v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992) (defendant must establish "that the approach taken by defense counsel would have been used by no professionally competent counsel"); *Harich v. Dugger*, 844 F.2d 1464, 1470-71 (11th Cir.1988) (same). Second, he must demonstrate prejudice. By showing "that counsel's ineffectiveness deprived the defendant of a reliable penalty phase proceeding." (quoting *Henry v. State*, 937 So. 2d 563, 569 (Fla. 2006)); *Asay v. State*, 769 So. 2d 974, 985 (Fla. 2000); *Coleman v. State*, 64 So. 3d 1210, 1218 (Fla. 2011). He has shown neither.

TRIAL COURT'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 Heyne's claim regarding failure to investigate and present mitigation:

> The representation of the defense attorneys was not deficient due to their failure to call the lay witnesses at the penalty phase. No evidence was presented that the Defendant even told his attorneys that he used cocaine with these three witnesses on the day of the murders. Moore testified that had the Defendant told him of any witness who could testify to his drug use, he would have tracked them down and interviewed them. The Defendant also was not prejudiced by his attorney's failure to call these witnesses. Although the lay witnesses would have provided some additional evidence that the Defendant used cocaine prior to the crimes other than the Defendant's self-reporting, it is doubtful that this evidence would have changed the Defendant's sentence. None of these witnesses could remember how much cocaine the Defendant consumed and merely provided a guess. Therefore, their testimony did not establish that Defendant had consumed a binge amount of cocaine rather than a normal amount. Also, none of these witnesses testified that the Defendant drank any alcohol in their presence. This differed from the Defendant's statement

to Dr. Riebsame that he drank about ten beers that day. The witnesses admitted that they used drugs themselves and that they used cocaine with the Defendant which could have caused them to lose credibility with the jury. *See Wheeler v. State*, 124 So. 3d 865, 881 (Fla. 2013).

bb. The lay witness testimony also would not have changed the Defendant's sentence because other evidence was presented during the trial and the penalty phase that shows that the Defendant was not intoxicated to the point of being unable to control his actions. The police interview of the Defendant shows that the Defendant was able to understand the questions that were asked and was able to answer then appropriately. It also shows that he was alert throughout the interview, although at one point he may have fallen asleep while he was alone in the room. (See Exhibit "J"). Officer Watson testified at the penalty phase that the Defendant was in the front seat of his patrol car on March 30, 2006 and was sitting two to three feet from him with the windows pulled up. He testified that he could not smell any alcohol and that he did not observe any indications that the Defendant had consumed alcohol or cocaine. He also testified that he observed the Defendant walk and also did not observe any indications that the Defendant had consumed alcohol and cocaine while the Defendant was walking. (See Exhibit "L", pgs. 575- 579). Detective Esposito testified that he was sitting within one to three feet of the Defendant during the three hour interview of the Defendant and that he did not see any signs that would indicate that the Defendant had used alcohol or drugs. (See Exhibit "L", pgs. 584-589). Both of these officers testified to their training and experience in detecting drug and alcohol use and to the signs they would look for in determining whether a person had used alcohol or drugs. The Defendant's actions after the crime also show that the Defendant was able to think clearly and control his actions. The Defendant took steps to cover up his involvement in the crime by calling a friend to pick him up, purchasing new clothes identical to the ones he was wearing, showering, and hiding his old clothes and the gun in his friend's attic. This shows that he was able to see the gravity of the situation and to come up with a plan to possibly avoid prosecution. Even if the lay witnesses as well as the additional expert witnesses had testified at the penalty phase, the result would not have changed. When weighed against this other evidence, it is unlikely that the jury and the judge would have found that that the Defendant suffered from an extreme

> mental disturbance due to the combination of his metal conditions and intoxication.

(V3, R503-04).

These findings are supported by competent, substantial evidence. As stated in *Clark v. State*, 35 So. 3d 880, 890-891 (Fla. 2010), this is not a case where the trial court did not consider mitigation evidence present in the record. The record establishes that trial counsel presented mitigating evidence at the penalty phase and the *Spencer* hearing, so Heyne was already accorded the benefit of the mitigation produced at the evidentiary hearing. Therefore, there can be no likelihood of a life sentence in this 10-2 decision.

MERITS—ARGUMENT SUPPORTING THE TRIAL COURT'S FINDINGS THAT COUNSEL WAS NOT INEFFECTIVE

Counsel was not ineffective. Heyne has shown neither deficient performance nor prejudice. The trial court made express findings on both the deficiency and prejudice elements, and there is competent, substantial evidence in the record to support the fact that counsel conducted a reasonable investigation.

Trial counsel conducted an extensive mitigation investigation for the penalty phase. Counsel testified as to the incredibly high level of preparation and the depth of the investigation that goes into a capital case. He spoke with every doctor Heyne had seen in his life, reviewed his medical records, his school records, talked to family members, interviewed all potential witnesses and deposed most of them.

Defendant's attorneys also specifically attempted to find additional evidence of Defendant's intoxication at the time of the crimes, but, after a very thorough investigation, with a team of investigators and three experienced defense attorneys assigned to this case, Amanda Hatchcock was the only witness to mention a drug issue with Heyne and she was not willing to testify at trial.[19] Trial counsel was not aware these persons even existed, and there is no evidence Heyne even disclosed them to his defense team.

At the penalty phase, counsel presented mitigation testimony "from former educators, family members, and evaluating psychologists." *Heyne*, 88 So. 3d at 119.

Trial counsel secured the testimony of Dr. Riebsame, who testified to his diagnosis of Heyne, which included a theory of alcohol and cocaine intoxication at the time of the offense. (V22, R2448). This Court pointed out in its Direct Appeal affirmance that "Dr. William Riebsame diagnosed Heyne with ADHD and possible bipolar disorder—one or both of which caused Heyne to have impulse control disorder—as well as cocaine and alcohol use and dependence at the time of the offense. Dr. Riebsame also discussed Heyne's history of impulsivity, including two documented suicide attempts." *Heyne*, 88 So. 3d at 119. Counsel also presented Dr.

[19] Hatchcock was not called as a witness to testify at the postconviction evidentiary hearing, either.

Wu, who testified “that imaging from a PET scan showed damage to Heyne's temporal and parietal lobes, evidencing learning difficulties, causing problems regulating aggression and impulse, and making addiction to alcohol and drugs more likely. Dr. Wu also testified that imaging was consistent with a history of traumatic brain injuries and specifically noted two concussions Heyne suffered as a child, another head injury when Heyne was incarcerated in 2004, and a slow processing speed relative to his IQ score of 88.” *Heyne*, 88 So. 3d at 119.

"Counsel is entitled to rely on qualified experts, even if those evaluations, in retrospect, were not as complete as others may desire." *Darling v. State/McDonough*, 966 So. 2d 366, 377 (Fla. 2007). Heyne is not entitled to “shop” for an expert for collateral relief, nor is trial counsel deficient for relying on competent testimony at the trial level. *Zommer v. State/Jones*, 2015 WL 175087, *14. n.5 (Fla. Jan. 15, 2015); *See Floyd v. State/McNeil*, 18 So. 3d 432, 454 (Fla. 2009) (“Trial counsel's investigation into mental-health mitigation ‘is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert.’ “ (quoting *Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000))).

Moreover, a defendant’s claim he was denied effective assistance of counsel because counsel failed to present mitigation evidence will not be sustained where the jury was aware of most aspects of the mitigation evidence that the defendant

claims should have been presented. *Troy v. State*, 36 57 So. 3d 828 (Fla. 2011) (citing *Van Poyck v. State*, 694 So. 2d 686, 692-93 (Fla. 1997)). In this case, the judge and jury heard substantial testimony about Heyne's possible intoxication at the time of the offense and his use of drugs and alcohol. Trial counsel also called Dr. Wu who testified to a possible brain trauma as evidenced by a pet scan and the impulse control and possible addictions later in life stemming from that. (V23, R2678-79). The trial court found that Heyne had an impaired capacity to appreciate the criminality of his conduct or conform it to the requirements of law and assigned this mitigator moderate weight, and that Heyne was under the influence of a mental or emotional disturbance, which it afforded little weight. Thus, any further evidence of this nature would have been cumulative.

In post-conviction, the trial court made a factual finding that "Dr. Carpenter testified that the Defendant had the same mental conditions that Dr. Riebsame testified to … this testimony would have been cumulative." (V3, R503). Counsel cannot be found ineffective for failing to provide cumulative evidence." *Kilgore v. State*, 55 So. 3d 487, 504 (Fla. 2010) (citing *Gudinas v. State*, 816 So. 2d 1095, 1108 (Fla.2002); *see also Card v. State*, 497 So. 2d 1169, 1177 (Fla.1986)). This is a situation, like in *Kilgore*, where the evidence in post-conviction of Heyne's intoxication may have "enhanced" the evidence from the penalty phase, but did not present anything new, and thus, was cumulative.

Additionally, the post-conviction mitigating evidence at issue would have likely proven more harmful than helpful because it would offer the theory of voluntary intoxication, without the neuropsychological factors to explain it that Dr. Wu provided in the original penalty phase. These intoxication witnesses could not establish a "binge" amount of cocaine use; or any specific amount at all. They also lacked credibility, and undermined the mitigating evidence that was presented in the penalty phase, specifically the alcohol use. As pointed out in the trial court's order "[a]lso, none of these witnesses testified that the Defendant drank any alcohol in their presence. This differed from the Defendant's statement to Dr. Riebsame that he drank about ten beers that day." (V3, R503). Overall, these witnesses painted a less mitigating picture for Heyne that the one he had at the penalty phase. *See Reed v. State,* 875 So. 2d 415, 437 (Fla. 2004) ("An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword"); *Jones v. State*, 855 So. 2d 611, 616 (Fla. 2003) (holding trial counsel was not ineffective for not pursuing a theory of voluntary intoxication in the penalty phase where counsel chose not to put on this defense when it was his experience "that juries did not accept voluntary intoxication as a defense or mitigating factor, especially when the charge is murder.")

As this Court explained in *Winkles v. State*, 21 So. 3d 19, 26 (Fla. 2009) "an

ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword." *See also Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004). The background investigation in this case was comparable to the mitigation preparation found constitutionally adequate by this Court, in *Wheeler v. State/Crews*, 124 So. 3d 865, 878 (Fla. 2013), where this Court found no ineffectiveness on the part of trial counsel for failing to call witnesses to testify as to the defendant's drug and alcohol where the witnesses "could have informed the jury and the judge as to the extreme amounts of drugs that Wheeler had been abusing shortly before the crime" but the witnesses' "testimony would not provide any evidence that the defendant was using drugs on the day of the shooting or how much he was using." This Court recognizes that such testimony concerning amounts of drugs consumed would be speculative. This Court also points out in *Wheeler* that a jury may not look favorably on such voluntary intoxication testimony stating, "this type of mitigation poses obvious dangers that should be and were considered by competent trial counsel … a jury may be less sympathetic to testimony from witnesses who were by their own admission involved in significant illegal drug use and who would have testified that Wheeler was an individual who sold drugs, paid people with drugs in lieu of cash, and used drugs extensively, ultimately killing a law enforcement officer and wounding two others." *Id* at 880-881. Similarly, here we have the testimony of

Heyne's friends, who allege to have been "partying" with him, availing themselves of his cocaine supply as a local drug dealer, and (in one witness's case) allowing the defendant to interact with her toddler child while he was allegedly high on cocaine.

Additionally, the witness testimony presented at the evidentiary hearing was not credible, and would have been impeached at trial by the testimony of the officers, who were well-trained in identifying signs of intoxication and impairment. According to the officers, Heyne evidenced no indicia of impairment even in close, extended contact. This was true both hours before the murders, and hours thereafter. Larabie would also have been a more credible witness when she described how Heyne behaved in a deliberate and calculated manner when concealing evidence of the crime then the intoxication witnesses. Furthermore, Wratchford's account of sleep deprivation would have been impeached by Heyne's statement to law enforcement that he had woken up at approximately 8 a.m. the morning of the murders, and was not in a state of intoxicated sleep deprivation, as asserted at the hearing.

Furthermore, trial counsel was not deficient in deciding not to call lay witnesses to substantiate Heyne's impairment[20] or Dr. Buffington because

---

[20] Amanda Hatchcock was the only lay witness known to trial counsel at the time

strategic decisions fall squarely within the class which *Strickland* describes as "virtually unchallengeable." *Strickland v. Washington*, 466 U.S. at 690-691.

Trial counsel made a well-reasoned strategic decision not to call Dr. Buffington. There was no toxicological evidence to support Heyne's claim of extreme drug and alcohol use, and intoxication is directly contradicted by the other evidence in the case, such as the officer's testimony that Heyne exhibited no indicia of impairment, his deliberate and thoughtful concealment of evidence directly following the murders, and his own statements. Trial counsel did not get a blood test of Appellant to determine his intoxication at the time of the crimes because too much time passed before his office was appointed to represent him. He did not, therefore, hire a toxicologist to testify about the Appellant's intoxication because he did not have any hard evidence, and a toxicologist, like Buffington, could do nothing more than speculate. The possibility of hiring a toxicologist was considered and rejected based on reasonable trial strategy. Moreover, Dr. Buffington, as a pharmacist, is not in any way a mental health professional and is neither qualified nor permitted to render a mental health diagnosis, or to substantiate statutory mental health mitigators in the absence of any physical evidence, while Dr. Riebsame and Dr. Wu are. Appellant only cites to

---

of the trial who had evidence of Heyne's use of intoxicants. However, she refused to testify at trial.

Strickland and *Porter v. McCollum,* generally, in support of this claim.

PREJUDICE

If Heyne can establish that counsel's performance was deficient for failing to call these intoxication witnesses, he must then "show[ ] that counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland* at 687. In other words, in order to establish the prejudice prong, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. As the Court explained in *Strickland*, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. In the penalty phase context, "the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id*. at 695.

As to the prejudice prong, Heyne alleges that having more mitigation witnesses to testify about his intoxication would have spared him the death penalty. However, there is no reasonable probability of a different outcome at trial. In fact, this Court, in its opinion affirming the conviction on direct appeal, discusses this issue directly:

> In this case, the record includes evidence that conflicts with the expert testimony, specifically, Heyne's "purposeful actions ... indicative of someone who knew those acts were wrong and who could conform his conduct to the law if he so desired." *Id*. (quoting *Nelson*, 850 So.

> 2d at 531). Following the shootings, Heyne took one of the murder weapons and placed it in a pillowcase, ran from the house, contacted an ex-girlfriend, and went back to her house. In an effort to conceal his involvement, Heyne took a shower, obtained replacement clothing identical to the clothing he wore when he committed the murders, washed the replacement clothing to make it look worn, hid the murder weapon and bloody clothes in the attic, and then lied to police about his involvement in the murder.
>
> Additionally, there was a conflict in the evidence regarding Heyne's self-reported drug use on the day of the murder, a factor vital to the experts' evaluation of Heyne's impulse control. In its sentencing order, the trial court observed that if Heyne was intoxicated on the day of the shooting, his intoxication was not so significant that it limited his ability to obtain a weapon, fire it accurately, contact Larabie, and then conceal the murder weapon, clothing, and drugs. *See Zommer*, 31 So. 3d at 750 ("[A]lthough Zommer may have had some drugs in his system at the time of the murder, the evidence does not support a finding that those drugs substantially impaired his capacity...."). Additional conflicting evidence not referenced in the sentencing order included the observations of the officers, who said that Heyne did not appear intoxicated later that day, and the toxicology report showing an absence of cocaine in Benjamin, with whom Heyne claimed to have used cocaine earlier that day.

Heyne v. State, 88 So. 3d 113, 124-25 (Fla. 2012), *cert. denied*, 133 S.Ct. 574 (2012) (emphasis supplied).

The trial court did hear and consider Heyne's evidence of intoxication, but reasoned that the facts proved that Heyne's disturbance was something short of "extreme." Appellant received the benefit of the impairment mitigation—as non-statutory mitigation as opposed to statutory. Therefore, there is no reasonable probability that more evidence that was refuted by the facts of the case would have changed the outcome of the trial.

In affirming Heyne's death sentence, this Court found Heyne's case was heavily aggravated. The jury recommendation was 10 to 2 in favor of death. This Court found the trial court balanced heavy aggravation against the minimal mitigation. In aggravation, the trial court found the following: (1) prior violent felony (**great weight**); (2) the murder was especially heinous, atrocious, or cruel (HAC) (**great weight**); and (3) the victim was less than twelve years of age (**great weight**.) "[T]he heinous, atrocious, or cruel aggravator is one of the 'most serious aggravators set out in the statutory sentencing scheme. " *Aguirre–Jarquin v. State*, 9 So. 3d 593, 610 (Fla. 2009) (*quoting Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999)), and "the prior violent felony aggravator is considered one of the weightiest aggravators." *Silvia v. State*, 60 So. 3d 959, 974 (Fla. 2011).

The following thirteen non-statutory mitigating circumstances were found: (1) Heyne suffers from a mental illness (great weight); (2) Heyne has brain damage and brain deficits (great weight); (3) Heyne had a problem with substance abuse and dependence (moderate weight); (4) Heyne had an impaired capacity to appreciate the criminality of his conduct or conform it to the requirements of law (moderate weight); (5) Heyne was under the influence of a mental or emotional disturbance (little weight); (6) Heyne was a good, caring father to a handicapped son (very little weight); (7) Heyne cared for and helped elderly neighbors when he was a child (very little weight); (8) Heyne gave his flannel jacket to a homeless

person (very little weight); (9) Heyne protected younger, weaker children when he was a child (very little weight); (10) Heyne played football and other sports as a child and was devastated when he could no longer play (very little weight); (11) Heyne was recommended to receive in-patient psychiatric treatment at age five but did not receive treatment (moderate weight); (12) Heyne has a history of suicide attempts and self-destructive behavior (moderate weight); and (13) Heyne exhibited good behavior during trial (some weight). *Heyne v. State*, 88 So. 3d at 126-27.

The testimony presented at the evidentiary hearing presented little new information, and at times, contradicted, or even presented a less-mitigating picture than that which the jury heard. For example, trial counsel conducted a thorough mitigation investigation, presented two mental health experts and five lay witnesses spanning from Heyne's childhood to present day, and elicited testimony as to Appellant's impairment around the time of the murders. As a result, Appellant was given the benefit of both statutory mental health mitigators in his penalty phase, just as non-statutory mitigation. There is no deficiency for failing to present the additional intoxication witnesses because any further evidence of intoxication would have been cumulative or less mitigating, and because counsel was allowed to rely on the opinions of his qualified experts. Finally, counsel was not ineffective because any decision not to present further testimony of

intoxication was a thoughtful, reasonable strategy not subject to second-guessing. Appellant is not constitutionally entitled to perfect or error-free counsel, only to reasonably effective counsel. *Waterhouse v. Stat*e, 522 So. 2d 341, 343 (Fla. 1988).The impairment testimony presented in post-conviction was not particularly credible, and would not have changed the Honorable Judge Eaton's ruling that impairment evidence fell short of the level of statutory mitigation given the contradictory evidence of Heyne's sobriety of thought and purposeful actions.

Even if trial counsel had hired the experts who appeared at the evidentiary hearing in addition to the experts that appeared for trial; and even if trial counsel secured the lay witnesses to testify to getting high with the defendant, it would not have resulted in a life sentence recommendation. Since trial counsel mounted a reasonable investigation into Heyne's background and mitigating factors, and because there is no reasonable probability of a life sentence from the additional witnesses that were presented at the evidentiary hearing, Appellant has failed to meet either prong of *Strickland*; and therefore, failed to prove his ineffectiveness claim.

CONCLUSION

Based on the foregoing arguments, the State respectfully requests this Honorable Court affirm the trial court's denial of postconviction relief.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by service of filing to the E-

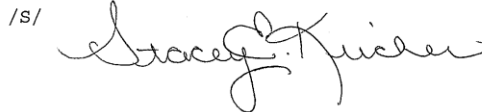
Portal to Eric Pinkard, Assistant CCRC-Middle, pinkard@ccmr.state.fl.us, support@ccmr.state.fl.us; Capital Collateral Regional Counsel; 3801 Corporex Park Drive, Suite 210; Tampa, FL 33619-1136 on this 10th day of February, 2015.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL



STACEY E. KIRCHER
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 050218
Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, Florida 32118
Primary E-Mail:
CapApp@MyFloridaLegal.com
Secondary E-Mail:
stacey.kircher@myfloridalegal.com
(386)238-4990
(386)226-0457 (FAX)