IN THE SUPREME COURT OF FLORIDA

ROBERT EARL PETERSON,

Appellant,

CASE NO. SC16-289
L.T. No. 16-2005-CF-11551

v.

STATE OF FLORIDA

DEATH PENALTY CASE

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Citations to the postconviction record in this brief will be designated as follows: The postconviction record shall be referred to by "PCR" and followed by the appropriate page number; the direct appeal record shall be referred to by "DAR" and followed by the appropriate volume and page number; Appellant's Initial Brief shall be referred to by "IB" followed by the page number.

STATEMENT OF THE CASE AND FACTS

The relevant facts and procedural history concerning the August 8, 2005, murder of Roy Andrews are recited in this Court's opinion on direct appeal:

> Peterson, who was 41 at the time of the crime, had been living at home with his mother and his stepfather. Andrews had been Peterson's stepfather since Peterson was fifteen. Shortly before the murder, Peterson's mother, at the urging of Andrews, told Peterson he had to move out. Also at Andrews' insistence, Peterson's mother stopped providing Peterson with money. Andrews was beaten and shot twice in Jacksonville, Florida, with his body left in the Greenlawn Cemetery very close to where Peterson's ex-girlfriend was buried.
>
> The State first presented evidence to establish that about a month before the murder, Peterson told several people that he was going to kill Andrews. In early July 2005, Peterson talked to Becky Price, his second cousin, and told her that Andrews had "kicked him out" and told his mother not to give him more money. Peterson informed Price that he was going to kill Andrews. About two weeks later, after his mother refused to give him money again based on Andrews' direction, Peterson told Price a second time that he was going to kill Andrews. While the statements scared her, Price did not take him seriously and did not warn anyone. At the beginning of July, Peterson told his aunt

that Andrews called his mother fat and that this made him "want to jump across the table and beat him to death."

On August 7, 2005, Peterson was staying at a hotel, the Masters Inn, with his girlfriend, Clara Keene. At 6:01 a.m. on August 8, the security cameras at his hotel showed Peterson leaving his room wearing jeans, shoes, a jacket, and a dark hat with a design on it.

At the time of the murder, Andrews was a counselor at a local drug clinic, Jacksonville Metro Treatment Center, and generally worked from 5:00 a.m. until 2:00 p.m. On August 8, 2005, Andrews arrived at 4:45 a.m. but left early at 9:30 a.m. Between 9 and 10 that morning, two people who worked close to Greenlawn Cemetery heard two loud pops that sounded like gun fire and then saw an older green pick-up truck with faded paint and big tires leaving the cemetery very quickly.

Andrews' body was found shortly after his murder. He was lying on the ground in a pool of blood, relatively close to the grave of Peterson's ex-girlfriend who had died about a year earlier. Near the body, law enforcement found a dark "Bike Week" baseball cap, which matched the hat that Peterson wore when he left the hotel room that morning. Andrews' truck was nearby, with the keys in the truck, the passenger door opened, and the hood of the truck released but not fully opened. Andrews' wallet was still in his pocket, and he had a considerable amount of money in his pocket. Andrews had been beaten around the head and shot in the head twice.

Around 10:30 a.m. that same day, Peterson called Keene at the hotel and asked her to let him into their room because he forgot his key. The video surveillance cameras showed Keene opening the door for Peterson. In the video, Peterson was dressed in different clothes from those he had worn when he left the hotel a few hours earlier: he was wearing a different shirt and not wearing an undershirt, shoes, or his hat. According to Keene, Peterson was upset and told her they needed to go to his mother's house.

A few days after the murder, the police arrested one of Peterson's acquaintances, Jimmie Jackson, for driving on a suspended license.

While Jackson was in custody, he agreed to call Peterson to ask about the murder. During their initial conversations, Peterson made a number of incriminating statements, implying that he had killed Andrews as he had planned. Jackson set up a meeting with Peterson, agreeing to meet him in a parking lot. Peterson drove up in his vehicle at the designated time and then entered Jackson's truck, which the police had wired.

During their conversation, Peterson admitted to killing Andrews and provided numerous details about the crime, including that he killed Andrews in broad daylight at 9:45 in the morning. Peterson explained that he killed Andrews because Andrews crossed the line by slapping his mother and calling her names. He then told Jackson that his mother knew about it because he and his mother were close and his mother was "contracting it." Peterson informed Jackson that even though the police took his red truck, he was not in that vehicle during the crime. He bragged that the vehicle he did use was "crushed and gone" on the same day as the crime. He then described the murder in detail, explaining that he was walking down Emerson Road, as though his truck had broken down, and Andrews picked him up and took him to the cemetery. Peterson described the crime as follows:

PETERSON: No, I busted his ass with brass knuckles. I tried to beat him to death so's I could take him somewhere else.

[JACKSON]: Oh, oh, oh, oh.

PETERSON: The bitch wouldn't fucking—I done broke his jaw, knocked all his teeth out, his eye ball hanging out his fucking head, the bitch wouldn't go out, so I had to go pop pop and haul ass. By that time, I'm covered from head to toe—

[JACKSON]: Blood.

PETERSON: So I hauled ass out way out to the west—

[JACKSON]: Yeah.

PETERSON: Hauled ass out to the fucking—got brain matter, the whole fucking nine yards. I went out to fucking Baldwin, stripped down, took a shower, scrubbed myself with a brush, got dressed, come back, still hit the cameras....
....

PETERSON: Set all my clothes, all my clothes, the vehicle I was driving, and the gun, you'll never find it. I don't give a fuck who you are. You can be Inspector Cluso, you ain't finding this shit. Drove back, and the man that I was working for says I was there from 9:00 to 11:00 and from 11:00 to 12:00. I eat lunch and from 12:00 to 1:00. I was sitting at my mama's house when they came and informed us he got killed.

Peterson next discussed his former girlfriend, who was buried in Greenlawn Cemetery, telling Jackson that Andrews "landed on her grave." Peterson also admitted that he made mistakes regarding some aspects of the plan because during the crime, there was a struggle and Peterson lost his hat and left some fingerprints in the truck. He planned to explain this evidence by saying that he left his fingerprints when he was with Andrews the night before and Andrews had a nose bleed.

Dr. Jesse Giles, the medical examiner, testified that Andrews had a significant number of blunt force injuries spread over his head and neck that were consistent with brass knuckles and that occurred shortly before the time of death. Andrews' cause of death was two contact gunshot wounds, where the gun was pressed against the victim's head. One gunshot wound was at Andrews' left temple. The other wound entered over Andrews' right ear, and the bone fragments from this wound severed the brain stem, which was fatal.

After the State rested, Peterson testified in his defense, denying that he killed Andrews. Peterson testified that he had visited Bike Week one time, and while there, he bought about four Bike Week hats. According to Peterson, on the day before the murder, he went to his mother's house to buy lottery tickets for her and saw Andrews sitting in his truck. Andrews had a trickle of blood coming from his nose, so

Peterson helped wipe it away. He then left and bought the tickets as he planned to do. When he brought the tickets back to his mother's house, he noticed the interior light of the truck was on, so he reached into Andrews' truck and turned off the light, knocking off his hat. He did not reach down to retrieve his hat because he was in a hurry to return to his hotel room with his girlfriend.

Peterson further testified that on the day that Andrews was killed, he got up at 5:30 that morning and wore a jacket because it was very cold in the hotel room. He spent the morning on various errands and went to his mother's house. Around 9 a.m., Peterson began to work on a siding project near his mother's house. Shortly after he began, he realized that his phone was missing, so he left to find it. Peterson explained that the reason he was dressed differently when he arrived at his hotel room late that morning was because he had taken off his hat and left it at his mother's house, along with his warmer clothes. He also was not wearing shoes because his shoes got dirty when he walked through a yard during the siding project.

In explaining the incriminating statements that he made to Jackson, Peterson testified that near the time of the murder, he had a drug deal going on with Jackson, where he had "invested" $10,000 so that Jackson could sell the drugs and he could make a $4,000 profit. In an attempt to get his money back, he made up a story that he beat his stepfather so badly that he knocked out his eyeball and all of his teeth—something that was not even accurate as to Andrews' actual injuries.

In his defense, Peterson also called Joel Sockwell, who testified that he lived near Peterson's mother's house. On the day of the murder, Sockwell went to work, but left around 9 a.m. and saw Peterson in the neighborhood while he was out on the patio. However, Sockwell was not certain about the times.

The jury found Peterson guilty of first-degree murder and tampering with evidence.

During the penalty phase, the State presented four victim impact statements and relied upon the evidence already presented to establish the aggravators.

The defense presented numerous witnesses, most of whom lost contact with Peterson in recent years but testified that years ago, Peterson was a good worker and friend. Many of the witnesses who testified on Peterson's behalf knew of Peterson's involvement at the raceway where Peterson raced cars. For example, David Bradshaw testified that he had known Peterson since 1986, when they raced together. According to Bradshaw, during that time, Andrews and Peterson got along well and worked on cars together. However, Bradshaw did not have regular contact with Peterson during the last five years. During this period of time, Peterson was married, but he and his wife eventually divorced. A few witnesses testified that they speculated that Peterson might have become addicted to drugs after the divorce, but never actually witnessed Peterson use any illegal substances.

In addition, Peterson presented testimony to establish that he had not received any disciplinary reports since he was in jail. Peterson also called his aunt, Laverne Rundall, who testified that she likewise had once contemplated whether Peterson was under the influence of drugs when she saw Peterson outside of Andrews' office at the Jacksonville Metro Treatment Center and did not recognize him because he was so scruffy and skinny. She asserted that Andrews and Peterson had a good relationship until recently, when they argued about money. On cross-examination, she asserted that Peterson obtained his truck and most of his money through his mother and Andrews.

Peterson's mother, Patricia Andrews, also testified on his behalf, asserting that Peterson and Andrews were very close and previously were involved in racing together. At the time of the murder, Andrews had been Peterson's stepfather for about eighteen years. According to Patricia, Peterson supported her significantly since she has chronic obstructive pulmonary disease and also provided a tremendous amount of support to Andrews when he was undergoing cancer treatment. They paid him for his help, including

> paying his child support and his truck insurance in exchange for his assistance. Andrews invited Peterson to live with them and told Peterson that if he was not working, they would find things for him to do around the house. On cross-examination, she admitted that Andrews recently had changed the arrangement, so that Peterson could not obtain money from one person without telling the other person. They tried to talk to Peterson about obtaining a better job. The jury voted to recommend a sentence of death by a vote of seven to five.
>
> During the *Spencer* hearing, Dr. William Morton testified regarding the effect of Peterson's cocaine use on his decision to murder Roy Andrews. The judge sentenced Peterson to death. In doing so, the judge found three aggravators: (1) the murder was cold, calculated, and premeditated (CCP); (2) the murder was heinous, atrocious, or cruel (HAC); and (3) the murder was committed for pecuniary gain. Peterson did not offer any statutory mitigation, and none was found. The court found two nonstatutory mitigators: Peterson had a history of drug abuse, and he had numerous positive qualities. The trial court sentenced Peterson to death, concluding that "[t]he three weighty aggravators, when weighed against the two non-statutory mitigators, which were assigned only at best slight weight, support a death sentence."

Peterson v. State, 94 So. 3d 514, 519-23 (Fla. 2012) (footnotes and internal page numbers omitted).

On direct appeal, this Court addressed eight issues: 1) the trial court erred in admitting a statement that could imply Appellant committed a prior murder; 2) the trial court erred in permitting the State to present certain victim impact evidence; 3) the trial court erred in denying the motion to suppress the statements that Appellant made to Jackson; 4) the trial court erred in finding CCP; 5) the trial court

erred in finding the murder was committed for pecuniary gain; 6) the trial court erred in giving little weight to the evidence pertaining to Appellant's cocaine addiction; 7) the death sentence is disproportionate; and 8) this Court should reconsider whether Florida's death penalty scheme is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). In addition, this Court also considered whether the evidence was sufficient to support a conviction for first-degree murder.

On May 17, 2012, this Court rejected each of the issues Appellant raised on appeal and found the evidence sufficient to support Appellant's conviction of first-degree murder. Peterson, 94 So. 3d at 538. Appellant filed a writ of certiorari in the United States Supreme Court, and on December 10, 2012, review was denied. Peterson v. Florida, 133 S. Ct. 793 (2012).

On November 13, 2013, Appellant filed a motion for postconviction relief in the trial court, raising the following issues: 1) Appellant's due process rights were violated when trial counsel lost or destroyed Appellant's trial records; 2) trial counsel was ineffective in the pretrial, guilt, and penalty phases of the trial due to counsel's inactivity during the case, as well as counsel's destruction of trial records;[1] 3) Appellant is denied his constitutional rights and effective assistance of

[1] The sub-parts to this claim included: 1) defense counsel failed to develop an attorney-client relationship; 2) defense counsel failed to investigate and present evidence in the penalty phase; 3) defense counsel failed to hire a mitigation expert;

counsel under the rules prohibiting Appellant's lawyers from interviewing the jurors; 4) the State improperly withheld evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963); 5) Appellant was denied an effective mental health evaluation because necessary documents were not provided to Appellant's expert; 6) Florida's capital sentencing scheme is unconstitutional because trial court judges are allowed unfettered discretion to assign weight to aggravators and mitigators; 7) the Duval County prosecutor's use of the death penalty is arbitrary and violates the Eighth Amendment; 8) Florida's use of the death penalty violates the Eighth Amendment because jurors are not required to issue a unanimous death sentence; 9) the cumulative prejudice resulting from trial counsel's deficient performance resulted in an unfair trial; 10) Appellant is innocent of first-degree murder. (PCR 177-249) The trial court held a Huff hearing on Appellant's postconviction motion and on April 10, 2014, granted Appellant an evidentiary hearing on claims 1), 2), and 4), and ruled that all others could be resolved as a matter of law. (PCR 367)

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4) defense counsel failed to effectively use the appointed investigator; 5) defense counsel failed to challenge five potential jurors, failed to investigate jury tampering, and failed to object to police presence throughout trial; 6) defense counsel failed to depose a witness, Jimmie Jackson, and for failing to call Jackson to testify; 7) defense counsel stipulated to the entrance of the confession tape; 8) defense counsel failed to hire experts to show Appellant's mental impairments; 9) penalty phase defense counsel was not death penalty qualified; and 10) defense counsel failed to object to prosecutorial misconduct and inadmissible hearsay.

Prior to the Huff hearing, Appellant filed an Initial Motion to Recuse or Disqualify. (PCR 358-64) The motion was based upon alleged comments made by the trial court in the first-degree murder case of Tajuane Dubose in 2010 and Thomas Bevel in 2014. Appellant alleged that in the Tajuane Dubose case, the trial court "'opined that Florida law did not recognize any such position as that of a mitigation coordinator,' and 'that [the mitigation coordinator] had already been paid too much and that the overpayment of mitigation coordinators was becoming a trend in capital cases.'" (PCR 359) Appellant further alleged that in the Thomas Bevel case, the trial court said,

> [T]his Court should not and will not codify or institutionalize the burgeoning cottage industry of former paralegals or social workers who are ardent death penalty opponents who declare themselves to be "mitigation experts" and demand exorbitant fees from the judicial system for doing work that any competent paralegal or investigator could do for one-third of the cost.

(PCR 359)

The trial court denied Appellant's motion, finding, "[n]othing in the principles stated [in the order] indicates in any fashion that this Court has not nor will not rely upon and give proper weight to evidence by 'mitigation experts.'" (PCR 365-66)

On August 20, 2014, Appellant filed a motion requesting the appointment of Dr. Morton as an expert, funded by the Judicial Administrative Commission

(JAC), because "[t]he services of a Psychopharmacologist are needed to adequately prepare Defendant's post-conviction motion." (PCR 429) Appellant further alleged that Dr. Morton would testify to mental mitigation with the benefit of information from other experts that trial counsel had not provided to him. (PCR 430) The motion only sought to have Dr. Morton testify to his opinions a second time, with the benefit of additional information. (PCR 430) The JAC objected to this unnecessary use of funds (PCR 431-35), and the trial court denied Appellant's motion. (PCR 502-03) In denying Appellant's motion to appoint Dr. Morton, the trial court found,

> Dr. Morton testified in the *Spencer* hearing, where he opined that the defendant had cognitive defects due to substance abuse. He further opined that these defects would prevent the defendant from forming the heightened premeditation necessary to impose the death penalty.
>
> Providing Dr. Morton with other information in the case, including additional history and reports of other mental experts, would serve no purpose other than to have him repeat the opinion he has already given herein, and would therefore amount to nothing more than bolstering his previous testimony.

(PCR 502)

At the postconviction hearing, Appellant attempted to not only admit Dr. Morton's correspondence between Dr. Morton and trial counsel, but also his curriculum vitae, a PowerPoint presentation he used during the Spencer hearing, his evaluation and memorandum of his findings, and his billing records. (PCR

1656-57) These documents are contained in the record as Defense Exhibit C. (PCR 636-50) In denying admission of Defense Exhibit C at the postconviction hearing, the trial court noted that the PowerPoint presentation, the billing records, and Dr. Morton's expert opinion were all contained in the trial record, and did not need to be readmitted into the postconviction record. (PCR 1662-63)

On March 16, 2015, Appellant filed a Motion to Exclude the Testimony of State's Expert, Alan J. Waldman, M.D., alleging that the testimony was based on unreliable principles and methods. (PCR 829-31) The trial court found that Dr. Waldman's testimony was based on "sufficient facts and data and was the product of reliable principles and methods which Dr. Waldman reliably applied to the facts." (PCR 1009) The trial court further noted, "Defendant's own expert, Dr. Richard Frederick, Ph.D., admitted that, although the best practice is to use standardized tests in a standardized manner, conclusions like those made by Dr. Waldman can be made solely on clinical examinations." (PCR 1009-10)

The trial court held an evidentiary hearing on the postconviction motion on multiple dates from September 2, 2014, through May 8, 2015. Charles Fletcher represented Appellant, along with Jim Nolan, in the guilt and penalty phases of Appellant's trial. Mr. Fletcher testified at the postconviction hearing, however, Mr. Nolan was not available to testify because he passed away between the trial and the

evidentiary hearing. Mr. Fletcher was admitted to the Florida Bar in 1997 and has tried between 75 and 80 felony cases, including five or six capital cases. (PCR 1200-02) Mr. Nolan primarily handled the penalty phase, but there was not a clear division of labor and Mr. Fletcher and Mr. Nolan worked as a team.

There were ten or eleven boxes of files containing documents for Appellant's trial. (PCR 1214-16) Mr. Fletcher steadfastly maintains that he delivered those ten or eleven boxes to the Office of the Regional Conflict Counsel (ORCC) following the trial. (PCR 1222-23) Nevertheless, the ORCC does not have a record of receiving the boxes from Mr. Fletcher. (PCR 1192-93) However, during Appellant's trial, the ORCC was in the process of moving its office to a new location. (PCR 1195-96)

When Mr. Fletcher was appointed to represent Appellant, his case had been ongoing for three to four years and was ready for trial. (PCR 1231, 1778) Appellant was represented by three other attorneys prior to Mr. Fletcher's and Mr. Nolan's appointments and "knew his file forwards and backwards." Mr. Fletcher did not believe Appellant required much assistance in being apprised of his case because he was already thoroughly familiar with it when Mr. Fletcher was appointed. (PCR 1248-49) While the jail log from the Duval County jail shows five visits to Appellant, Mr. Fletcher testified that he visited Appellant more than

what was recorded. For instance, he would on occasion sign in to see one client and end up meeting with Appellant, or meet with him through a video conferencing system. (PCR 1223-24) Mr. Fletcher pointed out that the bar complaint filed by Appellant included the admission that many of Mr. Fletcher's jail visits were not reflected in his billing records. (PCR 1224) Also not reflected in the billing records were the many times Mr. Fletcher met with Appellant in court. (PCR 1226) During the process of reviewing Appellant's case files, Mr. Fletcher read a large stack of letters written by Appellant to his former attorneys and other individuals. While Mr. Fletcher did not recall whether he ever responded in writing to Appellant, he confirmed that he generally did not write to clients in jail due to the risk that another inmate might acquire the document. (PCR 1247-49)

Very early on in his representation of Appellant, Mr. Fletcher was aware of Appellant's defense and his desire to testify, and he worked to construct a defense around Appellant's testimony. (PCR 1233-35, 1237-38) Against his better judgment, Mr. Fletcher filed and argued a motion to suppress at Appellant's behest. (PCR 1238-39) He also argued over 50 pretrial motions that had been filed by previously appointed attorneys. (PCR 1294)

Although Mr. Fletcher used mental health experts in the past, he declined to use one in this case outside of the Spencer hearing. (PCR 1245-46) The strategy

during this case was to show the good aspects of Appellant's life. Mr. Fletcher believed an expert subjected to cross-examination would do more harm than good, given the facts of the crime and the evidence presented against Appellant. (PCR 1245-46, 1263) Mr. Fletcher likewise believed presenting similar mitigation, such as evidence of Appellant's childhood head injuries, would be similarly harmful. Mr. Fletcher testified regarding other mitigation evidence he did not present. Mr. Fletcher never presented any evidence that Appellant's wife, Lisa Peterson, had been raped because neither she nor Appellant ever told him, despite meeting with Lisa Peterson for hours. (PCR 1259) Mr. Fletcher never presented evidence that Appellant suffered sexual abuse because he asked trial counsel not to. (PCR 1260)

At the postconviction hearing, Appellant presented the testimony of Dr. Ouaou and Dr. Gold. In addition, Dr. Waldman testified for the State, and Appellant presented Dr. Frederick as a rebuttal witness.

Dr. Ouaou was concerned with Appellant's prior head trauma and believed multiple traumatic brain injuries could affect his adult behavior. (PCR 1537-38) However, Dr. Ouaou did not form the opinion that Appellant's traumatic brain injuries caused him to murder Andrews. (PCR 1554-57)

Dr. Gold opined that Appellant sustained multiple psychological traumas as a child and is prone to post-traumatic stress disorder and other problems, including

depression. (PCR 1588-90, 1596) However, Dr. Gold was clear in his testimony that he could not conclude that such problems would affect Appellant's behavior. (PCR 1568-70)

Dr. Waldman was presented by the State as a licensed, board certified, psychiatrist and forensic psychiatrist. (PCR 1788-92) Dr. Waldman testified that board certification is achieved by only 50 percent of practicing psychiatrists and neuropsychiatrists. (PCR 1792) Dr. Waldman has been qualified as an expert in psychiatry in Florida between 50 and 100 times, and has never been prohibited from testifying as an expert. He is used by both the State and the defense in postconviction proceedings. (PCR 1973) As a psychiatrist, Dr. Waldman possesses a medical degree from Case Western Reserve College of Medicine, which permits him to conduct clinical evaluations as a medical doctor. (PCR 1789)

In Dr. Waldman's opinion, Appellant was malingering during the clinical evaluation in order to feign the symptoms of a psychological illness. Dr. Waldman's opinion was based on both a clinical analysis of Appellant, as well as Appellant's M-FAST test. (PCR 1797-1801)

At the postconviction hearing, Appellant presented Dr. Richard Frederick, an expert psychologist, to rebut Dr. Waldman's testimony. (PCR 2154-55) Dr.

Frederick did not conduct a clinical evaluation of Appellant, but instead reviewed the video of Dr. Waldman's interview. (PCR 2158)

Dr. Frederick disagreed with Dr. Waldman's opinion that Appellant was malingering, and opined that Dr. Waldman did not follow the standardized procedures when administering the M-FAST test to Appellant. (PCR 2167-68, 2187) However, Dr. Frederick acknowledged that Dr. Waldman did use a variety of clinical methods administered by physicians, and acknowledged that a doctor can determine that someone is malingering based solely on a clinical interview. (PCR 2206) Like Dr. Waldman, Dr. Frederick did not believe Appellant suffered from auditory hallucinations; he did not notice any cognitive defects during the evaluation; and did not believe Appellant suffers from a psychotic disorder or any compelling signs of psychosis. (PCR 2189-2202)

On August 4, 2015, the trial court denied Appellant's claims for postconviction relief. (PCR 1001-79) Of those claims, the following two claims are raised by Appellant in this appeal: 1) Appellant's due process rights were violated when trial counsel lost or destroyed Appellant's trial records; and 2) trial counsel was ineffective in the pretrial, guilt, and penalty phases of the trial due to counsel's inactivity during the case, as well as counsel's destruction of trial records. (PCR 177-227)

In denying the first claim, the trial court noted that the ORCC was in the process of moving its office at the approximate time Appellant's trial concluded, and found Mr. Fletcher's testimony that he delivered the boxes to the ORCC "worthy of belief." (PCR 1012) The trial court further found that Appellant failed to demonstrate prejudice. The trial court determined that,

> It is complete speculation that the lost files would have changed the outcome of the postconviction proceedings. Additionally, Fletcher testified as to what was in the boxes, most of which could be recreated or replaced. To the extent that the material could not be recreated, the attorney work product "would most likely support the State's position by identifying specific reasons for trial counsel's choice not to call certain witnesses or pursue various courses of action."

(PCR 1013) (internal citations omitted)

In the postconviction proceedings, Appellant claimed that he was not obligated to demonstrate that he was prejudiced by the loss of trial records because an actual conflict of interest existed. (PCR 181-82) The trial court found that this was without merit and Appellant's failure to demonstrate prejudice was fatal to his claim. In denying Appellant's conflict of interest claim, the trial court noted that Appellant failed to present any evidence or cite to any specific evidence in the record that a conflict existed. The court found that no evidence suggested that Fletcher purposefully destroyed trial records or held any ill will toward Appellant, and the claim was purely speculative. (PCR 1013)

In ruling on the second claim, the trial court found that each of Appellant's subclaims were without merit. The subclaims relevant here are that a) Mr. Fletcher failed to establish an attorney-client relationship; b) that Mr. Fletcher's caseload was so burdensome it established a conflict of interest;[2] and c) Mr. Fletcher and Mr. Nolan failed to investigate and present proper mitigation evidence.

In denying subclaim a), the trial court found that Mr. Fletcher generally declined to write to his incarcerated clients because it created the risk that a cellmate could gain access to it. However, in reviewing Appellant's case file, Mr. Fletcher did read many letters written by Appellant. (PCR 1018) Mr. Fletcher's records also reflected that he read the cases Appellant cited, researched the issues, and filed motions on those bases, despite expecting the motions to be denied. (PCR 1018-19) The court further found that Mr. Fletcher's frequency in meeting with Appellant was not deficient. While the jail records reflected only a few visits, Mr. Fletcher testified that he did not bill for every interaction with Appellant, co-counsel, or former counsel. Mr. Fletcher testified that he would meet with Appellant before and after court appearances, but would not bill for both the court appearance and the meeting. He also would go to the jail and sign in under one

[2] The trial court addressed subclaim b) in its discussion of Appellant's first postconviction claim.

[3] Unless the evidence is presented to the jury, the requirements of Daubert are

inmate's name, but often see several inmates while there, thus the jail records may not reflect every meeting he had with Appellant. Mr. Fletcher also did not always bill for meetings with Appellant via a video conferencing system. Mr. Fletcher testified that in Appellant's bar complaint against him, Appellant stated that Mr. Fletcher visited him at jail multiple times, but failed to bill for it. Based on these facts, the trial court ruled that Appellant failed to meet his burden in showing that counsel failed to establish an attorney-client relationship. (PCR 1019)

In denying subclaim c) the trial court found that trial counsel's decisions were based on reasonable trial strategy. Mr. Fletcher testified that he and Mr. Nolan decided the best strategy was to portray Appellant as a good man who had a bad day. (PCR 1027) The court found that this strategy was well-informed and that trial counsel consulted with two experts, Dr. Harry Krop and Dr. William Morton. Trial counsel decided on a penalty phase strategy after realizing that the other types of mitigation were inconsistent with the evidence of the crime, and would damage their credibility. Defense counsel did not present evidence of Appellant's head injuries because this would be inconsistent with the guilt phase evidence and Appellant's intelligence. (PCR 1028-29) He did not present evidence of Appellant being sexually assaulted because Appellant did not want him to. (PCR 1029) During Appellant's trial, Mr. Fletcher was unaware that Appellant witnessed the

rape of Lisa Peterson; Appellant never informed him and Peterson never told him either, despite meeting with Mr. Fletcher for hours. Finally, the evidence that Appellant's mother attempted suicide was inconsistent. Based on these facts, the trial court concluded "[t]rial counsel was not deficient for choosing to pursue other mitigation evidence that they determined would be more likely to help Defendant." (PCR 1030) The trial court further found that Appellant failed to establish prejudice because the potential mitigation would not outweigh the three aggravators that the court found were proven: 1) CCP; 2) HAC; and 3) the murder was committed for pecuniary gain. (PCR 1031)

SUMMARY OF THE ARGUMENT

Issue I: The trial court did not err in denying appellant's motion to recuse or disqualify Hon. Lawrence Haddock, Jr. Appellant's motion was legally insufficient, and did not allege facts that would put a reasonably prudent person in fear of receiving an unfair trial. The trial court's procedure in ruling on the motion was proper.

Issue II: The trial court did not err in denying Appellant's Motion to Exclude the Testimony of State's Expert, Alan J. Waldman, M.D. No specific set of methods is required to be used in forming an expert opinion. The methods used by an expert need only be reliable. Dr. Waldman used reliable clinical

methods in forming his expert opinion and his resulting testimony satisfied the requirements of section 90.702, Florida Statutes.

Issue III: The trial court did not err in denying Appellant's claim that his due process rights were violated when counsel could not produce Appellant's trial records. This claim alleges both ineffective assistance of counsel and a violation of Appellant's right to due process. Appellant's claim that trial counsel was ineffective fails because Appellant cannot attribute the lost records to trial counsel. The loss of the trial records does not violate due process because Appellant failed to show that the loss impaired his ability to provide a meaningful defense.

Issue IV: The trial court did not err in rejecting Appellant's claim that trial counsel was ineffective. Trial counsel maintained contact with Appellant and took other steps to establish an attorney-client relationship. The evidence does not demonstrate that trial counsel had an actual conflict of interest in representing Appellant. Additionally, trial counsel effectively investigated possible mitigation and presented mitigation evidence based on a reasonable trial strategy.

Issue V: The trial court did not err in denying Appellant's motion to appoint Dr. Morton, a psychopharmacologist. Neither Dr. Morton's testimony nor Dr. Morton's records would have assisted Appellant in proving his ineffective

assistance of counsel claims, and thus, Appellant was not prejudiced by the trial court's ruling.

Issue VI: Appellant is not entitled to relief under Hurst v. Florida, 136 S. Ct. 616 (2016). Hurst is not retroactive to cases that are final because it is a purely procedural rule. Appellant is not entitled to be resentenced to a life sentence under section 775.082(2), Florida Statutes, because this statute only applies where the death penalty itself is held to be unconstitutional, and Hurst struck down Florida's process for imposing capital sentences, not capital sentencing itself.

Issue VII: Appellant waived all other claims. Appellant's attempt to raise thirteen other claims by submitting them without briefing is insufficient to preserve the claims, and they are waived.

ARGUMENT

ISSUE I: WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO RECUSE OR DISQUALIFY HON. LAWRENCE HADDOCK, JR.

Appellant asserts the trial court, the Honorable Lawrence Haddock, Jr., should have granted the defense motion to recuse or disqualify. (IB 20) The motion was based upon alleged comments made by the court in the first-degree murder case of Tajuane Dubose in 2010 and Thomas Bevel in 2014. Appellant suggests those comments were sufficient to support a belief that the trial court held a bias against mitigation specialists, and that the trial court erred by denying the motion and evaluating the truth of the allegations in the motion. (IB 23-24)

This Court has held that the denial of a motion to disqualify is reviewed de novo. Barnhill v. State, 834 So. 2d 836, 842-43 (Fla. 2002). A motion to disqualify is legally sufficient when the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. Id. at 843 (citing MacKenzie v. Super Kids Bargain Store, 565 So. 2d 1332 (Fla. 1990). A bias sufficient to disqualify a judge requires Appellant to show that a reasonable person would fear that the trial court has a personal bias or prejudice against him. Subjective fears are insufficient. Arbelaez v. State, 775 So. 2d 909, 916 (Fla. 2000) (judge's "tough-on-crime" stance during her election campaign and her former

employment as a prosecutor during appellant's trial did not require her disqualification from ruling on motion for postconviction relief).

Florida courts have upheld trial court denials of motions to disqualify under similar circumstances. In City of Hollywood v. Witt, the trial court made comments about the veracity of the petitioner's witnesses and legal counsel that warranted the disqualification of the trial court in the case in which the comments were made. 868 So. 2d 1214, 1217 (Fla. 4th DCA 2004). While those comments were sufficient to establish a reasonable fear of bias in that case, it was not sufficient to establish grounds to disqualify the trial court in the petitioner's other cases because the petitioner failed to show that the comments demonstrated a reasonable fear of bias specific to those cases. Id. at 1217-18.

The cases in which Florida courts have overturned denials of motions to disqualify involve circumstances where the bias in one case clearly extended to others. For example, in Shands Teaching Hosp. & Clinics, Inc. v. Samuel ex rel. Mathis, the bias established in one of petitioner's cases extended to the rest of petitioner's cases because the bias expressed by the trial court specifically concerned the trial court's disapproval of petitioner's and its board of trustees' litigation tactics. 926 So. 2d 441, 443-44 (Fla. 1st DCA 2006). In fact, the trial court even stated that its disapproval was not limited to the case in which the

comments were made. Id. at 444. Because the bias was specific to the petitioner, the reasonable fear of bias extended to other cases in which the petitioner was a party. Id.

The comments allegedly made by the trial court in other cases do not establish that a reasonably prudent person would have a well-founded fear of receiving an unfair trial in Appellant's case. In his motion to recuse or disqualify, Appellant alleged that in the Tajuane Dubose case, the trial court "'opined that Florida law did not recognize any such position as that of a mitigation coordinator,' and 'that [mitigation coordinator] had already been paid too much and that the overpayment of mitigation coordinators was becoming a trend in capital cases.'" (PCR 359) Appellant further alleged that in the Thomas Bevel case, the trial court said,

> [T]his Court should not and will not codify or institutionalize the burgeoning cottage industry of former paralegals or social workers who are ardent death penalty opponents who declare themselves to be "mitigation experts" and demand exorbitant fees from the judicial system for doing work that any competent paralegal or investigator could do for one-third of the cost.

(PCR 3559)

Unlike the comments made in Shands, these comments do not reflect an individualized bias against Appellant or his mitigation coordinator. Furthermore, there is no basis for Appellant's claim that the comments reflect any bias at all; the

comments were not pejorative, like the comments in Shands or City of Hollywood, and did not express a distrust or negative opinion of the mitigation coordinator in the Dubose or Bevel cases. In fact, the comments made were regarding the cost associated with using mitigation coordinators generally and were not specific to the individual mitigation coordinators in either case. The comments simply reflect the court's reasoning in granting and denying motions in other unrelated cases.

Appellant argues that an individualized bias against his case exists because his mitigation coordinator is the same one used in the Bevel case. This claim is without merit, because as discussed supra, the comments were not pejorative and were general comments not specific to that mitigation coordinator. As stated in City of Hollywood, the comments in the Dubose and Bevel cases would have to show an individualized bias in Appellant's case to support a motion to disqualify here, and the statements clearly do not.

Appellant argues that in denying the motion, the trial court exceeded the scope of a proper review by evaluating the truth of the evidence instead of taking it as true. (IB 23-24) However, the trial court's order never claims the statements were not made or that someone else made them. Rather, in denying the motion, the trial court found, "[n]othing in the principles stated [in the order] indicates in any fashion that this Court has not nor will not rely upon and give proper weight to

evidence by 'mitigation experts.'" (PCR 365-66) The court order merely explains that the facts alleged would not cause a prudent person to be in fear of not receiving a fair trial. This Court must review the allegations in the motion to recuse de novo, and an independent review of the facts alleged reveals that the motion is legally insufficient. Therefore, the trial court's order denying the motion to disqualify should remain undisturbed.

ISSUE II: WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO EXCLUDE THE TESTIMONY OF DR. ALAN J. WALDMAN

Appellant argues that the trial court erred in denying Appellant's Motion to Exclude the Testimony of State's Expert, Alan J. Waldman, M.D., and this Court should give no deference to his testimony because he did not use standardized testing methods in his evaluation. Appellant claims Dr. Waldman's testimony did not meet the standard of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and violates section 90.702, Florida Statutes. The standard of review of a trial court's decision to admit evidence is an abuse of discretion; however, such discretion should be guided by the rules of evidence. Jackson v. State, 107 So. 3d 328, 339 (Fla. 2012). Appellant's claim amounts to a disagreement with the trial court about the weight that should have been allocated to each expert. This claim is without any merit and should be denied.

Section 90.702, Florida Statutes, commonly known as Florida's "Daubert standard," governs the admission of scientific evidence. To be admissible, scientific evidence must be 1) based upon sufficient facts or data; 2) the product of reliable principles and methods; and 3) the witness must have applied the principles and methods reliably to the facts of the case.[3] An expert's opinion is to be evaluated by the court for admissibility, and once admitted, is purely a matter of weight. Marsh v. Valyou, 977 So. 2d 543, 549 (Fla. 2007) (citing United States Sugar Corp. v. Henson, 823 So. 2d 104, 110 (Fla. 2002); United States v. Brown, 415 F. 3d 1257, 1270 (11th Cir. 2005) (stating, "[q]uestions about the weight given to testimony, as distinguished from the issue of its admissibility, are for the factfinder"). If expert witnesses present conflicting evidence, the conflict should be evaluated as a matter of weight. Friedrich v. Fetterman, 137 So. 3d 362, 366-67 (Fla. 2013).

The Daubert standard is not well suited for evaluating mental health expert opinions, but such opinions may still be admitted because Daubert employs a flexible approach. Andrews v. State, 181 So. 3d 526, 529 (Fla. 5th DCA 2015) (citing Jenson v. Eveleth Taconite Co., 130 F. 3d 1287, 1297 (8th Cir. 1997)).

[3] Unless the evidence is presented to the jury, the requirements of Daubert are relaxed when determining admissibility. United States v. Brown, 415 F. 3d 1257, 1269 (11th Cir. 2005); In re Zurn Pex Plumbing Products Liability Litigation, 644 F. 3d 604, 613 (8th Cir. 2011).

Andrews notes that issues in mental health fields often cannot be subjected to the rigid objective testing that is readily applicable in other scientific disciplines, like chemistry or physics. Andrews, 181 So. 3d at 528. See also, Blanchard v. Eli Lilly & Co., 207 F. Supp. 2d 308 (D. Vt. 2002) ("much scientific data, including that derived from behavioral science analyses of both aggregate data and individuals undergoing psychiatric or psychological evaluation, simply cannot be measured by the Daubert standards").

This claim arises out of a factual disagreement between two forensic mental health experts regarding whether Appellant was malingering. Dr. Waldman was presented as a licensed, board certified psychiatrist and forensic psychiatrist. (PCR 1788-92) He testified that board certification is achieved by only 50 percent of practicing psychiatrists and neuropsychiatrists. (PCR 1792) Dr. Waldman has been qualified as an expert in psychiatry in Florida between 50 and 100 times, and has never been prohibited from testifying as an expert. He is used as an expert witness by both the State and the defense in postconviction proceedings. (PCR 1973) As a psychiatrist, Dr. Waldman possesses a medical degree from Case Western Reserve College of Medicine, which permits him to conduct clinical evaluations as a medical doctor. (PCR 1789)

In Dr. Waldman's opinion, Appellant was malingering during the clinical evaluation in order to feign the symptoms of a psychological illness. Dr. Waldman's opinion was based on both a clinical analysis of Appellant, as well as Appellant's M-FAST test. (PCR 1797-1801)

At the postconviction hearing, Appellant presented Dr. Richard Frederick, an expert psychologist, for the purpose of rebutting Dr. Waldman's testimony. (PCR 2154-55) Appellant takes issue with Dr. Waldman's administration of the M-FAST test, and urges this Court to disregard Dr. Waldman's testimony "due to his refusal or inability to perform and conduct standardized tests." (IB 24) However, an expert is not obligated to use those methods that Appellant deems most appropriate, but only those methods that are scientifically reliable. Even the testimony of Appellant's own expert, Dr. Frederick, does not support the claim that Dr. Waldman's testimony should be excluded based on the methods he used.

Dr. Frederick disagreed with Dr. Waldman's ultimate expert opinion that Appellant was malingering, and opined that Dr. Waldman did not follow the standardized procedures when administering the M-FAST test to Appellant. (PCR 2167-68, 2187) However, Dr. Frederick acknowledged that Dr. Waldman did use a variety of clinical methods administered by physicians. He also acknowledged that a doctor can determine that someone is malingering based solely on a clinical

interview, and confirmed that even he has done so. (PCR 2206) Dr. Frederick's testimony supports the trial court's finding that Dr. Waldman's testimony is based on reliable methods.

Notably, the issue of malingering was the only substantive disagreement between Dr. Frederick and Dr. Waldman. Like Dr. Waldman, Dr. Frederick did not believe Appellant had a panic attack during the evaluation; he did not believe Appellant suffered from auditory hallucinations; he did not notice any cognitive defects during the evaluation; and did not believe Appellant suffers from a psychotic disorder or any compelling signs of psychosis. (PCR 2189-2202) The underlying conclusions made by both experts are remarkably similar, further undermining Appellant's claim that Dr. Waldman's methods were unreliable.

The trial court's ruling to admit Dr. Waldman's testimony was proper under Daubert and section 90.702, Florida Statutes. A specific set of methods, such as standardized testing, is not required to be used in forming expert mental health opinions. In Daubert, the Supreme Court emphasized that the inquiry should be a "flexible one" when evaluating expert principles and methodology. Daubert, 509 U.S. at 580. See also Blanchard, 207 F. Supp. 2d at 317 (holding that the court should not apply a "rigid checklist" to evaluation of mental health expert's opinion). As noted in Andrews and Jenson, mental health factual issues are very

complex, and do not fit cleanly into a Daubert analysis. The stringent weighing of pure opinion testimony and matters of factual dispute, which Appellant urges this Court to pursue, is plainly inappropriate as a test for admissibility of matters relating to mental health expert testimony.

Appellant's claim amounts to a disagreement with the trial court on the weight that should be allocated to Dr. Waldman's testimony. The record clearly demonstrates that Dr. Waldman used reliable methods to develop his opinion and was qualified to present expert testimony. The trial court did not abuse its discretion in admitting his testimony.

ISSUE III: WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT HIS DUE PROCESS RIGHTS WERE VIOLATED WHEN TRIAL COUNSEL COULD NOT PRODUCE APPELLANT'S TRIAL RECORDS

Appellant claims that his trial counsel, Mr. Fletcher, was ineffective and prejudiced him by "destroying or conveniently losing" eleven boxes containing Appellant's trial records, thereby denying him due process. (IB 34) To establish ineffective assistance of counsel (also known as a Strickland claim), Appellant must satisfy a two-prong test, establishing both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668 (1984). The requirements for Appellant to establish a Strickland claim are discussed in further detail in Issue IV, infra. The review of an ineffective assistance of counsel claim is a mixed question

of law and fact. This Court must defer to the trial court's findings of fact that are supported by competent, substantial evidence, and review that court's application of law to those facts de novo. Carter v. State, 175 So. 3d 761, 767 (Fla. 2015).

Appellant primarily relies on American Bar Association (ABA) guidelines to support his claim that Mr. Fletcher was ineffective. This Court has clearly held that ABA guidelines are not mandatory regulations for defense counsel to rigidly follow.

> The ABA Guidelines are not a set of rules constitutionally mandated under the Sixth Amendment and that govern the Court's Strickland analysis. Rather, the ABA Guidelines provide guidance, and have evolved over time as has this Court's own jurisprudence. To hold otherwise would effectively revoke the presumption that trial counsel's actions, based upon strategic decisions, are reasonable, as well as eviscerate "prevailing" from "professional norms" to the extent those norms have advanced over time.

Mendoza v. State, 87 So. 3d 644, 653 (Fla. 2011).

In Strickland, the United States Supreme Court (Supreme Court) similarly held that no specific set of rules can properly account for the requirements of effective assistance of counsel. 466 U.S. at 688-89. Rather, strict reliance on such rules in evaluating effective assistance of counsel could inhibit trial counsel's "vigorous advocacy of defendant's cause." Id. Thus, Appellant's reliance on the ABA guidelines to support his point is unpersuasive.

In ruling on this claim, the trial court found that Appellant did not establish ineffective assistance of counsel. The trial court noted that the Office of Regional Conflict Counsel (ORCC) was in the process of moving its office to a new location at the approximate time Appellant's trial concluded, and found Mr. Fletcher's testimony that he delivered the boxes to the ORCC "worthy of belief." (PCR 1012) The trial court further found that Appellant failed to demonstrate prejudice. The trial court determined that,

> It is complete speculation that the lost files would have changed the outcome of the postconviction proceedings. Additionally, Fletcher testified as to what was in the boxes, most of which could be recreated or replaced. To the extent that the material could not be recreated, the attorney work product "would most likely support the State's position by identifying specific reasons for trial counsel's choice not to call certain witnesses or pursue various courses of action."

(PCR 1013) (internal citations omitted)

The trial court's ruling is supported by the record. In the present case, there is no evidence to support Appellant's claim that Mr. Fletcher intentionally or accidentally lost or destroyed any records. Mr. Fletcher steadfastly maintains that he delivered ten or eleven boxes to the ORCC following trial. (PCR 1222-23) Nevertheless, the ORCC does not have a record of receiving the boxes from Mr. Fletcher. (PCR 1192-93) However, during Appellant's trial, the ORCC was in the process of moving its office to a new location. (PCR 1195-96) More than likely,

the boxes were accidentally lost or destroyed during the move. Regardless, Appellant has failed to establish that his trial counsel was deficient.

Furthermore, Appellant does not allege any specific prejudice, and has not presented any proof that prejudice exists. He does not identify any notes, correspondence, or other specific items that were necessary to establish his postconviction claims. Rather, Appellant's claim of prejudice is speculative at best, asserting, "collateral counsel was devoid of potential exhibits and attorney-client communications that would have existed if the boxes had not been intentionally lost or destroyed." (IB 40) Without providing any useful detail, Appellant argues that the loss of the trial records prevented postconviction counsel from evaluating Mr. Fletcher's work, and allowed Mr. Fletcher to deflect allegations of ineffectiveness. (IB 40-41) Appellant's claim that his trial counsel was ineffective in losing or destroying his trial records is wholly unsupported and should be denied.

In an apparent attempt to relieve himself of the responsibility to satisfy Strickland's prejudice prong, Appellant argues that trial counsel's workload created a conflict of interest. (IB 43) Appellant claims this alleged conflict of interest "actually affects the adequacy of his representation," thereby excusing Appellant from demonstrating prejudice under Strickland. (IB 41) Conflict of

interest claims are mixed determinations of law and fact; the appellate court defers to the lower court's factual findings that are supported by competent substantial evidence and reviews the legal conclusions de novo. See Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 1999); U.S. v. Novaton, 271 F. 3d 968, 1010 (11th Cir. 2001).

In denying Appellant's conflict of interest claim, the trial court noted that Appellant failed to present any evidence or cite to any evidence in the record that an actual conflict existed. The court found that no evidence suggested that Fletcher purposefully destroyed trial records or held any ill will toward Appellant, and the claim of an actual conflict was purely speculative. (PCR 1013)

The trial court's ruling is supported by the record. The record does not establish that any factor, including Mr. Fletcher's workload, created an actual conflict. Appellant has not presented any evidence of an actual conflict, nor cited to any such evidence in the record. Rather, Appellant makes a general claim that the conflict "actually affects the adequacy of [Mr. Fletcher's] representation." (IB 41) The claim of an actual conflict is speculation and nothing more. Appellant's failure to present any evidence of prejudice arising out of the loss of his trial records cannot be excused by the existence of an actual conflict and is fatal to his claim. The trial court's order should remain undisturbed.

Finally, Appellant argues that his due process rights were violated by the loss of the trial records. Appellant claims that the missing records would have allowed him to prove various Strickland claims, thus, the disappearance of the records prejudiced him. As discussed, supra, Appellant fails to identify any specific prejudice he suffered because he could not access the missing trial records.

This Court has discussed the issue of lost, stolen, or destroyed files and their impact on the defendant in a death penalty case in Jones v. State, 928 So. 2d 1178 (Fla. 2006). The standard of review for this claim is an abuse of discretion. Id. In a postconviction proceeding, Jones claimed the loss of his trial counsel's files hindered his collateral counsel's investigation and denied him due process. Id. at 1192. "[T]he only items destroyed … that could not be recreated or replaced were trial counsel's personal notes of any interviews she had with Jones, Jones' relatives, or other witnesses as well as phone messages and impressions and theories of the case." Id.

In denying Jones' relief on appeal, this Court stated it is the defendant's responsibility to show that the loss of records "impaired his ability to provide a meaningful defense." Jones, 928 So. 2d at 1192. This Court held the trial notes were unlikely to "[provide] any additional information beyond what trial counsel testified about at the hearing." Id. Moreover, such notes and impressions would

most likely support the State's position that trial counsel's representation was not ineffective. Id.

The trial court denied Appellant's due process claim on the same basis that this Court denied Jones' claim. The trial court found a complete lack of evidence that the lost trial records prejudiced Appellant's Strickland claims. The trial court noted, "[i]t is complete speculation that the lost files would have changed the outcome of the postconviction proceedings." (PCR 1013) Appellant's claim that his due process rights were violated is without merit and should be denied.

ISSUE IV: WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN THE GUILT AND PENALTY PHASES OF APPELLANT'S TRIAL

As noted in Issue III, supra, Appellant must satisfy a two-prong test to establish ineffective assistance of counsel, establishing both deficient performance and prejudice. Strickland, 466 U.S. at 668. To establish deficient performance, a defendant must show that counsel made specific errors so serious that he was not functioning as the counsel guaranteed to Appellant by the Sixth Amendment. Id. at 687; Pietri v. State, 885 So. 2d 245, 252 (Fla. 2004) ("a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct") (quoting Strickland, 466 U.S. at 690). "Judicial scrutiny in these cases

must be 'highly deferential' and 'every effort … made to eliminate the distorting effects of hindsight.'" Bryant v. State, 901 So. 2d 810, 820 (Fla. 2005) (citing Strickland, 466 U.S. at 689). The standard for evaluation is not whether an attorney could have done more. Pagan v. State, 29 So. 3d 938, 949 (Fla. 2009) Rather, "[c]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. This presumption is heightened when reviewing the conduct and performance of an experienced trial lawyer. Chandler v. United States, 218 F. 3d 1327, 1316 (11th Cir. 2000); Provenzano v. Singletary, 148 F. 3d 1327, 1332 (11th Cir. 1998) (stating, "Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel."). In line with this standard of deference, an attorney is not ineffective for strategic decisions that are part of the trial strategy, even if these decisions appear to be unwise in retrospect. "The decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" Dingle v. Sec'y Dept. of Corr., 480 F. 3d 1092, 1099 (11th Cir. 2007) (quoting Adams v. Wainwright, 709 F. 2d 1443, 1445 (11th Cir. 1983)).

In this case, Mr. Fletcher testified at Appellant's postconviction hearing, but Mr. Nolan was unavailable. In the absence of testimony regarding trial counsel's strategy, a court presumes trial counsel exercised reasonable professional judgment in all decisions. Gore v. State, 964 So. 2d 1257, 1269-70 (Fla. 2007) (finding the defendant did not meet his burden of deficient performance when his lead counsel was not called to testify during the hearing, and defendant only presented testimony from co-counsel which criticized the strategy of lead counsel). While courts may not indulge in post hoc rationalization, they also cannot insist that counsel "confirm every aspect of the strategic basis for his or her actions." Harrington v. Richter, 562 U.S. 86, 110 (2001). "There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" Id. at 109 (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003).

To establish prejudice, Appellant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. This Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford v. State, 727 So. 2d 216, 220 (Fla. 1998). In evaluating the probability that the error affected the sentence, this Court must consider the totality of the evidence in

mitigation, including the evidence presented during trial and postconviction proceedings, and reweigh it against the evidence in aggravation. Porter v. McCollum, 558 U.S. 30, 41 (2009) (citing Williams v. Taylor, 529 U.S. 362, 397-98 (2000)).

On appeal, the review of an ineffective assistance of counsel claim is a mixed question of law and fact. This Court must defer to the trial court's findings of fact that are supported by competent, substantial evidence, and review that court's application of law to those facts de novo. Carter, 175 So. 3d at 767.

A. Whether trial counsel was ineffective due to a conflict of interest and by failing to establish an attorney-client relationship

Appellant maintains he was denied effective assistance of counsel because Mr. Fletcher failed to establish an attorney-client relationship and because his caseload was so burdensome as to create a conflict of interest. (IB 43) Appellant does not allege that his trial counsel committed any specific shortcomings or failures in establishing an attorney-client relationship. To support his point, Appellant relies solely on the fact that Mr. Fletcher was handling six other capital cases while representing Appellant (IB 43), as well as an email by a prosecutor in another of Mr. Fletcher's capital cases, in which the prosecutor said Mr. Fletcher was overworked. (IB 44)

In denying Appellant's claim the trial court found that Mr. Fletcher's attorney-client relationship with Appellant was not deficient and his actions reasonable. Mr. Fletcher read Appellant's letters, but did not write back due to the risk a cellmate may intercept it. (PCR 1018) Mr. Fletcher read the cases Appellant cited, researched the issues, and filed motions on those bases, despite expecting the motions to be denied. (PCR 1018-19) The court further found that Mr. Fletcher's frequency in meeting with Appellant was not deficient. While the jail records reflected only a few visits, Mr. Fletcher testified that he did not bill for every interaction with Appellant, co-counsel, or former counsel, and he would meet with Appellant before and after court appearances, but would not bill for both the court appearance and the meeting. He also would go to the jail and sign in under one inmate's name, but often see several inmates while there, thus the jail records may not reflect every meeting he had with Appellant. Mr. Fletcher also testified that in Appellant's bar complaint against him, Appellant stated that Mr. Fletcher visited him at jail multiple times, but failed to bill for it. Based on these facts, the trial court ruled that Appellant failed to meet his burden in showing that counsel failed to establish an attorney-client relationship. (PCR 1019)

Firstly, Appellant's claim is not fully preserved. In order to preserve a particular issue in a postconviction proceeding for appellate review, a party must

have presented it to the lower court, and the specific legal argument or ground to be argued on appeal must be part of that presentation. Doorbal v. State, 983 So. 2d 464, 492 (Fla. 2008) (holding that Strickland claim regarding a denial of a motion to sever was not preserved for appellate review because the defendant never asserted to the trial court the claim he raised on appeal, that his peripheral role in the killings was a basis for severance); see Archer v. State, 613 So. 2d 446, 448 (Fla. 1993) (stating that the issue "must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved"); Woods v. State, 733 So. 2d 980, 984-85 (Fla. 1999) (holding that a boilerplate motion for judgment of acquittal was not sufficient to preserve the issue on appeal because it did not set forth the specific grounds that formed the basis of the issue on appeal); Morrison v. State, 818 So. 2d 432, 455-56 (Fla. 2002) (holding that severance claim was unpreserved on appeal because the defendant did not argue that objections to statutory aggravator jury instructions must be specifically objected to at trial in order to be preserved for appeal).

In the present case, Appellant argued in the trial court that Mr. Fletcher's inaction in preparation of Appellant's trial constituted a Strickland violation, and his workload created a conflict of interest. Appellant relied on Mr. Fletcher's

actions in handling his case as grounds for this claim. (PCR 185-88, 989-91) Here, however, Appellant cites an email in capital case 2008-CF-011059 to support his Strickland claim. (IB 44) Much like the defendant in Doorbal, Appellant's argument in his Initial Brief was not presented to the trial court. Appellant never argued in the trial court that Mr. Fletcher's alleged performance in any of his other cases was a basis for the Strickland claim. At no point during the postconviction trial court proceedings did Appellant present any evidence of the email quoted in the Initial Brief. (IB 44) In fact, Appellant concedes that postconviction counsel was unaware of the other capital case and the email until after the trial court's postconviction order was issued. (IB 37, footnote 1) The trial court was effectively deprived of the opportunity to evaluate the evidence and the claim it supported. Such a circumvention of the trial court is impermissible and this Court should disregard Appellant's claim as it relates to this email.

Should this Court determine that this claim is properly preserved, it is without merit. Deficient performance can be established by identifying "particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under the prevailing professional standards." Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). There is no minimum standard for jail visits or communication with a client, but this Court has rejected

ineffectiveness claims where counsel spoke with the defendant for 20 to 25 minutes before he was appointed, met with him on six or seven separate occasions, and communicated with him as needed. Farr v. State, 124 So. 3d 766, 775-76 (Fla. 2012). To establish prejudice, Appellant must show "but for [Mr. Fletcher's] unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

When Mr. Fletcher was appointed to represent Appellant, his case had been ongoing for three to four years and was ready for trial. (PCR 1231, 1778) Appellant was represented by three other attorneys prior to Mr. Fletcher's and Mr. Nolan's appointments and "knew his file forwards and backwards." (PCR 1249) While the jail log from the Duval County jail shows five visits to Appellant (PCR 1225-26), Mr. Fletcher insisted during his testimony that he visited Appellant more than what was recorded. For instance, he would on occasion sign in to see one client and end up meeting with Appellant, or meet with him through a video conferencing system. (PCR 1223-24) Mr. Fletcher pointed out that the bar complaint filed by Appellant included the admission that many of Mr. Fletcher's jail visits were not reflected in his billing records. (PCR 1224) Also not reflected in the billing records were the many times Mr. Fletcher met with Appellant in court. (PCR 1226) In preparation of Appellant's case, Mr. Fletcher also read a large stack

of letters written by Appellant to his former attorneys and other individuals. While Mr. Fletcher did not recall whether he ever responded in writing to Appellant, he confirmed that he generally did not write to clients in jail due to the risk that another inmate may acquire the document. (PCR 1247-49)

Very early on in his representation of Appellant, Mr. Fletcher was aware of Appellant's defense and his desire to testify, and he worked to craft a defense around Appellant's testimony and his recorded admission of guilt. (PCR 1233-35, 1237-38) Against his better judgment, Mr. Fletcher filed and argued a motion to suppress at Appellant's behest. (PCR 1238-39) The evidence clearly demonstrates that Mr. Fletcher did everything he could to attend to Appellant's wishes inside the confines of his professional judgment. As such, Appellant has failed to demonstrate deficient performance by Mr. Fletcher.

Appellant also fails to establish prejudice caused by any alleged deficiency. The basis of Mr. Fletcher's representation began with the knowledge that Appellant was going to testify. Mr. Fletcher also knew what that testimony consisted of, and therefore had to mold his defense around Appellant's story. (PCR 1233-35, 1237-38, 1244) Appellant's contention here is that if Mr. Fletcher had properly established an attorney-client relationship with Appellant, he would have received an acquittal instead of a conviction. (IB 43-45) Appellant's contention

fails because his testimony shaped the entire defense, and that testimony would not have changed regardless of the type or frequency of interaction that Mr. Fletcher had with Appellant. Thus, Appellant has failed to show both deficient performance and prejudice and this claim should be denied.

Finally, the conflict of interest Appellant alleges clearly did not exist. While this Court has recognized conflicts of interest arising from grossly excessive caseloads, such is not the case here. See Public Defender, Eleventh Judicial Circuit of Fla. v. State, 115 So. 3d 261, 279 (Fla. 2013) (holding, "the prejudice required for withdrawal … based on an excessive caseload is a showing of 'a substantial risk that the representation of [one] or more clients will be materially limited'") (quoting R. Regulating Fla. Bar 4-1.7(a)(2)). The evidence in the present case clearly does not rise to the level put forth in Public Defender, Eleventh Judicial Circuit, as is reflected in the discussion of Mr. Fletcher's representation, supra. Mr. Fletcher met with Appellant, discussed the case and trial strategy with him, and developed a defense around Appellant's recorded admission of guilt and his anticipated testimony. Mr. Fletcher would not have been able to do these things if his caseload rose to the overbearing level described in Public Defender, Eleventh Judicial Circuit. Appellant's claim is clearly without merit, and the trial court's ruling should remain undisturbed.

B. Whether trial counsel was ineffective by failing to investigate and present experts and lay witnesses to testify on mitigation

Appellant claims Mr. Fletcher and Mr. Nolan were ineffective for failing to investigate and present evidence of mitigation related to his mental health and childhood environment. (IB 45) In order to succeed on this claim Appellant must show the actions taken by Mr. Fletcher and Mr. Nolan were so unreasonable that no competent attorney would have followed suit. Maxwell, 490 So. 2d at 932. Appellant must also show that had mental health evidence been presented he probably would have received a life sentence. Gaskin v. State, 822 So. 2d 1243, 1247 (Fla. 2002) (citing Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995)). "Stated otherwise, Hildwin must demonstrate that but for counsel's errors he would have probably received a life sentence." Hildwin, 654 So. 2d at 109.

"[A]n attorney is not ineffective for decisions that are part of trial strategy that in hindsight, did not work out to the defendant's advantage." Mansfield, 911 So. 2d at 1174. Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance, only if it was "so patently unreasonable that no competent attorney would have chosen it." Adams, 709 F. 2d at 1445. See Gore, 964 So. 2d at 1257 (holding defense counsel's failure to investigate capital defendant's possible exposure to pesticides that allegedly caused neurological disorders could be sound trial strategy and would not

support Strickland claim; no member of defendant's family ever referenced pesticide exposure, argument for pesticide exposure seemed tenuous to defense counsel, expert testimony tended to refute theory based on pesticide exposure, and counsel focused on other theories of mitigation); Reed v. State, 875 So. 2d 415, 422-27 (Fla. 2004) (holding that trial counsel was not ineffective where counsel failed to hire various experts who would not have assisted in the defense).

In deciding Appellant's claim, the trial court found that Mr. Fletcher and Mr. Nolan decided the best penalty phase strategy was to portray Appellant as a good man who had a bad day. (PCR 1027) The court found that this strategy was well-informed and that trial counsel consulted with two experts, Dr. Harry Krop and Dr. William Morton. Trial counsel decided on a penalty phase strategy after realizing that the other types of mitigation were inconsistent with the evidence of the crime and would damage their credibility. The trial court noted that trial counsel had reasoned bases for not presenting the various mitigation evidence at issue. Based on these facts, the trial court concluded "[t]rial counsel was not deficient for choosing to pursue other mitigation evidence that they determined would be more likely to help Defendant." (PCR 1028-30) The trial court further found that Appellant failed to establish prejudice because the potential mitigation would not

outweigh the three aggravators that the court found were proven: 1) CCP; 2) HAC; and 3) the murder was committed for pecuniary gain. (PCR 1031)

In the present case, Mr. Fletcher and Mr. Nolan made the strategic decision to not use a mental health expert or lay witnesses to establish mental health mitigation based on the deliberate thought-out nature of the crime, Appellant's confession and boasting, and the concern of losing credibility with the jury by presenting contradictory information. (PCR 1276-78) Mr. Fletcher testified that the facts reflected that it was "a very deliberate, planned, intelligent person that committed the crime." (PCR 1277) He explained that to then present evidence to the jury that Appellant had mental health issues would have contradicted the evidence of the crime and ruined the defense's credibility before the jury. (PCR 1277-78) As Mr. Fletcher aptly noted, "on cross-examination, the doctor would have gotten his hat handed to him." (PCR 1277)

Appellant specifically points to counsel's failure to acquire a neuropsychological evaluation and failure to provide additional records to Dr. Krop as evidence of an insufficient investigation. (IB 48-49) However, the record does not support this claim. Dr. Krop did not testify at the postconviction hearing, and Mr. Nolan passed away before having an opportunity to testify. Appellant cites to specific portions of the postconviction record, claiming that Mr. Fletcher knew

that doctors had requested additional information and testing and these requests went unanswered. (IB 7, 46) However, Mr. Fletcher actually testified that he was not personally involved in interactions with the doctors in the case and did not remember what Mr. Nolan provided them. (PCR 1261-62) He also did not remember if any doctors recommended additional testing or examinations. (PCR 1267) Mr. Fletcher conceded that there would not have been a strategic reason to withhold notes from their experts, but made it very clear that he did not know of any notes or other information that had been withheld. (PCR 1262) To further make his point, Appellant relies solely on the correspondence contained in the record as Defendant's Exhibit B. (PCR 631-36) This exhibit was excluded from evidence in the postconviction hearing by the trial court and cannot be relied upon by Appellant as substantive support for his claim. (PCR 1655-56) Mr. Fletcher testified that nothing in his meetings with Appellant indicated a need for neuropsychological testing, and he had no reason to believe that Appellant was withholding information about his social background. (PCR 1325-26)

Much like the defense attorneys in Gore, 964 So. 2d at 1257, the decision not to use a mental health expert was part of the trial strategy based on years of experience. (PCR 1245-46, 1256, 1262-69) Although Mr. Fletcher used mental health experts in the past, the strategy during this case was to show the good

aspects of Appellant's life. (PCR 1263) Mr. Fletcher believed an expert subjected to cross-examination would do more harm than good, given the facts of the crime and the evidence presented against Appellant. Furthermore, Appellant cannot present any evidence that trial counsel's decisions were not based on a reasonable strategy. Thus, counsel's performance cannot be deemed deficient, as the decision to not use a mental health expert was based on sound trial strategy.

Appellant has likewise failed to show prejudice from the any decision to not present mental health mitigation or a mental health expert. Appellant claims a list of evidence highlighting negative aspects of Appellant's traits and upbringing should have been presented to the jury. Appellant argues that failure to present this evidence to the jury amounts to prejudice. (IB 49-52) However, the list contains items such as Appellant's substance abuse as a juvenile and sexual abuse by family members. (IB 50) Mr. Fletcher's belief that this evidence would have clashed with the defense strategy in the eyes of the jury was reasonable.

To support his claim that the failure to present mental mitigation was prejudicial, Appellant presented the testimony of Dr. Ouaou and Dr. Gold. In addition, Dr. Waldman testified for the State, and Appellant presented Dr. Frederick as a rebuttal witness.

Dr. Ouaou was concerned with Appellant's prior head trauma and believed multiple traumatic brain injuries could affect his adult behavior. (PCR 1537-38) However, Dr. Ouaou's did not form the opinion that Appellant's traumatic brain injuries caused him to murder Andrews. (PCR 1554-57)

Dr. Gold opined that Appellant sustained multiple psychological traumas as a child and is prone to post-traumatic stress disorder and other problems, such as depression. (PCR 1588-90, 1596) However, Dr. Gold was clear in his testimony that he could not conclude that such problems would affect Appellant's behavior. (PCR 1568-70)

Dr. Waldman did not believe that Appellant had post-traumatic stress disorder (PCR 1803-04), but diagnosed him with antisocial personality disorder and a cocaine disorder. (PCR 1816-17) Dr. Waldman opined that Appellant was malingering during his interview. (PCR 1803-04)

Dr. Frederick did not conduct a clinical evaluation of Appellant, but instead reviewed the video of Dr. Waldman's interview. (PCR 2158) While Dr. Frederick did not believe Appellant was malingering during the interview, he still saw no signs of psychosis or cognitive defects. (PCR 2187, 2189, 2202)

In sum, four doctors have evaluated Appellant and none of them believes that Appellant's claimed mental health problems affected him at the time of the

crime. At most, Dr. Gold and Dr. Ouaou have stated their opinion regarding possible brain injury, and psychological trauma, but stopped short of a definitive statement that it was affecting Appellant during the murder. Moreover, Dr. Fletcher and Dr. Waldman each saw no signs of cognitive defects or psychosis.

Accordingly, Appellant cannot satisfy the requirement in Gaskin to prove that if the mitigation evidence had been presented he probably would have received a life sentence. Gaskin, 822 So. 2d at 1247. The evidence presented by the mental health experts does more harm than good, as four doctors found no reason to believe Appellant's cognitive function was impacted or impaired prior to or during the murder. Much like in Reed, Mr. Fletcher and Mr. Nolan are not ineffective for failing to hire experts who would not have assisted the defense. Furthermore, the evidence in aggravation was weighty given the aggravators of CCP, HAC, and pecuniary gain. Therefore, Appellant cannot claim prejudice for failure to present mental health evidence when no beneficial evidence was presented during the postconviction hearing.

Appellant's reliance on Griffin v. State, 114 So. 3d 890 (Fla. 2013), State v. Bright, 2016 WL 3348432 (Fla. June 16, 2016), and Parker v. State, 3 So. 3d 974 (Fla. 2009), is misplaced. In Griffin, this Court upheld the trial court's finding of ineffective assistance of counsel because Griffin's counsel's choice not to

investigate mitigation was based on a "hunch" that if the defendant entered a guilty plea, the court would sentence him to life in prison. Griffin, 114 So. 3d at 909. Unlike the present case, Griffin's counsel was not acting on reasoned judgment, and the Strickland test was easily satisfied. Id. Much like Griffin, Bright, 2016 WL 3348432 at *17 and Parker, 3 So. 3d at 984, progress similarly, where trial counsel failed to investigate substantial mitigation that would have benefitted the defense. All three of these cases are easily distinguishable from the present case because the mitigation adduced at Appellant's postconviction hearing would not have impacted Appellant's sentence, and presenting such mitigation would have undermined defense strategy. By contrast, the mitigation discovered in Griffin, Bright, and Parker was very significant and would have benefitted the defenses in those cases rather than harming defense credibility.

Appellant urges this Court to reverse this case and order a new penalty phase, even if the Strickland test is not satisfied (IB 52-53); however, this position is counter to the law. In the three cases Appellant cites to make this point, Hurst v. State, 18 So. 3d 975 (Fla. 2009), Phillips v. State, 608 So. 2d 778 (Fla. 1992), and State v. Lara, 581 So. 2d 1288 (Fla. 1991), this Court found that both prongs of the Strickland test were satisfied before reversing the lower court rulings. Furthermore, the two-prong Strickland test has been repeatedly articulated, and has not been

departed from by this Court. See Rigterink v. State, 193 So. 3d 846, 862-63 (Fla. 2016); Hernandez v. State, 180 So. 3d 978, 988 (Fla. 2015); Bailey v. State, 151 So. 3d 1142, 1148-50 (Fla. 2014). The discussion of the facts in this case, supra, establishes that the Strickland test is not satisfied. This claim is clearly without merit, and the trial court's denial of Appellant's Strickland claim should remain undisturbed.

ISSUE V: WHETHER APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT DENIED APPELLANT'S MOTION TO APPOINT DR. MORTON, A PSYCHOPHARMACOLOGIST

Appellant argues that his due process rights were violated when the trial court denied his motion to appoint Dr. Morton as an expert in postconviction proceedings. He claims he was further prejudiced when the trial court later refused to admit copies of Dr. Morton's records into evidence at the postconviction hearing. In arguing that the trial court's rulings prejudiced him, Appellant claims that he was unable to establish when Dr. Morton was first contacted by Mr. Nolan. Appellant also claims that he was unable to establish that trial counsel failed to supply their expert with adequate records and prepare their expert for the hearing, though he fails to explain how Dr. Morton's testimony and/or records would have established this. (IB 59-61) Appellant's claim is without merit because any

evidence relevant to this Strickland claim was already contained in the direct appeal record.

"Procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue." Dept. of Law Enforcement v. Real Property, 588 So. 2d 957, 960 (Fla. 1991). The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000).

Appellant alleges that the appointment of Dr. Morton was essential to proving Appellant's Strickland claim by demonstrating the nature of Dr. Morton's interactions with Appellant's trial counsel. (IB 59-61) Appellant further alleges that the trial court "refused to allow Dr. Morton to testify." (IB 61) However, a review of the record reveals that Appellant filed a motion requesting the appointment of Dr. Morton as an expert, funded by the Judicial Administrative Commission (JAC), because "[t]he services of a Psychopharmacologist are needed to adequately prepare Defendant's post-conviction motion." (PCR 429) Appellant further alleged in the motion that Dr. Morton would testify to mental mitigation

with the benefit of information from other experts that he was not provided prior to testifying at the Spencer hearing.

The motion to appoint Dr. Morton only alleged that Dr. Morton would testify at the postconviction hearing to the conclusions he had already presented at the Spencer hearing, but with the added benefit of additional information. The motion indicated that this testimony was necessary to demonstrate that Appellant's trial counsel was deficient by not providing more information to Dr. Morton prior to the Spencer hearing, and this deficiency impacted his Spencer hearing testimony. While Appellant's motion states that this additional information will allow Dr. Morton to provide a "clearer understanding" of Appellant's disorders, it gives no indication that Dr. Morton's expert conclusions would change, or that he would be able to testify to any new conclusions he could not make before. The motion did not allege that Dr. Morton's expert testimony or records were necessary to establish at what point during the case Appellant's trial counsel contacted Dr. Morton, nor did it alleged that he would testify to the nature of his communications with trial counsel. (PCR 430) The JAC objected to this appointment because having Dr. Morton repeat his Spencer hearing testimony was an unnecessary use of funds (PCR 431-35), and the trial court denied Appellant's motion. (PCR 502-03)

In denying Appellant's motion to appoint Dr. Morton, the trial court found,

> Dr. Morton testified in the *Spencer* hearing, where he opined that the defendant had cognitive defects due to substance abuse. He further opined that these defects would prevent the defendant from forming the heightened premeditation necessary to impose the death penalty.
>
> Providing Dr. Morton with other information in the case, including additional history and reports of other mental experts, would serve no purpose other than to have him repeat the opinion he has already given herein, and would therefore amount to nothing more than bolstering his previous testimony.

(PCR 502)

Appellant's claim that his due process rights were violated by the trial court's denial of his motion to appoint Dr. Morton as an expert is unsubstantiated. He claims that Dr. Morton's expert testimony was necessary to prove his Strickland claim. However, Appellant has failed to demonstrate how Dr. Morton's expert testimony was necessary to prove any of his Strickland claims. The alleged failures of trial counsel include inadequately preparing Dr. Morton for the Spencer hearing and contacting him too late in the trial process. (IB 60-61)

Expert testimony is not required to establish either of these points. Appellant never called, nor attempted to call, Dr. Morton as a fact witness. (PCR 1658-59) At the postconviction hearing, Appellant's only explanation for choosing not to call Dr. Morton as a fact witness was that he could not call him as an expert. (PCR 1660-61) There is no record of Appellant indicating that Dr. Morton's expert conclusions would change or that he would testify to new conclusions. (PCR 1656-

64) There is no record of Appellant proffering Dr. Morton's testimony, and there is no indication that Dr. Morton was unavailable to testify. Appellant's choice not to call Dr. Morton to testify as a fact witness was elective and not forced upon him as he now asserts. The trial court's ruling here was proper because the appointment of Dr. Morton to give expert testimony at the postconviction hearing was not necessary to prove the alleged deficiencies of trial counsel at issue here. Appellant was not prejudiced by the court's ruling and this claim should be denied.

Appellant also argues that the trial court's refusal to admit a variety of Dr. Morton's records at the postconviction hearing also prejudiced his ability to prove the Strickland claims at issue. At the postconviction hearing, Appellant attempted to not only admit Dr. Morton's correspondence between Dr. Morton and trial counsel, but also his curriculum vitae, a PowerPoint presentation he used during the Spencer hearing, his evaluation and memorandum of his findings, and his billing records. (PCR 1656-57) These documents are contained in the record as Defense Exhibit C. (PCR 636-50) While Appellant now claims that this documentation would have been used to establish the nature of Dr. Morton's communications with trial counsel, this claim rings hollow. Appellant's motion to appoint Dr. Morton, and the nature of the documents Appellant attempted to admit,

reflect an attempt to repeat the substance of Dr. Morton's expert testimony, which he previously presented at the Spencer hearing, and nothing more.

In denying admission of Defense Exhibit C at the postconviction hearing, the trial court noted that the PowerPoint presentation, the billing records, and Dr. Morton's expert opinion were all contained in the trial record, and did not need to be readmitted into the postconviction record. (PCR 1662-63) Furthermore, the very records Appellant was attempting to admit would not have assisted him in establishing his Strickland claim. The records demonstrate extensive correspondence and preparation with the trial counsel that represented Appellant prior to Mr. Fletcher's and Mr. Nolan's appointments to the case. (PCR 637-43) The preparation that occurred prior to Mr. Nolan's appointment made it unnecessary for Mr. Nolan to contact Dr. Morton until it was time to schedule a hearing date. Furthermore, even if evidence of when Mr. Nolan contacted Dr. Morton was helpful to Appellant's case, such evidence already existed in Dr. Morton's billing records, which the trial court noted were contained in the trial record. (PCR 1662)

The records and testimony Appellant was attempting to admit do not establish deficient performance by Mr. Fletcher or Mr. Nolan, therefore, the trial court's rulings did not prejudice Appellant in establishing his Strickland claims

during the postconviction proceedings. As discussed at length in Issue IV, supra, the trial court found that trial counsel's decision not to present various mitigation was a reasoned trial strategy. The trial court concluded "[t]rial counsel was not deficient for choosing to pursue other mitigation evidence that they determined would be more likely to help Defendant." (PCR 1028-30) The trial court further found that Appellant failed to establish prejudice because the potential mitigation would not outweigh the three aggravators that the court found were proven: 1) CCP; 2) HAC; and 3) the murder was committed for pecuniary gain. (PCR 1031)

Appellant was not entitled to have Dr. Morton testify or to have Defense Exhibit C admitted at the postconviction hearing because neither the testimony nor the documents would have assisted him in establishing his Strickland claim. The trial court's refusal to appoint Dr. Morton and refusal to admit Defense Exhibit C into evidence was not unfair and does not violate Appellant's right to due process of the law.

ISSUE VI: WHETHER APPELLANT IS ENTITLED TO RELIEF UNDER HURST V. FLORIDA

A. Whether Hurst is retroactive to cases in which the conviction and sentence are final[4]

[4] Subparts A and B, under Issue VI in Appellant's Initial Brief (IB 62-67), are combined in this argument and addressed together.

Appellant incorrectly argues that Hurst v. Florida, 136 S. Ct. 616 (2016), is retroactive to his case and other cases in which the conviction and sentence are final. Appellant claims that the Hurst ruling was a new substantive rule of constitutional law and a "development of fundamental significance," and thus, Hurst is retroactive, and thereby applicable to his case. This claim is without merit because Hurst is merely procedural and does not create a new constitutional right.

New constitutional rules of criminal procedure generally do not apply retroactively to cases on collateral review, but new substantive rules do apply retroactively. Teague v. Lane, 489 U.S. 288, 310 (1989); Schriro v. Summerlin, 542 U.S. 348, 351 (2004). Substantive rules alter "the range of conduct or the class of persons that the law punishes," Schriro, 542 U.S. at 353. Procedural rules, by contrast, "regulate only the manner of determining the defendant's culpability." Id. Once a criminal conviction has been upheld on appeal, the application of a new constitutional rule must comport with these requirements. Thus, the question before this Court is whether Hurst is procedural or substantive.

A complete understanding of the decision by the Supreme Court in Hurst requires a review of the Supreme Court's relevant decisions in Apprendi v. New Jersey, 530 U.S. 466, 494 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). Apprendi established that a defendant is entitled to a jury determination of any fact

designed to increase the maximum punishment allowed by a statute. Apprendi, 530 U.S. at 494. Then in Ring, 536 U.S. at 584, the Supreme Court extended its holding in Apprendi to capital cases stating, "[c]apital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Id. at 589. In extending Apprendi to capital sentencing, the Supreme Court struck Arizona's capital sentencing scheme because the judge alone was authorized to determine the presence or absence of the aggravating factors required to impose a capital sentence. Id. at 607-09. Finally, in Hurst v. Florida, the Court held that Florida's capital sentencing structure violated Ring because it required a judge to conduct the factfinding necessary to enhance a defendant's sentence. Hurst, 136 S. Ct. at 621-22. In arriving at its decision, the Supreme Court looked directly to Florida's sentencing statute, which does not "make a defendant eligible for death until 'findings *by the court* that such a person shall be punished by death.'" Id. at 622 (citing Fla. Stat. § 775.082(1)) (emphasis in original opinion).

Schriro v. Summerlin is particularly informative in determining whether Hurst is substantive or procedural because the Supreme Court directly addressed whether its decision in Ring was retroactive. Schriro, 542 U.S. at 349. The Supreme Court held the decision in Ring was procedural and not retroactive. Id. at

353. This was because Ring only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." Id. If Ring was not retroactive, then Hurst likewise cannot be retroactive because Hurst merely extends Ring to Florida's capital sentencing scheme.

This Court looks to Witt v. State, 387 So. 2d 922 (Fla. 1980), when considering the retroactive application of a new constitutional rule of law to final convictions. Witt held that a new rule of constitutional procedure will not apply to final convictions unless the change "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." Id. at 931. The opinion notes that a "development of fundamental significance" falls within two categories, either "changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" or "those changes of law which are of sufficient magnitude to necessitate retroactive application…." Id. at 929.

Appellant begins his argument by claiming that Hurst was a "development of fundamental significance" under Witt v. State, and as such, Hurst applies retroactively to Appellant's case. To make his point, Appellant guides this Court to Falcon v. State, 162 So. 3d 954 (Fla. 2015), which is clearly distinguishable from

the present case. In Falcon, this Court was considering the retroactivity of Miller v. Alabama, 132 S. Ct. 2455 (2012), a Supreme Court case holding that mandatory life sentences without parole for juveniles was prohibited under the Eighth Amendment. It is particularly important to note here that Miller wholly prohibited application of the sentence at issue to an entire class of defendants. Id. at 2463-64. This is strikingly unlike the facts of Hurst, where only Florida's scheme for implementing the death penalty was found unconstitutional. In fact, this Court in Falcon hinged its finding on the fact that Miller's scope exceeded mere procedure and prohibited the imposition of the penalty at issue on an entire class of defendants. Falcon, 162 So. 2d at 961-62 ("Clearly, by invalidating section 775.082(1), Florida Statutes, as applied to juveniles convicted of a capital homicide offense, Miller announced a prohibition on the state's power to 'impose certain penalties'—nondiscretionary sentences of life imprisonment without the possibility of parole.").

Appellant further argues that Hurst is a substantive rule of constitutional law, necessitating retroactive application, based on Montgomery v. Louisiana, 136 S. Ct. 718 (2016). Appellant's reliance on Montgomery fails in much the same way it does on Falcon. Like Falcon, Montgomery considered the retroactive application of Miller v. Alabama, and found that it was retroactive because it prohibited the

application of the sentence at issue to an entire class of defendants. Montgomery, 136 S. Ct. at 732-34. "Because Miller determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption'… it rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." Montgomery, 136 S. Ct. at 734. The very cases Appellant relies on soundly defeat his reasoning because Hurst did not prohibit the application of capital sentencing to a class of defendants, but merely struck the sentencing scheme used to apply the capital penalty.

Should this Court determine that Hurst applies to Appellant's case, any Sixth Amendment error is harmless beyond a reasonable doubt. The Supreme Court has held that violations of the Sixth Amendment right to a jury trial are subject to harmless error. Washington v. Recuenco, 548 U.S. 212, 222 (2006). This Court has been consistent in finding that deficient jury factfinding, in violation of the Sixth Amendment, is often harmless beyond a reasonable doubt. Galindez v. State, 955 So. 2d 517, 521-23 (Fla. 2007); Johnson v. State, 994 So. 2d 960, 964-65 (Fla. 2008); see Pena v. State, 901 So. 2d 781, 783 (Fla. 2005) (failure to instruct jury on age requirement was not fundamental error). The appropriate harmlessness

standard is whether it is clear beyond a reasonable doubt that a rational jury would have made the findings in question. Galindez, 955 So. 2d at 522-523.

It is readily apparent from the record that any Hurst error is harmless because the evidence in this case overwhelmingly supports the three weighty aggravators[5] found by the trial court, including that the murder was heinous, atrocious, and cruel (HAC), and cold, calculated, and premeditated (CCP). (DAR 17:3126) Appellant told multiple people he was going to kill Andrews. One such time occurred after Andrews would not give him money. Appellant later described the murder to an acquaintance. He explained how he pretended his truck had broken down, and Andrews picked him up. He bragged about the brutality of beating Andrews almost to death, and then shooting him in the head twice. The forensic evidence corroborated the severity of the beating and the brutality of Andrews' death. Peterson, 94 So. 3d at 520-21 (Fla. 2012). The aggravators in this case far outweigh the meager mitigation. No statutory mitigation was found, and the nonstatutory mitigation consisted only of Appellant's long history of drug use and a few positive personal qualities, including being a good son and being a skilled mechanic. Furthermore, these mitigators were assigned very little weight. (DAR 17:3131-34) If presented the opportunity to make specific factual findings

[5] The trial court also found that the murder was committed for pecuniary gain. (DAR 17:3126)

regarding all of the aggravators in this case, any reasonable jury would find those aggravators to be proven, and far outweigh the modest mitigation.

No reasonable factfinder could disagree with the weighing decision eloquently outlined in the trial court's sentencing order. No possible constitutional error prejudiced Appellant on these facts. Thus, his capital sentence should be upheld.

B. Whether Appellant Should Be Resentenced Under Chapter 2016-13, Laws of Florida, if Resentencing is Granted

Appellant's reliance on section 775.082(2), Florida Statutes, to require imposition of a life sentence is misplaced because Hurst struck down Florida's process for imposing capital sentences, not capital sentencing itself. In Hurst, the Supreme Court recognized that under section 775.082(1), Florida Statutes, a defendant could only be eligible for a capital sentence upon "findings by the court that such person shall be punished by death." Hurst, 136 S. Ct. at 622 (quoting § 775.082(1) (2010)). The Supreme Court's holding hinged on the fact that Florida's capital sentencing procedure did not require the jury to make the "critical findings" required to impose a capital sentence, but rather, solely the trial court must find the facts to impose a capital sentence. Id. In contrast, the statute Appellant relies on, section 775.082(2), Florida Statutes, provides that a life sentence must be imposed

"[i]n the event the death penalty in a capital felony is held to be unconstitutional…" § 775.082(2).

Appellant's argument fails because Hurst did not hold that capital sentencing itself was unconstitutional; it only invalidated Florida's procedures for implementing capital sentencing, finding that they could result in a Sixth Amendment violation if the judge makes factual findings that are not supported by a jury verdict. Hurst, at 624. Therefore, section 775.082(2), Florida Statutes, does not apply by its own terms.

Appellant relies on Rusaw v. State, 451 So. 2d 469 (Fla. 1984), arguing that the facts of Rusaw are analogous with the present case. (IB 69) Appellant's reliance on Rusaw is misplaced because Rusaw involved the crime capital sexual battery,[6] for which capital sentencing was entirely constitutionally prohibited. Id. at 470. Unlike Hurst, the capital sentencing scheme was never at issue in Rusaw, but rather, the case addressed proper sentencing when capital sentencing was wholly prohibited from being applied to an entire class of crime. Id. The circumstances of Rusaw are completely unlike Hurst, which only struck down Florida's capital sentencing scheme, not the death penalty itself. As discussed, supra, Hurst did not

[6] Rusaw was convicted of sexual battery upon a person eleven years of age or younger by a person eighteen or older, pursuant to section 794.011(2), Florida Statutes.

find that capital sentencing was unconstitutional, thus, Rusaw is not at all persuasive. Should this Court determine that resentencing is warranted in this case, this Court should remand for resentencing under Chapter 2016-13, Laws of Florida.

ISSUE VII: WHETHER THE TRIAL COURT IMPROPERLY DENIED VARIOUS OTHER CLAIMS BELOW

Appellant seeks to raise thirteen claims by briefly referencing arguments made in his trial motion for postconviction relief and submitting them without briefing. This Court has long held such claims to be deemed waived. In Duest v. Dugger, 555 So. 2d 849 (Fla. 1990), this Court rejected eleven claims that were submitted to this Court in a similar manner. "The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Id. at 852; see also Barwick v. State, 88 So. 3d 85, 101 (Fla. 2011); Jones v. State, 928 So. 2d at 1182. Because Appellant does not brief the thirteen issues raised here, this Court should deem them waived.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, State of Florida, respectfully urges this Court to affirm the conviction and sentence of death imposed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of September, 2016, I electronically filed the foregoing with the Clerk of the Court by using the e-portal system which will send a notice of electronic filing to Frank Tassone, Esq., frank@tassonelaw.com, counsel for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/*Jennifer L. Keegan*
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