

IN THE SUPREME COURT OF FLORIDA

Case No. SC16-801

**ERIC KURT PATRICK,
Appellant,**

v.

**STATE OF FLORIDA,
Appellee.**

**ON APPEAL FROM THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, STATE OF FLORIDA**

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Eric Kurt Patrick, was the defendant at trial and will be referred to as the “Defendant” or “Patrick”. Appellee, the State of Florida, the prosecution below will be referred to as the “State.” References to the records will be as follows: Direct appeal record - “R” or “T”; Post-conviction record - “PCR”; any supplemental records will be designated symbols “SR”, and to the Appellant’s brief will be by the symbol “IB”, followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Eric Kurt Patrick (“Patrick”) was indicated on November 9, 2005 for first degree murder, kidnapping, and robbery. The jury trial began on February 2, 2009 and concluded on February 20, 2009 when the jury returned guilty verdicts on all counts. The penalty phase trial began on June 12, 2009 and ended with the jury recommending death by a vote of seven to five. The court held a hearing pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993), on August 20, 2009. The court issued the sentencing order on October 9, 2009, sentencing Patrick to death. It found seven aggravators and thirty-nine non-statutory mitigators¹.

¹The trial court found the following aggravators, all of which were assigned great weight: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment; (2) defendant was previously convicted of another capital felony or a felony involving the use or threat of

Patrick appealed² the conviction and sentence to the Florida Supreme Court which upheld both. Patrick v. State, 104 So.3d 1048 (Fla. 2012). He then filed a

violence to the person; (3) the capital felony was committed while the defendant was engaged in the commission or attempting to commit or escape after committing the crime of robbery or kidnapping; (4) the capital felony was committed for pecuniary gain (this aggravating circumstance was merged with the preceding circumstance); (5) the capital felony was especially heinous, atrocious, or cruel; (6) the capital felony was committed in a cold, calculated, and premeditated manner; and (7) the victim of the capital murder was particularly vulnerable due to advanced age or disability. The Florida Supreme Court struck the CCP aggravator on direct appeal. The trial court found the following non-statutory mitigators: (1) substantial physical and verbal abuse as a child (little weight); (2) tragic youth predisposing defendant to violence (little weight); (3) instability during childhood (little weight); (4) kidnapping by abusive father at a young age (no weight); (6) defendant witnessed extreme domestic violence (some weight); (7) extreme emotional impact from parents' divorce (no weight); (8) severe drug abuse and addiction starting in childhood (some weight); (9) drug abuse at the time of the murder (some weight); (10) defendant's strong religious faith (little weight); (11) defendant's remorse (some weight); (12) defendant loves his family (little weight); (13) defendant is close to his mother (some weight); (14) defendant has a good relationship with his brother (little weight); (15) defendant had no positive role model (no weight); (16) capability of good relationships (no weight); (17) defendant confessed to law enforcement (little weight); (18) good courtroom behavior (little weight); (19) artistic ability (no weight); (20) defendant recognizes the need to change (little weight); (21) extreme mental or emotional disturbance at the time of the crime (not to the level of statutory mitigation and little weight); (22) Multi-generational dysfunction (little weight); (23-31) sexual abuse related mitigation (some weight); (32) good jail conduct (no weight); (33-38) emotional trauma related mitigation (little weight); and (39) fear of being victimized at the time of the crime (little weight).

² The following issues were raised on direct appeal: (1) erroneous juror disqualification; (2) limitations of cross examination by defense counsel; (3) the trial court's voluntary intoxication instruction was an impermissible comment on the evidence; (4) the trial court's failure to grant the motion to suppress; (5) the trial court erred in admitting gruesome autopsy photographs; (6) improper closing argument by the prosecutor; (7) the trial court erred in denying the motion for judgment of acquittal; (8) cumulative error in the guilt phase; (9) the standard jury

petition for writ of certiorari in the United States Supreme Court, which was subsequently denied. Patrick v. Florida 134 S.Ct. 85 (2013).

In affirming the judgement and sentence, the Florida Supreme Court found the following facts:

Eric Kurt Patrick was recently released from prison and homeless when he met Steven Schumacher at Holiday Park during a rain shower when both men took shelter under a pavilion. Schumacher invited Patrick to lunch, then to stay with him at his home until Patrick was back on his feet. On the night of Sunday, September 25, 2005, Patrick beat Schumacher to death. Patrick left Schumacher's apartment and took Schumacher's truck and parked it at the Tri-Rail station. Patrick withdrew approximately \$900 from Schumacher's bank account using his ATM card in three separate transactions. Patrick was arrested after a separate, unrelated encounter with Deputy Kurt Bukata. Patrick confessed to beating Schumacher, stated that he was afraid Schumacher was dead, and that he didn't mean to kill him.

On November 9, 2005, Patrick was charged by indictment. The jury trial began on February 2, 2009. At trial, the State called twelve witnesses during its case-in-chief.

On the night of the murder, Patrick and Schumacher drank beers and went to bed. Patrick gave Schumacher a massage, then they both lay naked in bed. According to Patrick, Schumacher attempted anal sex, which Patrick refused. Patrick stated that Schumacher was “riding up on me squeezing me.” After Patrick told him to stop, Schumacher stopped but tried again later. Patrick then explained that he “cut loose on [Schumacher].”

Patrick admitted and the evidence verified that Patrick beat Schumacher in the bedroom, beginning in the bed. He began hitting

instructions dilute the jury's sense of responsibility; (10) improper prosecutorial argument and limitations of defense argument at the penalty phase; (11) numerous errors in the sentencing order; (12) disproportionality of the death penalty; and (13) cumulative error in both guilt and penalty phases.

Schumacher with his fists but also beat him with a wooden box because his hands hurt so badly. Schumacher's nose was broken and his face was cut. He was hit so hard that his teeth were broken. Patrick then tied up Schumacher using a telephone cord at the base of the bed, then taped his mouth when Schumacher yelled for help. Patrick did not want Schumacher "to go to the law" on him. Patrick put Schumacher in the bathtub on his side where Schumacher was later found dead.

Jenny Scott and Robert Lyon, Schumacher's friends, usually saw him daily. They last saw Schumacher on September 25, 2005, when they went over to offer him dinner. Scott did not hear from Schumacher and she also noticed his truck was missing. When Scott went to check on Schumacher on Tuesday, he did not answer so she called the Sheriff's Department.

Deputy James Snell responded to Scott's call. They both went into the apartment and saw that the bedroom was dark and disarrayed. Both Deputy Snell and Scott saw blood stains throughout the room. At that point, Scott ran out of the apartment. Deputy Snell found Schumacher's body in the bathtub. The body was very bloody and the hands and ankles were bound in the back; the head and face were taped, with the face resting on the drain. The pants were pulled down although still on the body. The body was cold and stiff and the blood had pooled. The ankles were bound with torn sheets and a knotted lamp cord. The wrists were bound by a telephone cord and tape. There was bruising on an elbow, the chin, and the top of the head. The tape on the head went both horizontally and vertically and there was a pillow case folded over the mouth under the tape. The tape seemed to be one continuous piece. Deputy Snell informed Scott that Schumacher was dead. Scott then provided the police with a description of Patrick.

The deputies found no evidence of forced entry into the apartment. Additionally, they discovered that the air conditioning was set at sixty degrees so all the windows had condensation on them. In the kitchen trash, the deputies found tape matching that used on Schumacher's face. Schumacher's wallet was in the living room. There were bloody footprints on the tile, a large blood stain on the bedroom carpet, and blood spatter on the dresser and wall. The bedroom lamp was cracked

and missing its cord. A cord was in the bed under the sheets. There was blood spatter on the sheets and headboard. Teeth were found in the bedclothes. A broken box with blood on it was under the dresser. Deputy Kurt Bukata ran into Patrick at a gas station and arrested him on an outstanding warrant. Patrick had injuries on his knuckles and was carrying a duffel bag. Patrick also had some abrasions on his upper body. Bukata inventoried the duffel bag and found blood-stained boots, jeans, briefs, and socks. He told Bukata that he had been involved in a fight with some men over his shoes. DNA tests identified Schumacher's blood on Patrick's jeans.

The trial ended on February 20, 2009, with the jury finding Patrick guilty of first-degree murder, kidnapping, and robbery.

On June 12, 2010, the court reconvened for the penalty phase. The State introduced two stipulations into the record. The State introduced a certified copy of Patrick's conviction for armed carjacking on April 17, 1998, for which he was sentenced to nine years' imprisonment. The State also introduced a certified copy of a document from the Department of Corrections showing that Patrick was released on August 9, 2005, and remained in the controlled release program until February 8, 2007. The State called Scott Tison and Dawn Allford. The defense called seven witnesses: Dorothy Dolighan, a friend of the family who grew up with Patrick's mother in Berlin, Germany; Carsten Patrick, Patrick's brother; Philip Arth, an investigator with the Broward County Public Defender's Office and former Ft. Lauderdale police homicide detective; Patrick's mother, Ingrid Franke; Father Jerry Singleton, the pastor at St. Anthony Catholic Church; Patrick, himself; and Dr. Christopher Fichera, a licensed clinical and forensic psychologist.

On August 20, 2009, the trial court conducted the final sentencing hearing, pursuant to *Spencer v. State*, 615 So.2d 688 (Fla.1993). The defense called two experts, and Patrick and his mother made statements to the court. The defense presented a Spencer memorandum in support of a life sentence. Dr. Fichera and Dr. Allan Ribbler, also a licensed psychologist, testified.

On October 9, 2009, the court issued its sentencing order. The court imposed the death penalty for the murder of Steven Schumacher. The

court sentenced Patrick to a mandatory life imprisonment term for the kidnapping as a prison releasee reoffender, to run consecutive to the death sentence. In its sentencing order, the trial court found six aggravators FN1 and sixteen non-statutory mitigating circumstances.FN2 The Court sentenced Patrick to thirty years as a violent habitual felony offender, with a fifteen-year minimum-mandatory term for the robbery, to run concurrent with the life sentence. Patrick now appeals raising seventeen claims.

Patrick v. State, 104 So.3d 1048, 1053-55 (Footnotes omitted).

Patrick filed his motion seeking post-conviction relief under Florida Rule of Criminal Procedure 3.851 on October 2, 2014. The State filed its response on December 1, 2014. The trial court denied an evidentiary hearing on claims 1, 2, 3, 4.2 and 6. It granted an evidentiary hearing on claims 4.1, 4.3, and 5. The evidentiary hearing occurred on August 31 through September 2, 2015. In a written order, the lower court denied relief on April 4, 2016. (PCR 7:1358-1394) This appeal followed.

SUMMARY OF THE ARGUMENT

Issue I This Court should not consider this issue in the appeal of the post-conviction motion since the lower court never considered the issue on its merits and never issued a final order on it.

Issue II The record clearly supported the contention that Patrick was not under the influence at the time of his confession and the post-conviction defense expert could not establish conclusively that Patrick exhibited any behaviors during that

confession to support a conclusion to the contrary. The lower court correctly determined that he had failed to prove either deficient performance or prejudice.

Issue III Patrick failed to show what a mitigation expert would have discovered or presented which the defense team had not, nor did he present any mitigation evidence which was not cumulative to that which was presented at trial. Furthermore, any additional mitigation evidence was known to the defense at the time of trial but Patrick himself refused to allow it to be presented to the jury, which also affected the ability of his mental health experts to present a more compelling case to the jury. The lower court's exclusion of his mother's trauma was proper as was its determination that he had failed to prove his counsel ineffective in the penalty phase.

Issue IV Shoeprint evidence has been allowed for over a century so counsel was not ineffective for not asking for a *Frye* hearing. The record does not demonstrate that any jurors were biased against Patrick and the lower court's summary denial was appropriate.

ARGUMENT

ISSUE I

THE LOWER COURT NEVER CONSIDERED THIS ISSUE ON THE MERITS SO IT IS NOT PROPERLY BEFORE THIS COURT IN THIS APPEAL. (Restated)

In his first issue, Patrick asserts that he is entitled to relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) since this Court has determined that those rulings are retroactive to defendants whose death sentences were imposed after June 24, 2002. *See Mosley v. State*, ___ So. 3d ___, 2016 WL 7406506 (Fla. Dec. 22, 2016). Patrick originally raised this issue in his direct appeal, which was before the *Hurst* decisions were issued. Since it would have been procedurally barred, he did not raise it as a claim in his post-conviction motion. While awaiting a ruling by the lower court on the post-conviction motion, the United States Supreme Court issued its *Hurst* decision. Patrick moved to amend his motion and filed his successive Rule 3.851 motion raising this issue. Without a written order, the lower court denied it without prejudice. *See e.g. Arbelaez v. State*, 898 So. 2d 25, 31 (Fla. 2005) (Trial court's denial of successive post-conviction motion to consider just issued *Ring v. Arizona* decision not an abuse of discretion).

Since there was no final ruling in the lower court, the issue is not properly before this Court in this particular appeal. *See Armstrong v. State*, 642 So.2d 730, 740 (Fla.1994) (concluding that appellant's claim that the trial court erred in failing to grant his pretrial request for an MRI to determine whether he had a brain tumor was procedurally barred because the trial judge reserved ruling on the issue and never issued a ruling). While the State maintains that this issue should be raised in

a successive Rule 3.851 motion, the defense has raised it in its present state habeas petition to which the State responds fully on the merits.

ISSUE II

TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO CHALLENGE THE VOLUNTARINESS OF THE CONFESSION. (Restated)

In claim II of his post-conviction motion, Patrick claimed that his trial counsel was ineffective in failing to challenge the voluntariness of the confession, arguing that it was not voluntary because he was suffering from cocaine withdrawal and from PTSD. Those factors allegedly affected his ability to coherently waive his constitutional rights. Following an evidentiary hearing, the lower court denied the claim. The State contends that Patrick failed to present sufficient evidence to establish that his trial counsel performed deficiently or that he was prejudiced by that performance. The trial court properly denied Patrick's claim.

The standard of review for ineffective assistance of counsel claims is the two prong test established by *Stickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984). The United States Supreme ruled that:

“[a] convicted defendant's claim that counsel's assistance was defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the

defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.” *Strickland*, 104 S.Ct. at 2064.

The court in *Strickland* stated that when judging an attorney’s performance, the standard is that of reasonably effective assistance, considering all the circumstances, and judicial scrutiny must be highly deferential. In order to show prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 2068.

This Court recently applied this standard in *Bogle v. State*, highlighting the two factors need to be established:

“First the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the bPCRd range of reasonably competent performance under the prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.”

Boling v. State, 41 So.3d 151, 155 (Fla. 2010) (quoting *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986)). This Court further noted that because the two prongs of *Strickland* present mixed questions of law and fact, the court employs a mixed standard of review, deferring to the trial court’s fact findings that are

supported by competent substantial evidence, but reviewing legal conclusions *de novo*. *Dennis v. State*, 109 So.3d 680, 690 (Fla 2012).

The standard of review for an appellate court reviewing a claim of ineffective assistance of counsel after an evidentiary hearing is mixed; clear error review applies to give great deference to the trial court's findings of fact whereby if competent substantial evidence supports the finding then it will not be disturbed, while the trial court's findings of law are subject to *de novo* review. *Bruno v. State*, 807 So. 2d 55 (Fla. 2001) and *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999).

After an evidentiary hearing, the trial court made the following factual findings:

An evidentiary hearing was held on this subclaim Dorothy Ferraro, second chair counsel, testified that she thought of hiring a toxicologist. She consulted with Dr. Teri Stockholm. After consulting Dr. Stockholm about the amount of drugs that Defendant self-reported that he had consumed, Dr. Stockholm opined that the Defendant couldn't have taken that amount of drugs. Ferraro felt that calling a toxicologist would not have been helpful. (EH Vol 5, 669-670) Ms. Ferraro testified that she decided that she would focus on the content of the video of Defendants confession instead of pursuing the mental health or issues. (EH Vol 5, 670) ⁶ This decision was made in part because Defendant wouldn't allow his attorneys to develop fully mental health mitigation.

⁶ Defendant was tested and found to have high average intelligence. He had obtained a G E D and an associate's degree. Further, according to Reres, Defendant had a lengthy felony record and on at least six (6) occasions, Defendant had confessed. (EH Vol, 2, 209)

The Defendant presented the testimony of Dr. William Morton Jr, a psychopharmacologist during the evidentiary hearing. He testified that his focus is on addictions. He interviewed Defendant in preparation for this hearing. He relied upon Defendant's self-report of the drugs he had consumed prior to his confession.

Morton explained that a toxicologist studies dead people while his profession studies live patients. He opined that from his review of the video of Defendant's confession, he saw mild to moderate cocaine withdrawal. He saw no significant visual signs of opioid withdrawal. He saw some psycho-motor retardation and six (6) instances of agitation. His opinion was that the detectives should have waited to obtain Defendant's confession, which was obtained 28 ½ hours after Defendant's arrest.

He further opined that Defendant may have been intoxicated, may have been going through cocaine withdrawal, had posttraumatic stress disorder (PTSD) and depression. Morton testified that it was difficult to pin point just one. (EH Vol 3, 428-434, 448-452)

Defendant's confession was played at the hearing on the motion to suppress, during the trial and for the jurors, pursuant to their request, during their deliberations.

The confession in this case, from the start, was video recorded. This Court had an opportunity to see and hear the Defendant at the time of the confession in this case. No signs of impairment were noted. His answers to questions asked were related to the question and responsive. The jurors were given the standard jury instruction regarding the Defendant's statement. (ROA at 707) The jury was free to determine if

Defendant's statement was freely and voluntarily made. They were also told that they could disregard the statement.

While, arguably, an expert could point out the subtleties that would show withdrawal, that is exactly what they would have been in this case. In other words, there was no glaring behavior that would have led a reasonable judge or jury to believe that Defendant was under the influence of any drugs or alcohol or manifesting any drug withdrawal symptoms.

Defendant testified during the penalty phase that he was not under the influence of drugs when he gave his statement, instead he was coming down under the influence. The following exchange occurred during cross examination:

Q. And that statement that you gave to Detective Nicholson that's in evidence for this jury to hear, you were completely straightforward and honest from the beginning to end in that statement?

A. From what I remember about it, yes.

Q. Well, what, you were under the influence in that statement now?

A. I was under the influence ~ no, I wasn't. I was coming down from drugs. I was under the influence when it happened.

Q. But you weren't under the influence when you gave the statement, were you Mr. Patrick?

A. I know I wasn't myself. I know I look at that statement, I've read that statement and it doesn't seem like myself today. I still think I had some of the affects (sic) of the drugs in me.

Q. So if there's any inconsistencies in the statement that you didn't take full responsibilities it is now just because you weren't yourself?

A. It is not now anything, ma'am, it is what it is.

(PCR at 3033)

Even if this court were to assume that Defendant could meet the first prong of the Strickland test, he still cannot show that had his confession been suppressed that outcome of the trial would have been different. As already discussed above, even without Defendant's confession, there was ample evidence of guilt in this case sufficient to obtain a conviction. Thus, for the reasons set forth herein, Defendant's subclaim is denied.

(PCR 7:1370-73) The facts presented at the evidentiary hearing fully support the trial court's findings and ruling.

In support of his claim, Patrick relied on the testimony of George Reres, Dorothy Ferraro, Adam Tebrugge, and Dr. William A. Morton. Patrick looked to Tebrugge's testimony to establish what appropriate steps an attorney should take in challenging pretrial statements; specifically, what defense counsel should look for and what experts they should seek to hire. Tebrugge testified that a defense attorney needs to determine the intelligence of the defendant and whether there was a knowing and voluntary waiver of *Miranda*. The attorney should look for signs of intoxication, mental illness, whether there was any coercion, and consult with an expert who works with false confessions. In cases where substance abuse is an issue, an addictionologist or toxicologist are appropriate experts. (PCR 23:1749-1752)

Reres testified that he was aware that Patrick had a severe drug problem, but did not consider hiring an addictionologist or psychopharmacologist to look at his demeanor during the confession. He and his co-counsel, Dorothy Ferrero, decided to contact a forensic toxicologist to testify as to how Patrick's drug use might impact the case. They chose Dr. Terry Stockholm because of her knowledge in the effects of drug addiction. (PCR 24:1825-1826) During cross examination, Reres testified that, after repeatedly viewing the confession, there was nothing in the video to indicate that it was not voluntary. A Motion to Suppress was filed, but not based on voluntariness because it was fruitless. (PCR 24:1865-1866)

Ferraro stated that, because of the damaging statements Patrick made, it was determined that the best strategy was to argue for the lesser included offenses. (PCR 27:2298) On cross-examination, Ferraro indicated that during his videotaped confession, a Detective asked Patrick if he is under the influence, and Patrick indicated he was not. When asked about whether she saw any signs of drug withdrawal or alcohol problems, Ferraro stated she was more focused on the content of what he was saying. If she had noticed any signs of withdrawal, it would be included in the motion to suppress. (PCR 27:2345-2346) Ferraro was responsible for contacting the forensic toxicologist, Dr. Teri Stockholm, which she did after the motion to suppress was denied. Ferraro provided Dr. Stockholm with the types and amounts of substances Patrick reported he consumed the night of the crime. Dr. Stockholm indicated that she could not help since “there’s no way anyone could have taken that amount of drugs”, it was ludicrous. (PCR 27:2324)

In *Strickland*, the United States Supreme Court wrote that strategic choices made after an investigation are basically unchallengeable. Strategic choices made after a less than thorough investigation are reasonable as long that there is a reasonable professional judgement to support the limitations. *Strickland*, 104 S.Ct. at 2066. The basis for ineffectiveness is not that current counsel disagrees with trial counsel’s strategic decisions. *Occhione v. State*, 768 So.2d 1037, 1048 (Fla 2000). Furthermore, there is no ineffective assistance of counsel if alternative

courses were considered and rejected and the decision was within the norms of professional conduct. *Rutherford v. State*, 727 So.2d 216, 223 (Fla 1998). Reres's and Ferraro's testimonies establishes that all possible avenues were considered and a strategic decision based on the facts and circumstances of the case.

Strickland further states:

“No particular set of detailed rules for counsel's conduct can satisfactorily take account the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decision. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.”

Id at 2065. *Strickland* makes it clear that there is no absolute correct way to represent a client. When assessing an attorney's performance “every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *Id*. See also *Cherry v. State*, 659 So.2d 1069, 1073 (Fla 1995) (“The standard is not how present counsel would have proceeded, in hindsight, but rather whether there was *both* a deficient performance and a reasonable *probability* of a different result.”) What Trebugge testified to where guidelines, they are not mandatory. Trebugge conceded that every case is different and what actions taken are determined by the facts and circumstances. (PCR

23:1756) It is also important to note that both Reres and Ferraro testified that they discussed speaking with experts but decided against it based on Patrick's behavior during his statement. Consequently, they considered various avenues but chose the one that they felt the best given the facts of this particular case. Counsel were not deficient.

Morton attested that Patrick was in a state of mild to moderate cocaine withdrawal and he did not see any significant withdrawal effects. However, because he was suffering from some withdrawal there may be some coercion. He also testified that during the police interview, Patrick was suffering from a combination of cocaine withdrawal, PTSD, depressive symptoms, as well as cocaine exacerbating the two conditions. (PCR 25:2083-2086) On cross examination, Morton testified that all of the information he received regarding Patrick's drug use and confession was from self-reporting. Morton stated that Patrick's taping of the Schumacher's mouth, tying the Schumacher up, packing a lunch, and turning down the air conditioning could be signs of planning, and, therefore, he was not suffering from any impairment. (PCR 25:2096-2098) He further testified that during the confession, Patrick was lucid, at times demonstrated by the fact that he drew a map, which showed motor and visual skills. Morton conceded that the behaviors he described Patrick exhibiting during the confession could be symptomatic of multiple diagnoses, not just cocaine

withdrawal. He also agreed that it might have been important to review Patrick's medical records after he was arrested to see if he withdrawing from something other than what he reported and was given medication for it. (PCR 25:2103-2106)

The record refutes Patrick's claim that his statement to the police was not voluntary. The fact that Patrick abused drugs and may suffer from PTSD does not render his statement involuntary. The confession was videotaped and showed Detective Nicholson giving Patrick a cigarette, water, food, and offering him the use of the bathroom. Patrick's hands were not restrained. It was only him and the Detective in the room. Nicholson slowly read Patrick his *Miranda* warnings and asked if he understood each one, to which Patrick said he did. Patrick then signed the form. At all times. Patrick's words were clear and normal. Nicholson did not ask Patrick any leading questions. Patrick showed no signs of distress and was the person supplying about what happened.

It has long been established that "[t]he rule of law seems to be well settled that the drunken condition of the accused when making a confession, unless such drunkenness goes to the extent of mania, does not affect the admissibility in evidence of such confession, but may affect its weight and credibility with the jury." *Lindsey v. State*, 66 Fla 341, 343, 63 So. 832, 833 (1913). In *Baker v. State*, 71 So.3d 802, 814, (Fla 2011), this court ruled that a defendant's confession may be used as evidence if the statement was made voluntarily and of his own free will,

which is determined by examination of the totality of the circumstances. In its order, the trial court noted:

“The confession on this case, from the start, was video recorded. This court had an opportunity to see and hear the Defendant at the time of the confession in this case. No signs of impairment were noted. His answers to questions asked were related to the question and responsive. The jurors were given the standard jury instructions regarding the Defendant’s statement (PCR at 707). The jury was free to determine if Defendant’s statement was freely and voluntarily made. They were also told that they could disregard the statement.”

(PCR 27:1372) The record firmly supports the lower court’s determination.

The facts of the case before the court are almost indistinguishable from the facts in *Buzia v. State*, 82 So.3d 784, 793 (Fla 2011). Buzia had filed a post-conviction motion for relief. One of his claims was ineffective assistance of counsel due to trial counsel’s failure to file a motion to suppress his confession on the grounds that it was not voluntary because he was intoxicated. This Court ruled that there was no evidence presented that Buzia was under the influence when he gave his confession. In fact, Morton testified on behalf of Buzia and stated that Buzia only showed mild symptoms of withdrawal. Morton made no conclusion that Buzia was under the influence of drugs at the time of his confession. *See also Davis v. State*, 990 So.2d 459, 464 (Fla. 2008), (where this court ruled that Davis’s claim that he under the effects of LSD was not supported by the evidence; he was interrogated 15 hours after his arrest.) Here, Patrick was questioned by the police over twenty-eight hours after the crime was committed. The videotaped

confession shows the Detective giving Patrick a cigarette, water, food, and allowing him to use the bathroom. He was read his *Miranda* warnings and expressed that he understood. Most importantly, he was not asked leading or suggestive questions. Again, the doctor stated that Patrick was only suffering from mild to moderate withdrawal symptom, he appeared lucid, and that his ability to plan was indicative of someone who was not suffering from any sort of diminished capacity. Reres and Ferraro both testified that there was nothing in the video to indicate that it was not voluntary and, had they seen evidence of Patrick being under the influence of drugs, that intoxication would have been included in the motion to suppress. Furthermore, during the penalty phase, Patrick testified that he was not under the influence of drugs when he gave his statement. There was no indication that Patrick was coerced or that he was so incapacitated that he could not voluntarily waive his *Miranda* rights. Other than Dr. Morton's testimony that there were subtle signs that Patrick was suffering from withdrawal; there was no other evidence presented that his confession was not voluntary.

Even if this court were to deem trial counsel's performance deficient, there is insufficient evidence to show that Patrick was prejudiced or that there would have been a different outcome to the case. *Strickland* establishes that the burden is on the Defendant to show that trial counsel's performance fell below the standard guaranteed by the Sixth Amendment and, but for that failure, there is reasonable

probability that the result of the proceedings would have been different. In making that determination, the court must look at “whether counsel’s assistance was reasonable under the circumstances” *Stickland*, 104, S.Ct. 2065. Hence, there is a strong presumption that trial counsel rendered effective assistance. The lower court correctly ruled that, even if his was deficient, he failed to demonstrate that there is a reasonable probability that there would have been a different result. Patrick failed to show that if his confession had been suppressed the outcome of the trial would have been different. As the trial court noted, even without the confession there was ample evidence to convict Patrick including: the video of him making withdrawals from an ATM with the Schumacher’s card; the bloody clothing and shoes in his bag when arrested, which later tested positive for DNA matching Schumacher; the wounds on Patrick’s hands and upper body; the identification by the Schumacher’s friends as the man staying with Schumacher Sunday night; and the shoe prints at the crime scene which had a pattern consistent with the shoes found in Patrick’s bag.

When looking at the totality of the circumstances, it is clear that trial counsel’s actions were not deficient and that Patrick was not prejudiced by the admission of the confession. The lower court’s factual findings were amply supported by the evidentiary hearing and trial record, as was its determination that Patrick failed to prove the requisite prejudice. Based on the foregoing, the lower

court's determination that Patrick failed to demonstrate either deficient performance of counsel or the necessary prejudice was correct and this Court should affirm the denial of relief.

ISSUE III

DEFENDANT'S TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO FULLY INVESTIGATE AND PRESENT MITIGATING EVIDENCE AND NO PREJUDICE CAN BE SHOWN. (Restated)

Defendant claims that the trial court erred in denying his claim that his trial counsel was ineffective for failing to hire a mitigation specialist, failing to travel to conduct witness interviews and gather records, failing to compile an adequate social history, hiring Dr. Fichera instead of various different mental health witnesses, and failing to present evidence of multi-generational trauma. The trial court granted an evidentiary hearing on these claims and denied relief, finding that Defendant had failed to prove his allegations. That ruling should be upheld since the evidence adduced at the hearing clearly supported the trial court's factual findings and legal conclusions.

The standard of review for an appellate court reviewing a claim of ineffective assistance of counsel after an evidentiary hearing is mixed; clear error review applies to give great deference to the trial court's findings of fact whereby if competent substantial evidence supports the finding then it will not be disturbed,

while the trial court's findings of law are subject to *de novo* review. *Bruno v. State*, 807 So. 2d 55 (Fla. 2001); *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999).

To establish ineffective assistance of counsel, the defendant must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. *Strickland*, 466 U.S. 688. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. At all times, the defendant bears the burden of proving not only that counsel's representation fell below an objective standard of reasonableness and was not the result of a strategic decision, but also that actual and substantial prejudice resulted from the deficiency. *See Orme v. State*, 896 So.2d 725, 731 (Fla. 2005).

In order to be entitled to relief on a claim of ineffective assistance of penalty phase counsel, a capital defendant "must demonstrate that but for counsel's errors he would have probably received a life sentence." *Hildwin v. Dugger*, 654 So. 2d 107, 109 (Fla. 1995). *See also, Sears v. Upton*, 561 U.S. 945 (2010); *Porter v. McCollum*, 558 U.S. 30 (2009); *Rompilla v. Beard*, 545 U.S. 374 (1996). The ability to create a more favorable strategy years later does not prove deficiency. *See Patton v. State*, 784 So. 2d 380 (Fla. 2000); *Cherry v. State*, 659 So. 2d 1069

(Fla. 1995). “In reviewing a claim that counsel’s representation was ineffective based on a failure to investigate or present mitigating evidence, the Court requires the defendant to demonstrate that the deficient performance deprived the defendant of a reliable penalty phase proceeding.” *Hoskins v. State*, 75 So. 3d 250, 254 (Fla. 2011).

“As the Supreme Court noted in *Strickland*, ‘the reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.’” *Cherry v. State*, 781 So. 2d 1040, 1050 (Fla. 2000) (quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984)).

After the evidentiary hearing, the lower court found the following facts and made the ruling pertinent to the penalty phase ineffective assistance of counsel claims:

Defendant contends that counsel was ineffective in not hiring a mitigation specialist or locating witnesses who could have testified to the abuse Defendant suffered as a child. Defendant also complains that the mental health testimony and evidence presented came from an ill-prepared witness, Dr. Chris Fichera. 10

Phillip Arth, the investigator from the office of the Public Defender, was assigned to locate and talk to witnesses for the penalty phase. Mr. Arth was able to locate Defendant’s father, but the father wanted nothing to do with the Defendant or this case. There were other witnesses, such as Defendant's ex-wife or ex-girlfriend, who wanted nothing to do with this case. Further, Defendant’s mother was not helpful in naming family members who could have been contacted to testify on Defendant’s behalf. (EH Vo 2, 129-152) There is no ineffective assistance of counsel when an attorney can't call a witness who is unavailable. *Simmons v State*, 105 So 3d 475 (Fla 2012).

Another witness, Mr Tebrugge testified regarding the standards established by the American Bar Association (ABA) and the Florida Association of Criminal Defense Attorneys (FACDL) regarding capital cases. He testified that the recommendation in investigating mitigation was to go back at least three generations. (EH Vol 1, 87) 11 In fact, Dr. Fichera attempted in his presentation to do that but because of this Court's ruling, he was not allowed. (ROA 2970-2891) 12

This Court notes, that both Mr. Reres and Ms. Ferraro had difficulty in persuading Defendant that certain evidence was crucial to his mitigation. As Mr. Reres testified, this case was a penalty phase mitigation case from the beginning. (EH Vol 2, 195) However, because of office policy constraints as well as difficulty with Defendant agreeing to the presentation of crucial evidence, the case became more complex.

At the beginning of the evidentiary hearing, just as in the penalty phase of the case, this Court had to colloquy Defendant to make sure that the record was reflective that it was he, not counsel, that [sic] wanted evidence withheld. (ROA 3052-3055, 3143-3148, EH Vol 3, 328-330)

The following witnesses testified during the penalty phase: Dorothy Dolighan (was a friend of Defendant's mother and knew him while he was growing up), Carsten Patrick (Defendant's brother), Ingrid Franke (Defendant's mother), Father Jerry Singleton, Dr. Christopher Fichera and Defendant [sic] (licensed clinical and forensic psychologist), Phillip Arth (investigator with the Office of Public Defender) and Defendant.

During the penalty phase as well as the evidentiary hearing, Defendant limited his attorneys as to what evidence could be presented, (ROA 3052-3055, EH Vol 2, 33-339), specifically, evidence of his sexual abuse as a child. Defendant did not want any testimony regarding anal sex or homosexual encounters. Ms. Ferraro testified that it was difficult to get information from Defendant.

George Reres testified that at the time of this trial he was the supervisor of the homicide unit. Both he and Ms. Ferraro testified that the elected Public Defender did not believe in mitigation specialists. (EH Vol 2, 163, Vol 5, 650) She didn't have names of people she could contact to speak about the Defendant. She had no information regarding close family members except Defendant's mother and brother. The brother had been reluctant to testify for Defendant. She testified that Defendant vacillated between wanting to present mitigation at a penalty phase. He is quoted as saying, "if I'm found guilty, I might as well give up." (EH Vol 5, 711)

Over the three days of the evidentiary hearing, this Court listened carefully to the testimony of approximately 17 witnesses: 13 One of them hadn't seen Defendant since he (Defendant) was six years old. (Dube)(EH Vol 4, 558); a neuropsychologist, Dr. Ouaou, who never spoke with Defendant about the crime (Vol 3, 396); a psychopharmacologist, Dr Morton; Dr Gold, a psychologist, who presented testimony regarding epigenetics. 14 The only problem is that he had never treated a patient in this area. (EH Vol 4, 594) 15

13 Defendant's mother and brother also testified during the penalty phase, the other witnesses, while their testimony was interesting, it served no purpose in persuading the Court that the outcome would have been different if their testimony had been presented to the jury in this case.

14 The Court allowed the doctor to testify over the objection of the State in this area. Because this is a death case, this Court wanted to hear anything that might have changed the outcome.

15 He also testified that "Defendant was cooperative, for the most part." (EH Vol 4, 582)

To prove prejudice, a defendant "must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence.

Whatever mitigation evidence that Defendant would allow his attorneys to present was presented in this case. The fact that current counsel was able to find certain witnesses that Ms. Ferraro or Mr.

Reres could not located [sic] in 2009 does not mean that they were ineffective. The fact that there are experts who disagree with the experts from 2009, (Drs Fichera, Weiss, Ribler or Dr Stockholm) does not change the fact that in 2009, Defendant received a fair and full penalty phase hearing. *See Cherry v. State*, So 2d 1040, 1052 (Fla 2000). The mitigation evidence that existed was presented and was considered by the jury and this Court.

Lastly, Defendant has failed to establish prejudice, in that he has failed to show that any additional mitigation evidence would have outweighed the aggravating factors. 16 Defendant has not shown that he was deprived of a reliable penalty phase proceeding.

16 There is a remote possibility that had Defendant allowed his attorneys to develop the sexual abuse evidence and had anyone of the doctors been allowed to present that evidence to the jury, there might have been at least one statutory mitigatory. However, with the aggravators that existed in this case, this Court would still have imposed the same sentence.

(PCR 7:1382-1384) (some footnotes omitted).

a. Using a mitigation specialist was not necessary.

Defendant claims his counsel's failure to hire a mitigation specialist was ineffective assistance because the Supplemental Mitigation Guidelines suggest a mitigation specialist be consulted. After the evidentiary hearing, the trial court made the following factual findings and determined that Defendant had failed to prove his claim. As quoted more fully above, the evidentiary hearing court said: "Whatever mitigation evidence that Defendant would allow his attorneys to present was presented in this case. ... Defendant has failed to establish prejudice, In that he has failed to show that any additional mitigation evidence would have outweighed

the aggravating factors. Defendant has not shown that he was deprived of a reliable penalty phase proceeding.” *Id.* at 1383-84. As noted by the court, Patrick failed to prove that a mitigation expert would have altered the trial in any way and, thus, failed to meet his burden under *Strickland*. This Court should affirm the denial of relief.

Trial counsel is not deficient simply because he did not hire a mitigation specialist. (“[T]o the extent Hoskins argues that counsel was deficient solely for failing to hire a mitigation specialist, the claim is conclusory. Failure to use an ‘expert’ in mitigation investigation does not per se constitute ineffective assistance.”) *Johnson v. State*, 135 So.3d 1002, 1029 (Fla. 2014) (quoting *Hoskins v. State*, 75 So.3d 250, 256 (Fla.2011)).

As the lower court noted, Patrick’s argument ignores that it was his own conduct during the course of his representation which thwarted the discovery and presentation of mitigation evidence. It is well settled that counsel may not be found ineffective where his client’s actions, admissions, or the evidence circumscribe his decisions. *See Rivera v. State*, 717 So.2d 477, 485 (Fla. 1998) (opining, “[w]hen a defendant preempts his attorney’s strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made.”); *Squires v. State*, 558 So. 2d 401, 402-03 (Fla. 1990) (noting counsel’s decisions circumscribed by defendant’s admissions to counsel and evidence). The fact that the defense attorneys may have

desired to hire a mitigation specialist is irrelevant in this case. Patrick failed to prove what evidence a mitigation specialist would have produced which trial counsel failed to either find or to consider pursuing; thus, he failed to meet his burden of prove for post-conviction relief.

Again, Defendant's trial counsel, Ms. Ferraro, testified at the evidentiary hearing that Defendant vacillated as to whether he wanted to present any mitigation at the penalty phase. Defendant was quoted as saying, "if I'm found guilty, I'd rather just give up." (ROA Vol. 27 page 2365). When trial counsel continued to pursue potential mitigation evidence, the Defendant continued to thwart counsel's progress. For instance, Defendant precluded Investigator Arth from pursuing information his father could have provided about the Defendant's childhood (ROA Vol. 25 page 2127) and prohibited his hired mental health expert, Dr. Fichera, from presenting to the penalty phase jury any testimony about the sexual abuse he suffered as a child. (T. 26:363). These limitations made presenting mitigation substantially more difficult for trial counsel. In order to be entitled to relief on a claim of ineffective assistance of penalty phase counsel, a capital defendant "must demonstrate that but for counsel's errors he would have probably received a life sentence." *Hildwin v. Dugger*, 654 So. 2d 107, 109 (Fla. 1995). *See also, Sears v. Upton*, 561 U.S. 945 (2010); *Porter v. McCollum*, 558 U.S. 30 (2009); *Rompilla v. Beard*, 545 U.S. 374 (1996). Hiring a mitigation specialist

would have done nothing to alleviate the restriction Defendant himself placed on the defense team; Patrick failed to present any evidence that he would have cooperated any more with a mitigation evidence than he did with his attorneys, investigator, and experts. As such, there is no valid basis to claim that hiring a mitigation specialist would probably have led to Defendant receiving a life sentence. The trial court was correct in its' order that "Whatever mitigation evidence that Defendant would allow his attorneys to present was presented in this case." (ROA 7:1383). It was the Defendant's own actions that would have made hiring a mitigation specialist a futile effort, unlikely to assist Defendant at sentencing.

b. The social history gathered by penalty phase counsel was adequate.

The Defendant further alleges ineffective assistance of counsel because his defense team did not travel to conduct witness interviews and gather records, nor did the attorney conduct an adequate social history. After an evidentiary hearing, the lower court made the following findings when discussing this claim:

[Investigator] Arth was able to locate Defendant's father, but the father wanted nothing to do with the Defendant or this case. There were other witnesses, such as Defendant's ex-wife or ex-girlfriend, who wanted nothing to do with this case. Further, Defendant's mother was not helpful in naming family members who could have been contacted to testify on Defendant's behalf. There is no ineffective assistance of counsel when an attorney can't call a witness who is unavailable...The fact that current counsel was able to find certain witnesses that Ms. Ferraro or Mr. Reres could not locate in 2009 does not mean that they were ineffective.

(ROA 7:1381-1383, citations omitted). Those findings were supported by competent, substantial evidence brought out at the hearing. Patrick failed to prove either deficient performance or the necessary prejudice required by Strickland. This Court should affirm the denial of relief.

The evidence that Patrick presented at the evidentiary hearing was largely cumulative to what his counsel presented at the penalty phase. The defense team located and brought multiple witnesses to the penalty phase such as Dorothy Dooligan, a friend of the family who grew up with Defendant's mother in Germany, Defendant's brother Carsten Patrick, Defendant's mother Ingrid Franke, Jerry Singleton who was a pastor at St. Anthony Catholic Church, and Dr. Fichera a licensed clinical and forensic psychologist.

Dorothy Dooligan was friends with Patrick's mother and knew him while he was growing up. She loved him very much. (T. 2822-30).

Defendant's mother Ingrid Franke testified that his father was physically and verbally abusive to both her and the two boys. In 1973, she had him arrested for abusing Patrick. After she divorced, Defendant moved in with his father since she could not support him. Defendant ran away once and ended up in a psychiatric facility. She loves him and he is very supportive of her. (T.24:2945-51).

Defendant's brother Carsten testified how the family moved every two or three years and where they lived. (T. 24:146-7). He explained their father's job in

the army and after he retired. He said that their father wanted them to be tough. (Id. 147-8). He explained that their father was the disciplinarian and had a very black and white view of behavior. The boys had to walk on eggshells and were beaten all the time with a large leather belt, from their ankles to their backs, leaving large welts which other children asked about. The boys never knew what would set their father off; they were very afraid of him. He was also condescending and verbally abusive to them as well. (Id. 149-54). Their father was a heavy drinker which exacerbated the violence. (Id. 154-56). Their father received in-patient treatment for alcohol twenty-two times. (Id. 158). Their father also routinely beat their mother; the boys would hear screaming, crying, and things being knocked over. They saw her bruises and black eyes. She was taken to the hospital on more than one occasion, including for a broken jaw and a compound fracture to her arm. She was also verbally abused by him. She eventually divorced him because of the violence; their father started a campaign of terror against her and the boys while the divorce was pending. Initially the boys lived with their mother but then moved in with their father who forbade them from having any contact with her. (Id. 159-65).

At the evidentiary hearing, Carsten testified that in addition to the abuse by their father, that their mother was very rigid and would smack them in the mouth or hit them with whatever was available to make sure they understood if they

stepped out of line. (PCR. Vol. 26 page 10). Defendant now claims that Carsten would have more fully testified about abuse at the trial had he been asked; specifically, that he would have testified about abuse Defendant suffered at the hands of his mother Ingrid Frank and her boyfriend David House. It should be noted that, although the Defense does outline abuse Carsten suffered at the hands of David House, *there is no specific reference to any abuse of Defendant by David House*. With regard to his mother, the Defendant told his trial counsel, Ms. Ferraro, that his mother “was *not* abusive” (ROA 27:2313) and since Defendant was very protective of his mother he would not have let Ms. Ferraro “trash” his mother at trial if she had tried. (ROA 27:2376). Furthermore, since the abuse of Defendant by his father was specifically brought out by Carsten, logic dictates that any other abuse would be relevant, yet Carsten never volunteered any of the information about additional abuse by their mother until after the Patrick was sentenced to death. Where witnesses fail to disclose evidence such as an abusive home, counsel cannot be deemed ineffective. *See Diaz v. State*, 132 So.3d 93, 114 (Fla. 2013) (rejecting claim of ineffective assistance for not discovering evidence of abuse when defendant and family were not forthcoming with that information); *Asay v State*, 769 So.2d 974, 987–88 (Fla. 2000) (same). Even if Carsten had been specifically asked about the Defendant being abused by his mother, after the extensive testimony regarding abuse by the father, such additional testimony would

merely have been cumulative. It is well settled that counsel does not render ineffective assistance by not placing before the jury cumulative evidence. *Van Poyck v. State*, 694 So. 2d 686, 692-94 (Fla. 1997) (finding defendant failed to prove ineffective assistance of counsel where the life-history account argued for in post-conviction litigation was, in large measure, presented to the jury).

Father Jerry Singleton, who visited prisons as part of his ministry, also testified during the penalty phase. He testified that he met and grew to know Defendant. He believed him to be an intelligent and sincere person who had a serious drug and alcohol addiction which led him into problems. Since he has been in jail, he began a 12 step program and can assist other recovering inmates. Defendant has taken full responsibility for his actions and is deeply remorseful. (T. 24:2954-65).

Defendant himself took the stand. He recalled his childhood in Alaska and the beatings with a belt by his father when he misbehaved. He also saw his mother beaten. His father was verbally abusive to him and the rest of the family. He detailed his history of substance abuse. That abuse led to his ten convictions. He was embarrassed and humiliated by what he had done to Schumacher. (T. 3028-30).

Dr. Christopher Fichera, a clinical and forensic psychologist, testified as well. However, Defendant instructed his attorneys not to present any evidence of

the alleged sexual abuse he had suffered, even though Dr. Fichera thought it vitally important.

MS. FERRARO: This information deals with sexual abuse suffered by the defendant as a child. He did not want this to be brought out into open court. He did not want the jury to know about it. He's specifically instructed us this was no way to be a part of his mitigation sentencing and I would like to present Dr. Fichera to proffer what the testimony would have been if the defendant had allowed us to introduce this piece of evidence that we consider to be vital.

(T. 26:363). Dr. Fichera did testify that he did a psycho-social evaluation on Defendant, interviewed him, and tried to interview as many family members as possible. He spoke with Defendant's mother and brother. (Id. 374-75). He then testified about Defendant's childhood, upbringing, and drug history, explaining how they affected Defendant and were mitigating. He explained at length how the type of childhood Defendant had put him at risk for a number of grave problems. (Id. 376-412). In fact, despite Patrick precluding his defense team from presenting evidence of his sexual abuse to the penalty phase jury, Dr. Fichera did tell the trial court at the *Spencer* hearing about the sexual abuse while Dr. Allan Ribbler told of his diagnosis of PTSD at the same hearing. (ROA 6:1028-63; 1063-1106).

Defendant now claims witness Hank Dube, a former coworker of Defendant's father, should have been called to testify during the penalty phase. Mr. Dube's testimony would have added nothing of any relevance since it was cumulative to that presented at trial. At the hearing, he testified that Patrick's

family lived in primitive conditions, the father was an alcoholic, and that the Patrick Sr. did not engage much with his children (PCR. 26:65-75), none of which is any more illuminating than the testimony that was offered during the penalty phase. Most significantly, it should be noted that Mr. Dube had not seen the Defendant since the he was six years old, limiting the relevance of his testimony.

Investigator Phil Arth testified during the penalty phase regarding his investigation. Later, during the evidentiary hearing, he outlined some of the difficulties he had had with witnesses in this case. One of the potential witnesses he contacted prior to the penalty phase was the Defendant's stepmother, Sharon Crompton, who told him that she did not have any relevant information. (PCR. 26:48). Defendant now argues that had she been spoken to in person, rather than over the telephone, she would have offered more details about the abuse Defendant suffered at the hands of his father. Patrick utterly failed to prove this contention at the hearing. Furthermore, this claim is directly contrary to what the Patrick himself said at the evidentiary hearing when he told the trial court that he prohibited trial counsel from getting Sharon Crompton involved. (PCR 25:2127). Even if this claim now were true, such testimony would have been cumulative to testimonies of Carsten Patrick, Ingrid Franke, and Defendant during the penalty phase. Given the testimony during the penalty phase about the abuse Defendant suffered at the hands of his father, counsel cannot be deemed deficient for failing to present

cumulative evidence of that same fact. *See Rutherford*, 727 So. 2d at 225; *Van Poyck*, 694 So. 2d at 692-94. Further, even the Defendant's own expert, Norman Adam Tebrugge, testified at the evidentiary hearing that writing a letter, or speaking to a potential witness by phone is not necessarily ineffective as the need to speak to a particular individual in person must be determined by examining each case. (PCR 23:1759).

Arth testified at the evidentiary hearing that he had found Defendant's father in Washington D.C. prior to the penalty phase but he was very difficult and refused to help Defendant, even hanging up on him when pressed for information about Defendant. (PCR 23:1775-1777). In fact, prior to Defendant's father hanging up on him, Arth had planned to get on an airplane to interview him in person but the defense team decided, after the hang up, that such travel would be fruitless. (PCR 24:1805-1807). “*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.” *Taylor v. State*, 3 So. 3d 986, 998 (Fla. 2009) (quoting *Wiggins v. Smith*, 539 U.S. 510, 533 (2003)). The difficulties with dealing with the Defendant's father were only exacerbated by the Defendant himself. Defendant specifically precluded Arth from further pursuing his father, thereby hindering the investigation. (PCR 25:2127). Defendant further hindered the investigation by refusing to allow trial counsel to interview other witnesses such as

his ex-wife Diana Thoreson. (PCR 25:2127). It is well-settled that counsel may not be found ineffective where his client's actions circumscribe his decisions. *See Rivera v. State*, 717 So.2d 477, 485 (Fla. 1998) (opining, “[w]hen a defendant preempts his attorney’s strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made.”).

Despite a lack of cooperation from witnesses, the investigation continued. Arth was able to get Patrick’s school records. He also tried to get the Defendant’s father’s military records, divorce records, and hospitalization records, but could not because many of the institutions no longer existed. (T pages 183-86). Given that witnesses were uncooperative and records were no longer available, the lack of that information cannot be a basis for ineffective assistance of counsel claims. *See Pooler v. State*, 980 So.2d 460, 467 (Fla. 2008) (rejecting claim of ineffectiveness where counsel sent investigator to find information/witnesses, but the investigator was unsuccessful in finding documentation). Given the lack of available documentation, the witnesses who withheld information, the witnesses who refused to help at all, and the Defendant’s own limitations on the investigation, the social history gathered was more than adequate; traveling to speak with the witnesses in person would have added nothing to this Defendant’s mitigation. It certainly cannot be legitimately argued that traveling to speak with the witnesses in person would have a reasonable probability of resulting in the Defendant receiving a life

sentence, as required to prevail on an ineffective assistance of penalty phase counsel claim per *Hildwin*, 654 So. 2d at 109.

c. The mental health experts utilized were adequate.

Patrick claims that trial counsel was ineffective for hiring Dr. Fichera, the defense mental health expert, as his testimony was not effective, was too general, and was not specifically tailored to the case. The State maintains that Patrick failed to prove either deficiency or prejudice so that the lower court properly denied the claim after an evidentiary hearing.

Defendant instructed his attorneys not to present any evidence of the alleged sexual abuse he had suffered even though Dr. Fichera thought it vitally important.

At the penalty phase, Ms. Ferraro stated as follows:

MS. FERRARO: This information deals with sexual abuse suffered by the defendant as a child. He did not want this to be brought out into open court. He did not want the jury to know about it. He's specifically instructed us this was no way to be a part of his mitigation sentencing and I would like to present Dr. Fichera to proffer what the testimony would have been if the defendant had allowed us to introduce this piece of evidence that we consider to be vital.

(T. 26:363). Further, when discussing the limitations Defendant placed on trial counsel, Ms. Ferraro stated at the evidentiary hearing that:

“[Defendant] kind of just tied our hands with, you know, where we can go with any type of mental health testimony...and basically he decided he didn't want any mental health to be introduced...We made a joint decision, and by “joint decision”, I'm including Mr. Patrick in it. I think the three of us together had made that decision not to put

forth any type of mental health mitigation. And we decided that the best course might be to save it all for the *Spencer* hearing.”

(PCR 27:2328-2330).

After the evidentiary hearing, the lower court made the following findings:

This Court notes, that both Mr. Reres and Ms. Ferraro had difficulty in persuading Defendant that certain evidence was crucial to his mitigation...Defendant limited his attorneys as to what evidence could be presented, specifically, evidence of his sexual abuse as a child. Defendant did not want any testimony regarding anal sex or homosexual encounters.

(PCR 7:1382).

Dr. Fichera did testify during the penalty phase that he did a psycho-social evaluation on Defendant, interviewed him, and tried to interview as many family members as possible. He spoke with Patrick’s mother and brother. (*Id.* 374-75). He then went through Defendant’s childhood, upbringing, and drug history, explaining to the jury how they affected Defendant and were mitigating. He explained at length how the type of childhood Defendant had put him at risk for a number of grave problems. (*Id.* 376-412). In fact, despite Defendant precluding his defense team from presenting evidence of his alleged sexual abuse to the penalty phase jury, Dr. Fichera did tell the trial court at the *Spencer* hearing about it while Dr. Allan Ribbler opined that Patrick suffered from PTSD at the same hearing. (PCR 6:1028-63; 1063-1106).

During the evidentiary hearing, the defense offered the testimony of Dr. Gold, a psychologist, who purported to be an expert in epigenetics, and claimed that trial counsel was ineffective for failing to call him as a witness during the penalty phase. The problem with this argument, and with Dr. Gold's testimony, is that Dr. Gold was not a reliable expert in this field since he had never even treated a patient in this area. (PCR 26:2248).

Any deficit in the information relayed by Dr. Fichera during the penalty phase cannot be attributed to ineffective assistance of counsel but instead is attributable to the significant limitations the Defendant placed on his trial counsel. Additionally, because the Defendant precluded his defense team from presenting evidence regarding his alleged child sexual abuse to the jury, they were also precluded from presenting evidence of his possible PTSD since the expert based their diagnosis of it on the abuse. (PCR 24:1879). Despite those crippling limitations at trial, Dr. Fichera did tell the trial court at the *Spencer* hearing about the sexual abuse and neuropsychologist Dr. Allan Ribbler told of defendant's diagnosis of PTSD. Defendant now claims it was error for his trial team to consult with Dr. Ribbler and, instead, should have consulted with a different neuropsychologist, Dr. Ouaou, since Dr. Ouaou conducted more extensive testing. The problem with that argument is that Dr. Ouaou did not meet with the Defendant until a decade after the crime was committed or six years after the Defendant's trial

and never even bothered to speak to the Defendant about the crime. (PCR 25:2049-50) Even if Dr. Ouaou could somehow divine anything relevant without actually speaking to the Defendant about the crime, per *Sexton v. State*, 997 So.2d 1073, 1085 (Fla. 2008), finding a post-conviction mental health expert who disagrees with “the extent or type of testing performed, or the type of mitigation presented” does not render trial counsel ineffective automatically.

The same reasoning applies to the defense argument that trial counsel was ineffective in hiring Dr. Stockholm, a toxicologist, as opposed to Dr. Morton, a psychopharmacologist, who they claim could have testified regarding the severity and extent of Defendant’s addiction (in contrast to Dr. Stockholm whom post-conviction counsel conceded would not have offered any favorable testimony had she been called. (PCR 27:2323-2324). See *Stephens v. State*, 975 So.2d 405, 415 (Fla. 2007) (reasoning “[b]eing able to secure an expert witness to provide an opinion as to mental health mitigation during post-conviction proceedings, which arguably could have been helpful to [the defendant], does not, in and of itself, render trial counsel’s performance ineffective.”); *Peede v. State*, 955 So.2d 480, 494 (Fla. 2007) (same). See also, *State v. Sireci*, 502 So.2d 1221, 1223 (Fla. 1987); *Asay v. State*, 769 So.2d 974, 986 (Fla. 2000) (reasoning that first expert’s evaluation is not less competent merely upon the production of conflicting evaluation by another expert). Further, Dr. Morton’s opinions should be viewed

with significant skepticism since even he acknowledged that the symptoms he claimed showed signs of withdrawal in Defendant when Defendant was giving his video-taped confession could have been caused by Defendant's PTSD. (PCR 25:2104-2105). Once again, Patrick failed to carry his burden under *Strickland*.

The mental health information presented during the penalty phase was as complete a picture as the Defendant would allow. Just because the Defense can now, years later, find doctors who may testify differently, the analysis does not change regarding whether trial counsel was permitted to rely on the experts they consulted with originally. *Jones v. State*, 732 So. 2d 313, 320 (Fla. 1999) (reasoning mental health expert's evaluation is not rendered inadequate or incompetent merely because the defendant had found an expert who would provide testimony conflicting with the original expert). Further, it should be noted that defense failed to ask Dr. Fichera or Dr. Ribbler whether the additional information that the defense now alleges should have been offered at the penalty phase would have changed their opinion or testimony in any way. This is fatal. *See Pooler v. State*, 980 So. 2d 460, 468 (Fla. 2008) (rejecting claim of ineffectiveness for not providing experts with additional documentation or for not obtaining a more in depth psychological evaluation in part because defendant failed to "demonstrate that [the trial mental health experts] would have changed their opinions had they

conducted more in-depth psychological evaluations or been provided with his records.”).

Despite the number of areas defense now claims should have been explored during the penalty phase, it remains true that his trial counsel did fully explore the areas Defendant would allow to be explored. The witness testimony the defense now bases his contention that trial counsel was deficient, would have been cumulative; counsel cannot be deemed deficient for failing to present cumulative evidence. Even if Patrick claims that the testimony now advanced is more detailed and thus more illuminating for the jury, that argument too must fail. *Woods v. State*, 531 So.2d 79, 82 (Fla. 1988) (reasoning “[t]he jury, however, heard about Woods's [psychological] problems and the testimony now advanced, while possibly more detailed than that presented at sentencing, is, essentially, just cumulative to the prior testimony. More is not necessarily better.”). Likewise, having obtained the non-statutory mitigator, Defendant cannot show that, but for counsel’s actions, the result of the proceeding would have been different had the additional witnesses been called. This Court should affirm the denial of relief.

d. Evidence of multi-generational trauma was properly excluded.

The Defendant claims that trial counsel was ineffective in that he failed to argue that testimony about the Defendant’s mother’s childhood was relevant

because it would have shown the effect of multi-generational trauma. After the evidentiary hearing, the lower court made the following findings:

Another witness, Mr. Tebrugge testified regarding the standards established by the American Bar Association (ABA) and the Florida Association of Criminal Defense Attorneys (FACDL) regarding capital cases. He testified that the recommendation in investigating mitigation was to go back at least three generations. In fact, Dr. Fichera attempted in his presentation to do that but because of this Court's ruling, he was not allowed.

(PCR 7:1381). At the evidentiary hearing Patrick contended that trial counsel was ineffective for failing to effectively argue for the admission of this evidence.

However, in footnotes 11 and 12 the lower court stated:

The Court allowed limited testimony [on] epigenetics. The theory behind this field of study is that violence can be present from generation to generation Prior to the hearing beginning, there was argument as to whether the Supreme Court had ruled on this Court's exclusion of this evidence. Just before offering his testimony, Dr. Fichera was ordered by the Court to remove certain slides from his presentation. All of the slides that this Court ordered removed were marked and put into the file as Court exhibit 2. Defendant is procedurally barred from raising the issue now, since it could have been raised on direct appeal.

(PCR 7:1381). Given that the Defendant failed to raise this argument on direct appeal, he is precluded from doing so now. It is well established that “[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack.” *Muhammad v. State*, 603 So.2d 488, 489 (Fla. 1992); *Vining v. State*, 827 So. 2d 201, 218 (Fla. 2002).

Even if the Defendant were not so precluded, his argument must fail as it is based on the his clearly mistaken belief that Defense's Supplemental Mitigation Guidelines are somehow applicable in a trial. Though such guidelines for defense attorneys may urge defense counsel to look back three generations to determine what mitigation strategy may be taken, that advice in no way means that such information is appropriate to be presented to the jury. The trial court properly determined this type of evidence was irrelevant and properly excluded the information from coming into evidence. As such, trial counsel cannot be ineffective for failing to argue for the admission of inadmissible evidence. *Kormondy v. State*, 983 So.2d 418, 430 (Fla. 2007).

To try to show why this type of testimony might be relevant, the defense put forth the testimony of Dr. Gold, a psychologist who purported to be an expert in epigenetics. The problem with the defense argument, and with Dr. Gold's testimony, was that Dr. Gold had never treated a patient in this area and he acknowledged that many of the supposed effects of the multi-generational trauma are the same as effects caused by PTSD. (PCR 26:2248; 27:2273). Trial counsel could therefore not be deemed ineffective for failing to put forth testimony about an area from a witness who could not legally qualify as an expert in that area and which was cumulative to what the defense presented at the trial.

At trial, Patrick showed the jury extensive evidence regarding his traumatic childhood through the testimony of a number of witnesses during the penalty phase. His mother, Ingrid Franke, testified that his father was physically and verbally abusive to both her and the two boys; in 1973 she had him arrested for abusing Patrick. (T.24:2945-51). Patrick's brother Carsten testified that the boys had to walk on eggshells and were beaten all the time with a large leather belt, from their ankles to their backs, leaving large welts which other children asked about. The boys never knew what would set their father off; they were very afraid of him. He was also condescending and verbally abusive to them as well. (*Id.* 149-54). Their father was a heavy drinker which exacerbated the violence. (*Id.* 154-56). Their father received in-patient treatment for alcohol twenty-two times. (*Id.* 158). Their father also routinely beat their mother; the boys would hear screaming, crying, and things being knocked over. They saw her bruises and black eyes. She was taken to the hospital on more than one occasion, including for a broken jaw and a compound fracture to her arm. Defendant himself took the stand and testified about the beatings with a belt by his father when he misbehaved. He saw his mother beaten. His father was also verbally abusive to him and the rest of the family. Dr. Fichera testified as well, but Defendant instructed his attorneys not to allow him to present to the jury any evidence of the alleged sexual abuse he had suffered as a child even though Dr. Fichera thought it vitally important. However,

that evidence was testified to by Dr. Fichera during the *Spencer* hearing and, at that same hearing, Dr. Ribbler testified regarding the evidence of Defendant's PTSD.

Given the extensive evidence regarding Defendant's traumatic childhood, additional witness testimony on that same subject would have been cumulative, and counsel cannot be deemed deficient for failing to present cumulative evidence. *Van Poyck*, 694 So. 2d at 692-94. Likewise, having obtained the non-statutory mitigator, Patrick cannot show that, but for counsel's actions, he would have received a life-sentence.

Finally, as the lower court correctly found, Patrick did not and cannot demonstrate the necessary prejudice as required by *Strickland*. Any of the above claims of ineffectiveness must be viewed in light of his confession which was corroborated by the medical examiner and other forensic evidence. Patrick has not shown that his confession was inaccurate or false. It remains admissible evidence of his actions and must be factored into the prejudice analysis along with all other testimony and forensic evidence.

Strickland requires that counsel be given the presumption of competent representation. In fact, even were counsel to have failed to investigate entirely, clearly a professionally unreasonable decision, it remains the defendant's burden to prove that, but for that failing, prejudice resulted. *See Strickland*, 466 U.S. at 691 (stating "[a]n error by counsel, even if professionally unreasonable, does not

warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment” and “[a]ccordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.”). As the Supreme Court provided: “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” *Id.*, 466 U.S. at 693. To prove *Strickland* prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* 466 U.S. at 694.

In addition to Patrick being unable to show deficient performance, he also cannot show prejudice because his own actions constantly limited the efforts of his trial counsel. As required by *Strickland*, the defendant must prove that counsel's performance fell below the standard guaranteed by the Sixth Amendment, *and* that, but for the alleged deficiency, there is a reasonable probability that the result of the proceedings would have been different. *Strickland*, 466 U.S. at 688-89. There is no reasonable probability that the result of the proceedings would have been different here. *See Breedlove v. State*, 692 So.2d 874, 877-78 (Fla. 1997) (finding no

prejudice under *Strickland* where mitigating evidence presented in post-conviction, particularly testimony concerning the defendant's drug addiction and beatings by his father, would not have changed the outcome in light of substantial aggravation in the record); *See also Asay*, 769 So.2d at 988 (“[T]his Court has reasoned that where the trial court found substantial and compelling aggravation, ... there was no reasonable probability that the outcome would have been different had counsel presented mitigation evidence of the defendant's abused childhood, history of substance abuse, and brain damage.”).

Here, the trial court found six aggravating factors and assigned weights: (1) Defendant was under a sentence of imprisonment (great weight); (2) Defendant had a prior violent felony (great weight); (3) the murder occurred in the course of a felony (great weight); (4) Pecuniary gain (merged with felony murder); (5) the murder was heinous, atrocious, and cruel (HAC) (great weight); and (6) the murder was cold, calculated, and premeditated (CCP) (great weight). While the CCP aggravator was stricken, the sentence of death was upheld. When this Court strikes an aggravating factor on appeal, ‘the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence’”. *Williams v. State*, 967 So. 2d 735, 765 (Fla. 2007) (quoting *Jennings v. State*, 782 So. 2d 853, 863 n. 9 (Fla. 2001)). Even with CCP being stricken, Patrick still has five remaining aggravators, including three of the weightiest. This case remains a

highly aggravated case with weighty aggravators of HAC, during the course of a felony, and prior violent felony. This Court should find that no *Strickland* prejudice has been shown. *See Jordan v. State*, 176 So.3d 920, 936-37 (Fla. 2015), death sentence upheld based on HAC, during the course of a felony and prior violent felony and the statutory mitigator of under the influence of extreme mental or emotional disturbance, and 37 non-statutory mitigators. *See Hodges v. State*, 55 So.3d 515, 542 (Fla. 2010) (opining “[q]ualitatively, prior violent felony and HAC are among the weightiest aggravators set out in the statutory sentencing scheme.”); *Offord v. State*, 959 So.2d 187, 191 (Fla. 2007) (noting “HAC is a weighty aggravator that has been described by this Court as one of the most serious in the statutory sentencing scheme.”); *Rivera v. State*, 859 So.2d 495, 505 (Fla. 2003) (finding HAC and prior violent felony aggravators are weighty factors).

Upon review of the entire record, including Patrick’s confession, the medical examiner’s testimony corroborating the events as described by Defendant, and the balance of the forensic evidence and testimony, this Court should find that there is no reasonable probability that the outcome of the trial would have been different or that Defendant would have received a life sentence. Surely, confidence in the outcome of the trial and sentencing proceeding have not been undermined and this Court should affirm the lower court’s denial of relief.

ISSUE IV

THE TRIAL COURT'S SUMMARY DENIAL OF THE DEFENDANT'S CLAIMS REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL DURING JURY SELECTION AND IN REGARD TO THE ADMISSION OF SHOEPRINT EVIDENCE WAS APPROPRIATE. (Restated)

Patrick claims that his Eighth and Fourteenth Amendment rights were violated by the trial court's summary denial of the claim that trial counsel was ineffective for failing to file a motion for a *Frye* hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), in order to challenge the admissibility of shoeprint evidence taken from the crime scene. He also argues that counsel was ineffective for failing to challenge for cause or peremptorily two jurors who ended up on his panel. The trial court's summary denial was appropriate in this case and this Court should affirm the ruling.

Summary denial is appropriate "when the motion and the record conclusively demonstrate that the movant is entitled to no relief." *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989). To establish ineffective assistance of counsel, the defendant must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 688 (1984).

Conclusory allegations are legally insufficient on their face and may be denied without a hearing. *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000). To be entitled to an evidentiary hearing, a defendant “must allege specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced [him].” *Roberts v. State*, 568 So. 2d 1255, 1259 (Fla. 1990).

a. Shoeprint Evidence.

After the evidentiary hearing, the lower court made the following findings with regard to the shoeprint evidence:

The State meticulously placed the expert’s training, experience and education on the record. The State of Florida called witness Thomas Hill. Prior to his testimony regarding the shoe print evidence in this case, he had been tendered by the State as an expert in blood pattern evidence...There was no objection or voir dire regarding Hill’s training, education or experience. This Court finds that Mr. Hill had the training, experience and education to give an opinion regarding shoe prints. In fact Mr. Hill opined that the bloody footprint from the crime scene was made by the right foot of an Ozark boot. Hill would have been allowed to offer his opinion even over the defense’s objection...*Frye* sets forth the test to be utilized when a party seeks the admission of expert testimony concerning new or novel scientific evidence. In this case, however, there was no new or novel scientific theory being presented by the shoe print testimony expert. Shoe print evidence has been utilized for at least one hundred years.

(PCR 7:1373-1375). This ruling was correct and should be affirmed. Defendant claims that the trial court violated his Fourteenth Amendment due process rights and his Eighth Amendment right to have increased scrutiny of his capital verdict

and sentence when the trial court summarily denied the claim that trial counsel was ineffective for failing to request a *Frye* hearing prior to the admission of shoeprint evidence. This claim is directly contrary to established caselaw and is, therefore, legally insufficient. As such, the trial court's summary denial was proper.

The State called Thomas Hill to testify regarding the shoeprint evidence. Mr. Hill testified regarding his extensive training, experience, publications and the multiple times he has been qualified as an expert in this field in both Washington and Florida. Mr. Hill then gave his expert opinion that the bloody footprint found at the crime scene was made by the right foot of an Ozark boot. (ROA 1570-1613). That boot was found in a duffle bag in the Patrick's possession at the time of his arrest.

Not all expert testimony requires a *Frye* hearing. *See Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993). A *Frye* hearing is "utilized in Florida only when the science at issue is new or novel." *Branch v. State*, 952 So. 2d 470, 483 (Fla. 2006) (citing *Brim v. State*, 695 So. 2d 268, 271-72 (Fla. 1997)). Shoeprint evidence is not new or novel, therefore, a *Frye* hearing was not necessary in this case. Over 120 years ago, in 1893, the U.S. Supreme Court recognized in *Whetston v. State*, 31 Fla. 240, 12 So. 661 (1893), that footprints found at or near the scene of a crime which correspond to those of the accused can be admitted into evidence. The law in Florida has not changed since 1893 regarding such admissibility. In 2006, this

Court specifically discussed the admissibility of shoeprint evidence in *Ibar v. State*, 938 So. 2d 451 (Fla. 2006). This Court determined that a *Daubert* hearing (pursuant to *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993)) was not required in Florida as Florida then followed *Frye*. The court then went on to determine that a *Frye* hearing was also not required in order for shoeprint evidence to be admissible because “[t]he use and reliance on footprint evidence is not new or novel and is [therefore,] not subject to *Frye* analysis.” *Ibar*, 938 So. at 468. Trial counsel here cannot be ineffective for failing to request a *Frye* hearing when *Frye* does not apply. See *McDonald v. State*, 952 So. 2d 484, 495-96 (Fla. 2006) (counsel was not ineffective for failing to request a *Frye* hearing because there was general acceptance in the scientific community of the forensic science relied on at the time of trial.)

The report Patrick now cites to discredit this type of evidence does not even do so. Instead, the report merely says that the examiner’s experience, clarity of the impression, and uniqueness of the characteristics go to the accuracy of the expert’s conclusion. All of these points were addressed during Hill’s testimony. Nothing in the report does anything to disavow the use of the evidence or to show any type of ineffectiveness on trial counsel’s part for refraining from asking for a *Frye* hearing when caselaw has specifically stated that no such hearing is required.

Even if trial counsel had raised a *Frye* challenge to Mr. Hill's testimony, given his extensive education, training, experience, publications, and work in the field, the objection would have been overruled as specifically noted in the trial court's order. (PCR 7:1374). Given that the trial court has specifically stated that the objection would have been overruled, Defendant cannot show any prejudice for trial counsel failing to raise an objection. "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986). Patrick failed to establish the prejudice required under Strickland to be entitled for relief. This Court should affirm the summary denial of relief.

ii. Jury Selection.

After the evidentiary hearing, the lower court made the following findings regarding juror:

Regarding Juror Martin:

There is nothing in this record that suggest that Mr. Martin was prejudiced against Defendant. There was no testimony regarding Defendant's sexual orientation. While Martin gave a response that suggested some bias when he stated that he'd have a problem if he found out the perpetrator of the crime was homosexual, he also gave answers that were helpful to the Defendant. At that point in the questioning, the venire knew that the victim of the crime was homosexual. If anything, the bias was more against the victim. Further, Mr. Martin was not pro-death. From his answers it was gleaned that he could be leaning towards a life sentence. Regarding

his answers to the hypotheticals regarding drug or alcohol use, Martin was, without knowing the law on credibility of witnesses, on point. A juror is free to believe or disbelieve all, some or none of the witness' testimony. The first consideration is whether the witness could see and know the things about which he/she testified. Alcohol and drugs diminish that ability.

(PCR 7:1389). Regarding Juror Schapira, the lower court stated:

Mr. Schapira, during the State's voir dire did state that he was pro death penalty. He gave a number of 8 on a scale of 1 to 10. He did however state that he was not predisposed to automatically recommend the death penalty. Further, when questioned by the defense, he stated that if he was Defendant, he'd be the type of juror for this case.

(PCR 7:1391-1392). The lower court concluded that "Defendant has failed to show that jurors Martin and Schapira were actually biased against him." *Id.* This ruling should be affirmed.

Patrick claims that the trial court violated his Fourteenth Amendment due process rights and his Eighth Amendment right to have increased scrutiny of his capital verdict and sentence when the trial court summarily denied the claim that trial counsel was ineffective for failing to challenge peremptorily or for cause Juror Martin and Juror Schapira. He claims Juror Schapira was biased because he supported the death penalty. He contends that Juror Martin was biased against drug users and homosexuals and may have thought Defendant was a homosexual since the victim was a homosexual. Defendant, however, provides absolutely no factual basis for his conclusory allegation that Juror Martin may have thought Defendant

was a homosexual. In fact, the only evidence at trial regarding Defendant's sexual preference was in his confession when he repeatedly told the police he was not gay. Though the Defendant offers snippets of voir dire to allege Juror Martin and Juror Schapira were biased, a reading of a larger portion of the complained about sections is necessary to fully evaluate these claims. A simple examination of what each juror said in the context in which it was said shows that each claim of bias is either conclusively refuted by the record or that there is no basis for a claim of actual bias against this Defendant. As such the trial court's summary denial was proper.

JUROR MARTIN

MR. MARTIN: May I ask another question then?

MS. TATE: Sure.

MR. MARTIN: I would have a bias if I knew the perpetrator was homosexual.

MS. TATE: If homosexuality in any way comes into play in this case with anyone involved would you not follow the law on that? Are you going to not hold me to the burden to prove those elements or hold me to a lesser burden or a higher burden or how do you feel about it?

MR. MARTIN: Put it this way, if I feel the person was a homosexual I personally believe that the person is morally depraved enough that he might lie, might steal, might kill.

(ROA at 424).

MR. MARTIN: Honestly I don't think any of us in here want to bear that burden when we leave here whether he's found innocent or guilty of thinking wow, I just sent somebody off to be executed, oh my God,

I hope we all make the right decision. Or, life in prison, he has his whole life to think about what he did and climb the walls and torment -- I don't know, I would be tormenting myself trying to put myself in his shoes, in the meantime thinking what he may be thinking. But you know what, if it was a guilty verdict I would say, hey, no, we don't want to send this guy to death, ask him what he wants to do, do you want to die or spend the rest of your life in prison. We couldn't do that? That would relieve our I know it sounds silly but I agree with what she's saying.

(ROA 665-666).

MR. RERES: Let me ask Mr. Martin, because you are second chair and I apologize, you get more attention than others in the panel. I'm not trying to leave anybody else out but we can start here. How do you feel about hearing testimony about drug use, illegal drug use?

MR. MARTIN: How do I feel about it?

MR. RERES: Yeah?

MR. MARTIN: Give me an example, please.

MR. RERES: Let's say that a witness testifies and you hear that the witness was using drugs at the time they observed the things that they're testifying about. Hypothetically, just hypothetically the witness gets up there and says the car was red. Oh, by the way, I had three drinks that morning, I popped a few pills but I was still okay, I could tell red from blue even though I couldn't really stand up.

MR. MARTIN: Okay.

MR. RERES: How would you feel about the testimony?

MR. MARTIN: Wouldn't be worth much if he was on drugs, would it?

MR. RERES: You could diminish his testimony based on that?

MR. MARTIN: Sure.

MR. RERES: Still might be right but got the color correct?

MR. MARTIN: But with those elements in play, drugs, I kind of wonder about his, about what he's saying, maybe thinking.

MR. RERES: Well, what about if instead of talking about the color of the car the witness is talking about what the witness did. The witness is testifying that he saw something that looked like a robbery happen and even though he had a few drinks and had a few pills that morning, looked like a robbery to him, he walked up, grabbed the guy that it looked like was assaulting someone else, threw him to the pavement and caused a serious injury and find out later those two people were just wrestling, fooling around, good friends, they weren't hurting each other. This drunk comes running out of nowhere, cause serious injury when he had no business interfering or being involved. Hearing that type of example, is an example. How would his being on drugs at the time influence your looking at him as a witness?

MR. MARTIN: Diminished, would have to be.

MR. RERES: Okay. He, let's say, you know, maybe it contributed to him being wrong about this wasn't really a fight going on, that he was suppose to (sic) break it up or had any reason to get involved in, it was just horseplay, he made it much worse?

MR. MARTIN: Sure.

MR. RERES: Would you all agree that that might go to what someone is thinking, what's going on in their mind, it's certainly affected by what kind of drugs they are using?

MR. MARTIN: Ulterior thought process.

MR. RERES: It does have an affect, (sic) doesn't it? Not asking anyone on this jury for any personal experiences, but all of you probably have had an experience with someone you believe to be intoxicated or use drugs at some point in your life, correct? You have seen somebody and come to say that guy's messed up, what has she been drinking, she can barely drive, see somebody driving down the street ...

(ROA 745-747).

JUROR SCHAPIRA

MR. SCHAPIRA: Yes, I did say I lean more towards the death penalty. On a scale from one to ten probably an eight or nine.

MS. TATE: But, you're not predisposed to that's the only recommendation you would make?

MR. SCHAPIRA: No.

MS. TATE: Under certain scenarios depending on what the evidence would be you're open to a recommendation for maybe life or if you found the aggravators outweighed the mitigators a recommendation of death?

MR. SCHAPIRA: Yes.

(ROA 429).

MS. FERRARO: That's what I thought, okay. You said that you can be open-minded and do as best as you can, those are the notes I have written down. But I wasn't quite sure what you, and it was in the context of talking about listening to evidence in the case and as far as sentencing recommendations. I'm going to ask you how you feel, what your feeling is about the death penalty. What do you feel specifically? Are you pro against, do you think it should be reserved for the worse cases?

MR. SCHAPIRA: Right in the middle, I go by the law.

MS. FERRARO: Okay.

MR. SCHAPIRA: If I were Mr. Patrick I would like somebody like me in the jury because I think you have to be, you have to hear everything, you have to be, take it very seriously and open mind, that's the way I am, take everything inside.

MS. FERRARO: And I love that. I love the way you termed that. So you feel that you are so open that, that you have no preconceived ideas and that you would listen to the evidence?

MR. SCHAPIRA: Yes.

MS. FERRARO: You're going to follow the law?

MR. SCHAPIRA: Yes, absolutely.

MS. FERRARO: Is there any type of evidence, especially as it relates to mitigation, that you feel is more swaying than other evidence, and by that I mean, you know, from doctors, you know, are you only open to listening to family members, are you open to listening to people other than professionals?

MR. SCHAPIRA: I'm open to listen to everything but I would take the weight of a doctor more than family, but in other cases family members can be against the defendant, you never know what's going to happen. So the State can bring the family member for against. So, I'm open-minded, I have to --

MS. FERRARO: And you understand though that there are certain facts that you only know only when you live with someone?

MR. SCHAPIRA: Yes.

MS. FERRARO: You can distinguish that from opinion?

MR. SCHAPIRA: Yes.

MS. FERRARO: Okay, that's not going to be an issue for you?

MR. SCHAPIRA: No.

MS. FERRARO: Can I ask what you do at Home Depot?

MR. SCHAPIRA: I coordinate the export delivery.

MS. FERRARO: Okay. And what type of law does your wife practice?

MR. SCHAPIRA: She is health law.

MS. FERRARO: Okay. Has she ever done any criminal work?

MR. SCHAPIRA: No, she hate it.

MS. FERRARO: She hates it, okay. Well, that's okay, there are areas that I don't like either.

(ROA 710-713).

Juror Schapira's comments about the death penalty do not show any bias at all. He was extensively questioned by both parties and clearly stated he would follow the law and listen to the evidence in support of the mitigators and aggravators. There certainly cannot be any legitimate argument that anything said by Juror Schapira showed bias against Defendant.

In *Carratelli v. State*, 961 So. 2d 312 (Fla. 2007), the Florida Supreme Court addressed the issue of whether trial counsel was ineffective for failing to object to a juror. The Court determined that, in order to obtain post-conviction relief, the defendant must demonstrate that an *actually biased* juror sat on the jury. The Court recognized that there is a higher standard for prejudicial reversible error in a post-conviction proceeding than there would have been on direct appeal and stated;

once a conviction has been affirmed on direct appeal a presumption of finality and legality attaches to the conviction and sentence, so that on post-conviction, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

(Citations, quotations, and brackets omitted). There is nothing about Juror Schapira's comments which raise any probability sufficient to undermine confidence in the outcome of this case.

Juror Martin's comments on drug and alcohol use also do not show bias and, as noted by the lower court, his comments are entirely consistent with what the law *allows* a juror to consider when assessing a witness's credibility. As the trial court succinctly put it "A juror is free to believe or disbelieve all, some or none of the witness' testimony. The first consideration is whether the witness could see and know the things about which he/she testified. Alcohol and drugs diminish that ability." (PCR 7:1389). Juror Martin's comments in this regard can, therefore, in no way give rise to a claim of actual bias against this Defendant.

Further, since during the trial the only testimony or evidence about Defendant's sexual orientation was when he himself repeatedly told the police during his confession that he was not gay, Juror Martin's statements about homosexuals cannot be the basis for a claim of actual bias against Defendant. If anything, Juror Martin's statement would have shown bias against the victim, as there was evidence that the victim was a homosexual. Bias towards the victim would have been helpful to the Defendant, as was Juror Martin's propensity towards a life-sentence instead of the death penalty. As such, trial counsel's decision not to challenge Juror Martin was a strategic decision, and a reasonable

one at that. It would be the defendant's burden to prove that counsel's representation fell below an objective standard of reasonableness, that it was not the result of a strategic decision, and that actual and substantial prejudice resulted from any deficiency. *See Orme v. State*, 896 So.2d 725, 731 (Fla. 2005).

Even if this Court were to believe that failure to challenge either juror was an unreasonable action, it remains the defendant's burden to prove that, but for that failing, prejudice resulted. *See Strickland*, 466 U.S. at 691 (stating "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment" and "[a]ccordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."). To prove *Strickland* prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* 466 U.S. at 694. No such showing can be made here.

Defendant only makes a conclusory allegation that he suffered prejudice from trial counsel's failure to challenge either juror and failure to challenge the shoeprint evidence. Conclusory allegations are subject to summary denial. *Freeman v. State*, 761 So. at 1061. While Patrick claims that summary denial deprived him of his Eighth and Fourteenth Amendment rights, neither right

precludes summary denial when appropriate. In *Hall v. State*, 742 So. 2d 225 (Fla. 1999), this Court examined a trial court's summary denial of all but one of that defendant's 3.850 claims in his capital case. This Court ruled that summary denial was appropriate stating:

After reviewing all of the claims raised, the circuit judge stated in a sixty-five page postconviction order his rationale, based on the record, for denying relief on each claim, including the ineffective assistance of counsel claims. *See* Final Order. Hall provides no substantive basis for support of his claim that the circuit court's detailed order in respect to these claims was erroneous. We appreciate the circuit court's fully delineating its ruling on each issue. We reject Hall's fourth claim in this appeal as being plainly insufficient.

Hall, 742 So. 2d at 227. Here, the circuit judge stated in a thirty-seven page post-conviction order her rationale, based on the record, for denying relief on each claim, including the ineffective assistance of counsel claims. (PCR 7:1358-92) Patrick provides no substantive basis for support of his claim that the circuit court's detailed order on these claims was erroneous. Therefore, this Court should similarly reject his claims as being plainly insufficient. The trial court's ruling was proper and should be upheld.

Upon review of the entire record, including Defendant's confession, the medical examiner's testimony corroborating the events as described by Defendant, and the balance of the forensic evidence and testimony, this Court should find that there is no reasonable probability that the outcome of the trial would have been different or that Defendant would have received a life sentence. This case remains

a highly aggravated case with five aggravators, three of which are among the weightiest, HAC, during the course of a felony, and prior violent felony. This Court should find that no *Strickland* prejudice has been shown. *See Jordan v. State*, 176 So.3d 920, 936-37 (Fla. 2015), death sentence upheld based on HAC, during the course of a felony and prior violent felony regardless of the statutory mitigator of under the influence of extreme mental or emotional disturbance, and 37 non-statutory mitigators. *See Hodges v. State*, 55 So.3d 515, 542 (Fla. 2010) (opining “[q]ualitatively, prior violent felony and HAC are among the weightiest aggravators set out in the statutory sentencing scheme.”); *Offord v. State*, 959 So.2d 187, 191 (Fla. 2007) (noting “HAC is a weighty aggravator that has been described by this Court as one of the most serious in the statutory sentencing scheme.”); *Rivera v. State*, 859 So.2d 495, 505 (Fla. 2003) (finding HAC and prior violent felony aggravators are weighty factors). Surely, confidence in the outcome of the trial and sentencing proceeding have not been undermined. This Court should deny any relief.

CONCLUSION

Based on the foregoing arguments and authority, the State respectfully submits that this Court should affirm the denial of relief on all of the post-conviction claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been electronically furnished to: Rachel Day, Assistant CCRC-South, dayr@ccsr.state.fl.us, and Jessica Houston, Staff Attorney, houstonj@ccsr.state.fl.us, 1 East Broward Blvd, Suite 444, Ft. Lauderdale, FL 33301; this 4th day of May, 2017.

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