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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC20-1036

EDWARD JAMES,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY
STATE OF FLORIDA

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PRELIMINARY STATEMENT

Citations to the record on appeal will be notated as (ROA, ___) with by the corresponding page number.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In its direct appeal decision affirming James's convictions and death sentences, the Florida Supreme Court summarized the facts as follows:

> On October 19, 1993, the grand jury in and for Seminole County, Florida, returned an indictment charging Edward James with two counts of first-degree murder, one count of aggravated child abuse, one count of attempted sexual battery, one count of kidnapping, one count of grand theft, and one count of grand theft of an automobile. On April 5, 1995, James appeared before the Honorable Alan A. Dickey, Circuit Judge, and, pursuant to a written agreement, entered pleas of guilty to all counts of the indictment and pleas of no contest to two counts of capital sexual battery charged by separate information. The plea did not include an agreement as to sentence. The State sought the death penalty for each of the murders that occurred in this case, and on May 30, 1995, James proceeded to a penalty phase trial before a jury.
>
> The record reflects that on the evening of Sunday, September 19, 1993, James attended a party at Todd Van Fossen's house. James rented a room from one of the victims in this case, Betty Dick, and lived about two blocks away from the Van Fossens. He arrived at 6 p.m. and stayed until approximately 10:30 p.m. Todd's girlfriend, Tina, noticed that James seemed intoxicated by the end of the evening and asked him if he wanted to spend the night, but James declined. James drank between six and twenty-four cans of beer during the party, as well as some "shotguns"-three beers drunk through a funnel in a very short period of time. Shortly after leaving the party James ran into Jere Pearson who lived nearby and was returning from the Handy Way convenience store. Jere Pearson was interviewed by the assistant state attorney and the assistant public defender before trial. An audiotape of the interview was played for the jury during the trial. [n.1]

> n.1: Jere Pearson was called by the defense to testify at trial, but came to court intoxicated. Mr. Pearson failed an Intoxilyzer test and the trial judge refused to let him testify at that time. As an alternative to Pearson's testimony, defense counsel proposed that the audiotape of the interview with Pearson conducted at the State Attorney's Office be played for the jury. The state agreed to defense counsel's proposal and James told the court that he also agreed with his counsel's proposal.

Pearson stated that when the two met, James was on his way to visit Tim Dick, the victim's son, and his girlfriend, Nichole, who also lived nearby. They stopped and talked for about ten minutes and Pearson watched James ingest about ten "hits" of LSD on paper. James told Pearson he had been drinking at Todd Van Fossen's party, but he appeared sober to Pearson.

After briefly visiting Tim Dick and Nichole where he drank some gin, James returned to his room at Betty Dick's house. When he entered the house, James noticed that Betty Dick's four grandchildren were asleep in the living room. [n.2] One of the children, Wendi, awoke briefly when James arrived. She observed that he was laughing and appeared drunk. James went to the kitchen, made himself a sandwich and retired to his room. Eventually, he returned to the living room where he grabbed Betty Dick's eight-year-old granddaughter, Toni Neuner, by the neck and strangled her, hearing the bones pop in her neck. Believing Toni was dead, he removed her clothes and had vaginal and anal intercourse with her in his room. Toni never screamed or resisted. After raping Toni, he threw her behind his bed.

> n.2: Wendi Neuner, Betty Dick's nine-year-old granddaughter, testified at trial that the children were supposed to spend the night with their uncle, Tim Dick, and his girlfriend Nichole, but did not because Tim and Nichole were drunk on Sunday evening.

James then went to Betty Dick's bedroom where he intended to have sexual intercourse with her. He hit Betty in the back of the head with a pewter candlestick. She woke up and started screaming, "Why, Eddie, why?" Betty's screaming brought Wendi Neuner to the doorway of her

grandmother's bedroom where she saw James stabbing Betty with a small knife. When James saw Wendi he grabbed her, tied her up, and placed her in the bathroom. Thinking that Betty was not dead, James went to the kitchen, grabbed a butcher knife and returned to Betty's room and stabbed her in the back. James removed Betty Dick's pajama bottoms, but did not sexually batter her.

Covered with blood, James took a shower in the bathroom where Wendi remained tied up and then threw together some clothes and belongings. He returned to Betty's room and took her purse and jewelry bag before driving away in her car. James drove across the country, stopping periodically to sell jewelry for money. He finally was arrested on October 6, 1993, in Bakersfield, California, and gave two videotaped confessions to police there. A videotape containing the relevant portions of James' statements was played for the jury.

Dr. Shashi Gore, the chief medical examiner for Seminole County, testified that he performed autopsies on Betty Dick and Toni Neuner. Betty Dick suffered twenty-one stab wounds to the back with the knife still embedded. The wounds damaged both lungs, the liver, and the diaphragm and fractured several ribs. Dick also suffered major stab wounds to the left side of the neck, below the left eye, and on the left ear. A knife blade was also discovered in Dick's hair. Dick died of massive bleeding and shock from the multiple stab wounds to her chest and back. Dr. Gore opined that she died within a few minutes of her assailant's attack.

Toni Neuner suffered contusions to her lips and hemorrhaging in her eyes caused by lack of oxygen from strangulation. Gore opined that the extensive force necessary to create the contusions on her neck indicated that a ligature had been used. Dr. Gore also found contusions around the anal and vaginal orifices. The roof of the vaginal wall was completely torn. Although the substantial amount of blood pooled in the pelvic cavity indicated that Toni Neuner was alive at the time she was sexually assaulted, Dr. Gore could not state that she was conscious when she was raped. Toni Neuner died of asphyxiation due to strangulation.

Dr. E. Michael Gutman, a psychiatrist, testified as a mental health expert witness on James' behalf. He conducted neuropsychological

tests on James in August of 1994. Dr. Gutman learned that James' father and grandfather had been alcoholics and James used crack cocaine, LSD, cocaine, marijuana, alcohol, and pills. In Dr. Gutman's opinion, James suffers from alcohol dependence and has an addictive craving for alcohol which he is unable to break. James has above average intelligence and his performance IQ is in the superior range.

James told Dr. Gutman that on the day of the offense, he had been drinking, had used crack cocaine and cannabis, and had taken some pills. He could not remember if he had taken LSD in the hours preceding the offense. Dr. Gutman determined that James has a passive aggressive or an addictive personality. In his opinion, James suffers from poly-substance dependence and abuse, as well as severe dysthymia, a chronic depressive disorder. James also has unresolved conflicts associated with being abandoned by his father.

Dr. Daniel E. Buffington, a clinical pharmacologist at the University of South Florida, testified for the defense about the effects of alcohol and drug addictions. He explained that if a person like James has an underlying psychological problem, LSD ingestion will most likely unmask it and allow it to come to the surface. The acute phase of affectation due to LSD ingestion is two to twelve hours after ingestion. Possible reactions to LSD include, among others: a psychotic adverse reaction which is accompanied by hallucinations; a psycho-dynamic/psychedelic experience which results in a slow emergence of the subconscious idea or psychological condition; and a cognitive psychedelic reaction which overcomes an individual's ability to control himself.

Dr. Buffington opined that if James had drunk between twenty and thirty cans of beer between the hours of 6 and 11:30 p.m., he most likely had a blood alcohol level of more than three times the legal limit. If James ingested ten "hits" of LSD, about 200 micrograms at a minimum-which is a heavy dose-when considered in conjunction with the alcohol use, the peak effect of the LSD ingestion would have occurred between 12:30 a.m. and 1 a.m. The description of the crimes is consistent with the effects that the LSD and alcohol would have had on James. Dr. Buffington explained that such a large dose of LSD could have caused a physical or mental breakdown and a sudden release of aggressive

action in someone like James, who suffers from a passive aggressive personality.

Dr. Buffington concluded that James was most probably under the influence of extreme mental or emotional disturbance due to his psychotic reaction and psychodynamic/psychedelic reaction to LSD. James further suffered from a decreased ability to control his behavioral pattern.

Betty and John Hoffpauir testified that they had known James for years. Once James made Betty Hoffpauir's grandson some golf clubs just out of kindness. James worked off and on with John Hoffpauir in his lawn business and would never take any money for helping him.

Betty Lee, who also testified on James' behalf, knew James through her daughter, who had lived next door to Betty Dick. When Betty Lee would visit her daughter, she often would see James playing with Toni and Wendi Neuner out in the front yard. James was also always willing to help Betty Lee's daughter whenever she called on him.

Anthony Mancuso is a volunteer with the Seminole County Correctional Facility and counsels inmates on religious matters. He testified that James is well-liked by the jail personnel as being a non-trouble maker. Once when Mancuso was ill, James wrote him a letter that Mancuso believes reflects James' spiritual growth while in custody. Mancuso explained that he has seen an incredible change in James since he entered the facility.

James also testified on his own behalf at the penalty phase. He was born in Pennsylvania in 1961. At the age of ten, he learned that his biological father had left him when he was just a baby. He eventually went to live with his biological father in Indianapolis when he was fourteen. However, James' father turned out to be a drug dealer and introduced James to marijuana. James moved with his father to Massachusetts, but his father returned to Indianapolis without James two weeks after the move. James has never heard from his father since that time. James subsequently moved to Florida with his mother after she separated from her second husband. He started experimenting with drugs, including marijuana and PCP, and eventually dropped out of school. He did get his GED, however, and entered the army at age seventeen. He started

using more drugs in the army and received a general discharge under honorable conditions. James then spent eighteen months hitchhiking around the country and ultimately had a son who was born in March of 1983. James went to San Francisco where he graduated from a computer learning center. One day, James received a phone call from his son's mother who threatened to kill his son unless James would take him. James returned to Florida and took custody of his son, Jesse. However, James soon realized he was not prepared to raise his son, and his drinking and drug usage increased. His drug abuse caused his relationship with his girlfriend to break up and he distanced himself from his son. From James' birthday on August 4, 1993, until the day of the offense on September 20, 1993, James was steadily intoxicated. James feels ashamed for what he did, especially because he loved Betty and her grandchildren and felt that they were like his own family. James explained that he does not believe his drug abuse excuses his conduct, but it does help to explain it. On the other hand, James also testified that he had never had an adverse reaction when he took LSD and always had good experiences. In addition, he did not remember taking LSD prior to the murders.

Following deliberations, the jury returned advisory penalty recommendations of death for each of the murder convictions. At the subsequent sentencing hearing held on August 18, 1995, the trial court confirmed the previous adjudications of guilt and sentenced James to life in prison with a mandatory minimum of twenty-five years before parole eligibility on each of the capital sexual battery convictions to run concurrent with each other. Additionally, James was sentenced to life in prison on the kidnapping charge, fifteen years on each count of the aggravated child abuse and attempted sexual battery, and five years on each count of grand theft-all to run concurrent with each other, but consecutive to the sentences on the capital sexual batteries.

The trial court followed the jury's recommendation and imposed a sentence of death for each of the first-degree murder convictions and filed a sentencing order in support of the death penalty. In aggravation, the trial court found that: (1) each murder was heinous, atrocious or cruel; (2) James was contemporaneously convicted of another violent felony; and (3) each murder was committed during the course of a felony. The trial court also considered sixteen mitigating circumstances applicable to this case, to include the statutory mitigator that James'

> ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired due to drug and alcohol abuse; and that James was under the influence of moderate mental or emotional disturbance at the time of the offense. The trial court gave both of these mental mitigators "significant weight." The trial court attributed "some weight" to James' past acts of kindness and helpfulness to friends; and his genuine shame and remorse for his offenses. The trial court attributed "substantial weight" to James' full cooperation with authorities in confessing to the crimes and entering pleas of guilty to the offenses he remembered and "no contest" to those he "truly [did] not remember." Additionally, the trial court attributed "some weight" to James' good conduct while incarcerated. In that regard, the trial court finally noted in mitigation that James is capable of offering assistance to others while in custody and serving as an example to others about the negative consequences of illicit drug use.

James v. State, 695 So. 2d 1229, 1230-3 (Fla. 1997).

James filed a writ of certiorari with the United States Supreme Court, which was denied, and his sentence became final on December 1, 1997. *James v. Florida*, 522 U.S. 1000 (1997).

James filed his first motion for postconviction relief on May 27, 1998. After subsequent amendments the trial court set an evidentiary hearing. However, on March 10, 2003, James filed a pro se motion to voluntarily dismiss his postconviction proceedings. *James v. State*, 974 So. 2d 365, 366 (Fla. 2008). The trial court held a hearing to ensure James was competent to proceed and understood the consequences of dismissal, following a procedure mandated by the Florida Supreme Court. *Id*. On April 22, 2003, the trial court entered an order dismissing James's motion and discharging collateral counsel.

In 2005, James contacted his previous attorneys requesting to reinstate his postconviction motion. After a hearing with the trial court his request was denied, and appealed to the Florida Supreme Court. That court found that the trial court "conducted a comprehensive *Durocher*[1] inquiry in 2003…in complete accord with our opinion in *Durocher*." *Id*. at 367-8.

In August 2018, the Capital Habeas Unit for the Office of the Federal Public Defender for the Northern District of Florida was appointed to represent James in relation to federal habeas claims. That office filed an initial federal habeas petition on December 18, 2018, which prompted Capital Collateral Regional Counsel ("CCRC") to move for reappointment to exhaust James's state-court claims. CCRC-Middle filed the motion, and simultaneously raised a conflict of interest. The motion was granted and the trial court appointed CCRC-North to represent James.

James's Rule 3.851 motion was filed on November 14, 2019. James raised the following five claims in this motion for postconviction relief:

I. Mr. James was denied effective assistance of counsel at the guilt and penalty phases of his capital trial, in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments under the United State Constitution and his corresponding rights under the Florida Constitution. Trial counsel failed to adequately investigate and prepare a defense or challenge the State's case and encouraged Mr. James to plead to all charges. As a result, the conviction is unreliable.

II. Mr. James was denied his procedural and substantive federal constitutional rights as they pertained to his incompetency at the time of his pleas,

[1] *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993).

waives, penalty phase, and sentencing. Trial counsel was ineffective for failing to properly investigate and raise the issue of Mr. James's competency.

III. Mr. James was incompetent at the time of his state postconviction waiver and was incompetent to waive his rights at that proceeding.

IV. Mr. James's death sentence violates his rights under the Sixth and Fourteenth Amendments, and corresponding provisions of the Florida Constitution.

V. Cumulatively, the combination of procedural and substantive errors deprived Mr. James of a fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and his corresponding rights under the Florida Constitution.

The State filed a response on November 27, 2019 alleging that all claims were meritless. On March 17, 2020, before holding a case management hearing, the circuit court entered an order dismissing James's motion entirely. Noting that Rule 3.851(5)(B) of the Florida Rules of Criminal Procedure require a case management conference before ruling on James's motion, the state did not contest his motion for a rehearing, which was filed on March 27, 2020. That motion was granted on April 13, 2020, and the case management conference was held on May 7, 2020. Counsel for both parties made argument and the court reserved ruling, ultimately summarily dismissing all of James's claims in an order filed on June 8, 2020. This appeal follows.

SUMMARY OF THE ARGUMENTS

In addition to arguing that all of James's claims were properly dismissed as untimely, procedurally barred, or refuted by the record, the State also argues that each claim could have properly dismissed as meritless for the following:

ISSUE I: All of the conduct James alleges as ineffective assistance of counsel either did not fall under the objective standard of reasonably competent performance because they were reasonable strategic decisions that in fact had positive results, or would not have prejudiced him due to the overwhelming evidence of guilt in this case.

ISSUE II: To succeed on this claim, James must establish that he was incompetent to proceed at the time based on a preponderance of the evidence. James does not assert any evidence in his motion that is newly discovered or was unknown to trial counsel at the time of his waivers. In fact, all the available evidence indicates that the opposite was true, he was in fact competent to proceed. None of his attorneys, prosecutors, judges, or even a mental health doctor who interviewed him prior to trial ever had concerns as to his competency, and all the issues of his substance abuse and mental illness were known at the time.

ISSUE III: To succeed on this claim, James must establish that he was incompetent to proceed at the time of his postconviction waivers based on a preponderance of the evidence. Much like in Issue II, James does not assert any

evidence in his motion that is newly discovered or was unknown to postconviction counsel at the time of his waivers. In fact, all the available evidence and the express findings of both the circuit court at the time of the waiver, and this very Court on appellate review, indicate that the opposite was true, that he was in fact competent to proceed.

ISSUE IV: James is not entitled to retroactive application of *Hurst*, and even if he were, this Court's recent decision in *State v. Poole* would forestall any relief. *Poole* held that the only requirement for a defendant to be death-eligible is a unanimous jury finding of any enumerated statutory aggravating factor, not a unanimous jury death recommendation. James pled guilty to several violent felonies in addition to his two murders, including two counts of capital sexual battery, that meet this requirement, and so there is no *Hurst*/*Poole* error.

ISSUE V: As there are no individual errors, there can also be no cumulative error analysis.

STANDARD OF REVIEW

Where the circuit court denies 3.851 claims without an evidentiary hearing, this Court reviews the circuit court's decision *de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling only if the record conclusively shows the movant is entitled to no relief. *Howell v. State*, 109 So.3d 763, 777 (Fla. 2013).

Ineffective assistance of counsel claims are a mixed question of law and fact. As such, this Court reviews the lower court's legal rulings *de novo*, and defers to the lower court's factual findings as long as they are supported by competent substantial evidence. *See Foster v. State*, 132 So.3d 40, 52 (Fla. 2013)

STANDARD OF REVIEW FOR CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

To prevail on a claim that trial counsel's assistance was "so defective as to require reversal of a conviction or death sentence," a defendant must satisfy both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984):

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

Id. at 687.

Under *Strickland*, for ineffective assistance of counsel claims to be successful, two requirements must be satisfied: First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the

fairness and reliability of the proceeding that confidence in the outcome is undermined. 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. *Ferrell v. State*, 29 So.3d 959, 969 (Fla. 2010), *citing Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986). The Court refrained from providing specific guidelines to evaluate counsel's performance. Instead, the Court held "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. 668.

The Court held that prejudice exists only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694; *see also Porter v. McCollum*, 558 U.S. 30, 55-56 (2009) (explaining that the Court does not require proof "'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome'" (*quoting Strickland*, 466 U.S. at 693-94)).

In evaluating counsel's performance under *Strickland*, there is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690. The

defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. at 689 (*quoting Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Additionally, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Because a court can make a finding on the prejudice prong of *Strickland* without ruling on the deficiency prong, claims of ineffective assistance of counsel are subject to summary denial when the court can determine the outcome of the proceeding would not be affected even if counsel were deficient. *Franqui v. State*, 59 So.3d 82 (Fla. 2011); *Troy v. State*, 57 So.3d 828, 828 (Fla. 2011); *Walls v. State*, 926 So. 2d 1156, 1173 (Fla. 2006) (summary denial appropriate on ineffective assistance of counsel claim where evidence was cumulative); *Freeman v. State*, 761 So. 2d 1055, 1063 (Fla. 2000). *See also Duest v. State*, 12 So.3d 734, 747 (Fla. 2009); *Stewart v. State*, 801 So. 2d 59, 65 (Fla. 2001) (Because the *Strickland* standard requires establishment of both the deficient performance and prejudice prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong). "Failure to sufficiently allege

both prongs results in a summary denial of the claim." *Spera v. State*, 971 So. 2d 754, 758 (Fla. 2007) (*citing Thompson v. State*, 796 So. 2d 511, 514 n. 5 (Fla. 2001)).

SUMMARY DENIAL OF POSTCONVICTION CLAIMS

A postconviction court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on the written materials before the court. A court may summarily deny a postconviction claim when the claim is legally insufficient, procedurally barred, or refuted by the record. *See Franqui*, 59 So.3d at 101; *Troy*, 57 So.3d at 840 (*citing Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008). A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. *Moore v. State*, 820 So. 2d 199, 203 (Fla. 2002).

Rule 3.851(e)(1)(D) requires a defendant to include a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought. The burden is on the defendant to establish a legally sufficient claim. *See Franqui*, 59 So.3d at 96 (*citing Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000)); *Nixon v. State*, 932 So. 2d 1009, 1018 (Fla. 2006). Conclusory allegations are not sufficient. *Franqui*, 59 So.3d at 96 (*citing Freeman*, 761 So. 2d at 1061).

The rule of sufficiency is equally applicable to claims of ineffective assistance of counsel. *See Thompson*, 796 So. 2d at 515 (Fla. 2001); *Knight v. State*, 923 So. 2d 387 (Fla. 2005). The facial sufficiency of an ineffective assistance of counsel

claim is determined by applying the two-pronged test of deficiency and prejudice set forth in *Strickland*. *Troy*, 57 So.3d at 834 (*citing Duest v. State*, 12 So.3d at 747). Allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for postconviction relief. *See Owen v. State*, 986 So. 2d at 543; *Melendez v. State*, 612 So. 2d 1366, 1369 (Fla. 1992) (holding counsel cannot be deemed ineffective for failing to make meritless argument).

When a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, a defendant is "required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have testified prejudiced the case." *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004), *cited in Bryant v. State*, 901 So. 2d 810, 821-22 (Fla. 2005) (concluding that a 3.851 claim of ineffective assistance was legally insufficient where the substance of the testimony was not described in the motion and the motion did not allege the specific facts to which the witness would testify).

A defendant's claim he was denied effective assistance of counsel because counsel failed to present mitigation evidence will not be sustained where the jury was aware of most aspects of the mitigation evidence that the defendant claims should have been presented. *Troy*, 57 So.3d at 835 (*citing Van Poyck v. State*, 694

So. 2d 686, 692-93 (Fla. 1997)). Further, if the record demonstrates that counsel's decision not to present evidence "might be considered sound trial strategy" the claim may be summarily denied. *Franqui,* 59 So.3d at 99, (*quoting Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). As the Florida Supreme Court explained in *Winkles v. State*, 21 So.3d 19, 26 (Fla. 2009): "an ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword." *See also Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004).

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

SUMMARY DENIAL OF PROCEDURALLY BARRED CLAIMS

The trial court must summarily deny claims that are procedurally barred. Fla. R. Crim. P. 3.851(e)(1). The Florida Supreme Court has consistently held that a claim that could and should have been raised on direct appeal is procedurally barred. *Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006); *Davis v. State*, 915 So. 2d 95, 129 (Fla. 2005); *Duckett v. State*, 918 So. 2d 224, 234 (Fla. 2005); *Robinson v. State*, 913 So. 2d 514, 523 (Fla. 2005). Further, it is inappropriate to use a different argument to relitigate the same issue. *Willacy v. State*, 967 So. 2d 131, 141 (Fla. 2007). A procedurally barred claim cannot be considered under the guise of

ineffective assistance of counsel. *Freeman*, 761 So. 2d at 1067 (holding that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel); *see also Rodriguez v. State*, 919 So. 2d 1252, 1262 (Fla. 2005).

ARGUMENTS

ISSUE I: THE CIRCUIT COURT PROPERLY DISMISSED JAMES'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY INVESTIGATE HIS CASE OR CHALLENGE THE STATE'S CASE, AND FOR ENCOURAGING HIM TO PLEAD GUILTY

In this claim James asserts the circuit court erred by not granting relief on several claims of ineffective assistance of trial counsel. He argues that trial counsel failed to properly investigate defenses and the aggravating circumstances; failed to investigate an alternate suspect; was ineffective in advising James to plead guilty to all charges; and failing to make James's competency to proceed an issue. The circuit court summarily denied this claim as untimely. (ROA, 573).

As the State argued in the court below, Rule 3.851 creates certain limitations for the filing of a motion for postconviction relief. It must be filed within one year after the judgment and sentence became final, and can only be filed outside that deadline under three scenarios: the facts on which the claim is predicated were unknown to the movant's attorneys and could not have been exercised by due diligence; the fundamental constitutional right asserted was not established within

the one-year time frame and has been held to apply retroactively; or postconviction counsel, through neglect, failed to file the motion. Fla. R. Crim. P. 3.851(d).

James's judgment and sentence became final 22 years ago on December 1, 1997, therefore one of the three exceptions above must apply. James does not make any claims based on new evidence. In fact, his claims are predicated on alleged facts he believes his trial counsel was ineffective in responding to, mainly his competency status and intoxication at the time of the murders. He does put forth a *Hurst v. Florida*, 136 S. Ct. 616 (2016) claim, however, *Hurst* has time and again been found to not be retroactive to cases like James's, which became final before *Ring v. Arizona*, 536 U.S. 584 (2002). *See*, *e.g.*, *Asay v. State*, 210 So.3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017); *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, 138 S. Ct. 513 (2017); *Lambrix v. State*, 227 So.3d 112 (Fla. 2017), *cert. denied*, 138 S. Ct. 312 (2017); *Hannon v. State*, 228 So.3d 505 (Fla. 2017), *cert. denied*, 138 S. Ct. 441 (2017); *Branch v. State*, 234 So.3d 548 (Fla. 2018), *cert. denied*, 138 S. Ct. 1164 (2018); *Jones v. State*, 234 So.3d 545 (Fla. 2018), *cert. denied*, 138 S. Ct. 2686 (2018); *Zack v. State*, 228 So.3d 41 (Fla. 2017), *cert. denied*, 138 S. Ct. 2653 (2018); *Cole v. State*, 234 So.3d 644 (Fla. 2018), *cert. denied*, 138 S. Ct. 2657 (2018). Finally, there is no allegation that there was negligence from postconviction counsel that caused a delay in filing. The circuit court properly found that this claim was untimely.

However, if this Court finds that this claim was timely, the circuit could still have dismissed the claim because it was meritless and did not indicate anything an evidentiary hearing would have produced to grant relief. The first part of this claim alleges that defense counsel was ineffective in not putting on a voluntary intoxication defense during a guilt phase trial and for failing to ensure a defense witness, Jere Pearson, arrived to court sober. The crimes in this case were especially horrific. Before brutally murdering Betty Dick, James strangled, and then anally and vaginally raped an 8-year-old girl, while she was still alive, so violently that her vaginal wall was completely torn. 695 So. 2d at 1231. From his deposition, it's evident that James's trial attorney, Gary Andersen, was well aware how those facts would play in front of a jury, as he was desperate to find a doctor who would testify that the child victim was dead during the rapes. It was this inability to find someone to contradict the State's expert that led to the strategic decision to urge James to plead guilty. (ROA, 316-7). Maintaining credibility with a jury, especially in a case with facts like these and overwhelming evidence of guilt, is incredibly important, and getting in front of the jury and asking them to convict on a lesser offense in this case because James was drunk and high would have severely lowered the defense's credibility with the jury.

Additionally, the issue of James's intoxication was not completely abandoned. Instead of using it as a defense to specific intent, it was used as substantial mitigation

in the penalty phase. The defense was able to present evidence that James had consumed a large amount of alcohol, and through the interview of Mr. Pearson, that he had also consumed a large amount of LSD shortly before the murder. 695 So. 2d at 1231. They also presented the testimony of Dr. E. Michael Gutman, who gave his opinion that James suffered from poly-substance dependence and abuse, and had an addictive craving for alcohol he could not break. *Id*. Finally, Dr. Daniel Buffington, a clinical pharmacologist, testified that LSD can unmask an underlying psychological problem within hours of being ingested. *Id*. at 1232. He also said that the description of James's crimes was consistent with the effects alcohol and LSD would have had on him, causing him to have a physical or mental breakdown and a sudden release of aggressive action from someone like James who was typically passive aggressive. *Id*.

All of this evidence resulted in the judge finding and assigning significant weight to two statutory mitigating factors: his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired due to drug and alcohol abuse; and he was under the influence of moderate mental or emotional disturbance at the time of the offense. *Id*. at 1233. Trial counsel made a strategic decision to counsel James to plead guilty in a case with horrific facts, and counsel's experience that a guilty plea usually results in an "abbreviated" presentation of facts by the State in a penalty phase. (ROA, 342). They also made

the decision to use James's intoxication as mitigation, rather than as a flimsy affirmative defense, and were successful in getting the judge to find two weighty statutory mitigators as a result. These were reasonable strategy decisions and as such, trial counsel was not ineffective and James suffered no prejudice.

James blames his trial counsel for the judge finding that there was insufficient evidence of LSD use, and that this heavily prejudiced him. He argues that had they ensured Mr. Pearson was sober to testify, the outcome of his case would have been different. First, counsel has no duty to babysit every witness, and in fact, would be physically incapable of doing so in a complicated capital murder case that involves a large number of witnesses as was the case here. Second, although Mr. Pearson did not testify in person, his testimony was still entered into the record and heard by the judge and jury by using his pre-recorded deposition. This is a non-issue as James still had the benefit of Mr. Pearson's testimony that James had consumed a large amount of LSD. Finally, the judge's finding that there was insufficient evidence that James consumed LSD was a result of James's own testimony that he did not recall taking the drug and Dr. Gutman's testimony that James also told him that he didn't recall taking the drug. Trial counsel cannot be ineffective for a result caused by James's own actions.

Next, James argues that trial counsel was ineffective for not investigating an alternate suspect, Tim Dick, Betty Dick's son. While James provides affidavits from

some neighbors that demonstrate Tim may have conceivably had a motive to murder his mother, James has not produced anything to suggest why Tim would have also brutally raped and murdered his own eight-year-old niece. The evidence James advances now that Wendi Neuner was coached by Tim to say James committed the murders, and that she did not actually witness them, is contradicted by Wendi's trial testimony saying the exact opposite, and James's own attachment to his motion where Nicole Angel testified that she saw Wendi covered in blood and Wendi immediately said James had attacked her grandmother. (ROA, 361). Even if Tim had told James to kill his mother, that does not change the overwhelming evidence of guilt against him, including his own lengthy confessions. At best, it merely potentially implicates a second suspect, it does not mitigate anything James did. Trial counsel was not ineffective in deciding not to investigate a red herring, and even if they were, testimony that Tim had urged James to kill Tim's mother would have had no impact on the outcome of this case given the evidence of guilt.

ISSUE II: THE CIRCUIT COURT PROPERLY DENIED JAMES'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY INVESTIGATE AND RAISE THE ISSUE OF HIS INCOMPETENCE

In this claim, James alleges the circuit court erred by not granting an evidentiary hearing to allow him to present evidence of his incompetence at the time of the murders and trial. The circuit court found that this claim was untimely and the

State maintains that it was for the same arguments made, *supra*, in Issue I. (ROA, 573).

However, if this Court finds that the claim was timely, the circuit still properly denied the claim because James has not put forth any evidence of his incompetence at the time of his trial or postconviction waivers that was not already known at the time of trial.

To succeed on this claim, James must establish that he was incompetent to proceed at the time based on a preponderance of the evidence. *See*, *James v. Singletary*, 957 F.2d 1562, 1571 (11. Cir. 1992). Instead of producing any evidence of his incompetence, James instead makes the bare, unsupported assertions that his history of substance abuse, alleged memory impairment, alleged head injuries, and alleged trauma and mental illness should have led trial counsel to question his competence. He does not even argue that he was definitively incompetent, but instead that it was merely an issue defense counsel should have explored.

Rather than the evidence supporting his incompetence at the time of his plea and waivers, the available evidence reaches the *opposite* conclusion. His trial attorney testified that he did not observe any mental health issues when he would meet with James, but that he had made such observations with other clients. (ROA, 320-1). In fact, James was helpful and "seemed to be very intelligent." (ROA, 322). He was also interviewed by a psychiatrist, Dr. Gutman, who never exhibited any

concerns as to James's competency. James's direct appeal and prior collateral counsel never had any concerns as to his competency, and a judge even found that he was competent to waive his postconviction proceedings and discharge counsel. James has failed to establish any evidence as to incompetency at the time of the pleas, much less a preponderance of the evidence. All the evidence he claims would have been produced at an evidentiary hearing were all known to trial counsel over two decades ago, and none of it was enough to concern his litany of attorneys, circuit or appellate judges, or a medical professional who interviewed him.

ISSUE III: JAMES HAS NOT INDICATED ANY EVIDENCE TO CONTRADICT THAT HE WAS COMPETENT AT THE TIME OF HIS POSTCONVICTION WAIVER AND POSTCONVICTION PROCEEDINGS

While pointing only to evidence available to postconviction counsel and the circuit court, James claims that he was incompetent at the time of his postconviction waiver. The circuit court found that this claim was untimely. (ROA, 573). The State asserts it was both untimely and meritless for the reasons argued, *supra*, in Issues I and II.

Most importantly, the issue of James's competence was explored and addressed by the circuit court at the time of his waiver, and the finding of competency was affirmed by this Court on appeal:

> In *Durocher v. Singletary*, 623 So.2d 482, 483 (Fla.1993), this Court was confronted with the issue of whether a capital defendant could waive the appointment of postconviction counsel and waive

postconviction proceedings on his behalf. Despite CCRC's contention that it had a statutory duty to represent the defendant and prosecute postconviction proceedings on his behalf, even in the face of defendant's objection, we concluded that "[i]f the right to representation can be waived at trial, we see no reason why the statutory right to collateral counsel cannot also be waived." *Id*. We explained that "[c]ompetent defendants have the constitutional right to refuse professional counsel and to represent themselves, or not, if they so choose." *Id*. (citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and *Hamblen v. State*, 527 So.2d 800 (Fla.1988)). However, we cautioned that "the state has an obligation to assure that the waiver of collateral counsel is knowing, intelligent, and voluntary." *Id*. at 485. We held that a detailed *Faretta*[n.3]-type inquiry must be conducted by the trial court to determine the defendant's competency and ability to understand the consequences of the waiver of counsel and the waiver or dismissal of postconviction proceedings before such a waiver could be approved. See *id*.

> n.3: *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525 ("Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942))).

Following *Durocher*, we have consistently held that the right to counsel and to prosecute postconviction claims may be waived so long as the waiver is made voluntarily, knowingly, and intelligently. See generally *Alston v. State*, 894 So.2d 46 (Fla.2004); *Castro v. State*, 744 So.2d 986 (Fla.1999); *Sanchez-Velasco v. State*, 702 So.2d 224 (Fla.1997). In *Slawson v. State*, 796 So.2d 491 (Fla.2001), for example, we reaffirmed that *Durocher* "established that the relevant test for competency in the context of waiving collateral counsel and collateral proceedings in Florida is whether the person seeking waiver has the capacity to 'understand [ ] the consequences of waiving collateral counsel and proceedings.' " *Id*. at 502 (quoting *Durocher*, 623 So.2d at 485).

In the present case, the record reflects that the trial court conducted a comprehensive Durocher inquiry in 2003 and found that James was competent to discharge counsel and dismiss all postconviction proceedings. In so doing, the court explicitly warned James that he would be precluded from any further relief in the state courts by his waiver:

> THE COURT: And that means that this case is basically going to be over.
>
> MR. JAMES: I'm sort of hoping that that's going to be the outcome of this hearing here.... It will be all said and done with and the State can go ahead and proceed in carrying out its sentence.

In addition to this pointed exchange the record reflects that the 2003 hearing was conducted in complete accord with our opinion in *Durocher*.

In this appeal, James does not attack the validity of the prior waiver hearing. [n.4] Rather, it is apparent that James has simply changed his mind and has decided he wants "to take up [his] appeals again." However, we conclude that a mere change of mind is an insufficient basis for setting aside a previous waiver. The procedures we have outlined in *Durocher* and other cases are intended to allow condemned prisoners to waive postconviction counsel and dismiss the proceedings only when it can be determined that such prisoners are competent and fully understand the consequences and finality attached to a waiver. Those proceedings are mandated to ensure that a capital defendant is making an intelligent and knowing decision while respecting his wishes to determine his fate. Because there is no dispute that those procedures were followed here and James has asserted no valid basis for avoiding his waiver, we affirm the trial court's order denying James' request to reappoint CCRC to resume postconviction proceedings.

> n.4: We have contemplated the possibility of needing to review the trial court's findings during the *Durocher* hearing, and have now codified the procedure for review of dismissal of postconviction proceedings and discharge of counsel. Fla. R.App. P. 9.142; Fla. R.Crim. P. 3.851(i).

> In our opinion regarding rule 3.851(i), we rejected the notion to extend our holding in *Klokoc v. State*, 589 So.2d 219, 222 (Fla.1991) (where defendant was not allowed to dismiss his direct appeal and counsel was instructed "to proceed to prosecute the appeal in a genuinely adversary manner"), to postconviction proceedings. *In re Amendments to Fla. Rules of Criminal Procedure* 3.851 & 3.590, 945 So.2d 1124, 1125-26 (Fla.2006). However, because of the amendment to rule 3.851, review of the waiver of counsel in postconviction proceedings is now automatic.

James v. State, 974 So. 2d 365, 367-8 (Fla. 2008).

Nothing in James's motion alleges anything that was not available to the trial court or trial counsel in 1995, his postconviction attorneys in 2003 or 2005, the circuit court in 2006, or this Court in 2008. Since it is inherently difficult for a court to make a retrospective determination of a defendant's competence, he must establish by a preponderance of the evidence that he was incompetent at the time. *James*, 957 F.2d 1562, 1571 (11th Cir. 1992). James has utterly failed to make that showing, and in fact all the available evidence, as argued, *supra*, indicates the opposite.

ISSUE IV: THE CIRCUIT COURT PROPERLY DENIED JAMES'S *HURST V. FLORIDA*, 572 U.S. 92 (2016) CLAIM

In this claim James alleges the circuit court erred by denying his claim for *Hurst* relief using several arguments that have been routinely dismissed by this Court. The circuit court found that this claim was untimely, and alternatively, that his death sentence satisfies the requirements outlined by this Court in *State v. Poole*,

297 So.3d 487 (Fla. 2020), which largely receded from *Hurst v. State* because of his contemporaneous convictions for aggravated child abuse, attempted sexual battery, kidnapping, and two counts of capital sexual battery. (ROA, 573).

In *Hurst*, the United States Supreme Court extended its holding in *Ring v. Arizona*, 536 U.S. 584 (2002) to Florida's death penalty procedures, holding that the Sixth Amendment right to jury trial rendered those procedures unconstitutional, because they allowed a judge to make the necessary findings to render a death penalty. In *Hurst II*, the Florida Supreme Court held:

> [b]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Hurst v. State, 202 So.3d 40, 57 (Fla. 2016) (receded from by *State v. Poole*). Neither *Hurst* nor *Hurst II* addressed the issue of whether the new constitutional rules were retroactive in application.

However, the United States Supreme Court has long held that when a constitutional rule is announced, its requirements apply only to defendants whose convictions or sentences are pending on direct review or not otherwise final. *See Griffith v. Kentucky*, 479 U.S. 314, 322, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). More importantly, this Court in *Asay v. State*, 210 So.3d 1 (Fla. 2016) specifically

addressed the issue of whether the Hurst decision applies retroactively.

This Court began its analysis pursuant to the retroactivity standard enunciated in the *Witt*[2], *Stovall*[3], and *Linkletter*[4] decisions. As part of its analysis, the Court reasoned:

> Resentencing hearings necessitated by retroactive application of *Ring* would be problematic. For prosecutors and defense attorneys to reassemble witnesses and evidence literally decades after an earlier conviction would be extremely difficult. We fear that any new penalty phase proceedings would actually be less complete and therefore less (not more) accurate than the proceedings they would replace.

Asay, 210 So.3d at 13.

Upon conclusion of its analysis, the Court conclusively and decisively stated: "[a]fter weighing all three of the above factors, we conclude that *Hurst* should not be applied retroactively to *Asay's* case, in which the death sentence became final before the issuance of *Ring*." *Id*. *See also Mosley v. State*, 209 So.3d 1248 (Fla. 2016) ("[W]e have now held in *Asay v. State* that *Hurst* does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in *Ring*."). Every argument advanced by James has been previously considered and rejected by the Florida Supreme Court, as they have universally declined to extend *Hurst* retroactivity to cases final before *Ring*.

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[2] *Witt v. State*, 387 So. 2d 922 (Fla. 1980).
[3] *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct.1697, 18 L.Ed.2d 1199 (1967).
[4] *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

Additionally, even if James were somehow entitled to retroactive *Hurst* relief, this Court largely receded from that decision in *Poole*, finding that a jury need only unanimously find a statutory aggravating circumstance, and not that they also unanimously recommend the death penalty. *Poole*, 297 So.3d at 508. As noted in the circuit court order's below, James had several qualifying felony convictions that established a statutory aggravating circumstance forestalling any *Hurst*/*Poole* relief.

ISSUE V: THE CIRCUIT COURT PROPERLY DISMISSED JAMES'S CUMULATIVE ERROR CLAIM

The circuit found that this claim was untimely. (ROA, 573). Additionally, the circuit court implicitly found that there was no cumulative error by dismissing all of James's claims and finding no error in his four other claims of relief.

James claims the cumulative error of individual claims has deprived him of a fair trial. This Court has explained that "where the alleged errors urged for consideration in a cumulative error analysis are individually either procedurally barred or without merit, the claim of cumulative error also necessarily fails." *Hurst v. State*, 18 So.3d 975, 1015 (Fla. 2009) (internal citations omitted). All of James's claims are procedurally or time barred, without merit, or harmless, so this claim should be summarily denied.

CONCLUSION

WHEREFORE, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant's motion for postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 29, 2020, a true and correct copy of the foregoing has been furnished by email to: Karin L. Moore, Assistant Capital Collateral Regional Counsel-North, 1004 DeSoto Park Drive, Tallahassee, FL 32301 Karin.moore@ccrc-north.org, and support@ccmr.state.fl.us, the attorney for Appellant.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.100(l).

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