**IN THE SUPREME COURT OF FLORIDA**

**ANTHONY NEAL WASHINGTON,**

**Appellant,**

**vs.** **CASE NO. SC00-1435**

**STATE OF FLORIDA,**

**Appellee.**

**_____/**

**ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA**

# ANSWER BRIEF OF THE APPELLEE

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## PRELIMINARY STATEMENT

Appellee will refer to the instant record on appeal as R followed by the volume number and the appropriate page numbers, e.g. (R I, 1-45). Appellee will refer to Washington's direct appeal record as DAR followed by the appropriate page numbers, e.g. (DAR 1572-1594).

## STATEMENT OF THE CASE AND FACTS

The facts of the case were summarized in this Court's opinion affirming Washington's judgment and sentence on direct appeal. Washington v. State, 653 So. 2d 362, 363-364 (Fla. 1994):

> On August 17, 1989, Ms. Alice Berdat, a 102-pound, 93-year-old woman, was found murdered in her bedroom, having been badly beaten about her face and head. Her body was badly bruised. There were signs that she had been vaginally and anally raped, and she suffered seventeen rib fractures. Death occurred between the hours of 5:51 a.m. and 10:00 a.m.
>
> Michael Darroch, the detective assigned to the case, learned that Anthony Washington was imprisoned at the Largo Community Correctional Work Release Center, located approximately 2.1 miles from Ms. Berdat's home. The Center's records indicated that on the day of the murder, Washington left the Center at 6:00 a.m., returned at 9:17 a.m., and did not work at his job at Cocoa Masonry. On August 31, 1989, Darroch visited Cocoa Masonry where he spoke with several of Washington's co-workers. The co-workers informed Darroch that Washington sold a gold-colored watch to fellow co-worker Robert Leacock. Darroch visited Leacock at his home, recovered the watch, and showed Leacock a single photo of Washington. Leacock identified Washington as the person who sold him the watch, which was later identified as belonging to Ms. Berdat.
>
> On September 5, 1989, Darroch and two police officers interviewed Washington at the Zephyrhills Correctional Center. Washington did not know, nor did the detective tell him, that he was suspected of murdering Ms. Berdat. The interview dealt with an unrelated sexual battery that occurred on August 25, 1989. Darroch read the defendant his rights and obtained hair and blood samples which he said could prove or disprove Washington's guilt in the sexual battery case. When the state sought to use the samples in the Berdat murder case, Washington moved for suppression. His motion was denied by the trial

court and on July 16, 1992, a jury convicted him of first-degree murder, burglary with a battery, and sexual battery. The judge overrode the jury's life recommendation and imposed the death sentence. (FN1) Washington appeals his convictions and sentences. (FN2)

> FN1. The court found aggravating circumstances of: (1) a capital felony committed by a person under sentence of imprisonment, (2) previous conviction of another felony involving the use or threat of violence, (3) a capital felony committed while engaged in the crimes of burglary and sexual battery, and (4) heinous, atrocious or cruel. The court found no statutory mitigating circumstances, and found the non-statutory mitigating circumstances of defendant's love for his mother, his high school diploma, and his sports activities during high school.
>
> FN2. The issues raised on appeal are: (1) the state improperly peremptorily excused an African-American prospective juror; (2) the trial court should have suppressed the blood sample; (3) Leacock's identification should have been suppressed; (4) the DNA evidence was improperly admitted; (5) there was insufficient evidence to support Washington's guilt; (6) the heinous, atrocious, or cruel aggravating circumstance was vague; (7) the death sentence was improperly imposed; (8) Washington should not have been sentenced as a habitual violent felony offender; and (9) one of the two written judgments filed is extraneous and must be stricken.

In affirming the judgment and sentence this Court opined in part:

> [6][7] In his fourth issue, Washington asserts that the trial court erred in not allowing him to depose Anne Baumstark, the DNA technician, and that the state, by not calling Baumstark as a witness,

failed to lay a proper predicate for admission of the DNA test results. Florida Rule of Criminal Procedure 3.220 states that a defendant may not depose a person that the prosecutor does not, in good faith, intend to call at trial and whose involvement with the case and knowledge of the case is fully set out in a police report or other statement furnished to the defense. The record reflects that the state did not intend to call Baumstark as a witness; that Baumstark submitted an affidavit which stated that she had conducted over 1200 DNA tests, had no specific recollection of Washington's test, and would have to rely on lab notes to discuss the testing procedure. Based on our review of the record, we find that the state satisfied the requirements of rule 3.220. We also find no abuse of discretion in the court's admission of the DNA test results. When previously faced with this issue, we stated that:

> In admitting the results of scientific tests and experiments, the reliability of the testing methods is at issue, and the proper predicate to establish that reliability must be laid. If the reliability of a test's results is recognized and accepted among scientists, admitting those results is within a trial court's discretion. When such reliable evidence is offered, "any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed."

*Robinson v. State*, 610 So.2d 1288, 1291 (Fla.1992) (quoting *Correll v. State*, 523 So.2d 562, 567 (Fla.1988)), *cert. denied*, --- U.S. ----, 114 S.Ct. 1205, 127 L.Ed.2d 553 (1994) (citations omitted). The DNA test results were presented through the testimony of FBI Special Agent Dwight Adams, Baumstark's supervisor. Adams testified as to the scientific reliability of the tests, interpreted the DNA test results, worked as a team with Baumstark, and supervised her as she conducted the actual test. Adams' familiarity with the test, his supervision over Baumstark's work, and Baumstark's affidavit laid a

proper predicate for admission of the DNA test results.

[8] Contrary to Washington's final guilt phase assertion, the circumstantial evidence produced by the state was sufficient to allow the issue of Washington's guilt to be submitted to a jury. When the case against the defendant is circumstantial, we have held that:

> [T]he burden is on the State to introduce evidence which excludes every reasonable hypothesis except guilt. The State is not required to conclusively rebut every possible
> variation of events which can be inferred from the evidence but only to introduce competent evidence which is inconsistent with the defendant's theory of events. Once this threshold burden has been met, the question of whether the evidence is sufficient to exclude all reasonable hypotheses of innocence is for the jury to determine.

*Atwater v. State*, 626 So.2d 1325, 1328 (Fla.1993) (citation omitted), *cert. denied*, --- U.S. ----, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994). The evidence against Washington included DNA test results that matched his semen with those found at the murder scene; microscopic tests that matched his hair characteristics with hairs found at the murder scene; his possessing and selling the victim's watch; and his proximity to the victim's home. Based on this evidence, the jury had sufficient basis to exclude all reasonable hypotheses of Washington's innocence.

(Id. at 365-366)

This Court also agreed that Judge Schaeffer's override of the jury life recommendation was proper:

> [10][11][12] We also find no merit in Washington's claim that the trial court improperly imposed the death sentence over the jury's recommendation of life imprisonment. In *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975), we held that "[i]n order to sustain a

sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." We have consistently interpreted *Tedder* as meaning that an override is improper if there exists a reasonable basis for a jury's recommendation of life imprisonment. *Freeman v. State*, 547 So.2d 125 (Fla.1989); *Hall v. State*, 541 So.2d 1125 (Fla.1989); *Ferry v. State*, 507 So.2d 1373 (Fla.1987). We have affirmed life overrides in cases similar to the instant one. For example, in *Coleman v. State*, 610 So.2d 1283, 1287 (Fla.1992), *cert. denied*, --- U.S. ----, 114 S.Ct. 321, 126 L.Ed.2d 267 (1993), the aggravating circumstances were: (1) a felony committed while engaging in a robbery, sexual battery, burglary, and kidnapping; (2) heinous, atrocious, or cruel; (3) cold, calculated, and premeditated; and (4) a previous conviction for a violent felony. The mitigating circumstances were the defendant's close family ties and maternal support. *See also Mills v. State*, 476 So.2d 172 (Fla.1985), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986); *Spaziano v. State*, 433 So.2d 508 (Fla.1983), *aff'd*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). On the other hand, we will not affirm a life override if the record contains mitigating circumstances which may provide a reasonable basis for the jury's life recommendation. For example, in *Esty v. State*, 642 So.2d 1074 (Fla.1994), we vacated a life override where the defendant: (1) was eighteen years old; (2) had no prior criminal history; (3) evidenced a potential for rehabilitation; and (4) may have been in an emotional rage during the commission of the murder. *See also Parker v. State*, 643 So.2d 1032 (Fla.1994). When faced with the facts of the instant case, we can only conclude that the judge's imposition of a death sentence was proper. Washington is convicted of causing Ms. Berdat's death by homicidal violence, including manual choking and blunt trauma to the chest with multiple rib fractures. There are four valid statutory aggravating circumstances, no statutory mitigating circumstances, and inconsequential non-statutory mitigating circumstances. (FN4) We disagree with Washington's assertion that the testimony of his mother and Dr. Merin, a clinical psychologist and neuropsychologist, provided a rational basis, i.e., rehabilitation potential, for

> the jury's recommendation of life. We agree with the trial court's finding that Washington's potential for rehabilitation is extinguished by the "totality of [his] past criminal history, and his behavior in jail to date." Since we are unable to find a reasonable basis for the jury's recommendation of life imprisonment, Washington's death sentence is affirmed.
>
> (Id. at 366-367)

Thereafter, Washington filed an Amended Motion to Vacate Judgment and Sentence on March 1, 1999 (R I, 1-46). The state filed a Response to Order to Show Cause (R I, 49-200; R II, 201-228). The lower court conducted a Huff hearing on August 12, 1999 (R IV, 614-687). Washington did not allege either in the Motion to Vacate or at the Huff hearing that trial counsel rendered ineffective assistance for the failure to request a hearing pursuant to Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) on the DNA evidence. On October 5, 1999, the lower court entered an order summarily denying certain claims and scheduling an evidentiary hearing on others (R II, 245).

An evidentiary hearing was conducted on November 18th and 19th, 1999 pertaining to the claim of ineffective counsel at penalty phase and testimony was presented by Willie Mae Washington (R V, 698-723), Holice Williams (R V, 726-744), Regina Batiste (R V, 745-765), Maurice Houston (R V, 767-773), Eric Bryant (R V, 775-790), trial counsel Franklyn Louderback (R V, 791-818), co-counsel Tom McCoun (R V, 822-849), Dr. Daniel Sprehe (R V, 850-871) and Dexter Washington (R VI, 880-895).

On June 5, 2000, Judge Schaeffer entered a comprehensive order denying the Amended Motion to Vacate (R II, 282-307) and attached exhibits including excerpts from the trial and/or direct appeal record (R II, 308 - R III, 596).

Judge Schaeffer explained her reason for summarily denying relief on Claim IA (counsel's alleged failure in questioning potential jurors) (R II, 284), Claim IB (counsel was ineffective for failure to cross-examine state witnesses and challenge the state's case) (R II, 285-288).

With respect to a claim of ineffective assistance of trial counsel at guilt phase for the failure to provide background information to the mental health expert, Judge Schaeffer explained that no evidentiary hearing was needed since this defendant asserted throughout that he was innocent, a defense contradictory to an intoxication by drugs defense and it would have been no defense to felony-murder (R II, 288-289).

Judge Schaeffer added this Summary of Guilt Phase Issues:

Summary of Guilt Phase Issues

> This completes all of the various issues raised in Claim I that bear on defendant's trial counsel having been ineffective at the guilt phase of defendant's trial. Although no evidentiary hearing was ordered as to these guilt phase issues of ineffectiveness, at the evidentiary hearing that was held on ineffectiveness of counsel at the penalty phase, defendant's trial counsel gave their credentials. Frank Louderback had been an attorney since 1975. Since 1980, he had a practice devoted to criminal defense. By 1990, he had tried 25 first-degree murder trials, and had been involved in 50 first-degree murder cases (Exhibit D,

pp. 104-105). Defendant's co-counsel, Tom McCoun is presently a Federal Magistrate Judge for the Middle District of Florida. He joined the Florida Bar in 1977. He was an assistant state attorney for three years, and then from 1980 - 1990 was in partnership with Mr. Louderback specializing in criminal defense work. At the time of defendant's trial, he had participated in 20 - 30 first-degree murder trials (Exhibit D, pp. 134-135). As a trial judge with over ten years experience on the criminal bench, and a prior criminal defense attorney for over eight years, I know that these two attorneys were two of the best Pinellas County had to offer. The Index to the record on appeal, (Exhibit E), shows they prepared well for this case by deposing state's witnesses, requesting expert witnesses of their own, filing appropriate motions, etc. The trial transcript shows they did an admirable job at defendant's trial in advocating defendant's claim that he was innocent of the crimes charged, and that he was at the Largo Work Release Center when the crimes were committed.

No singular claim made by the CCRC, nor the collective claims made warranted an evidentiary hearing, as they were either refuted by the record, were erroneous, or were not cognizable in a 3.850 motion. As to all claims, contained in Claim I, dealing with ineffective assistance of counsel at the guilt phase of his trial, they are hereby denied. I specifically find defendant's counsel, Frank Louderback and Tom McCoun, were effective counsel. Further, this court is confident in the outcome of the guilt phase of the trial and is not persuaded that the issues claimed, singularly or collectively, undermine this court's confidence in the outcome of the guilty verdicts. *Strickland v. Washington*, 466 U.S. 668 (1984) requires both ineffectiveness of counsel's performance and prejudice to warrant relief. Defendant has not satisfied either prong of the *Strickland v. Washington* standard, and is therefore, not entitled to a new guilt/innocence determination.

(R II, 290-291)

The court also rejected summarily a claim that trial counsel was ineffective at guilt phase for failing to object to the

testimony of witness Berdat (the victim's son who identified the watch) (Claim IF) (R II, 289-290). Judge Schaeffer also summarily denied a number of claims as issues that could have been or were urged on direct appeal (R II, 291-293).

As to the issue of ineffective assistance of counsel at penalty phase - the subject matter of the evidentiary hearing - Judge Schaeffer summarized the evidence and concluded that relief was not warranted (R II, 293-306).

Judge Schaeffer's order recites:

> At the evidentiary hearing, several witnesses were called to testify that the defendant had been a substantial user of various types of illegal drugs since attending high school. They knew about his drug use in Miami, when he was not in prison. (Exhibit D, pp. 14-17; 19-20; 41; 44; 59-68; 81; 89-93; 101-102; 194-195; 197-200). None of them testified of any knowledge of the defendant's drug use at the Largo Work Release Center, where he was in custody when the murder, rape, and burglary were committed. I will accept their testimony about defendant's drug use as true.
>
> The only witness who testified about possible drug use while the defendant was in custody was his brother, Dexter Washington. However, when you boil down his testimony, all he knows is that the defendant wanted him to bring him money or drugs. He testified at the evidentiary hearing that the defendant said there were drugs to be purchased at the facility he was in. But the facility he was speaking of was the Pinellas County Jail, where the defendant would have been awaiting trial for the murder charge. He had tried to visit once, but they wouldn't allow it and another time he came up with his mother. He came with his mother during Mr. Washington's trial. The defendant was at the Pinellas County Jail. And the time he tried to visit before he came up for the

trial, the defendant was at the Pinellas County Jail awaiting trial on the murder charge. It appears when the defendant was at the Largo Work Release Center, when the murder was committed, his brother was in another prison for his own murder charge and did not get out while the defendant was still at Largo. Therefore, he cannot be of any help as to whether there even were drugs at the Largo Work Release Center, and certainly cannot tell us that the defendant was ever using drugs while he was there. (Exhibit D, pp. 192-207).

Testimony from Dr. Sprehe revealed that the defendant said he had a heavy drug habit. According to the history he obtained from the defendant, Dr. Sprehe was able to diagnose the defendant as having a substance dependency disorder, and a lesser diagnosis of substance abuse disorder. (Exhibit D, pp. 166-168).

The defendant told the doctor that he was using drugs while at the Largo Work Release Center. (Exhibit D, p. 167). <u>However, he says he was not using drugs at the time of the murder</u>. He said he "bought the watch, you know, from someone, and that he wasn't there. And he does tell me that he is pretty sure he was clear-headed at that time and not high, and so he knew where he was and it was not there in that neighborhood." (Exhibit D, pp. 174; 178-179). He also said his drug use at the Largo Work Release Center was "intermittent ...they're available and sometimes he got hold of them" (Exhibit D, p. 177).

Dr. Sprehe says long-term drug use would affect one's "impulsivity." (Exhibit D, p. 166). It would "increase impulsivity, and reduces societal awareness, reduces moral values ...sort of a don't care attitude after a while, because the main focus is getting some more of the drug." (Exhibit D, p. 165).

Dr. Sprehe agrees with Dr. Merin in most all respects. He agrees that this defendant was not suffering from any brain impairment, and had nothing going on to interfere with his ability to reason. There was no psychosis, no break with reality. There was no evidence of fantasies or delusions. There was no schizophrenia or personal delusions. The defendant was competent and understood right from wrong. He

disagrees with Dr. Merin only in that he finds a substance abuse dependency disorder and a lesser substance abuse disorder, not found by Dr. Merin. (Exhibit D, pp. 171-172; 181-182).

To get in this evidence of defendant's history of drug abuse and the emotional disorders that resulted from this drug abuse, what would the defendant have had to give up; what evidence would the trial jury have heard that it didn't hear?

**Willie Mae Washington**

1. He was expelled from high school because of drugs and did not graduate when he should have because of it. He finished in night school. (Exhibit D, pp. 17-18).

2. After high school, he moved away from home. (Exhibit D, p. 18).

3. He sometimes wouldn't show up for work, and when he did, he sometimes would be sent home by his Dad because he was high. (Exhibit D, pp. 19-20).

4. He was getting arrested (for burglary) and getting into trouble. (Exhibit D, p. 21).

5. He was always fighting with everybody and he wasn't brought up that way. (Exhibit D, p. 22).

6. The defendant didn't grow up in Liberty City, but in Coral City, a better place than Liberty City. (Exhibit D., pp. 29, 34).

7. The defendant didn't play football in high school. He only wrestled. (Exhibit D, p. 31).

**Holice Williams**

1. When the defendant did drugs, he got violent. He used to fight a lot. (Exhibit D, pp. 46, 48).

2. He and his family moved with the Washington family from Liberty City to Coral City, a nicer neighborhood. (Exhibit D, p. 49).

**Regina Batiste**

1. Coral City was a new neighborhood when the Washingtons moved there. They had new houses. It was a good neighborhood. (Exhibit D, p. 58).

2. When defendant had drugs, he "gets real mean." (Exhibit D, p. 60).

3. To get money for drugs, he would get the "fast money". He would "touch something." "Touch something" means "a little robbery maybe or somebody slip and get the pocketbook of the lady. Little things. Little things that add up." (Exhibit D, p. 63).

4. Defendant came out of the dark one night and robbed her by taking her coat off her. He acted like he didn't know who she was. He scared her. (Exhibit D, pp. 67; 69; 76).

**Eric Bryant**

1. One day when the defendant was on crack (after he had gotten out of jail for a "B & E or something"), he was trying to sell some jewelry. A friend of Mr. Bryant said, don't buy it, it's his (defendant's) mother's jewelry (Exhibit D, pp. 94-95).

2. They said defendant stole the jewelry out of his mother's house. "I guess when a person is on crack, you will steal from whoever you can steal from, you know, to support your habit. And, you know, I don't want to make him seem like a bad person or anything, but, you know, crack will do that to people." (Exhibit D, p. 95).

3. Defendant didn't play football in high school, only wrestled. (Exhibit D, p. 98).

**Dexter Washington**

1. The defendant went to a juvenile boy's school and went to prison in Florida City. (Exhibit D, p. 197).

2. The defendant got violent when he got high. (Exhibit D, p. 199).

3. When the defendant wasn't working he stole to support his habit. His daddy "gave up on him" (this is what is in my notes where the court reporter says "unintelligible") - "because he would not stop the drugs and he would be on the job and getting high. My Daddy didn't play that. So I guess he was breaking in houses or do what they do to support his habit." (Exhibit D, p. 200).

4. The defendant stole from his brother - "jewelry, guns, stuff like that" and sold them to support his habit. (Exhibit D, p. 200).

5. The defendant's brother had been to prison and was in prison (for murder) until just before defendant's trial. (Exhibit D, p. 206).

**Dr. Daniel Sprehe**

1. The defendant has to steal and sell drugs to support his habit. He had a $40 to $500 per week habit. (Exhibit D, p. 164). (He later says $50 to $400 per week.) (Exhibit D, p. 180).

2. The defendant made as much as $3,000 per week selling drugs (Exhibit D, pp. 164-165; 180).

3. All his "major" burglaries, and his "long criminal record" were directly related to the fact that he needed money for drugs. (Exhibit D, p. 165).

4. He stole money, did burglaries and sold large amounts of drugs to support his habit. (Exhibit D, p. 180).

What do the defendant's lawyers say about their strategy at the penalty phase and their preparation for it?

Mr. Frank Louderback, a very experienced criminal defense attorney, (see earlier discussion on page 9

for his credentials) was principally responsible for the guilt phase of the trial. He had asked that Mr. McCoun be appointed to assist with the DNA evidence in the guilt phase and to handle the penalty phase. They would have discussed his background with him and asked for a list of family and friends who might help at the penalty phase. They had Dr. Sid Merin appointed as a confidential expert to assist them in the penalty phase of the trial. If the defendant gave them names of people who could be called [in] the penalty phase, they would have investigated these people and tried to locate them and speak to them over the phone or by letter to see if they had anything relevant to say. He remembers Mrs. Washington as being reluctant to come as a witness. She had more than one son in prison and was tired of traveling the state for them. Dr. Merin was appointed principally for the penalty phase, to develop mitigation. There was nothing in the case that gave them any reason to question the defendant's competence or sanity. Mr. Washington maintained his innocence and they maintained that defense for him throughout. (Exhibit D, pp. 106; 116; 118-121).

When specifically asked if he would have considered calling a prior girlfriend who would testify she and the defendant used drugs throughout high school and that he later robbed her (for drug money), Louderback said he would never have put her on as a witness. (Exhibit D, pp. 123-124).

Mr. Louderback agrees that mitigation in the form of habitual drug use is a two-edged sword. There are many crimes (drug possession, thefts, drug sales, etc.) that the jury gets to know about which they otherwise do not get to know about. He says that anyone in the business knows and certainly in Pinellas County, that habitual drug use is looked down on. Also, Mr. Washington was in prison at the time of this offense. Mr. Louderback has no recollection that he had any indication that defendant was using drugs when this crime occurred. If he had had any indication, he would have explored it for mitigation. (Exhibit D, pp. 125-130).

Tom McCoun, a very experienced criminal defense attorney, (see earlier discussion on page 9 for his credentials) and now a Federal Magistrate Judge, was

the lawyer principally responsible for the penalty phase of the trial. He had a standard format he followed for all capital trials and he would have followed it in this case. The public defender was originally appointed and they did some work up with letters going to prisons and schools. He had at least two conversations with the defendant, one in October 1991, and one in March or May of 1992, where they started from "A and went to Z", in terms of "growing up, early years, school, high school, subsequent to high school and so on and so forth." He specifically had notes in his file which reflected defendant told him of being involved with "marijuana, Quaaludes, cocaine, and wine." He didn't get an investigator appointed, as it was his practice to do this work himself. He got the names of family members and friends that might be useful. He talked to the mother, and a sister. He did not talk to the brother, because he was in custody on his own murder charge. He remembered the mother knew of his drug use only second hand. She heard on the street he was involved with it. He did not develop that testimony further. He thought about getting his high school coach, but he was deceased. His notes reflected some names of friends. One was in jail. He talked to some jailers to try to get favorable information as part of his work up. The mother was to try to contact some of the friends. If he had a phone number, he contacted them. He had at least one phone number and would have called. (Exhibit D, pp. 134-145).

He says that his approach to the penalty phase was to develop a picture that would reflect that the person if he were given a life sentence, would be able to survive the prison setting and do well, not be a threat to other people, not do harm to himself or others - possess some potential for rehabilitation. He was trying to "create a picture for the jury that this was a person who could survive in prison lawfully, without hurting other people...." (Exhibit D, pp. 148-149).

He further says "[W]hat I was attempting to do in the penalty phase was to develop some evidence that this person had a useful existence ... and family support, helping his mother, helping his kids, ... had the ability to live within a confined setting and not be harmful to anyone else and that there was some

potential for rehabilitation." (Exhibit D, p. 149).

He further says, "My focus was to try to convince the jury in this case that in spite of the horrendous nature of the facts in this case, that Mr. Washington did not intend to kill the victim...." (Exhibit D, p. 149).

As to developing drug abuse as a mitigating factor, Judge McCoun was asked questions by Mr. Cooks, [sic] counsel for the defendant, Ms. King, counsel for the state, and this court.

He was asked by Ms. King on cross-examination:

> Q. Okay. Well, in Dr. Merin's testimony, after having done this battery of tests and his examination of the defendant, do you think it would have been very beneficial to present this particular jury with evidence of the fact that the defendant may have done drugs while he was in high school?
>
> Judge McCoun answered:
>
> A. You know, we just - looking back at my notes, for instance, of the penalty phase, it seems to me that I may have made some passing mention of it, but it was <u>just not a focus of what I was attempting to do</u>.
>
> I think there are some cases when use of drugs can be a mitigating factor. And I have to say honestly that <u>I don't think that it was a mitigation factor in the circumstance of this case</u>, because we had a defendant who insisted and probably still insists that he didn't commit the offense.
>
> So I don't know that it lends - would have made a difference to the jury, because they recommended life anyway. You would have to see what Judge Schaeffer says about the impact it might have had on her. But I think given the circumstances of this case, <u>that's not the focus of what I was attempting to do</u>. (Exhibit D, pp. 151-152, emphasis added).

Ms. King specifically asked Judge McCoun if he had any reason to think [t]hat the defendant who had been in custody for a year prior to the murder would have had a defense of the use of drugs - even for the penalty phase. He answered "No". (Exhibit D, p. 153).

Mr. Crooks asked Judge McCoun the following question on re-direct examination:

Q. Judge McCoun, once Mr. Washington was convicted and you went into the penalty phase, obviously the goal was to get a jury recommendation of life, which you did successfully. However, this Court, as you are well aware, overrode that jury verdict since Mr. Washington got death.

Would you not have considered it to be an important aspect of his life, if you would, for this Court to have had knowledge of at least, if the drug involvement in fact was much more extensive than just something that he did in high school?

In other words, assuming for a moment that his drug involvement would have started in his mid years in high school and continued essentially, if you would, up through the time that this crime allegedly was committed, would that not have been something that you probably would have wanted to --

Judge McCoun answered:

A. I'm trying to put your question in the context of some notes that I have in the file. The notes that I mentioned - we talked about marijuana, cocaine, Quaaludes and wine. We started at A and went to Z. In other words, we talked about his early upbringing, whether or not there had been any abuse and whether or not there had been any learning disability, so on and so forth, and just kind of worked through the person's life, which would be the way that I would conduct this.

And the notes simply reflect that, uh -

talked about did he have any problems with fighting. He did go to reform school at Okeechobee at age 16 or 17 for fighting. And then it says, "Adult," that he was again hanging around with the wrong crowd - drugs, marijuana, Quaaludes, cocaine and wine. Led to B and E's, robbery one time.

You know, I don't know. At this point, obviously, it's a significant fact. I can just tell you that in my calculus of how I was doing this case - my philosophy is you start winning the penalty phase during the guilt phase. That was always my philosophy. And, frankly, it was fairly successful.

So which would dictate that I would be, try to be consistent with the position that we had taken in the guilt phase. We would want to be consistent. We wouldn't want to suddenly stand up and say, "Okay, forget what we told you in that phase. Now I want you to -" and so in my calculus for this case, that just didn't play a big part because it just didn't jump out that it was a significant point. (Exhibit D, pp. 154-155).

Later this court asked Mr. McCoun the following questions to which he gave the following answers:

Q. You had quite a bit of experience here in Pinellas County handling capital cases or at least cases in which the state was seeking the death penalty, some did and some didn't reach the penalty phase.

Did you find, as a defense lawyer, that telling jurors about a defendant's constant use of drugs could sometimes be a two-edged sword?

A. I think that - and I'll go back to - I didn't articulate it very well in my early answer - I think that when I first started practicing, you used to be able to stand up and say he's got a drug problem, he's got an alcohol problem. And frankly, it was used as a real mitigating factor.

I think over a period time it became less of

one, and frankly it was negative, could be real negative to assert that argument.

Q. It certainly allowed the juries to know about felonies, crimes that they certainly were not permitted under the law to know about, to bring up somebody's drug possession and drug use, is that true?

A. Yes, ma'am.

Q. And the - I think Pinellas County jurors were tough on drug users, at least here in Pinellas County.... Would that be fair?

A. Uh, it's not a positive. It's not a positive, not something that you would want to waive [sic] in front of a Pinellas County jury. (Exhibit D, pp. 156-157, emphasis added).

As to whether or not Judge McCoun followed up on defendant's brother and would have wanted to call the defendant's brother as a witness - a brother who was facing a murder charge, he answered:

A. I think he was facing a murder charge. I think that's reflected in here. I think he was facing a murder charge, and that to me just wasn't a positive, so.....

Q. So, in other words, regardless of whether he could testify about the defendant's drug use and background, it was too dangerous, the fact that a sibling, a family member, was likewise facing a murder charge, to put before the jury?

A. I would not want to. I mean one of the things that we were trying to do was to get a mother who loved him dearly and a mother who said that he loved her and provided support and so on and so forth and - I just didn't want to do anything to cloud up the family picture, which from the mother's perspective looked pretty good. (Exhibit D, p. 159, emphasis added).

Now, the mere fact that the brother had finished his prison term and could have testified does nothing to change this - he had been to prison for murder. He

said the defendant stole from him to get drugs. He says the defendant's father gave upon [sic] him because he would not stop using drugs and would be "on the job and getting high." He says the defendant got violent when he got high. He says the defendant constantly wanted him to send money or bring drugs so that he could do drugs in prison. None of this fit the picture the defense counsel was trying to portray, and did so successfully in the penalty phase before the jury. (Record pages provided earlier in this Order).

In Claim IC, the CCRC says trial counsel was ineffective in the penalty phase for not providing Mr. Washington's mental health expert with adequate background information to permit a meaningful evaluation of Mr. Washington for the presence of mitigation. The only evidence Dr. Sprehe had that Dr. Merin did not have was defendant's extensive drug use that allowed Dr. Sprehe to diagnose the defendant with an emotional disorder called substance dependency disorder and a lesser disorder called substance abuse disorder. In every other aspect, Dr. Sprehe agrees with Dr. Merin's analysis of the defendant.

This one aspect of defendant's life - his serious drug addiction that provides these disorders, carries baggage that a sentencing jury would have to hear that his trial lawyer didn't want them to hear. Judge McCoun didn't want the jury to know the defendant was a drug addict. He didn't want them to know the defendant sold drugs, sometimes making $3,000 per week, robbed his girlfriend and others, and stole from his mother, his brother, and many others, to support his drug habit. He didn't want the Pinellas County jury to know he committed a felony every time he used cocaine, stole a gun, took a lady's purse, committed a burglary, or sold drugs. The totality of all this may not have been considered mitigating by Mr. Washington's jury. Had they known all this, they may well have recommended a death sentence. Counsel cannot be deemed ineffective for not explaining a background of drug addiction and presenting it to Dr. Merin and thus to the jury when he knew this may not produce a good result for his client. <u>He knew about the defendant's drug use - he simply elected not to explore and exploit it because he didn't want to go there</u>. Knowing what juries will accept as mitigating

and what they won't is not ineffectiveness. To the contrary, omitting all this from the jury's knowledge proved to be effective. It got the defendant a life recommendation in a very aggravated case.

The CCRC's investigation into defendant's background produced evidence that the defendant had substantial drug abuse problems that allowed Dr. Sprehe to diagnose an emotional disorder caused by substantial drug abuse. Was defendant's trial counsel required to fully investigate this drug abuse and present it to Dr. Merin? The clear answer from *Strickland v. Washington* is no:

> These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable [sic]; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations, or make a reasonable decision that makes particular investigations unnecessary. In any effectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in light of all the circumstances, applying a heavy measure of deference to counsel's judgments. *Strickland v. Washington* @ 690-691 (emphasis added).

There is a suggestion that defense counsel should have had more than one psychological expert. This court is very familiar with Dr. Merin. He has been used by me as an expert witness in my law practice and has testified in my court on numerous occasions. He is an excellent witness, as is obvious by the result he helped to obtain in this case. Defendant's newly acquired doctor added nothing to what Dr. Merin found except drug dependency which Judge McCoun did not want explored for reasons already expressed. There was no ineffectiveness for not having more than one expert. Dr. Merin was sufficient in every way.

Counsel made a judgment call not to investigate

and present to the jury defendant's drug abuse and possible emotional disorders because of that abuse. His judgment was sound. It was reasonable. It should not be second-guessed.

There is much made in the motion that Mr. Washington was shot, involved in a car accident and suffered dizzy spells. Dr. Sprehe had every opportunity to develop anything that could be developed from this. Nothing was developed.

There is discussion in defendant's motion that a proper investigation would reveal that drugs were readily available at the Largo Work Release Center and that the defendant was using them at the time of the crime. The only person who says drugs were available at the work release center is Mr. Washington to Dr. Sprehe. This same Mr. Washington denies to this very day - to everyone, including Dr. Sprehe, that he was using drugs when this crime occurred.

There is insufficient evidence in this record to find that defendant was using drugs while in prison for the year proceeding the murder and there is no evidence that he was using drugs at the time of the murder. The evidence that does exist as to defendant's drug use at the time of the murder is to the contrary.

In Claim I D, the CCRC says counsel was ineffective for failure to present mitigating evidence. The claim begins "In Mr. Washington's capital penalty phase proceedings, substantial mitigating evidence, both statutory and non-statutory went undiscovered so it could not be presented for the consideration of the judge and jury...."

There was no statutory mitigation developed by the CCRC at the evidentiary hearing ordered in this case.

The additional non-statutory mitigation presented at the evidentiary hearing has already been discussed. And it comes at quite a price. This, too, has already been discussed.

Contrary to defendant's motion, there was no evidence presented at the evidentiary hearing that the state withheld any mitigation from Mr. Washington.

None of Mr. Washington's siblings were called at the evidentiary hearing except his brother, who was back in prison again. He did not talk about any random shootings, or how he or Mr. Washington were terrified for their lives as claimed in defendant's motion.

No teachers were called at the evidentiary hearing, although the defendant claims his trial counsel was ineffective for not doing so.

There was no testimony from Dr. Sprehe or anyone else that Mr. Washington has brain damage, as claimed in the motion.

Contrary to allegations in defendant's motion, none of Mr. Washington's children or their mothers were called to testify at the evidentiary hearing, and no one who did testify at the evidentiary hearing even suggested he was a good father or that he financially supported his children, as his mother had testified at trial in front of the jury (which this court refuted in her sentencing order).

No employers were called at the evidentiary hearing. What did appear from the testimony at the evidentiary hearing is that during the very few years the defendant worked for his father, he was often unreliable on the job because of his drug use. The trial jury heard only uncontroverted testimony that he was a good worker. (This court refuted this in her sentencing order, and the evidence presented at the evidentiary hearing causes this previously uncontroverted evidence to be quite controverted).

No evidence was presented that the defendant had chronic dizzy spells, due to a head injury acquired in an auto accident. In fact there was no evidence of an auto accident or a head injury presented at the evidentiary hearing, although this was claimed in the defendant's motion.

Trial counsel, Tom McCoun, had an overall penalty phase strategy, which he explained at the evidentiary hearing. It worked for the jury. It did not work for the court, who overrode the jury's life recommendation. Had the strategy of the CCRC been employed, I have no doubt the jury would have seen Mr.

Washington in a different light. He would not, in my opinion, have received a life recommendation from the jury.

Trial counsel were not ineffective in the way they decided to present the evidence in the penalty phase. To the contrary, they were quite effective in their choice of mitigation to be presented. It resulted in a life recommendation from the jury.

The Florida Supreme Court has recognized the dilemma that a defendant who insists on claiming his innocence puts on trial counsel at the penalty phase. *Rose v. State*, 617 So.2d 291, 294 (Fla. 1993). Trial counsel here, as did Mr. Rose's trial counsel, touched on drug use at the penalty phase, but did so without totally abandoning his client's claim of innocence. (Exhibit H, pp. 59; 61; 97-99). He cannot now be found ineffective for his decision.

*Strickland v. Washington* @ 689 reminds us that "judicial scrutiny of counsel's performance must be highly deferential....[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." The United States Supreme Court further states in *Strickland* @ 689:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy" .... There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. (Emphasis added)

The Florida Supreme Court has stated, on more than one occasion, that a "jury's recommendation of life imprisonment is a strong indication of counsel's effectiveness." *Francis v. State*, 529 So.2d 670, 672 (Fla. 1988), and other cases cited therein. They have also stated "Bickerstaff's effectiveness in securing a jury recommendation of life imprisonment cannot be overlooked." *Mills v. State*, 603 So.2d 482, 485 (Fla. 1992).

Quite simply put, Mr. Washington received effective representation at his penalty phase. Both the law, and this court's analysis, support this conclusion.

As to Claim G, as it is written, it can be denied. It seems to suggest the sentencing order is incorrect. This could have been raised on appeal and is not cognizant, therefore, in a 3.850 motion. If the CCRC meant to say my original sentence would have been different, I will comment <u>briefly</u>, although it is not necessary to do so to resolve this motion.

If the additional mitigation had been presented to Mr. Washington's sentencing jury, I have little doubt it would have recommended a death sentence. If it had, my job would have been much easier, as the aggravating circumstances far outweigh the mitigating circumstances, developed by both trial counsel and collateral counsel. If the jury had recommended life, which I doubt, not much would have changed in my original sentencing order. I would note the following changes:

> Category 2: Defendant's positive contributions to his community or society, as evidenced by an exemplary work, military, family, or other record. The positive character traits would be less than in the original order. The defendant may have been kind to his mother, but he also stole her very own jewelry to support his drug habits. He was a clear menace to the neighborhood. He was always fighting and was violent when on drugs. He sold drugs in his neighborhood. He stole from his brother and robbed and stole from his friends and others to support his habit. He did not play football, as originally thought. The minimal weight given to

this category in my original sentencing order would lessen, or actually disappear altogether. Therefore, the category would produce no mitigation when taken together as a whole. (Exhibit A, pp. 14-16).

Category 3: Defendant's drug use. I would find the defendant once had a serious drug abuse problem, which would be mitigating. However, I would still find, as I did in my original order, that there was no evidence of any drug use at or around the time of the murder and, therefore, the mitigation of substance abuse, in the context of this murder, was entitled to very little weight. (Exhibit A, p. 16).

Category 4: Defendant's emotional or psychological problems, including defendant's childhood and family background. In discussing the defendant's emotional or psychological problems, I would find that he suffered from an emotional disorder of substance dependency, a disorder brought on by his long-term drug abuse. This may have increased his impulsivity at the time of the murder and rape, his "I don't care" attitude, as suggested by Dr. Sprehe. But, because he was not using drugs when he committed the burglary, rape, and murder, this additional information would still not rise to a mitigating circumstance in the context of the court's entire discussion of this category. (Exhibit A, pp. 16-17).

My conclusion would be the same as it was in my original sentencing order, for all the reasons stated herein and therein: The aggravating circumstances in this case so far outweigh the mitigating circumstances that a sentence of death is so clear and convincing that virtually no reasonable people, <u>armed with all the facts and all the law</u> could differ. (Exhibit A, pp. 22-23).

The above discussion of what my sentencing order might have said is an interesting exercise, but it isn't necessary. In other words, if the defendant could convince this court, which he could not, that the additional evidence presented at the evidentiary hearing would have precluded this court's override,

the defendant is not entitled to relief. If the defendant can convince the Florida Supreme Court that the additional evidence presented at the evidentiary hearing would have resulted in that Court's reversal of this court's override, the defendant is not entitled to relief. The reason is that before the defendant is entitled to any relief, BOTH prongs of the *Strickland* test must be met. *Strickland v. Washington,* 466 U.S. 668, 687, 697 (1984). The defendant has not been able to establish either prong, but he clearly has failed to establish the first prong, that trial counsel's performance was deficient. To do this, he must have established that counsel made "errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington,* 687. This he simply has been unable to do. The defendant had effective counsel at the penalty phase of his trial.

Washington now appeals.

## SUMMARY OF THE ARGUMENT

ISSUE I: The lower court correctly denied relief on the claim that trial counsel rendered ineffective assistance at the penalty phase. Judge Schaeffer's order thoroughly explained that counsel's actions and decisions were competent ones which successfully achieved a life recommendation and the alternative now suggested by second-guessing collateral counsel probably would have been less successful with the jury. Counsel was neither deficient nor did counsel's actions result in prejudice under the Strickland standard. Relief must be denied.

ISSUE II: The lower court correctly denied relief summarily on the claim of ineffective assistance of counsel at the guilt phase. The claim on appeal should not be addressed because appellant did not present to the lower court in his 3.850 motion or at the Huff hearing the current assertion that counsel should have requested a Frye hearing. It is merely an appellate afterthought after rejection of his other claims. Alternatively, the contention is meritless. Counsel acted as able advocates in litigating Washington's trial and there is neither deficiency nor resulting prejudice.

ISSUE III: The lower court correctly summarily denied relief. The contention that the court failed to give great weight to the jury recommendation - basically an attack on the court's jury override - is not cognizable in a post-conviction motion. This

Court approved the sentencing order on direct appeal.

ISSUE IV: Any challenge to the validity of jury instructions must be asserted on direct appeal; thus any challenge now is procedurally barred since such challenges were or could have been made previously.

ISSUE V: The challenge to an allegedly unconstitutionally automatic aggravating circumstance must be raised on direct appeal and is procedurally barred now. Alternatively, the claim is meritless.

ISSUE VI: The claim of cumulative error is barred and meritless.

ISSUE VII: The challenge to the constitutionality of the capital sentencing statute is procedurally barred and not cognizable collaterally. It is also meritless.

## ARGUMENT

## ISSUE I

**WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT PENALTY PHASE.**

### A. Ineffective Counsel at Penalty Phase for Failure to Present Mitigating Evidence

Initially, it would be appropriate to remember some general principles and presumptions governing performance that aid courts in assessing claims of ineffective assistance under the Sixth Amendment. In Chandler v. United States, 218 F.3d 1305, 1313-1319 (11th Cir. 2000)(en banc), cert. denied, ___ U.S. ___, 149 L.Ed.2d 129 (2001) the court summarized the following reminders:

(1) The purpose of ineffectiveness review is not to grade counsel's performance. Trial lawyers in every case could have done something more or different, so omissions are inevitable. The issue is not what is possible or prudent or appropriate but only what is constitutionally compelled.

(2) The burden is on petitioner to prove that counsel's performance was unreasonable; he must establish that particular and identified acts or omissions of counsel were outside the wide range of professionally competent assistance.

(3) Judicial scrutiny of counsel's performance must be highly deferential, courts must avoid second-guessing counsel and the fact that a particular defense ultimately proved to be

unsuccessful does not demonstrate ineffectiveness.

(4) Counsel cannot be adjudged incompetent for performing in a particular way in a case so long as the approach taken might be considered sound trial strategy. Petitioner's burden of persuasion is a heavy one.

(5) The reasonableness of a counsel's performance is an objective inquiry. The relevant question is not whether counsel's choices were strategic, but whether they were reasonable. See Roe v. Flores-Ortega, ___ U.S. ___, 145 L.Ed.2d 985 (2000) (The relevant question is not whether counsel's choices were strategic, but whether they were reasonable). And counsel's admissions in a post-conviction hearing that his performance was deficient matters little. The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted in the circumstances as defense counsel acted at trial. A petitioner must establish that no competent counsel would have taken the action counsel did take.

(6) When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger. The point is that experience is due some respect.

(7) A reviewing court must avoid using the distorting effect

of hindsight and must evaluate reasonableness from counsel's perspective at the time. The proper inquiry was articulated in Rogers v. Zant, 13 F.3d 384, 388 (11th Cir. 1994): "Once we conclude that declining to investigate further was a reasonable act, we do not look to see what a further investigation would have produced."

(8) No absolute rules dictate what is reasonable performance for lawyers.

(9) No absolute duty exists to investigate particular facts or a certain line of defense. Counsel's conducting or not conducting an investigation need only be reasonable to fall within the wide range of competent assistance. And counsel need not always investigate before pursuing a line of defense. Investigation (even a non exhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. A lawyer can make a reasonable decision that no matter what an investigation might produce, he wants to steer clear of a certain course. Rogers v. Zant, 13 F.3d 384, 387 (11th Cir. 1994).

(10) Because the reasonableness of counsel's acts depends critically on information supplied by petitioner or petitioner's own statements or actions, evidence of a petitioner's statements and acts in dealing with counsel is highly relevant to effective assistance claims.

(11) Counsel is not required to present every non frivolous defense, nor is counsel required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy. Considering the realities of the courtroom more is not always better. Stacking defenses can hurt a case. Good advocacy requires winnowing out some arguments and witnesses to stress others.

(12) No absolute duty exists to introduce mitigating or character evidence. This should not be confused with the fact that a petitioner has a right to present mitigation at the sentencing phase free of governmental interference with the presentation of evidence.

Appellant argues in essence that he presented testimony below pertaining to drug usage and that this Court has recognized in some contexts that drug use can be mitigating. This is not a direct appeal nor the continuation of a direct appeal. Washington had a direct appeal and this Court affirmed the judgment and sentence of death that was imposed in accordance with Tedder v. State, 322 So. 2d 908 (Fla. 1975). Washington v. State, 653 So. 2d 362 (Fla. 1995). This Court's affirmance was not an interlocutory ruling nor made by an intermediary court. His attempt to suggest that the mere discovery and presentation of more or other evidence ipso facto entitles him to relief should be rejected. The Court in

Spinkellink v. Wainwright, 578 F.2d 582, 604-605 (5th Cir. 1978) in another context repudiated the notion that federal courts should analyze whether other convicted murderers equally or more deserving to die had been spared, noting that "[t]he process would be never-ending and the benchmark for comparison would be chronically undefined." Id. at 605. Both this Court and the Eleventh Circuit Court of Appeals have rejected the mechanistic approach that the presence of a life recommendation followed by additional mitigation evidence produced collaterally compels a conclusion of trial counsel ineffectiveness. See, e.g. Porter v. State, 478 So. 2d 33, 35 (Fla. 1985); Porter v. Singletary, 14 F.3d 554 (11th Cir. 1994) (rejecting a claim that counsel failed to sufficiently investigate and present evidence of a difficult childhood and family relations when such mitigation would have included an extensive criminal record); Routly v. State, 590 So. 2d 397 (Fla. 1992) (speculative that judge or jury would have considered evidence as a whole mitigating); Routly v. Wainwright, 33 F.3d 1279, 1297 (11th Cir. 1994); Mills v. State, 603 So. 2d 482 (Fla. 1992); Mills v. Singletary, 161 F.3d 1273, 1286 (11th Cir. 1998).

Rather, the inquiry now is whether trial counsel failed to satisfy the two-prong test of Strickland v. Washington on a claim of constitutionally ineffective assistance, i.e. whether his performance was deficient (errors so serious that counsel

was not functioning as the counsel guaranteed the defendant by the Sixth Amendment) and whether the deficient performance prejudiced the defense (a showing that the errors were so serious as to deprive the defendant of a fair trial, i.e., a trial whose result is reliable).

At the evidentiary hearing the testimony established that attorney Louderback had been admitted to practice in 1975, his practice had evolved into pretty much a completely criminal defense practice in 1980. He had tried about twenty-five first degree murder cases and was involved in twice that many. Prior to the Washington case he had tried at least a dozen cases that involved a second phase and Mr. McCoun was in at least as many or more (R V, 791-793). Louderback had discussed with his client his background for purposes of penalty phase and trial preparation; he was aware of his mother, siblings and inquired about other people who might have been friends, relatives, neighbors. Appellant was examined by Dr. Merin and the typical procedure would be to talk to Merin or provide him with information that he may have requested so that he had an overview at the time he met with the client, and of looking for penalty phase matters they would tell Merin they were looking for mitigation type things. The witness testified that it would depend on the case whether participation in drugs would be one of the areas to evaluate (R V, 794-796). He did not recall how

many witnesses they may have talked to (R V, 800-801) and added that he only got a portion of his file back - about one fourth of the total file - after it had been shipped over to CCR (R V, 808).

Louderback also testified that he had asked for the appointment of Mr. McCoun as co-counsel [they asked for the appointment of a confidential expert to study DNA] and that as was customary whatever attorney argued the guilt phase the other would do penalty phase so as not to lose credibility with the jury following the guilt-innocence determination. His sentencing memorandum included a suggestion urging the court to consider for mitigation Washington's drug history (R V, 804-805).[1]

Louderback stated that appellant's mother was reluctant to appear; she made a statement to the effect she was tired of traveling around the state and being a witness in her sons' penalty phase proceedings which is when they became aware that there was a brother either on death row or who had been subject to penalty phase proceedings in another circuit. It is not unusual in penalty phase proceedings that parents are unwilling to appear. Louderback acknowledged that bringing to a jury's attention the fact of perpetual drug use is sometimes a two-edged sword and here there was the additional fact that at the

[1] See sentencing memorandum at DAR 1534.

time of the crime Washington was an inmate at a work release center and was not a person at liberty on the street. When you admit a defendant's drug use the jury is hearing of other criminal activity they would otherwise not get to hear. It can be dangerous for the defense to use drugs (R V, 813-814):

> "Anybody that's in this business knows that juries in general tend to look down on drug use and drug use and drug use." (R V, 814)

Louderback had no recollection that it was indicated by Washington or any one else that he was using drugs that day and it is a reasonable assumption that Washington didn't tell him that (R V, 817-818). They maintained the position throughout of their client that he was innocent (R V, 809) and with the testimony of appellant's mother and Dr. Merin, the strategy worked in getting a life recommendation (R V, 811). Louderback was adamant that he would have never used a witness like Washington's prior girlfriend who stated that Washington had even robbed her (R V, 812; R V, 755, 764).

Co-counsel Tom McCoun, currently a United States Magistrate Judge in the Middle District of Florida, was admitted to the Florida Bar in 1977, served as a prosecutor for three years and did predominantly criminal defense work after that. At the time of this trial in 1992 he had participated in twenty to thirty first degree murder cases and participated in all the penalty phases in those cases (R V, 822-823). He testified that

Washington's asserting his innocence would affect what he might do with any information he may have been given about drug use. His files reflect he had a conversation with appellant in October of 1991 and does not reflect on drug use. In a later conversation in March or May of 1992 there is mention in the notes of marijuana, Quaaludes, cocaine and wine. He did not recall using an investigator because it was his practice to go himself and try to develop witnesses, i.e. to talk to people himself and evaluate whether or not he thought they might be useful (R V, 826-828). McCoun recalled having problems hooking up with appellant's mother - her information regarding drug use was second hand (she heard on the street he was involved in it) so he would have talked to her. They did not speak to a brother who was pending prosecution but he spoke to the mother and sisters. They considered using a coach but he was deceased. They wouldn't have held back on any witnesses (R V, 830-831) and his practice would have been to contact the witnesses listed in his file (R V, 833).

McCoun confirmed the practice of defense counsel was to separate the guilt phase from penalty phase and that they used Dr. Merin in the latter phase (R V, 835). McCoun explained that his approach in penalty phase was to develop a picture that the client could survive in a prison setting without being a threat to other people, with potential for rehabilitation. McCoun

wanted to show Washington had a useful existence and family support and despite the horrendous nature of the crime, he did not intend to kill the victim but only to render her unconscious like another victim. His notes reflect he made a passing mention that he may have done drugs but it was not a focus of what McCoun was attempting to do. McCoun did not think it was a mitigating factor in this case because they had a defendant who insisted he did not commit the offense, it wouldn't have made a positive difference to the jury since they recommended life and McCoun had no reason to think there was a drug defense available even for penalty phase (R V, 837-841). McCoun's philosophy was to start the penalty phase during the guilt phase - which had proven successful - and that would dictate trying to be consistent with the position taken in the guilt phase. He would not want to stand up and tell the jury "to forget what we told you earlier in the guilt phase". Thus, drugs didn't jump out as a significant point (R V, 842-843). McCoun further explained the two-edged nature of drug use - early in his practice it was a real mitigating factor to say a defendant had a drug or alcohol problem but over a period of time it became less and less so and could be a real negative to assert that argument. It allowed juries to know about felonies and additional crimes they would not have been permitted under the law to know about. It is not something you want to wave in

front of a jury (R V, 844-845). McCoun's notes did not reflect any mention by Washington he was using drugs while in the prison system. Moreover, to use a drug defense you need to admit the crime but explain that it was done while high on drugs and inconsistent defenses don't sell very well (R V, 845-846). He would have written down any names the defendant gave him as a possible witness; he didn't follow up on the brother because he thought he was facing a murder charge and "that wasn't a positive". He would not want to put before a jury that a sibling was also facing a murder charge. McCoun was trying to develop a mother who loved him dearly and provided support and he didn't want to cloud the family picture which looked pretty good (R V, 847). The record reflects that at penalty phase the defense called as witnesses appellant's mother, Dr. Merin and Dr. Joan Wood (DAR 1695-1741).

As Judge Schaeffer's order denying relief explains, trial counsel at penalty phase attempted to develop a picture reflecting that if Washington were given a life sentence he would do well in that setting, not be a threat to other people or do harm to others and himself and he possessed some potential for rehabilitation (R II, 298). Counsel would not want to "do anything to cloud up the family picture, which from the mother's perspective looked pretty good" (R II, 301) by using a brother who had been in prison for murder who could relate the defendant

stole from him to get drugs, that his father gave up on him because he would not stop using drugs and would be on the job getting high.[2] None of that fit the picture counsel would want to portray (R II, 301). The courts have declined to find trial counsel ineffective in other cases where counsel similarly chose or would have been faced with an unattractive alternative that would have damaged or destroyed the more successful option that was utilized. See, e.g. Glock v. Moore, 195 F.3d 625 (11th Cir. 1999), cert. denied, ___ U.S. ___, 148 L.Ed.2d 150 (2000) (much of the evidence at the collateral hearing of abuse by mother was cumulative to that presented at trial; that which was non-cumulative pertaining to abuse by stepmother would not have changed the result). The Court in Glock noted that counsel's strategy to show his client was a good candidate for rehabilitation included as a key component the stepmother as the cornerstone of the loving and supportive family scenario. Id. at 637. The contention on collateral review that counsel should have presented evidence of abuse by the stepmother was rejected. The more evidence of abuse he presented, the less likely the court would have found he was a good candidate for rehabilitation potential. Id. at 638. Although trial counsel Trogolo may not have been aware of any of the abusive stepmother evidence since introduction of that evidence would have meant

[2] Dexter Washington testified that he had been to prison on a murder charge and had gotten out in 1989 or 1990 (R V, 894).

the exclusion of the supportive family evidence his track would continue to be a reasonable strategy (citing Bertolotti v. Dugger, 883 F.2d 1503, 1519 (11th Cir. 1989)). Id. at 640. The court concluded:

> "Petitioner likely would have fared worse at trial if he had been able to pursue the strategy for which he now argues."
>
> (Id. at 640)

Accord, Housel v. Head, 238 F.3d 1289 (11th Cir. 2001) (Even when counsel's investigation is less complete than collateral counsel's, trial counsel has not performed deficiently when a reasonable lawyer could have decided in the circumstances not to investigate). A showing of alcohol and drug abuse is a two-edged sword which can harm a capital defendant as easily as it can help him at sentencing. Waldrop v. Jones, 77 F.3d 1308, 1313 (11th Cir. 1996); Tompkins v. Moore, 193 F.3d 1327, 1338 (11th Cir. 1999); Cade v. Harley, 222 F.3d 1298 (11th Cir. 2000); Rogers v. Zant, 13 F.3d 384 (11th Cir. 1994) (when there is a tactical reason for forgoing an intoxication defense such as maintaining credibility in the jury's eyes, counsel is not ineffective in doing so); Hill v. Moore, 175 F.3d 915, 926 (11th Cir. 1999) (counsel not ineffective for failing to pursue evidence of history of drug and alcohol abuse since none of it so compelling that it would have changed the result of the proceedings); Duren v. Hopper, 161 F.3d 655, 662 (11th Cir.

1998) (counsel's tactical decision not to use chronic drug use because it would be perceived by jury as inconsistent with strategy of appealing to jury for mercy based on unfortunate childhood approved; noting that a weak defense is not made strong merely by its presentation to the jury); Funchess v. Wainwright, 772 F.2d 683, 689 (11th Cir. 1985) (reasonable to elect not to present mitigating factors which imply guilt but attempt to excuse culpable conduct when maintaining innocence). See also Atwater v. State, ___ So. 2d ___, 26 Fla. L. Weekly S395 (Fla. 2001) (defense counsel competently and properly made a strategic decision to argue the facts showed acts constituted second-degree and not first-degree murder; counsel properly attempted to maintain credibility with the jury by being candid as to the weight of the evidence; also evidentiary hearing held properly denied where personal and family history presented was put on through expert witness Dr. Merin); Waterhouse v. State, ___ So. 2d ___, 26 Fla. L. Weekly S375 (Fla. 2001) (approving summary denial of post-conviction motion and reaffirming that a post-conviction movant bears the responsibility of alleging specific facts which demonstrate a deficiency in performance which prejudiced the defendant; rejecting effort to relitigate the same issue using different words previously resolved on direct appeal).

In the instant case Judge Schaeffer found that this aspect

of appellant's life - drug use - carried baggage that a jury would have to hear, i.e. drug use, that he sold drugs sometimes making $3,000 per week, that he robbed his girlfriend and others and stole from his mother, brother and others. Counsel cannot be deemed ineffective for not explaining appellant's background of drug use to Dr. Merin or jury when he knew this might not produce a good result for his client. He knew about drug use and simply elected not to explore and exploit it because he didn't want to go there, knowing what juries will and will not accept as mitigating (R II, 301). Omitting this from the jury's knowledge proved effective, it achieved the life recommendation (R II, 302). See Porter v. Singletary, 14 F.3d 554 (11th Cir. 1994) (counsel's decision not to introduce family background evidence at sentencing to avoid introduction of defendant's extensive criminal history evidence was a reasonable tactical choice entitled to deference).[3] See also Clisby v. Alabama, 26 F.3d 1054, 1056 (11th Cir. 1994) ("Precedents show that many lawyers justifiably fear introducing evidence of alcohol and drug use"); Rogers v. Zant, supra, at 387-388 ("No evidence in the record shows that the lawyers' worries about the counter productive nature of a drug-based defense ... were unrealistic.

[3] As noted in Judge Schaeffer's sentencing order of September 4, 1992 (DAR 1572-1594) the court had the benefit of a defense sentencing memorandum (DAR 1530-36), a defense supplemental sentencing memorandum (DAR 1553-56) and a pre-sentence investigative report (DAR 1595-1600).

Counsel could have reasonably believed that Rogers' drug use as a defense would have (1) damaged their own credibility as advocates of good sense before the ... jury; (2) drawn attention away from other kinds of evidence and argument that the lawyers thought might be better received; and (3) at worst, been perceived by the jury as *aggravating* instead of mitigating."); White v. Singletary, 972 F.2d 1218, 1225-26 (11th Cir. 1992); Waldrop v. Jones, 77 F.3d 1308, 1313 (11th Cir. 1996).

Appellant criticizes trial counsel and, of course, Judge Schaeffer for the decisions trial counsel made and with 20/20 hindsight pontificates that drug use should have been presented at the Spencer hearing. Appellee would note that the sentencing order was filed in September of 1992, prior to this Court's instruction in Spencer v. State, 615 So. 2d 688 (Fla. 1993). Counsel need not anticipate future developments in the law and this Court has acknowledged that Spencer is not to be given retroactive effect. See, e.g. Armstrong v. State, 642 So. 2d 730, 738 (Fla. 1994); Pittman v. State, 646 So. 2d 167, 172 (Fla. 1994).

**B. Counsel's Use of Dr. Merin and Alleged Failure to Provide Him with Information about Appellant's Drug Use**

At the penalty phase of trial, trial defense counsel presented the testimony of clinical psychologist Sidney J. Merin (DAR 1695-1722). Merin conducted a three part psychological

evaluation which included taking a history, observing the individual as he takes the history, and administering a battery of psychological tests (DAR 1699). Washington's average IQ range extended from 90 to 109, a level of potential approaching that of an average college individual (DAR 1706-1707). There was no evidence of psychosis or schizophrenia or paranoidal delusion (DAR 1708). Merin described appellant as a weak or dependent personality, a big bully who developed a "reaction formation". In the neighborhood the environment lent itself to acting tough, "you better be tough or you didn't exist" (DAR 1709-10). He had a conduct disorder, not a full blown sociopathic personality and it is not unexpected that he would handle things with denial (DAR 1713-14). Washington is more of an opportunist, and capable of developing a conscience (DAR 1715-16). He had no mental problem; it is of a behavioral nature (DAR 1719). Both attorneys Louderback and McCoun testified they had retained a competent expert in Merin (R V, 809; 835-36).[4] Defense witness psychiatrist Daniel Sprehe testified at the evidentiary hearing that Washington told him he sold and used drugs and opined that appellant had a substance

[4] The state indicated surprise at the conclusion of the evidentiary hearing that Dr. Merin had not been called after CCR initially had related it would be using Dr. Merin as a witness (R VI, 896). The court indicated uncertainty as to whether Merin would be needed but that should it become so she would request his testimony (he was at that time unavailable) (R VI, 896-97).

dependency disorder (R V, 850-52; 856). Sprehe admitted that he had not talked to Merin but agreed with Merin that Washington did not suffer from any brain impairment which would interfere with his ability to reason in any way. He agreed there was no psychosis, no break with reality, no fantasies or delusions (R V, 859-860). Sprehe did not know whether Washington gave Merin the same information he gave him. Appellant told him he bought the watch and wasn't at the crime scene; he was pretty sure he was clear-headed at the time and not high so he knew where he was (not in that neighborhood). As to the rape a week later (see testimony of Mary Beth Weigers at penalty phase - DAR 1682-89) Washington admitted to Sprehe as to the intercourse with her twice for pay and denied choking her to unconsciousness (R V, 862).

Sprehe agreed that it would take some planning to arrive at the location of the two crime scenes from the work release center, drugs weren't interfering with cognitive ability. Sprehe had no information from any source other than appellant about using drugs while in the work release center (R V, 863-64). Sprehe was not aware that the jury in considering aggravating factors was not permitted to hear about non-violent crimes and Sprehe agreed with Merin's conclusions, aside from Merin not developing substance abuse (R V, 868-70).

Judge Schaeffer noted that the substance abuse disorder

approach "carries baggage that a sentencing jury would have to hear that his trial lawyer didn't want them to hear." McCoun didn't want the Pinellas County jury to know he committed a felony every time he used cocaine, stole a gun, took a lady's purse, committed a burglary or sold drugs. The totality of all this may not have been considered mitigating by the jury and had they known this they may well have recommended a death sentence (R II, 301). Judge Schaeffer added:

> "This court is very familiar with Dr. Merin. He has been used by me as an expert witness in my law practice and has testified in my court on numerous occasions. He is an excellent witness, as is obvious by the result he helped to obtain in this case. Defendant's newly acquired doctor added nothing to what Dr. Merin found except drug dependency which Judge McCoun did not want explored for reasons already expressed. There was no ineffectiveness for not having more than one expert. Dr. Merin was sufficient in every way." (R II, 302)

Also, the lower court observed regarding the suggestion that drugs were readily available at Largo Work Release Center and that Washington was using them at the time of the crime:

> "The only person who says drugs were available at the work release center is Mr. Washington to Dr. Sprehe. This same Mr. Washington denies to this very day - to everyone, including Dr. Sprehe, that he was using drugs when this crime occurred.
>
> There is insufficient evidence in this record to find that defendant was using drugs while in prison for the year proceeding the murder and there is <u>no evidence</u> that he was using drugs <u>at the time of the murder</u>. The evidence that does exist as to defendant's drug use at the time of the murder is to the contrary" (R II, 302-303).

To the extent that appellant is urging what Dr. Merin's testimony would have been at penalty phase, that is highly speculative especially since collateral counsel declined to call Dr. Merin at the evidentiary hearing. Moreover, it is speculative and collateral counsel hypothesizes that Washington would have told Merin what he subsequently told Sprehe, the mental health expert retained by collateral counsel. Dr. Sprehe testified that he had not talked to Dr. Merin (R V, 859) and didn't know if Washington gave Merin the same information he gave to Sprehe (R V, 860). Dr. Merin testified at penalty phase about taking a history from appellant, observing him as he took a history and administered a battery of psychological tests (including Revised Beta, Clinical Analysis Questionnaire, MMPI-2, Peabody Picture Vocabulary, Sentence Completion, Thematic Apperception, Wonderlic Personality) (DAR 1699-1705). Merin found him to be a weak, dependent personality (DAR 1709). Appellant indicated to Dr. Merin that he had not done the things he was charged with (DAR 1714). As to Washington's denials, "Intellectually he knows, but in order to reveal that to me or, perhaps, to even his attorneys is to admit to a defect, to admit to a fault, admit to a weakness which characteristically is not typical of him" (DAR 1720). Obviously, appellant's self-serving statements to Dr. Sprehe concerning the paid consensual intercourse with rape victim Weigers (R V, 862-63) was not a

view accepted by Mary Beth Weigers (DAR 1685-88). He strangled her to unconsciousness twice, whether willing to admit that to Dr. Sprehe or not.

**C. Sentencing Court's Failure to Find and Apply Mitigating Evidence**

In his final subsection appellant appears to renew Claim I G in the lower court - an assertion that the sentencing court violated the Eighth Amendment since there was ineffective presentation of mitigation evidence. Judge Schaeffer properly rejected this contention (R II, 305-306). The court noted that to the extent it suggests the sentencing order was incorrect, the claim could have been raised on direct appeal and is not cognizable in a 3.850 motion. Judge Schaeffer then commented on the suggestion that her original sentence would have been different (although it was not necessary to do so to resolve the motion).

Judge Schaeffer prefaced here remarks by observing that if the additional mitigation had been presented to the jury she had little doubt it would have recommended a death sentence and if it had her job would have been easier as the aggravating circumstances far outweigh the mitigating circumstances developed by both trial and collateral counsel. If the jury recommended life - which she doubted - not much would have changed in the original sentencing order. Then she noted the changes in categories 2, 3, and 4 (R II, 305). She added:

> "My conclusion would be the same as it was in my original sentencing order, for all the reasons stated herein and therein: The aggravating circumstances in this case so far outweigh the mitigating circumstances that a sentence of death is so clear and convincing that virtually no reasonable people, armed with all the facts and all the law could differ. (Exhibit A, pp. 22-23)" (R II, 306).

Judge Schaeffer further noted that this discussion was not necessary because to prevail on the claim of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984) appellant must demonstrate both prongs, i.e. that counsel's performance was deficient (errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment) and that deficient performance prejudiced the defense (a showing that counsel's errors were so serious as to deprive the defendant of a fair trial , a trial whose result is reliable). Washington failed to establish either prong (R II, 306).[5]

[5] Appellant challenges the lower court, pointing to Dr. Sprehe's testimony about drug use at the Largo Center (R V, 855). Sprehe stated that Washington told him that. Sprehe also testified on cross-examination that appellant told him he bought the watch and wasn't at the murder scene, he was pretty sure he was clear headed at the time and was not high, he knew where he was and was not in that neighborhood (R V, 861-862). Drugs weren't interfering with cognitive ability and Sprehe had no information from any source other than appellant that he was using drugs while in the work release center (R V, 864). Neither attorney - Louderback or McCoun - had any indication Washington may have used drugs that day (R V, 817-18; 841). Judge Schaeffer's statement that there was no evidence that he was doing drugs at the time of the murder (R II, 303) remains correct.

Appellant simply is attempting in this subsection to reargue the correctness of the jury override previously approved by this Court on direct appeal. He may not relitigate it based on Keen v. State, 775 So. 2d 263 (Fla. 2000). See Mills v. Moore, ___ So. 2d ___, 26 Fla. L. Weekly S242, 245 (Fla. 2001) ("Keen is not a major constitutional change or jurisprudential upheaval of the laws as it was espoused in Tedder. Keen offers no new or different standard for considering jury overrides on appeal. Thus, we disagree with Mills' contention that Keen offers a new standard of law and we reject the contention that Keen was anything more than an application of our long-standing Tedder analysis. Tedder is the seminal case in Florida on jury overrides and remains so after Keen. Tedder was applied to this case. Keen provides no basis for our reconsideration of this issue.").

Appellant criticized Judge Schaeffer's brief comment in dicta but his quote at page 35 of his brief from R II, 305 omits the language at the end of the sentence "in the context of the court's entire discussion of this category (Exhibit A, pp. 16-17)." A review of the original sentencing order on those pages reiterates that even if drug abuse had been established the fact that he was not on drugs when the murder occurred would afford the mitigator very little weight (DAR 1587). Sprehe continued to agree with Merin on the remainder of Washington's

profile, i.e. that appellant is an opportunist and bully with no psychosis, schizophrenia or paranoid delusions. Preying on the weak is not mitigating (DAR 1588).[6]

In conclusion, the judge who presided over the 3.850 motion was the same judge who presided at trial and imposed the death sentence. The judge's finding that the failure to present additional evidence at the sentencing phase had no effect on the sentence is entitled to considerable weight. Routly v. State, 590 So. 2d 397, 402 (Fla. 1991); Francis v. State, 529 So. 2d 670, 673 n. 9 (Fla. 1988) ("who, better than he, could determine whether failure to introduce this evidence prejudiced Francis sufficiently to meet the Strickland v. Washington test? Post-conviction relief motions are not abstract exercises to be conducted in a vacuum, and this finding is entitled to considerable weight.").

Additionally, this Court has consistently observed that counsel's effectiveness in securing a jury recommendation of life imprisonment cannot be overlooked. Mills v. State, 603 So.

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[6] Appellant indicates that Judge Schaeffer misstated counsel's testimony in her sentencing order (Brief, pp. 37-38). She did not. Attorney Louderback was emphatic that he "would never have put somebody like that [the prior girlfriend whom appellant later robbed] as a witness" (R V, 812). Whether current counsel agrees with the approach or tactics of counsel Louderback and McCoun is totally irrelevant. They are not ineffective simply because subsequent counsel in hindsight would have done something more or different.

2d 482, 485 (Fla. 1992)[7]; Francis, supra at 672; Lusk v. State, 498 So. 2d 902, 905 (Fla. 1986); Buford v. State, 492 So. 2d 355, 359 (Fla. 1986); Douglas v. State, 373 So. 2d 895, 896 (Fla. 1979); State v. Bolender, 503 So. 2d 1247 (Fla. 1987).

This Court has affirmed the denial of post-conviction relief in similar cases. For example, in Grossman v. Dugger, 708 So. 2d 249 (Fla. 1997) this Court affirmed the trial court's denial of post-conviction relief in an ineffective assistance of counsel at penalty phase claim despite the claim that counsel did not use thirty-three mitigation witnesses provided by the defendant since counsel did not want to use witnesses who had not seen the defendant in years and would say that he was into stealing and heavy drug use but who did call three mitigation witnesses in addition to defendant's mother who had close contact with him in recent years. See also Rivera v. State, 717 So. 2d 477 (Fla. 1998) (trial counsel's failure to use evidence of defendant's voluntary intoxication at the time of the offense was not ineffective assistance where defendant continually and consistently maintained his innocence and professions of innocence short-circuited any reliable voluntary intoxication

[7] The Court in Mills distinguished Stevens v. State, 552 So. 2d 1082 (Fla. 1989) because counsel there in addition to making no investigation of Stevens' background, presented no mitigating evidence, made no argument to the jury on his client's behalf, and misrepresented Stevens' background and criminal record to the trial judge. Here, Washington's counsel made reasonable investigation and decided to pursue other matters.

defense during the guilt phase); Asay v. State, 769 So. 2d 974 (Fla. 2000) (trial counsel not ineffective where he conducted a reasonable investigation into mental health evidence simply because defendant has now secured the testimony of a more favorable mental health expert; nor is counsel ineffective for failure to investigate and present other mitigation since it would have opened the door to testimony of his violent past).

The lower court properly rejected appellant's claim of ineffective assistance of counsel at the penalty phase and this Court should affirm.

## ISSUE II

**WHETHER THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE.**

Appellant next argues that the lower court erred in denying relief on Claim I(B)(a) in the amended Rule 3.850 motion. Judge Schaeffer denied relief, explaining:

> a) Crime Scene Investigation
>
> Defendant asserts his counsel should have better investigated the state's version of the crime scene evidence, including the integrity of the crime scene. The problem with this assertion is that regardless of the integrity of the crime scene, the defendant proposes no plausible explanation of how pubic hairs matching his got in the victim's residence, on or about the victim's vagina, or how semen matching his got inside the victim's vagina, or how he came to possess the victim's watch which was stolen from the

victim's residence, and sold by defendant to a co-worker the day following the murder.

The defendant's counsel took depositions of the state's witnesses. (See Index to Record on Appeal, attached, Exhibit E). They explored weaknesses in the state's case in front of the jury, including attacking the testimony of the hair analyst and the DNA expert. Trial counsel pointed out to the jury that neither hair evidence, nor DNA is an exact science that can conclude either the hair or the semen belongs to defendant to the exclusion of all others. (See Original Record on Appeal, excerpts attached, pp. 2420-2421; 2430-2431; 2454-2455; 2510-2511; 2516-2517; 2604-2605; 2607-2610; 2653-2656; 2658-2660, Exhibit F).

Defendant asserts trial counsel failed to investigate leads regarding other potential suspects. However, he fails to suggest how following up other leads to other suspects would change the evidence that defendant's hair and semen were found, and that defendant had the victim's stolen watch and sold it. In other words, there is no showing that such pursuit would have probably changed the result of the verdict.

Defendant suggests that an independent hair analyst could have "rebutted" Ms. Hildreth, the state's hair expert's, testimony that "hairs are not a positive identification and that there could be more than one person with similar hair." Quite to the contrary, that is exactly what <u>any</u> hair analyst would have concluded, as did the state's expert, Ms. Hildreth. (Exhibit F, pp. 2420-2421; 2430-2431; 2454-2455). This is exactly the testimony the defendant's counsel wanted, and no hair expert would have "rebutted" it, nor would any competent defense attorney want that testimony "rebutted." <u>It should be noted that the CCRC makes no allegations that another expert would refute the trial evidence that the pubic hairs found at the scene of the homicide, on or about the victim's vagina, matched the known pubic hairs of Mr. Washington.</u>

As to an independent DNA expert, defendant's trial counsel made a motion for a confidential DNA expert, which was granted. (Exhibit F, pp. 324-326,329). Trial counsel obviously made use of their confidential

expert. (Exhibit F., p. 2385). Trial counsel deposed the state's expert, FBI DNA laboratory supervisor, Dwight Adams, who testified at trial and was cross-examined at great length by trial counsel. Mr. Adams testified on cross-examination that DNA matching is not a positive means of identification, such as fingerprint evidence would be, but it simply matched Mr. Washington's known DNA. (Exhibit F, 2510-2511; 2516-1517).

Defense attorney now suggests that trial counsel was ineffective because he never sought to "rebut" this testimony with an independent analysis and DNA expert. Effective trial counsel would not want to "rebut" this testimony and no independent expert would do so. This is exactly what trial counsel wanted the jury to understand. Counsel was not ineffective for making sure the jury knew that DNA was not a positive method of identification to the exclusion of all others. It should be noted that the CCRC makes no allegation that another expert would refute the trial testimony that the DNA from the vaginal swabs of the victim's vagina matched the known DNA of Mr. Washington.

As to the court's refusal to allow defense counsel to depose Anne Baumstork [sic], and to further allow Agent Adams to testify before the jury, these rulings were made pre-trial, and at trial, and were raised on appeal and rejected. They are not, therefore, proper for this motion.

Defendant suggests trial counsel was ineffective for failing to get an independent pathologist. However, as to those issues in the motion that deal with death penalty issues, the matter is moot since the jury recommended life. As to those issues which defendant raises which suggest time of death could have been challenged with an independent pathologist, defendant's trial counsel used the state's own pathologist quite adequately to argue that the time of death supported defendant's claim of innocence. Dr. Wood, the Medical Examiner, said the time of death was two hours either side of 8:00 a.m., most likely closer to 10:00 a.m. (Exhibit F, pp. 1663-1668). The testimony at trial established that defendant had returned to the work release center by 9:17 a.m. and that it took 39 minutes to walk from the victim's

> house to the work release center. (Exhibit F, pp. 2323-2324; 2350; 2360). The defendant didn't need another medical examiner to establish facts that defendant's counsel established quite adequately through the medical examiner who testified at trial. These facts were argued effectively in closing argument. (Exhibit F, pp. 2603-2604; 2651-2653).
>
> (R II, 285-286)

* * *

Judge Schaeffer added the conclusion, as noted earlier in the Statement of Facts:

> Summary of Guilt Phase Issues
>
> This completes all of the various issues raised in Claim I that bear on defendant's trial counsel having been ineffective at the guilt phase of defendant's trial. Although no evidentiary hearing was ordered as to these guilt phase issues of ineffectiveness, at the evidentiary hearing that was held on ineffectiveness of counsel at the penalty phase, defendant's trial counsel gave their credentials. Frank Louderback had been an attorney since 1975. Since 1980, he had a practice devoted to criminal defense. By 1990, he had tried 25 first-degree murder trials, and had been involved in 50 first-degree murder cases (Exhibit D, pp. 104-105). Defendant's co-counsel, Tom McCoun is presently a Federal Magistrate Judge for the Middle District of Florida. He joined the Florida Bar in 1977. He was an assistant state attorney for three years, and then from 1980-1990 was in partnership with Mr. Louderback specializing in criminal defense work. At the time of defendant's trial, he had participated in 20 - 30 first-degree murder trials (Exhibit D, pp. 134-135). As a trial judge with over ten years experience on the criminal bench, and a prior criminal defense attorney for over eight years, I know that these two attorneys were two of the best Pinellas County had to offer. The Index to the record on appeal, (Exhibit E), shows they prepared well for this case by deposing state's witnesses, requesting expert witnesses of their own, filing appropriate motions, etc. The trial transcript shows they did an admirable job at defendant's trial in advocating defendant's

> claim that he was innocent of the crimes charged, and that he was at the Largo Work Release Center when the crimes were committed.
>
> No singular claim made by the CCRC, nor the collective claims made warranted an evidentiary hearing, as they were either refuted by the record, were erroneous, or were not cognizable in a 3.850 motion. As to all claims, contained in Claim I, dealing with ineffective assistance of counsel at the guilt phase of his trial, they are hereby denied. I specifically find defendant's counsel, Frank Louderback and Tom McCoun, were effective counsel. Further, this court is confident in the outcome of the guilt phase of the trial and is not persuaded that the issues claimed, singularly or collectively, undermine this court's confidence in the outcome of the guilty verdicts. *Strickland v. Washington*, 466 U.S. 668 (1984) requires both ineffectiveness of counsel's performance and prejudice to warrant relief. Defendant has not satisfied either prong of the *Strickland v. Washington* standard, and is therefore, not entitled to a new guilt/innocence determination.

(R II, 290-291)

**A. <u>The instant claim is procedurally barred and appellant is not entitled to relief because he failed to present this claim to Judge Schaeffer and here is changing the ground on appeal from that urged below</u>.**

In Claim I B(a) in Washington's Amended Motion to Vacate, appellant argued that trial defense counsel failed to investigate the crime scene evidence (R I, 9, par. 15), failed to investigate leads regarding other potential suspects (R I, 10, par. 16), failed to effectively investigate and argue that the hair evidence was unreliable (R I, 11, par. 18), failed to adequately investigate and argue that the DNA evidence was unreliable because he never sought to rebut the testimony of FBI Agent Adams with an independent analysis and DNA expert (R I,

12, par. 19), failed to investigate and argue that the findings of the medical examiner were unreliable (R I, 13-14, par. 21). Appellant did not allege in that petition or at the Huff hearing on August 12, 1999 that counsel was ineffective for failing to request a Frye hearing (R IV, 630-643).

Appellant's claim relating to this point occurs at paragraph 19 of Claim I B(a) in the Amended Motion to Vacate (R I, 12-13):

> 19. Defense counsel failed to adequately investigate and argue that the DNA evidence was unreliable. Mr. Washington was convicted mostly on the basis of DNA evidence. Dwight Adams, an FBI special agent, testified that there was a match between the DNA found in the semen on the vaginal swabs from the victim and the DNA in the known blood sample of Mr. Washington (R. 2501). [FN 5] Mr. Adams conceded DNA matching is not a positive means of identification, and that other individuals could have a similar DNA profile (R. 2511). However, defense counsel never sought to rebut this testimony with an independent analysis and DNA expert. This was especially important in view of the trial courts [sic] refusal to allow live testimony from Anne Barstauk [sic], the actual technician who performed the various steps in the FBI protocol for DNA profiling. [FN 6] Had an independent expert been called, the jury would have been aware of the proper sequence for DNA profiling, (extracting the DNA and digesting it); what safeguards must be present at every step to prevent misidentification; and what qualifications and levels of proficiency an analysis technician must have. Additionally, had an independent DNA expert been called, he/she could have testified to the exactness of DNA profiling at the time. [FN 7]
>
> [FN 5] Police detectives duped Mr. Washington into giving hair and blood samples on the pretext that it would exculpate him as a suspect in a totally unrelated crime.
>
> [FN 6] Had Ms. Barstauk [sic] been called,

> either to give a deposition, or at trial, or both, there would have been a specific record as to her qualifications. Also, if there were any problems of disruptions which may have affected the procedure, this would also be in the record.
>
> [FN 7] In 1989, the "science" of DNA was far less exact than it is today.

The claim now urged - counsel was ineffective for failing to request a Frye hearing - ab initio - was not presented to the lower court and appellant may not permissibly change the basis of his argument on appeal which was not presented to or considered by the lower court. And it is unfair for Washington to criticize Judge Schaeffer for the failure to grant relief on a matter not presented to her.[8] See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court [citations omitted]. Furthermore, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below); Occhicone v. State, 570

[8]Judge Schaeffer properly summarily denied relief in an order explaining why relief was unavailable on the assertions of alleged counsel ineffectiveness pertaining to the crime scene investigation, the contention pertaining to an independent hair analyst, an independent DNA expert, and an independent pathologist (R II, 285-286). Additionally, Judge Schaeffer addressed claims pertaining to counsel's alleged ineffectiveness relating to the watch evidence and previous convictions on collateral crimes (R II, 287-288) which are presumably abandoned by the failure to pursue on this appeal.

So. 2d 902, 906 (Fla. 1990) (In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court, citing Bertolotti v. Dugger, 514 So. 2d 1095, 1096 (Fla. 1987)); Mordenti v. State, 630 So. 2d 1080 (Fla. 1994); San Martin v. State, 705 So. 2d 1337, 1345 (Fla. 1997) ("... we note that San Martin's intelligence level was never argued to the trial court as a basis for suppressing the statements. Thus, that issue is not available for appellate review."); Goodwin v. State, 751 So. 2d 537, 544 (Fla. 1999) (Our appellate cases are filled with examples of errors that are unpreserved either because no objection was made or because the objection was not specific; of if the error was invited or defendant opens the door to the error, appellate court will not consider the error a basis for reversal. If it is alleged that evidence has been improperly excluded and the appellate record does not establish that a proffer has been made, the lack of an adequate record will be grounds to affirm); Phillips v. State, 705 So. 2d 1320 (Fla. 1997) (Objection to applicability of jury instruction does not preserve claim that instruction was vague or overbroad).[9]

[9] To the extent appellant may be attempting to reargue the issue stated below that trial counsel failed to call an expert to testify to the jury, the lower court properly denied relief as stated in its Order Denying Motion to Vacate at R II, 286. The direct appeal record contains repeated reference to the DNA consultant retained by trial defense counsel, Dr. Gary Litman (DAR SR 2807, 2822; DAR 2176). Trial counsel could choose not

**B. Alternatively, the claim is meritless.**

A review of the record reveals that attorney McCoun was not deficient on this score. He filed a Motion to Appoint Confidential Expert in the field of DNA examination and identification (DAR 324-25) and that motion was granted by the trial judge (DAR 329). He filed a Motion to Compel on February 17, 1992 stating therein that concurrently he was filing a Motion for Costs to hire an expert in DNA analysis and statistical probabilities (DAR 827-29) and that motion was granted February 28, 1992 (DAR 863-64). McCoun filed a Second Motion to Compel DNA Records on March 17, 1992 and the court granted the motion on April 2, 1992 and reserved ruling on any other aspect of the motion pending further motions of the parties (DAR 949-51, R 1016). At the March 17 hearing on that motion, McCoun indicated that he was being assisted by an expert Dr. Gary Litman (DAR 2803-07). McCoun took the deposition on FBI special agent Dwight Adams on April 24, 1992 (DAR 1135-81). McCoun subsequently filed a Motion to Compel technician Baumstark to participate in a deposition on May 14, 1992 (DAR 1183-85) and the court's order of May 22, 1992 noted that the motion for deposition was withdrawn pending the receipt of

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to call an expert at trial ("I met with him, but we do not intend to call him" - DAR 2176) since as Judge Schaeffer explained counsel's cross-examination of Adams adequately explained to the jury that DNA evidence was not a positive method of identification to the exclusion of all others and counsel would not want to rebut that fact (R II, 286).

"bench notes" (DAR 1190). On June 3, 1992 McCoun filed a Motion to Compel the Deposition of FBI technician Baumstark (DAR 1193-1200) and after a hearing on June 9, 1992 (DAR SR, 2819-36), the trial court denied the Motion to Compel Deposition (DAR 1279). McCoun filed a Motion in Limine on July 15, 1992 (DAR 1281-83) which was denied during trial (DAR 2498)[10].

**(1) <u>Trial counsel was not deficient</u>.**

Appellant argues that trial counsel fell short of

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[10] Appellant erroneously recites at pages 42 and 43 of his brief that on February 28, 1992 trial counsel filed "Defendant's 2nd Motion to Compel DNA Records" and that a hearing was conducted on the motion on February 25, 1992. The correct chronology as reflected in the record is as follows:

(1) Trial counsel filed a Motion to Compel on or about February 17, 1992 (DAR 827-29). The trial court held a hearing on February 25, 1992 (DAR SR 2761-2800) and entered an Order on Motion to Compel and Motion to Continue on February 28, 1992 (DAR 863-64).

(2) Trial counsel filed Defendant's 2nd Motion to Compel DNA Records on or about March 17, 1992 (DAR 949-51). A hearing was held on March 17 (DAR SR 2801-2810) and the trial court entered its order on April 2, 1992 (DAR 1016).

(3) Trial counsel filed a Motion to Compel the deposition of Technician Baumstark on or about May 14, 1992 (DAR 1183-85) and following a hearing on May 20, 1992 (DAR SR 2811-18) the trial court entered its order on May 22, 1992 (DAR 1190).

(4) Trial counsel filed a Motion to Compel Deposition of FBI Technician Baumstark on or about June 3, 1992 (DAR 1193-1200) and following a hearing on June 9 (DAR SR 2819-36) the trial court entered its order on June 11, 1992 (DAR 1279).

(5) Trial counsel filed a Motion in limine apparently during trial in July (DAR 1281-83) which after argument was denied (DAR 2498).

Strickland's requirement to act as an advocate citing Hayes v. State, 660 So. 2d 257 (Fla. 1995) and Vargas v. State, 640 So. 2d 1139 (Fla. 1st DCA 1994), quashed on other grounds, 667 So. 2d 175 (Fla. 1995), decisions that were announced two or three years after the trial in the instant case. In Hayes, supra, this Court reversed a conviction because of the erroneous admission of collateral crime evidence and that DNA testing on a tank top was unreliable because a technician applied a controversial "band-shifting" technique which the National Research Council had recommended be declared inconclusive. Id. at 264. The court noted in footnote 1 of its opinion that that case did not involve the aspect of statistical likelihood that someone other than the defendant had a DNA pattern that matched the DNA taken from the crime scene. In Vargas, supra, the Court of Appeals concluded that appellant had demonstrated that the method by which FDLE arrived at population frequencies of one in 30 million and one in 60 million using the FBI data bases is not generally accepted in the relevant scientific community but that it was possible to calculate more conservatively the population frequencies. Id. at 1150. But the First District Court of Appeals has recognized that merely incanting Vargas does not mandate appellate relief. See Crews v. State, 644 So. 2d 338 (Fla. 1st DCA 1994) (rejecting claim for relief under Vargas where defendant only argued in the abstract that ethnic

substructures within data bases might produce incriminating and misleading population frequencies whereas in contrast Vargas had identified himself as a person of Puerto Rican descent and based his challenge on the alleged paucity of Puerto Rican genetic samples in the FBI's Hispanic data base). Olvera v. State, 641 So. 2d 120 (Fla. 5th DCA 1994) (defendant here did not challenge the admissibility of the FBI's data bases but instead claimed generally that the trial court erred in failing to conduct a Frye hearing; unlike Olvera, Vargas presented substantial evidence to support his claim that the specific FBI data base used in his case was not generally accepted in the scientific community).

Trial counsel was not deficient and appellant has failed to demonstrate prejudice, i.e., a reasonable probability of a different outcome had trial counsel acted differently. While appellant has shown that subsequent to this trial and appeal some attorneys have litigated DNA issues in a variety of contexts, he has failed to establish that attorney McCoun's failure to request a Frye hearing on DNA probabilities constituted deficient performance. McCoun was aware from having deposed FBI expert Dwight Adams, and from his retained consultant Dr. Gary Litman, that the probability of selecting an unrelated individual at random from the black population having a DNA profile matching appellant's was approximately 1 in

195,000 (DAR 1165), that it was Adams' practice to only testify to the more conservative value (here 1 in 195,000) but that using the newer population database with another 200 individuals added to that, the data now would be about 1 in 400,000 individuals (DAR 1177). Adams explained:

> "A. Well, certainly the more rare event is more detrimental to your client. The more conservative event is more in favor to your client. And so it's been my practice to only testify to that more conservative, or more common number.
>
> Q. Okay. Which as between these two figures would be what?
>
> A. One in 195,000 individuals."

(DAR 1177-78)

At trial, McCoun elicited on cross-examination of Adams that the term match is somewhat of a misnomer - he could not say that the DNA on the semen of the vaginal swabs is from Mr. Washington, only that he could not distinguish between the profiles of the semen on the swabs with that of Washington (DAR 2510), that he could not eliminate Washington as being a possible source of that semen, that the technology does not have the power of a fingerprint that would eliminate all individuals except for just one (DAR 2511; 2516-17), that some individuals agree with and some believe their statistics were not conservative enough (DAR 2517-18), that other laboratories he was familiar with would come up with a figure much larger than his agency's (DAR 2518), that most population geneticists would

require at least 100 to 150 individuals for an adequate population base (Adams used more, a base of 500 blacks) (DAR 2519-20) and that their approach was so conservative that it would offset any sub-population difficulties that might arise and therefore "really becomes a non-issue", a view not only of the FBI but of others who had published papers (DAR 2520). The witness acknowledged that other individuals or agencies may take a different view "in each direction" (DAR 2521).

Agent Adams additionally testified that the estimate now of selecting a black individual at random - having a DNA profile like that of Washington - using the current black population database - would be approximately 1 in 400,000 (DAR 2522).

Trial counsel was not deficient here because he was able to elicit the limitations on DNA technology and had the state's expert witness provide the very conservative estimate, i.e. the one most beneficial to his client of 1 in 195,000 (the probability of selecting an unrelated individual at random from the black population having a DNA profile matching the appellant's).

Washington has not suggested anything in this pleading or to the lower court in his Rule 3.850 motion asserting or contesting the testimony as erroneous (and would explain attorney McCoun's concession to Judge Schaeffer during jury selection that regarding his DNA consultant "[a]s of yesterday

afternoon we don't intend to call him. I met with him, but we do not intend to call him" (DAR 2176)). A defense expert would not be needed to corroborate Adams' testimony.

**(2) Appellant failed to satisfy the prejudice prong of Strickland.**

Similarly, the prejudice prong remains unsatisfied. Appellant has not demonstrated any error in the testimony adduced at the trial by FBI special agent Adams. He has not demonstrated with any specificity that the testimony would be different or even that he would have prevailed had trial counsel requested the hearing he now suggests for the first time on this appeal.[11] The DNA evidence would not be suppressed and the remaining evidence (similar hairs, appellant's proximity to the murder scene, his possession of and selling the victim's watch a day after the homicide) is still unchallenged and unchallengeable.

Appellant's sole argument on the prejudice element is a reference to Thorp v State, 777 So. 2d 385 (Fla. 2001) - decided some nine years after the trial - a case in which this court held that the trial court's failure to exclude blood samples and resulting DNA because of several critical and substantial

[11] Obviously the test is not whether there is a likelihood of a different outcome in a "mini-proceeding" (i.e. motion to suppress or motion in limine) but rather the ultimate proceeding, that which determined guilt or the sentence imposed. State v. Stirrup, 469 So. 2d 845, 848 (Fla. 1985), rev. denied, 480 So. 2d 1296 (Fla. 1985).

misstatements set out in an affidavit for search warrant, the falsity of which were known to the police officer affiant and with the redacted facts omitted, the remaining facts failed to establish probable cause constituted reversible error. The court found the error could not be deemed harmless since the expert testimony and prosecutorial argument on the conclusive nature of the evidence (the probability of a match would be about one in 3.6 billion) and the absence of any other physical evidence placing Thorp at the scene of the crime required reversal and a new trial. Thorp does not require reversal here. The DNA evidence is not inadmissible as a result of an illegal search.

Thus, even if an argument could be constructed now that trial counsel should have done something more, there is no reasonable probability that 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. Strickland v. Washington, 466 U.S. 668, 694, 80 L.Ed.2d 674, 698 (1984); Waterhouse v. State, ___ So. 2d ___, 26 Fla. L. Weekly S375 (Fla. 2001) (reciting necessity of defendant to state facts regarding both deficiency and prejudice requirements).[12]

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[12] In Brim v. State, 695 So. 2d 268 (Fla. 1997) this Court acknowledged that the NRC had recently issued its updated report. Id. at 270. The Court acknowledged that while there

In conclusion, trial counsel McCoun satisfied the requirements of Strickland to act as an advocate for Washington. He did not fail to investigate; rather, he retained the services of a confidential DNA expert Dr. Litman, he deposed FBI expert Dwight Adams and repeatedly sought to depose and examine technician Baumstark, and urged the trial court to preclude testimony. Although the trial court ruled adversely to his motion to compel - a ruling approved by this Court on direct appeal - that does not render his performance inadequate. Counsel was not required to do more, especially since prevailing appellate decisions did not command it and Mr. McCoun was able to elicit the favorable information learned to the jury in his cross-examination (the limitations of DNA and lack of certainty in comparison to fingerprints, the fact that others are in disagreement, and that use of different or changing databases can yield other or less conservative figures). Appellant has not shown now - years later - that his conduct was unreasonable or the likelihood of a different result had he acted

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had been criticism over the ceiling principles and that the 1996 report now found them to be unnecessary, this fact did not mean they were unreliable, "by analogy, the fact that we now have calculators does not make long-hand arithmetic unreliable. If anything, calculators only make such long-hand work unnecessary." Id. at 273. The Court added, "Indeed, there appears to be a high probability that a Frye test will be satisfied in light of the dissipation of the debate over population substructures. Id. at 275. Since the debate over population substructures has dissipated, appellant has failed to establish that counsel's actions at trial were deficient or that the prejudice prong of Strickland can be satisfied.

differently.

## ISSUE III

**WHETHER THE LOWER COURT ERRED IN DENYING RELIEF ON APPELLANT'S CLAIM THAT THE SENTENCING COURT FAILED TO GIVE GREAT WEIGHT TO THE JURY'S LIFE RECOMMENDATION.**

The lower court correctly and summarily denied relief on this point (in Claim II, below at R II, 291), pointing out that the sentencing order reflected that the court was required to give great weight to the jury's recommendation under Tedder v. State, 322 So. 2d 908 (Fla. 1975), that the court had applied the proper standard and that the Florida Supreme Court had affirmed the judgment and sentence in Washington v. State, 653 So. 2d 362 (Fla. 1995). Judge Schaeffer was correct in determining that "This claim is not appropriate, therefore, and is barred from post-conviction relief" (R II, 291).

Appellee notes that at the Huff hearing, counsel for appellant indicated he wasn't going to comment too much and sought to preserve the issue "for federal appeals" (R IV, 661).

This Court previously addressed the correctness of the trial court's Tedder analysis:

> [10][11][12] We also find no merit in Washington's claim that the trial court improperly imposed the death sentence over the jury's recommendation of life imprisonment. In *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975), we held that "[i]n order to sustain a sentence of death following a jury recommendation of

> life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." We have consistently interpreted *Tedder* as meaning that an override is improper if there exists a reasonable basis for a jury's recommendation of life imprisonment. *Freeman v. State*, 547 So.2d 125 (Fla. 1989); *Hall v. State*, 541 So.2d 1125 (Fla. 1989); *Ferry v. State*, 507 So.2d 1373 (Fla. 1987). We have affirmed life overrides in cases similar to the instant one.
>
> (653 So. 2d at 366)

## ISSUE IV

**WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT'S CLAIM THAT THE JURY INSTRUCTIONS IN BOTH THE GUILT AND PENALTY PHASES OF THE TRIAL WERE CONSTITUTIONALLY INVALID.**

The lower court properly and summarily denied relief at Claim III, below, R II, 291:

> "This claim is broken into three sub-parts, but all parts deal with jury instructions given during the trial. Counsel conceded at the *Huff* hearing that these were matters to be raised on appeal (which some were) and were not proper for post-conviction relief. (Exhibit B, pp. 50-53). This claim is summarily denied. Additionally, the jury returned a life recommendation, so these claims, as to penalty phase instructions, are moot."

See also Huff hearing transcript at R IV, 664-666.

Undaunted, appellant complains on this appeal (A) that the jury instructions on the HAC factor were not given limiting construction and counsel failed properly to object, (B) that the instruction on the committed during the course of a robbery

aggravator is unconstitutional on its face and as applied and (C) the instructions to the jury diluted their sense of responsibility in determining the proper sentence. Appellant apparently does not challenge any guilt phase instructions.

As to (A), the challenge to the vagueness of the HAC instruction, this Court considered and rejected the claim on Washington's direct appeal and it is inappropriate to use the Rule 3.850 vehicle to revisit that issue. On appeal, this Court ruled:

> [9] Washington's first penalty-phase issue asserts that the heinous, atrocious, or cruel aggravating circumstance is vague and arbitrarily and capriciously applied. We find this argument to be without merit. *See Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).
>
> (653 So. 2d at 366)

Appellee also asserts that trial counsel apparently declined the trial court's invitation to submit an appropriate limiting instruction (Direct Appeal Record, R 2721-35). Washington may not obtain relief on the basis that counsel failed to object because this Court did not rule the claim to be barred but rather "without merit". To the extent that Washington may be urging a different argument in support of the same issue, counsel is not ineffective simply because collateral counsel may offer something different. Finally, as the lower court noted here, any such error would be harmless since the jury returned a life recommendation.

As to (B), the challenge now made to the during the course of a robbery aggravator, the claim is barred for the failure to object at trial and raise on appeal. Remeta v. Dugger, 622 So. 2d 452 (Fla. 1993); Waterhouse v. State, ___ So. 2d ___, 26 Fla. L. Weekly S375 (Fla. 2001); Atwater v. State, ___ So. 2d ___, 26 Fla. L. Weekly S395 (Fla. 2001). Furthermore, the instruction is not unconstitutionally vague and appellant cites no case law holding that it is. Even if there were an infirmity in the instruction, the jury's recommendation of life would render it moot.

As to (C) - the jury's sense of responsibility being diluted - the claim is barred for the failure to object and assert on appeal. The claim is meritless. See Rose v. State, 617 So. 2d 291, 297 (Fla. 1993); Melendez v. State, 612 So. 2d 1366, 1369 (Fla. 1992). Finally, the jury obviously did not regard their role as diminished in light of their life recommendation.[13]

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[13]Appellant in his brief at page 65 refers to a number of record cites in which he claims the court improperly instructed the jury that its role was advisory (R. 249, 250, 266, 267, 269, 270, 268, 556, 557, 567, 576, 583, 590, 597, 606, 618, 626, 631, 642, 643, 649, 655, 659, 683). On appellee's review of the direct appeal transcript, the trial court's guilt phase instruction to the jury occurred at TR. 668-695 or R. 2661-2688 and the penalty phase instruction is at TR. 745-752 or R. 2738-2745. Judge Schaeffer told the jury that the "advisory sentence" was "entitled by law and will be given great weight in determining what sentence will be imposed." (TR. 745, R. 2738). Appellee sees no instruction diluting the jury's sense of responsibility.

## ISSUE V

**WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT'S CLAIM THAT HIS SENTENCE RESTS ON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE.**

Judge Schaeffer summarily denied relief on this point below at Claim V, Vol II, R. 292:

> MR. WASHINGTON'S SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE IN VIOLATION OF *STRINGER V. BLACK*, *MAYNARD V. CARTWRIGHT*, *HITCHCOCK V. DUGGER*, AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.
>
> This is summarily denied. It was an issue available for appeal, and was not the sole aggravating factor in this case, but merely one of four aggravating factors. Additionally, the jury recommended a life sentence, rendering this moot. And counsel conceded at the *Huff* Hearing that it was a "preservation issue." (Exhibit B, pp. 55-56).

Appellee reiterates that this claim was an issue for direct appeal (if properly preserved by contemporaneous objection at the time of trial) and thus is not cognizable for post-conviction challenge and is now barred. Waterhouse v. State, ___ So. 2d ___, 26 Fla. L. Weekly S375 (Fla. 2001); Atwater v. State, ___ So. 2d ___, 26 Fla. L. Weekly S395 (Fla. 2001). Additionally this Court has repeatedly rejected the argument. See Jones v. State, 648 So. 2d 669 (Fla. 1994); Blanco v. State, 706 So. 2d 7, 11 (Fla. 1998)(J. Wells, concurring); Mills v. State, ___ So. 2d ___, 26 Fla. L. Weekly S275 (Fla. 2001). As the court's order noted, appellant at the Huff hearing did not

seek an evidentiary hearing but rather only sought to preserve it for later review (R IV, 668-669).

## ISSUE VI

**WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT'S CLAIM THAT THE TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERROR.**

Appellant's failure to identify any such error in his brief is fatal to his claim that the trial court erroneously denied relief. Since any individual alleged errors are without merit, any cumulative error contention must fail. See Downs v. State, 740 So. 2d 506, 509 n. 5 (Fla. 1999); Freeman v. State, 761 So. 2d 1055, 1068-69 (Fla. 2000); Mann v. State, 770 So. 2d 1158, 1164 (Fla. 2000); Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998); Waterhouse v. State, ___ So. 2d ___, 26 Fla. L. Weekly S375 (Fla. 2001); Atwater v. State, ___ So. 2d ___, 26 Fla. L. Weekly S395 (Fla. 2001). The lower court properly disposed of this issue below in Claim VI, at R II, 292):

> "This claim is denied. Counsel, at the *Huff* Hearing said this was the "catch all" and "totality" argument. (Exhibit B, pp. 56-57). As to any penalty phase errors, they are moot, the jury having returned a life recommendation. As to the trial errors made, singularly and collectively, must be raised on appeal, not in a post-conviction motion. As to collective ineffective claims of counsel involving the guilt phase of the trial, this has already been addressed in this order. As to collective ineffective claims of counsel at the penalty phase, they are moot as to errors before the jury since the jury recommended a

> life sentence. As to collective errors that might have affected the court's sentence, such errors will be addressed singularly and collectively later in this Order."[14]

## ISSUE VII

**WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT'S CLAIM THAT FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.**

Washington contends that the lower court erred in denying him an evidentiary hearing. He urges that the state's law fails to meet rudimentary guarantees, that execution by electrocution constitutes cruel and unusual punishment, that the statute fails to provide any standard of proof that aggravating factors outweigh mitigating factors, that the sentencing procedure does not have independent reweighing of aggravating and mitigating circumstances, that aggravating circumstances have been applied in a vague and inconsistent manner, that the jury receives unconstitutionally vague instructions, and that there is a presumption of death when a single aggravating factor is found.

Appellant presented this claim in Claim VII, below (R I, 42-44). All of these challenges to the Florida capital sentencing statute are matters to be urged on direct appeal, and are

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[14]As Judge Schaeffer noted in her order, Washington's counsel at the Huff hearing indicated relief was not appropriate at this time (R IV, 669-670).

therefore not cognizable on a post-conviction challenge (since Rule 3.850 does not constitute a second appeal). This claim is procedurally barred now. See Waterhouse v. State, ___ So. 2d ___, 26 Fla. L. Weekly S375 (Fla. 2001); Ragsdale v. State, 720 So. 2d 203, 205 n 1 & 2 (Fla. 1998); Marek v. State, 626 So. 2d 160, 162 (Fla. 1993).

Additionally, and alternatively, the lower court correctly ruled that as to the attack on the death penalty scheme "it has been upheld too many times to note here by both the Florida Supreme Court and the United States Supreme Court" (R II, 293). Moreover, this Court has upheld electrocution in Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999) and the legislature has now passed a law allowing a defendant to be executed by lethal injection and thus the claim was properly denied summarily.[15]

[15]Appellee notes that at the Huff hearing conducted on August 12, 1999, Washington was not urging the need for an evidentiary hearing on Claim VII but apparently only to preserve it for later review (R IV, 670-672). It would seem to be disingenuous for appellant to suggest in this Court that he was denied a desired evidentiary hearing on the claim.

## CONCLUSION

Based on the foregoing arguments and authorities, the lower court's order denying post-conviction relief must be affirmed.

Respectfully submitted,

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_____
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**COUNSEL FOR APPELLEE**

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Ruck Paul DeMinico, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this _____ day of July, 2001.

_____
**COUNSEL FOR APPELLEE**

## CERTIFICATE OF TYPE SIZE AND STYLE

**I HEREBY CERTIFY** that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____

**COUNSEL FOR APPELLEE**