

IN THE SUPREME COURT OF FLORIDA

JACK DEMPSEY
FERRELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC02-1498

APPELLEE'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the trial court, will be referenced in this brief as Appellee, the prosecution, or the State. Appellant, Jack Dempsey Ferrell, the defendant in the trial court, will be referenced in this brief as Appellant or by his proper name.

The record on appeal consists of ten consecutively paginated volumes and one volume (Volume 11) of exhibits, which will be referenced by the letter "R," followed by any appropriate page number. "TR" will designate the trial record, followed by any appropriate page number. "IB" will designate Appellant's Initial Brief, followed by any appropriate page number. "SB" will designate Appellant's Supplemental Initial Brief on direct appeal after remand, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The trial court set out the factual background and procedural history of the instant case as follows:

FACTUAL BACKGROUND

On May 11, 1992, Jack Dempsey Ferrell was indicted for first degree murder in the shooting death of Mary Ester Williams. The facts as stated in *Ferrell v. State*, 653 So.2d 367 (Fla. 1995) are as follows:

Ferrell and Williams were live-in lovers whose relationship was marked by verbal and physical confrontations. On April 18, 1992, neighbors overheard the couple arguing and observed Ferrell enter and exit the couple's apartment several times. Upon his final exit and before driving away in his car, Ferrell approached one of the neighbors and stated, "You better call the police, I just killed my old lady upstairs."

Williams was found lying on the apartment floor, having suffered two gun shots to the head. She died ten days later due to brain injury associated with hemorrhaging. When Ferrell was arrested he smelled of alcohol and possessed the gun that was subsequently identified as the murder weapon. At trial, Ferrell testified that the gun accidentally fired when Williams pushed him. This was refuted by the State's expert who testified that accidental firing of the gun was unlikely.

During the trial proceedings, evidence of a collateral crime was admitted when Ferrell's neighbor testified that approximately one week before the murder Ferrell told her that he had "killed one bitch and he will do it again" and "that if he went back to prison he's sure he wouldn't be coming back this time."

The mental health expert opined that Ferrell has an IQ of eighty and suffers from brain and frontal lobe damage. The expert also opined that Ferrell's drinking contributed to his mental incapacibilities. The jury found Ferrell guilty of first-degree murder and by a vote of ten to two recommended a sentence of death. Judge Daniel P. Dawson accepted the jury's recommendation and sentenced Ferrell to die.

653 So.2d at 369.

PROCEDURAL HISTORY

May 11, 1992	Defendant indicted for first degree murder.
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February 4, 1993 Defendant found guilty following a trial by jury.

March 9, 1993 Defendant sentenced to death.

February 16, 1995 The Supreme Court of Florida affirmed Defendant's conviction, but remanded the case to the trial court with instructions to prepare a new sentencing order. *Ferrell v. State*, 653 So.2d 367 (Fla. 1995).

June 20, 1995 Trial court issued a new sentencing order, again sentencing Defendant to death.
Aggravators: Defendant was previously convicted of committing a felony involving the use or threat of violence to the person.
Mitigators: Statutory - none.
Non-statutory: Defendant was impaired; Defendant was disturbed; Defendant was under the influence of alcohol; Defendant was a good worker; Defendant was a good prisoner; and Defendant was remorseful.

April 11, 1996 Death sentence affirmed. *Ferrell v. State*, 680 So.2d 390 (Fla. 1996).

March 17, 1997 The Supreme Court of the United States denied Defendant's petition for writ of certiorari to the Supreme Court of Florida. *Ferrell v. Florida*, 520 U.S. 1123 (1997).

January 21, 1998 Original "Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend" was filed with the Clerk of the Circuit Court for Orange County.

June 23, 2000 Amended Motion was filed.

August 14, 2000 *Huff* hearing held.

February 7-8, 2001,
September 4, 2001 Evidentiary hearings on Defendant's
rule 3.850 held.

April 17, 2002 Final documents in support of
Defendant's claims filed by CCRC.

(R, 1848-49).

SUMMARY OF ARGUMENT

1. Ferrell cannot show entitlement to reversal on the instant ineffective assistance of counsel claim as there is competent, substantial evidence to support the trial court's finding that counsel sufficiently prepared for the presentation of mitigation. Notwithstanding the failure to demonstrate deficient performance, Ferrell cannot establish the prejudice prong under Strickland because it is not reasonably probable, given the cumulative nature of alleged additional mitigation, that this altered picture would have led to the imposition of a life sentence, outweighing the substantial aggravator at issue in this case.

2. Ferrell argues that a brain scan should have been requested prior to trial to assist the jury in understanding the extent of his brain damage. Ferrell asserts that "the law" recognized the value of scans and "could" have been utilized by counsel in requesting the brain scan. However, Ferrell does not provide "law" for the proposition that counsel should have, or was required to have, requested a brain scan (SPECT or PET) that his mental health expert did not deem necessary and that might have revealed nothing and been used by the

State to refute any claim of brain damage that did show up on the tests conducted by Dr. Upson.

3. Ferrell argues that trial counsel's performance was deficient for not objecting to the prosecutor's argument to the court; however, there was nothing improper in the state attorney offering argument during the new sentencing proceeding. Thus, any objection to a change in the order blamed on the argument by the state attorney would have been without merit. Further, to prevail on a penalty phase claim of ineffective assistance of counsel, the death-sentenced defendant must show that but for counsel's errors, the defendant would have received a life sentence. Nonetheless, as the evidence on mitigation and aggravation remained the same, the weight assigned the mitigators remained the same, and the **sentence remained the same**, it is unclear how Ferrell was prejudiced by the "change" from statutory to non-statutory.

ARGUMENT

Jurisdiction

This Court has jurisdiction pursuant to Article V, section 3(b)(1) of the Florida Constitution.

ISSUE I

WHETHER FERRELL'S TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE, PREPARE, AND PRESENT MITIGATION EVIDENCE?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.'" Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

The instant allegation of ineffective assistance of counsel is addressed to the penalty phase of Ferrell's trial and has three sections lettered A-C. Section A is not actually a separate claim, but simply states the standard for claims of ineffective assistance of counsel during the penalty phase in a capital case. The legal test to be employed by a court reviewing claims of ineffective assistance of counsel was set out by the United States Supreme Court in Strickland v. Washington, 104 S.Ct. 2052, 2065 (1984); accord Williams v. Taylor, 120 S.Ct. 1495 (2000) (recent decision affirming that merits of ineffective assistance claim are squarely governed by Strickland). The United States Supreme Court articulated the test in the following way:

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

Strickland, 466 U.S. at 687.

Thus, in order to prove ineffective assistance of counsel, a defendant must establish that (1) counsel's performance was deficient and (2) there exists a reasonable

probability that but for counsel's unprofessional errors the results of the proceeding would be different. Further, unless a defendant makes both showings it cannot be said that the conviction resulted from a breakdown of the adversary process that renders the result unreliable. Strickland.

In a capital case, this two-part test applies to claims of ineffective assistance of counsel during the sentencing phase, as well as the guilt phase of the trial, because a "capital sentencing proceeding ... is sufficiently like a trial in its adversarial format and in the existence of standards for decision ... that counsel's role in the proceeding is comparable to counsel's role at trial--to ensure that the adversarial testing process works to produce a just result under the standards governing decision." Collier v. Turpin, 177 F.3d 1184, 1198 (11th Cir.1999) (quoting Strickland, 466 U.S. at 686-87, 104 S.Ct. 2052).

Grayson v. Thompson, 257 F.3d 1194, 1215 (11th Cir. 2001).

Below, the trial court applied Strickland to Petitioner's claim(s) of ineffectiveness of counsel. (R, 1854-55). More specifically, the circuit court addressed the instant sub-claim and concluded:

a. Lay Witnesses¹

In this subsection Defendant claims that: (1) trial counsel presented only three lay witnesses in mitigation, two of whom were work related and one of those had not seen Defendant in over ten years; (2) that there were no family members presented; (3) that trial counsel only asked for five hundred dollars with which to conduct investigation; (4) that the investigator did limited work and never

¹Although Ferrell labels this sub-claim "B. 1," there is no part 2. Further, despite Ferrell's discussion of expert testimony, the State will restrict its answer to the testimony of the lay witnesses addressed by the circuit court's order.

spoke with Defendant. Further, Defendant maintains that had his trial attorney, Irwin, called family members to testify they could have told the Court of many non-statutory mitigators, such as that alcoholism was prevalent in Defendant's family, that his mother was pregnant at age fourteen, that his father was murdered when he was a child, and that he grew up in a family of sharecroppers in extreme poverty in North Carolina. Further, these witnesses could have testified to the fact that Defendant suffered head injuries as a child.

The State responds that it conceded the issue of brain damage at trial and writes in its Response that "[f]or the purposes of argument the undersigned will concede . . . that Mr. Ferrell was brain damaged, that the brain damage was aggravated by alcohol, and that Mr. Ferrell was drunk on the day he killed Ms. Williams." The State goes on to say that the prosecutor's argument was not that Defendant did not have these problems, but rather that there was little connection between Defendant's mental impairment/alcoholism and the murder.

The State recommended that the Court hear evidence on the issue of whether Irwin's performance was deficient by reason of his failure to call background witnesses who could have testified about Defendant's impoverished upbringing, his positive character traits, and any connection between these factors and the crime.

The Court granted a hearing on this claim in order to determine whether Defendant's proposed witnesses could have provided additional information in the sentencing phase that should have been considered in mitigation.

Irwin testified at the evidentiary hearing that he had hired an investigator who did interview Defendant's mother, Katie Dawson, in North Carolina. However, Ms. Dawson has a heart condition and did not want to travel at that time. Irwin also contacted Defendant's former wife, who was an amputee and did not wish to travel or to testify.

At the evidentiary hearing six witnesses testified on Defendant's behalf. They were: Mack Jones, Defendant's childhood friend; Katie Dawson, Defendant's mother; Grace Roundtree, Defendant's half-sister; Mary Boddie, Defendant's aunt; Susie Graham, Defendant's aunt; and Larry Roundtree,

Defendant's brother-in-law. All these witnesses testified that Defendant was a hard worker and had worked in agricultural labor from early childhood. A common statement was that Jack (Defendant) worked hard, as did everyone else, because that was just the way it was in North Carolina among poor black people during the mid-twentieth century. They also testified about experiencing racial prejudice and poverty. Some of them had long since moved from North Carolina and most had not had contact with Defendant for many years.

Mack Jones' testimony agreed with the above statements and only added that he and Defendant had been childhood friends. Mr. Jones moved decades ago to Baltimore, Maryland, where he currently resides and where he has been successfully employed for many years. His testimony added nothing specific as to how Defendant's childhood impacted his behavior on the day of the crime.

Defendant's mother, Katie Dawson, reiterated that Defendant, like all of his relatives and friends, worked hard and was poor. She added that Defendant's father died when Defendant was three years old. She testified that she believed Defendant's father had been poisoned, but she was not positive. She did not offer any testimony as to how Defendant's father's death had impacted Defendant's life. No evidence was offered to show that Defendant had witnessed his father's dying or even that Defendant had any recollection of his father or his father's death. Under these circumstances, it is difficult to conclude that the death of Defendant's father was connected to Defendant's actions over fifty years later.

Defendant's half-sister, Grace Roundtree, testified that Defendant's mother drank, but she was not asked to elaborate on how that affected Defendant's life or whether Defendant's mother was ever abusive when she drank. She also testified that even at a young age Defendant often worked to help support his family and to allow the other children to attend school. Ms. Roundtree also said that no one contacted her about testifying on behalf of Defendant in 1992 or 1993.

Defendant's aunt, Mary Boddie, testified that Defendant fell from a truck and hit his head when he was a child. Although she was not an eye witness to the accident, she said that she recalled Defendant

being taken to the doctor. She was asked whether Defendant behaved differently after the accident and she replied that he did "sometimes." It was not clear from this witness' testimony whether she recalled Defendant's age at the time of the accident, nor whether his different behavior was simply the changing behavior of a growing child or was attributable to the accident. Ms. Boddie also testified that she thought that Defendant's father had been poisoned.

Another aunt, Susie Graham, testified that she had heard of Defendant's truck accident, but that she did not know much about it and did not know when it occurred.

Defendant's brother-in-law, Larry Roundtree, testified that he met Defendant in the summer of 1989 in Orlando. The essence of his testimony was that while in Orlando he and his wife stayed with Defendant who was very hospitable.

At sentencing the Court found that Defendant's ability to conform his conduct to the requirements of law was somewhat impaired. The Court also found that Defendant was under the influence of some mental or emotional disturbance at the time of the crime. Additionally, the Court found that Defendant was under the influence of alcohol at the time the crime was committed. In keeping with testimony presented by Defendant's friends and family, the sentencing Court found that Defendant was a hard worker.

Under the terms of *Strickland*, Defendant must show that his attorney's performance was deficient and that the deficient performance prejudiced Defendant, thereby depriving him of a fair trial. 466 U.S. 668. First, Defendant must identify the acts or omissions that he deems to be the product of unreasonable professional judgement, and second, he must show that those acts were so unreasonable that they undermined confidence in the outcome of the trial. Id. "[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 466 US. at 695.

This Court finds that Defendant's trial attorney's decision not to call additional witnesses during the penalty phase was the result of reasonable professional judgment. No evidence was

presented to show that any of the above witnesses could have been located or were willing to testify. Moreover, attorney Irwin did attempt to have Defendant's mother and his former wife testify. Neither wanted to do so. Finally, having carefully listened to each witness that did testify at the evidentiary hearing, this Court finds no evidence that was not taken into account by the sentencing judge, and no evidence to demonstrate that had Irwin presented the above witnesses at the penalty phase of Defendant's trial, their testimony would have induced a reasonable doubt respecting guilt.

Based on the foregoing, and having granted a hearing on this claim, it is now denied.

(R, 1866-71).

The circuit court supported its denial of this sub-claim by first finding that Ferrell had failed to present any evidence to show that any of the witnesses could have been located or were willing to testify. Ferrell does not address this finding other than to note that his half sister testified that she had not been contacted about testifying on his behalf. Next, the circuit court found that attorney Irwin did attempt to have Defendant's mother and his former wife testify, but that neither wanted to do so. This finding is supported by competent, substantial evidence. Attorney Irwin testified that "Mr. Ferrell's mother apparently was having some kind of a heart problem and felt she was unable to travel. Georgia Mae Long, as I recall, was an amputee and coming to the courthouse was very - was very difficult for her; but along with that, she bluntly stated she did not wish to appear in court." (R, 148).

Additionally, the circuit court found that Ferrell had presented "no evidence that was not taken into account by the sentencing judge, and no evidence to demonstrate that had Irwin presented the above witnesses at the penalty phase of Defendant's trial, their testimony would have induced a reasonable doubt respecting guilt." Ferrell "maintains that had his trial attorney, Irwin, called family members to testify they could have told the [c]ourt of many non-statutory mitigators, such as that alcoholism was prevalent in Defendant's family, that his mother was pregnant at age fourteen, that his father was murdered when he was a child and that he grew up in a family of sharecroppers in extreme poverty in North Carolina. Further these witnesses could have testified to the fact that Defendant suffered head injuries as a child." (IB, 22). However, Ferrell also concedes that "[s]ome of them had long since moved form (sic) North Carolina and most had not had contact with Defendant for many years." (IB, 24). Further, Ferrell does not challenge the circuit court's summation of the lay witness testimony. Given Ferrell was over 50 years of age at the time of the murder, it was not unreasonable for the circuit court to conclude that this testimony from Ferrell's distant past would have offered little for the jury to weigh against Ferrell's prior murder conviction.

Regarding the circuit court's mistake in referencing the guilt phase, as opposed to the penalty phase, it is clear from

the balance of the order on this sub-claim that the circuit court was addressing "whether Defendant's proposed witnesses could have provided additional information in the sentencing phase that should have been considered in mitigation." (R, 1867).

The circuit court addressed the instant issue's other sub-claim and concluded:

b. Expert Social Worker Testimony

Defendant claims that Irwin should have called an expert social worker to do an in-depth psycho-social assessment of how the events and circumstances that shaped Defendant's life impacted his behavior on the day of the crime.

The State simply responds that an evidentiary hearing should be held on this issue.

The Court granted a hearing on this claim in conjunction with subsection a. above. However, at the evidentiary hearing, Defendant's attorneys agreed to the close of evidence on this subsection without having presented any evidence. (T. Feb. 8, 2001, at 208.) No expert social worker was offered as a witness.

However, at the evidentiary hearing on September 4, 2001, which was scheduled specifically to hear only evidence on Claim II, Section C, mental testing, different CCRC attorneys appeared on behalf of Defendant and those attorneys sought to have the Court hear evidence on the social worker issue, although they had no evidence available for presentation at that time. At the close of the hearing, CCRC stated that it would like to file "some sort of proffer from the social worker." (T. Sept. 4, 2001, at 160.) On December 14, 2001, a status hearing was held and Defendant's attorneys again asked that they be allowed to file a proffer on this claim, which the Court agreed to allow, stating: "I will, however, of course, allow you to make a full proffer and I will ask you to please put this whole issue in your memorandum, if you wish, and then I can review it a second time and either deny or grant it." (T. Dec. 14, 2001, at 8.)

On January 22, 2002, Defendant's closing statement was filed and attached thereto were the following documents: A notarized letter which is signed "Dr. Marvin Dunn, Expert Witness." The letter reiterates the facts concerning Defendant's childhood and concludes with the following opinion:

All of the above factors are red flags which should have suggested an in depth examination of Mr. Ferrell's social history by a licensed clinical social worker. It is almost certain that his criminal behavior was impacted by at least some of the factors cited. A trained social worker would have recognized these as possibly having an impact on the criminal behavior of this individual.

Next, is a facsimile from "Marjorie B. Hammock, Social Work Practitioner." Ms. Hammock details how she would have gathered information on Mr. Ferrell's background and how she would have presented it to the jury. She also included information on her own background and her credentials.

Finally, there is a letter from Bill E. Mosman, whose letterhead lists his credentials as attorney, psychologist and family mediator. Mr. Mosman also re-states the facts presented by the lay witnesses and other information from trial and postconviction witnesses.

The Court, having carefully reviewed these documents and the comments of counsel submitted in the written closing argument, again finds no evidence that was not taken into account by the sentencing judge, and no evidence to demonstrate that had Irwin presented the above witnesses at the penalty phase of Defendant's trial, their testimony would have induced a reasonable doubt respecting guilt.

Based on the foregoing, having accepted and reviewed the information proffered by Counsel, and having granted the opportunity for a hearing on this claim, it is now denied. *Owen v. State*, 773 So. 2d 510, 515 (Fla. 2000) (holding, in part, that where trial court granted evidentiary hearing on claim, but defendant chose not to present any evidence, that claim was procedurally barred).

(R, 1871-73).

Although the circuit court denied this sub-claim because it was waived and because Ferrell failed to demonstrate a reasonable probability of a different result, the record is undisputed that counsel did hire and consult with a mental health expert for the purpose of determining the effect of Ferrell's mental health on his case. Thus, the decision to hire a social worker appears to be second-guessing by current counsel, rather than identification of a defect in trial counsel's strategy; however, counsel cannot be found ineffective for failing to provide cumulative evidence. Gudinas v. State, 816 So.2d 1095, 1108 (Fla. 2002). "Further, this Court has stated, '[t]he standard is not how present counsel would have proceeded, in hindsight, but rather whether there was *both* a **deficient performance** and a reasonable probability of a different result.'" Id. (quoting Cherry v. State, 659 So.2d 1069, 1073 (Fla. 1995)). Notwithstanding the circuit court's finding that Ferrell had failed to establish the prejudice component, Ferrell has not provided authority for his position that the circuit court incorrectly applied Strickland by failing to find that Petitioner's trial counsel was not functioning as the "counsel" guaranteed Petitioner by the Sixth Amendment, and that this clear, substantial deficiency so prejudiced the defense that the outcome is undermined, based on an alleged failure to present cumulative evidence through the testimony of a social worker.

Regarding the prejudice prong, Ferrell denigrates Dr. Upson's² contribution in the penalty phase proceedings and supports that position by quoting this Court's statement that "his brief testimony in the penalty phase (ten pages of transcript) merely encapsulated his ... detailed guilt phase testimony." (IB, 27 & 38). However, Ferrell takes this Court's comment out of context and excerpts only the portions he wishes to use to downplay the mitigation evidence attributable to Dr. Upson. In Ferrell's appeal of his re-sentencing, he argued that the trial court's rejection of the statutory mitigating circumstances "overlooked the testimony of the defense mental health expert, Dr. Upson, who testified **only** in the penalty phase." Ferrell, 680 So.2d at 391. In response to that inaccurate argument, this Court pointed out that "[t]he record shows that Dr. Upson testified in both the guilt and penalty phases and that his brief testimony in the penalty phase (ten pages of transcript) merely encapsulated his **vastly more extensive (ninety-two pages of transcript) and** detailed guilt phase testimony." Id. The point clearly being that

²Ferrell, in a different claim before this Court, describes Dr. Upson as "a qualified expert in the field of neuropsychology" who presented uncontroverted testimony that he was under the influence of extreme mental or emotional disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired at the time of the crime. (IB, 76). In that same claim, Ferrell supports Dr. Upson's conclusions by pointing out that "[t]he conclusions reached by Dr. Upson were reached after performing a series of tests, clinical evaluations of Mr. Ferrell and interviews with family." (IB, 74).

there was "extensive" evidence in the record of the guilt phase of the trial that was properly considered by the trial court in weighing the mitigation against the aggravation to determine a proportionate sentence.

Moreover, it is clear from a review of Dr. Upson's testimony during the guilt and penalty phases that he covered all of the areas of Ferrell's mental health that were possibly relevant to the time period of the crime. Dr. Upson covered Ferrell's IQ test results (R, 664), his education (R, 665), his organic brain damage evidenced by frontal lobe dysfunction (R, 667-79), his depression (R, 676), his lack of psychopathic tendencies (R, 677), his alcohol abuse from age 14 (R, 682-83, 695, & 727), and the excellent opinion his employer had of him as a good worker (R, 732)³. On cross-examination, Dr. Upson testified that in his opinion Ferrell's "life experiences decreased his ability to control his behavior without impulse or they led to his behaving more impulsively." (R, 700). During the penalty phase, Dr. Upson offered additional testimony on Ferrell's ability to function well in the controlled environment of prison (R, 79), his lack of future dangerousness (R, 81), and that because of Ferrell's brain damage he was under the influence of extreme mental or emotional disturbance and that his capacity to conform his

³Dr. Upson testified that Ferrell's work supervisor knew why Ferrell had previously been in prison, had never had any alcohol related problem with him, and would rehire him if Ferrell could come back.

conduct to the requirements of the law was substantially impaired at the time of the crime. (R, 81-83). Throughout his testimony, Dr. Upson stressed Ferrell's brain damage and alcoholism, and consequent loss of impulse control when he was under the influence of alcohol. Given this extensive mental health testimony, Ferrell cannot show that the circuit court incorrectly applied Strickland by failing to find that Petitioner's trial counsel was not functioning as the "counsel" guaranteed Petitioner by the Sixth Amendment, and that this clear, substantial deficiency so prejudiced the defense that the outcome is undermined, based on an alleged failure to present cumulative evidence through the testimony of a social worker.

ISSUE II

WHETHER FERRELL'S TRIAL COUNSEL WAS INEFFECTIVE FOR ALLEGEDLY FAILING TO PRESENT MEDICAL EVIDENCE OF BRAIN DAMAGE?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "The appellate court must defer to the trial court's findings on factual issues but must review the court's

ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Ferrell argues that a brain scan should have been requested prior to trial to assist the jury in understanding the extent of his brain damage. (IB, 45). Ferrell asserts that "the law" recognized the value of scans and "could" have been utilized by counsel in requesting the brain scan. (IB, 48). However, Ferrell does not provide "law" for the proposition that counsel should have, or was required to have, requested a brain scan (SPECT or PET) that his mental health expert did not deem necessary and that could have revealed nothing and been used by the State to refute any claim of brain damage that did show up on the tests conducted by Dr. Upson. (R, 694 & 743).

The legal test to be employed by a court reviewing claims of ineffective assistance of counsel was set out by the United States Supreme Court in Strickland v. Washington, 104 S.Ct. 2052, 2065 (1984); accord Williams v. Taylor, 120 S.Ct. 1495 (2000) (recent decision affirming that merits of ineffective assistance claim are squarely governed by Strickland); and, is more fully addressed in the preceding issue. Below, the trial court applied Strickland to the instant claim of ineffectiveness of counsel. (R, 1872-80). More specifically,

the circuit court addressed the instant claim, Claim II(C) below, and concluded:

c. FAILURE TO PRESENT MEDICAL EVIDENCE OF BRAIN DAMAGE

In this claim Defendant asserts that Dr. Upson, the neuropsychologist called to testify at both the guilt and penalty phases of Defendant's trial, lacked medical expertise (T. at 662), and that medical testing was not performed for the purpose of confirming a diagnosis of brain damage. (T. at 694-95.) Defendant also states that the State's questioning of medical examiner Thomas Hegert established that brain damage caused by long-term alcohol abuse can only be determined by medical testing. (T. at 551.)

Defendant states that he has recently been examined and tested by Dr. Henry Dee, a neuropsychologist, who is prepared to testify that in his opinion Defendant suffers from brain damage and that Positron Emission Tomography (PET) testing will verify this. Defendant also states that to the extent PET testing was unavailable to Defendant's trial counsel, PET technology is newly discovered evidence.

Finally, Defendant claims that Irwin never requested that the trial Court find in mitigation that Defendant suffered from brain damage.⁴ Based on these statements, Defendant asserts that trial counsel was ineffective for failing to support Dr. Upson's testimony with medical testing evidence.

⁴However, the trial court did consider Defendant's impairment, as well as the fact that he was disturbed, as a non-statutory mitigators.

The State counters that there is no reasonable probability that additional experts', testimonies would have resulted in a not guilty verdict or a life sentence. In support of this, the State notes again that it did not contest Defendant's claims of brain damage and alcoholism. The State argued that these "defects" were not sufficiently linked to Defendant's cognition in planning and executing the murder.

Defendant does not allege that Dr. Dee did medical testing, only that in his opinion medical

testing in the form of a PET scan would support his opinion, as well as Dr. Upson's opinion. In *Davis v. State*, 742 So. 2d. 233, 237 (Fla. 1999) the court found that a claim alleging a need for a PET scan and an evidentiary hearing to determine how the PET scan results might affect the defendant's conviction and sentence to be speculative in that the defendant had presented no PET scan results to support his claim and, further, the court found that the claim was meritless in that there was no reasonable probability that the outcome of the trial would have been different with the admission of PET scan evidence.

In the instant case, the Court granted an evidentiary hearing on this claim, which was held on September 4, 2001. At a status hearing on March 19, 2001, the Court ruled that Defendant could be tested by neuropsychiatrist Dr. Walter Afield and that the State could then depose Dr. Afield. Following these events, another status hearing was held on May 1, 2001. By the time of this hearing, the parties were referring to a SPECT (Single Photon Emission Computed Tomography) scan instead of a PET scan.⁵

⁵A review of postconviction proceedings transcripts reveal that the term SPECT was first used by the State while questioning Mr. Irwin during the February 7, 2001, hearing. However, that usage was only in the context of asking Mr. Irwin what types of tests were reviewed in a manual Mr. Irwin had used as an educational aid while preparing for Defendant's trial. (T, Feb. 7, 2001, at 122.) At the end of the February 7, 2001, hearing, the defense began referring to a SPECT scan instead of a PET scan. (T. Feb. 7, 2001, at 209.) Since that time the defense has sought a SPECT scan, *although no* amendment of the original request for a PET scan was ever filed.

At the May 1, 2001, hearing the State reported that it had deposed Dr. Afield and that it conceded that Defendant had mild to moderate brain damage and that a SPECT scan would show a black and white picture of that damage. However, there was no evidence that a picture of physical brain damage could show how that damage effected Defendant's capacity to function. Therefore, the Court determined that no SPECT scan would be ordered, but

the parties' experts would be heard at the September evidentiary hearing.

At the September 4, 2001, hearing, Defendant called Dr. Michael Foley, a diagnostic radiologist, Dr. Walter Afield, a neuropsychiatrist, and Dr. Henry Dee, a clinical neuropsychologist. The State called Dr. James Upson, a neuropsychologist.

The defense questioned Dr. Foley about both the PET scan and the SPECT scan. Dr. Foley differentiated the tests, testifying that a "PET scan is related to metabolic activity, as well as how well the brain is using glucose versus a SPECT scan which shows how well the brain receives. profusion [blood flow]" (T. Sept. 4, 2001, at 18.) Dr. Foley went on to testify that if he did a SPECT scan for a clinical doctor, he could report from the scan whether the patient had normal or abnormal blood flow to the brain, but that it would then be up to the clinician to "make sense of what that means for that particular patient." (T. Sept. 4, 2001, at 31.) He later expanded upon this by stating:

If you had sent me the scan and I didn't know the first thing about this patient and let's say it shows abnormalities, I would read that, give it back to you and I would have no idea of what the patient had, whether he was beat up before, whether he was an alcoholic before, whatever. I would just tell you here are the abnormalities and it would be up to you as a clinician to figure out his history or figure out if this means something or not with regard to what I've found.

(T. Sept. 4, 2001, at 43.)

Moreover, Dr. Foley also testified that even though SPECT scans were available in the 1980s, due to a lack of insurance funding, scans were not generally recognized until the mid1990s and that even in 2001 doctors were not as well-educated about the use of SPECT scans as they could be. (T. Sept. 4, 2001, at 16-17, 54, 70.)

Dr. Afield testified that he had seen Defendant on two occasions and had taken Defendant's history, had performed a physical exam, and had dole psychological testing. (T. Sept. 4, 2001, at 91.)

He, testified that a SPECT scan would produce a black and white picture of any brain damage, but did not testify that it was necessary in order for him to make a diagnosis. (T. Sept. 4, 2001, at 93.) He, too, stated that the SPECT scan would not show the degree of functional impairment and that even without the scan, he would testify, based upon his other testing, that Defendant was impaired. (T. Sept. 4, 2001, at 96, 100.) Finally, Dr. Afield testified that in 1992 the SPECT scan was in its infancy. (T. Sept. 4, 2001, at 106.)

Dr. Dee testified that he had evaluated Defendant on June 5, 2000, and that he had also reviewed various materials, including some of the tests given by other doctors, court records, and prison records. (T. Sept. 4, 2001, at 111, 113-14.) He added that no additional documentation was necessary in order for him to make his diagnosis. (T. Sept. 4, 2001, at 114.) Dr. Dee also testified that he knew from his testing that Defendant was intellectually impaired. (T. Sept. 4, 2001 at 116), and went on to attribute that damage to Defendant's alcoholism:

When I asked him, he estimated for me that he had been drinking a quart of vodka or gin [a day] for 25 or 30 years with a chaser. That's substance abuse.

but what I mean is that there's just no way to escape injury to the brain from that type of substance abuse.

(T. Sept. 4, 2001, at 122).

Dr. Dee also expressed doubt that Defendant could perform today in the same manner he did at the time of the crime. Before the crime, Defendant was working everyday as a mason in the construction trades. Dr. Dee stated that while Defendant's work had been backbreaking, it was not complex, however "whether or not he can do it today, I just don't know. I doubt it." (T. Sept. 4, 2001, at 124.) This indicates that although Defendant has been incarcerated for ten years, his mental condition has continued to deteriorate, perhaps due to his diabetes and high blood pressure.⁶

⁶All parties agreed that Defendant suffered from both diabetes and high blood pressure, both of which were long-standing problems

for Defendant. See, for example, references to diabetes on pages 38, 102-03 of September 4, 2001, hearing transcript.

Finally, Dr. Dee agreed that a SPECT scan would confirm what was there, stating that when a doctor has some clinical ground, he wants to investigate further. However, Dr. Dee did not testify that a SPECT scan was necessary for him to diagnose Defendant as being mentally impaired.

Dr. Upson, who testified for the State, was also Defendant's expert witness at trial. (See discussion of Claim I, C.) At the evidentiary hearing, Dr. Upson testified that prior to trial Mr. Irwin, as Defendant's attorney, had assisted him in obtaining necessary background information about Defendant. With that information and his own evaluation of Defendant, Dr. Upson testified that he felt prepared to present his professional opinion to the jury. (T. Sept. 4, 2001, at 138.) Also at the evidentiary hearing, Dr. Upson testified that while today he might order a SPECT scan done in a case like Defendant's, at the time of Defendant's trial, the SPECT scan was used primarily to assess brain damage to accident victims. Dr. Upson agreed with the defense's experts' statements that in the early 1990s, SPECT scans were just beginning to be used in conjunction with psychological evaluations. (T. Sept. 4, 2001, at 155.)

At trial, Dr. Upson's diagnosis was that Defendant suffered from alcohol induced brain damage. (T. Sept. 4, 2001, at 157.) At the evidentiary hearing, Dr. Upson testified that a SPECT scan would not have assisted him in determining what functional impairment Defendant was actually expressing. (T. Sept. 4, 2001, at 159.)

Based upon testimony from experts for both Defendant and the State, a SPECT scan would show a black and white picture of Defendant's brain, which would reveal areas that are not receiving blood flow; however, the scan would not provide any additional information concerning Defendant's functional impairment. Further, none of the experts testified that the scan was necessary to complete their medical opinions regarding Defendant's brain damage. Therefore, Defendant has failed to show the particularized showing of need for the scan, as required by *Rogers v. State*, 783 So. 2d 980, 999

(Fla. 2001) and *Robinson v. State*, 761 So. 2d 269, 275-276 (Fla. 1999).

Moreover, this claim is not asserted for the purpose of determining the usefulness of either a PET or a SPELT scan today. Instead, this is a claim of ineffective assistance of trial counsel for not having ordered a scan in 1992. Yet, there is no evidence that such scans were being used to demonstrate brain damage in capital cases in Florida in 1992.

First, all of the experts who testified at Defendant's evidentiary hearing stated that while the tests were available, they were just beginning to be used in conjunction with psychological assessments.

Second, the Court gave Defendant's attorneys the opportunity to provide case law demonstrating that such tests were being used in 1992, and allowed for such authority to be attached to Defendant's written closing statement. Defendant's attorneys referred to authority, but failed to provide copies. The Court then specifically ordered that authority relied upon be provided to the Court. In response, three citations were provided. The first was "*James v. State*, Seminole County, Case No. 93-3237." No copy of this case was provided and the response stated that "[t]here is not a separate order granting a SPECT scan issued by the court in this case. The court file contains a transport order where the Defendant on October 18, 1994 was transported to Central Florida Regional Hospital to have the SPELT scan performed." The response goes on to provide that this citation was offered for the proposition that SPELT scans were available and being used by defense counsel. However, it is not possible for this Court to determine whether the test was done or whether the results were presented at trial. Additionally, the date of testing was two years after Defendant's trial.

Defendant's response also cited to *Mason v. State*, 597 So. 2d 776 (Fla. 1992). A review of this case reveals no mention whatsoever of either a PET or a SPECT scan. The response states that one of Defendant's attorneys had personal knowledge of the case and referenced it "for the proposition that this test was available in Florida, and used by defense counsel for defendants"

Defendant's response also cites to "State of Florida v. Darious Kimbrough Case No.: CR92-10868 (9th Judicial Circuit)-Order Granting Request for Pet Scan, September 26, 1992)." However, this order was issued in conjunction with postconviction proceedings in 2001, not 1992. Additionally, the Court searched for cases which ordered a SPECT scan in 1992 in criminal proceedings and found none.

Third, Mr. Irwin testified at the evidentiary hearing on February 7, 2001, that he obtained materials containing information on defending capital cases in Florida in 1992 from the Florida Public Defender Association. That material, a copy of which was entered into evidence and also was attached to the State's written closing statement, contains sections on intelligence, mental illness, and organic brain damage. While the material includes a list of various types of tests in use to aid defense attorneys in presenting mental health issues to the jury, neither PET nor SPECT scans are included in that listing.

Therefore, the Court finds that Mr. Irwin's failure to order either a PET or a SPECT scan did not constitute a professionally unreasonable omission. The jury did hear Dr. Upson's testimony and was aware of Defendant's problems. (See Claim I, C.) Moreover, the Court finds that the presentation of results from a scan would have only served to confirm Dr. Upson's opinion, but was not necessary to the formation of that opinion. See *Robinson*, 761 So. 2d at 275-76. Hence, there is no reasonable probability that presentation of the results of a PET or SPECT scan would have resulted in a different outcome at trial. *Strickland*, 466 U.S. at 694.

Based on the foregoing, and having granted a hearing on this claim, it is now denied.

(R, 1872-80).

As noted by the circuit court:

Dr. Upson, who testified for the State, was also Defendant's expert witness at trial. (See discussion of Claim I, C.) At the evidentiary hearing, Dr. Upson testified that prior to trial Mr. Irwin, as Defendant's attorney, had assisted him in obtaining necessary background information about Defendant. With that information and his own evaluation of Defendant, Dr. Upson testified that he felt prepared

to present his professional opinion to the jury. (T. Sept. 4, 2001, at 138.) Also at the evidentiary hearing, **Dr. Upson testified that while today he might order a SPECT scan done in a case like Defendant's, at the time of Defendant's trial, the SPECT scan was used primarily to assess brain damage to accident victims. Dr. Upson agreed with the defense's experts' statements that in the early 1990s, SPECT scans were just beginning to be used in conjunction with psychological evaluations.** (T. Sept. 4, 2001, at 155.)

At trial, Dr. Upson's diagnosis was that Defendant suffered from alcohol induced brain damage. (T. Sept. 4, 2001, at 157.) **At the evidentiary hearing, Dr. Upson testified that a SPECT scan would not have assisted him in determining what functional impairment Defendant was actually expressing.** (T. Sept. 4, 2001, at 159).

(R, 1877)(emphasis supplied).

This testimony shows that Dr. Upson did not think brain scans were necessary for him to present his testimony to the jury, and that the newness of the procedures, especially in the context of showing brain damage from alcohol abuse, limited their value to his testimony. If the mental health professional was not of the opinion that the scans were necessary to assist him in presenting his professional opinion to the jury, it is not clear to the State how counsel's "failure" to request a scan deemed unnecessary by his expert falls outside the wide range of reasonable professional assistance guaranteed defendants.

At trial, Dr. Upson was asked about E.E.G.'s, C.T. scans, M.R.I's, SPEC (sic) scans, and P.E.P.⁴ (sic) scans. (R, 694).

⁴Dr. Upson stated that he did not think P.E.P. (sic) scans were used in Florida as there were very few of them. (R, 694).

Dr. Upson testified that these tests might not show the brain damage that was indicated on his tests. (R, 743). Thus, the jury was informed that although no scans were conducted on Ferrell, those scans were not necessarily as informative or accurate in detecting Ferrell's organic brain damage as the tests conducted on him by Dr. Upson. In addition, it is self evident from the record that counsel and Dr. Upson were both aware of the possibility that a brain scan might show no damage - the results of which could then have been used against Ferrell at trial.

Regarding Ferrell's argument that "[i]f the court had granted post conviction attorneys request for a SPECT scan the true nature, extent, and progression of brain damage suffered by Mr. Ferrell due to his alcohol abuse and head trauma could have been more precisely determined and illustrated via demonstrative evidence" (IB, 49), it must be remembered that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 104 S.Ct. at 2065. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on

In Brown v. State, 755 So.2d 616, 633 n13 (Fla. 200), this Court noted testimony that "the PET scan was not widely accepted until recently and still not approved by the Food and Drug Administration as a medical diagnostic tool."

the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 2066; see also Grayson v. Thompson 257 F.3d 1194, 1216 (11th Cir. 2001); Williams v. Head, 185 F.3d 1223, 1238-39 (11th Cir. 1999); Mills v. Singletary, 161 F.3d 1273, 1286 (11th Cir. 1998). In light of the strictures of Strickland, it is not clear how, in making a fair assessment of counsel's performance, discovering the unknown actual results of a PET or SPECT scan, as opposed to the possible results known to counsel, can help evaluate counsel's perspective at the time of deciding whether to seek further testing the defense's mental health expert did not think necessary.

Therefore, Ferrell cannot show that the circuit court incorrectly applied Strickland by failing to find that Petitioner's trial counsel was not functioning as the "counsel" guaranteed Petitioner by the Sixth Amendment, and that this clear, substantial deficiency so prejudiced the defense that the outcome is undermined, based on an alleged failure to request an unnecessary, and possibly negative, brain scan.

ISSUE III

WHETHER FERRELL'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AND PRESERVE AN ALLEGED SENTENCING ERROR THAT WAS BRIEFED ON DIRECT APPEAL IS COGNIZABLE IN THE INSTANT ACTION?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.'" Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

In the circuit court, Ferrell argued that trial counsel's performance was prejudicially deficient for not objecting to "the prosecutor['s] argu[ment] to the court that he was under no obligation, despite the two previous sentencing orders, to find that the statutory mental health mitigators had been proven." (R, 869). Before this Court, Ferrell has removed mention of his claim of ineffectiveness of counsel from his statement of the issue (IB, 52), and, with brief mention of counsel's alleged ill-preparedness (IB, 58), focuses exclusively on whether there was trial court error in the sentencing proceeding and in the sentence itself. (IB, 52-79).

The legal test to be employed by a court reviewing claims of ineffective assistance of counsel was set out by the United

States Supreme Court in Strickland v. Washington, 104 S.Ct. 2052, 2065 (1984); accord Williams v. Taylor, 120 S.Ct. 1495 (2000) (recent decision affirming that merits of ineffective assistance claim are squarely governed by Strickland); and, is more fully addressed in the Issue I. Below, the trial court applied Strickland to the instant claim of ineffectiveness of counsel. (R, 1872-80). More specifically, the circuit court addressed the instant claim, Claim V below, and concluded:

Defendant states in this claim that in its original order, the Court found, along with non-statutory mitigators, two statutory mitigators: (1) that Defendant's ability to conform his conduct to the requirements of the law was substantially impaired; and (2) that Defendant was under the influence of an extreme emotional disturbance at the time of the crime. § 921.141(6)(b) and (f), Fla. Stat. (2000) (wording of statute subsections unamended since time of Defendant's sentencings) (emphasis added). While the existence of these conditions of impairment and disturbance may be found to be either statutory or non-statutory mitigators, in order to be statutory mitigators they must be found to be substantial and extreme, respectively.

On direct appeal, the Supreme Court of Florida remanded Defendant's case to the trial Court with orders to issue a new sentencing order. *Ferrell v. State*, 653 So. 2d 367 (Fla. 1995). Apparently the first four pages of the original sentencing order had inadvertently been lost, and hence, were never filed with the Clerk and never reached the Supreme Court on appeal. (S.R. at 21.)

Defendant's Amended Motion goes on to say that upon remand the Court changed its finding so that all mitigators were found to be non-statutory. Further, Defendant suggests that the Court made this change at the urging of the State in an off-the-record exchange and that trial counsel failed to object to this discussion. Defendant states that Irwin's failure to request that the discussion in question be on the record constitutes ineffective assistance of counsel.

The State's position is that the State Attorney was simply pointing out to the Court that the weight given each mitigator should be detailed separately in the Court's sentencing order, as opposed to assigning a total weight to all mitigators combined. The State also asserts that pointing this out to the Court was not improper behavior.

A hearing was granted on this claim, since it involved allegations concerning information which was not a part of the record. As stated earlier, Defendant's attorneys informed the Court that they planned to call the sentencing judge, Circuit Court Judge Daniel P. Dawson, as a witness at the hearing. Therefore, Judge Dawson recused himself and Judge Maura T. Smith was assigned to this case. At the hearing, both Judge Dawson and attorney Irwin were called as witnesses, as was Assistant State Attorney Dorothy Sedgwick, who was the prosecutor at trial.

Judge Dawson testified at the evidentiary hearing that he did not realize that his entire order had not gone to the Supreme Court until the case was remanded. At that point, he was unsure whether he should just forward the four missing pages of his original order to the Supreme Court or write a new order. According to his testimony, as well as the testimony of Irwin and Sedgwick, there was a meeting in Chambers, prior to the hearing set for issuing a new sentencing order. At the meeting, Judge Dawson informed the attorneys that his complete order had not gone up to the Supreme Court. Judge Dawson testified that he did not recall any discussion at that time of whether he should find statutory as opposed to non-statutory mitigators and that his recollection was only that he should weigh each mitigator.

It is obvious from the transcript of the post-remand sentencing hearing that the attorneys were furnished a copy of the original sentencing order before going on the record for that proceeding. (S.R. at 25.) At the postconviction evidentiary hearing, Judge Dawson went on to testify that once on the record, the in-Chambers discussion was repeated.

During the post-remand sentencing hearing, the State expressed concern that the original sentencing order, even with the missing pages restored, would not comply with the requirements of *Campbell v. State*, 571 So. 2d 415, 419-20 (Fla. 1990), *rev'd on other grounds*, 679 So. 2d 720 (Fla. 1996) (finding that when considering mitigating circumstances in death penalty

cases, the trial court must expressly evaluate each mitigating circumstance in its written order and determine whether each has been established by the greater weight of the evidence). There followed a recess, during which time, Judge Dawson wrote a second sentencing order.

Again, it is apparent from the transcript of the post-remand sentencing hearing, that a copy of the second sentencing order was also given to each attorney to review before the hearing resumed. (S.R. at 30-31.) When the hearing resumed the State expressed concern that the second sentencing order still would not meet the requirements of *Campbell*. (S.R. at 32-34.)

At the postconviction evidentiary hearing, Irwin testified that he recalled a second off-the-record meeting. However, both Judge Dawson and Sedgwick testified that they could not recall such a meeting. Back on the record at the post-remand sentencing hearing, Judge Dawson announced his intent to read the second sentencing order and the following exchange took place.

The Court: Anything from either party before the Court proceeds?

Ms. Sedgwick: Yes, Your Honor. I did have a question. Along the intent of *Campbell*. Is this Court finding that the proposed mitigators to be proven by a preponderance of the evidence. Mitigators that were contested as being proven. That he was under the influence of extreme mental or emotional disturbance at the time of the killing and that he was-the other contested mitigator, that his ability to conform his conduct to the requirements of law was substantially impaired?

The Court: Both of those issues are ones that the Court has some difficulty in how to place in a written order its findings. The finding that there is, in fact, a--there is some degree and I know that the term of mitigating factor number one is extreme--,

Ms. Sedgwick: That is the statutory one, Your Honor, but there's a lesser degree that is a nonstatutory. This is extreme, that's

why I'm asking, are you really finding that proven by a preponderance of the evidence.

The Court: The court was finding a nonstatutory level of mental or emotional disturbance as opposed to statutory extreme level of mental or emotional disturbance and the Court has indicated that the level of mitigation, given the factors, to be very low there for weight to be given to these mitigating factors--

Ms. Sedgewick: I think under Campbell that isn't adequate

Mr. Irwin: I'm a little confused. As far as I understand the Florida Supreme Court order, they were basically directing the Court to issue another sentencing order and I don't see anywhere in the order that we're supposed to be debating the Court's order at this time. It seems to me that they were pretty clear in saying that the--

Ms. Sedgewick: I'm not asking the Court to change his ruling. But since they send things back for rearticulation to comply with Campbell--this is a new area of the law. I think it's fair for us to comment on whether or not we think it complies with *Campbell* or whether it needs further definition.

The Court: So at this time the Court will take a short recess and we will determine whether or not anymore definite language could be placed in the order to clearly express to the appellant [sic] court what the Court's findings are and to more clearly bring the order within the scope of *Campbell*.

S.R. at 32-36 (transcript of second sentencing hearing).

Following the above exchange, the Court took a second recess, during which time a third sentencing order was produced and copies supplied to the attorneys. Thereafter, the proceedings resumed and the final sentencing order was read to Defendant on the record. (S.R. at 37-46.) , This third order found the

same mitigators to be proven, but did not find any of them to be statutory. The order expressly stated that the Court did not find Defendant to be **substantially** impaired and did not find him to be under the influence of extreme mental or emotion disturbance at the time of the killing. (S.R. at 42.)

Irwin requested that all three sentencing orders be entered so that the record would be complete. The Court replied that if Irwin had a copy of the second order and wished to present it as a defense exhibit for the purpose of the second sentencing proceedings, a copy could be made. (S.R. at 37.)

Subsequently, the third sentencing order went to the Supreme Court of Florida, which affirmed. *Ferrell v. State*, 680 So. 2d 390 (Fla. 1996). Defendant then filed a motion for rehearing, which was denied. However, that denial gave rise to a dissenting opinion, which addressed the very point Defendant now raises. That dissent read in part:

Rather than entering an order referring to the apparently misplaced original order, the trial court prepared a second order that again found the two statutory mitigating factors described above. However, before executing this order, the trial court had a brief discussion with counsel and then enter (sic) a third order not finding the two statutory mitigators to exist. This change of findings, without explanation of any kind, completely undermines confidence in the sentencing order under review.

680 So. 2d at 392 (Anstead, J. dissenting, in which Kogan, C.J. concurs).

At the postconviction evidentiary hearing, copies of all three sentencing orders were entered into evidence.

This Court finds that the original sentencing order in this case went to the Supreme Court of Florida minus four pages. The record on appeal does contain the transcript of the original sentencing hearing, wherein there is recorded the Court's complete sentencing order as read on April 21, 1993. However, it is not perfectly clear from that transcript at exactly what point the Court began reading its order, because the Court interrupted itself in several places to ask questions of the

attorneys. Therefore, the Supreme Court, considering only what appeared to be the complete order, remanded the case to the sentencing Court with orders to write a new sentencing order.

This Court now finds that the sentencing Court's intent never changed in this case, however that intent may have been expressed in writing. In all three sentencing orders, Judge Dawson stated that he gave equal consideration to all mitigators and each time he found them to carry little weight. Further, in light of the fact that Defendant had a previous conviction for second degree murder, Judge Dawson found this single aggravator to outweigh the mitigating factors proven.

Nonetheless, this Court also finds that the sentencing Court was influenced by the State to change the way it expressed its intent. However, this is not improper so long as no new evidence is presented. Apparently, there has been some confusion among trial courts about how to handle a case *which is* remanded only for a more clearly written sentencing order as opposed to a new sentencing. Acknowledging a need for clarification, in 1999, the Supreme Court of Florida addressed the problem.

This Court accepts responsibility for any confusion in these types of cases. We have been less than specific in outlining the exact procedure to be followed in a *Campbell* error case like this

On remand, the court is to conduct a new hearing, giving both parties an opportunity to present argument and submit sentencing memoranda before determining an appropriate sentence. No new evidence shall be introduced at the hearing. See *Crump v. State*, 654 So. 2d 545, 548 (Fla. 1995) ([quoting *Davis v. State*, 648 So. 2d 107, 109 (Fla. 1994)] "[A] reweighing does not entitle the defendant to present new evidence."). After the hearing is concluded, the trial judge is instructed to submit a revised sentencing order explicitly weighing the mitigating circumstances consistent with *Campbell*.

Reese v. State, 728 So. 2d 727, 728 (Fla. 1999) (remanding a second time and finding insufficient the trial court's submission of a revised sentencing order

without a hearing or input from the trial attorneys following initial remand).

Upon receiving the case on remand a second time, the trial court in *Reese* had "[b]oth parties submit[] sentencing memoranda prior to the hearing and present[] argument during the hearing." *Reese v. State*, 768 So. 2d 1057, 1058 (Fla. 2000). The trial court then submitted a detailed, eight-page, amended order discussing and evaluating each of the non-statutory mitigators raised. The Supreme Court found that that order satisfied the requirements of *Campbell*. 768 So. 2d at 1059.

In the instant case, in light of the above findings, this Court finds that Irwin's representation of Defendant at the post-remand sentencing fell within the range of reasonably effective assistance required by *Strickland*. 466 U.S. at 687. (See Claim I A. above.) Irwin did object on the record to any additional argument of counsel at the time of the post-remand sentencing hearing. (S.R. at 35.) Further, at the postconviction evidentiary hearing, Irwin testified that it was his understanding that the two mitigators in question had been established as statutory mitigators and that he did not know until the Court wrote its third and final sentencing order that they had been downgraded to a nonstatutory mitigators. Even more importantly, this Court finds no evidence that off-the-record discussions took place about topics that were not later put on the record. Therefore, there would not have been anything more to which Irwin should have or could have raised an objection. Nor is there any evidence that he had done so,)t would have changed the outcome of the proceedings. Under the second prong of *Strickland*, an error on the part of counsel, "even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." 466 U.S. at 691. Finally, this Court finds that the Supreme Court of Florida was aware of the proceedings at the post-remand sentencing hearing, having as a part of the supplemental record, the transcript of those proceedings, yet it affirmed the sentence. 680 So. 2d at 392.

Based on the foregoing, and having granted a hearing on this claim, it is now denied.

(R, 1885-92).

Initially, the State would note that the issue of whether the trial court failed to make an independent determination of the aggravating and mitigating circumstances due to the argument of the state attorney was raised and briefed by Ferrell, as well as argument addressing the merits of the order, as directed by this Court on January 5, 1996, during the direct appeal following remand. (SB, 4-10)(Supplemental Initial Brief of Appellant dated January 29, 1996). Thus, it is inappropriate for Ferrell to attempt to relitigate the same claim that was decided adversely to him on direct appeal under the guise of an ineffectiveness of counsel claim. Arbelaez v. State, 775 So.2d 909, 919 n.8 (Fla. 2000); Torres-Arboleda v. Dugger, 636 So.2d 1321, 1323 (Fla. 1994)("Proceedings under rule 3.850 are not to be used as a second appeal; nor is it appropriate to use a different argument to relitigate the same issue."). See also Kelley v. State, 569 So.2d 754, 756 (Fla. 1990)(stating that "while our opinion did not specifically discuss such additional evidence [which was discussed in a supplemental brief], it is clear that the issue was decided adversely to Kelley.").

Notwithstanding the obvious procedural bar, as noted by the circuit court, there was nothing improper in the state attorney offering argument during the sentencing proceeding. Reese v. State, 728 So.2d 727, 728 (Fla. 1999)(directing that both parties be given an opportunity to present argument). Thus, any

objection to a change in the order blamed on the argument by the state attorney would have been without merit.⁵

Further, after listening to the testimony of all involved at the sentencing proceeding, the circuit court found "that the sentencing Court's intent never changed in this case, however that intent may have been expressed in writing." (R, 1890). The circuit court noted that "[i]n all three sentencing orders, Judge Dawson stated that he gave equal consideration to all mitigators and each time found them to carry little weight." (R, 1890). Here, as in Lynch v. State, 28 Fla. L. Weekly S75 (Fla. Jan. 9, 2003), this is a question of form, not substance. Judge Dawson evaluated the two mental health mitigators and afforded them the weight he found appropriate under the evidence presented on mental health. Although the labels, statutory or non-statutory, may have changed, the weight assigned and the sentence rendered remained unchanged.

As this Court has repeatedly stated, to prevail on a penalty phase claim of ineffective assistance of counsel, the death-sentenced defendant must show that but for counsel's errors, the defendant would have received a life sentence. See e.g. Rose v. State, 675 So.2d 567, 570-71 (Fla. 1996). Thus, as the evidence

⁵On direct appeal, in his motion for rehearing of this Court's remand order, Ferrell argued that the order was unclear as to whether the parties were to have input into the trial court's order. Thus, it is inconsistent to now argue that trial counsel's failure to object to the state's input was constitutionally deficient if the order was unclear on that point.

on mitigation and aggravation remained the same, the weight assigned the mitigators remained the same, and the **sentence remained the same**, it is unclear how Ferrell was prejudiced by the "change" from statutory to non-statutory.

Finally, Ferrell's argument that Dr. Upson's testimony on the statutory mitigators was uncontroverted (IB, 76), or that Dr. Upson's testimony on the statutory mitigators was presented without contradiction (SB, 8), ignores the State's cross-examination of Dr. Upson. The State's cross-examination of Dr. Upson introduced the following evidence to the jury:

Q In the history that you received as to the facts of this murder, of this killing of Mary Esther Williams, did you receive a factual history that a witness, Willie Cartwright, gave information to the police that the defendant, Jack Ferrell, had made a statement to her "I killed one bitch and I'll kill another?"

A I was aware of that, yes.

Q For the purpose of your consideration of that statement, did you presume that to be true, that he said that?

A I just assumed that he said that, probably, yes.

Q Isn't it true that the plain meaning of those words indicate reflection on his prior murder and verbalization of his intent to do another?

A That's one interpretation, yes.

Q In your opinion, do the deficits that you say that you saw on his testing indicate that he didn't understand what he was saying when he said those words?

A They do not.

Q Do the deficits that you say that you saw on his testing indicate that he didn't mean those words when he said those words?

A No.

Q In the history that you received of the facts of the commission of this crime, did you receive information that Jack Ferrell, prior to the shooting of Mary Esther Williams, again to Willie Cartwright, has made the statement that when he went back to prison he wasn't coming back this time?

A I have heard that statement.

Q For the purpose of your considering that, did you consider that statement to be true?

A I presumed that it was probably true.

Q Doesn't the plain meaning of those words mean that he reflected on his prior time in prison and that he reflected that in the future he may not get out of prison?

A I don't know that it reflects his reflection on the prior prison. It certainly is an indication that he thought that he could go to prison again and he might not get out.

Q When he says I may not get out this time, you don't think that means that he's reflecting on the prior time?

A He's reflecting that he has been there before, yes.

Q Do the deficits that you say you observed in his testing indicate that he would not have understood or meant what he said when he said those words?

A I have no way of testing for that.

Q All right. You talked about the fact that he - you found the present - that you determined that he did have what you described as the superego, that he was a person that did have a conscious (sic), he is not a criminal that does not have a

conscious (sic). You said you believed that he did have this superego, this conscious (sic). Doesn't the fact that you found that in your testing mean the fact that he had spent time in prison for the murder of another woman should have had an affect on his impulse control and his decision making?

A It would have under conditions similar to those where he's not under the influence of alcohol, but as I've tried to point out, it's my opinion that the alcohol exacerbates an underlying condition. That's when he loses the impulse control.

Q Impulse control aside, did anything you found indicate that he had a memory problem with remembering him being in prison and punished for killing anyone before? Does he have a memory problem with that?

A He has a memory problem, but he did remember killing someone, and he did remember being in prison, yes.

Q In your opinion, based upon the history you were given of how the murder occurred, is it your opinion that he was capable of knowing right from wrong?

A Yes.

Q Based upon the history that was given to you, in your opinion, at the time of the shooting, was he capable of appreciating the criminality of his acts?

A I'm very uncertain of that, because **I don't know how or at what level he was intoxicated, if he was intoxicated**, and to what extent he was thinking in terms of right and wrong, but in general, I don't think he's a depraved person, to the point he doesn't know right from wrong.

Q I'm asking you at the time. Are you saying you don't know, because you don't know how intoxicated he was?

A I'm very uncertain about what he knew. I have the feeling that probably if he had thought about it clearly, he probably would not have done it, because he would have realized the wrongness, yes.

Q In your opinion, based upon - do you have an opinion based upon the history you were given, whether at the time of the shooting, he was capable of appreciating that she would or could die from shooting her?

A I have no data on that.

Q You have no opinion as to whether mentally he thought she would or could die from that shooting?

A I have no data to indicate that.

Q What about the fact that when he left he told - he immediately told people to call the police, I just killed my old lady. Did you consider that as reflecting anything about his appreciation of the criminality of his act or anything about his capability to appreciate that she could or would die?

A I think it indicates several things. One is, it is not an indication of a very good planned event. It's like something happened and now he's running and he's announcing that fact that something happened, somebody do something, and, yet, he announces the fact that he did it.

Q Isn't it equally consistent with someone who decided ahead of time that they were prepared to take the consequences for what they would do?

A I think you could interpret it that way.

(TR, 728-35).

The State may have conceded that Ferrell had organic brain damage and was intoxicated at the time of the offense, but the State never conceded that Ferrell was intoxicated to the extent that he was unable to form the intent necessary to commit the

crime charged. This testimony shows that the State was able to effectively use Dr. Upson to establish that Ferrell's claim of voluntary intoxication, and consequent impulse problem due to his alleged organic brain damage, was based only on information from Ferrell; and, that Ferrell's claim of intoxication was inconsistent with his behavior, and statements made, at the time of the crime. In addition to refuting any claim of voluntary intoxication⁶, this is also competent, substantial evidence that supports the trial court's determination that Ferrell was not under the influence of extreme mental or emotional disturbance at the time of the killing or that his ability to conform his conduct to the requirements of law was substantially impaired.

Finally, Ferrell cannot establish the prejudice prong under Strickland because it is not reasonably probable, given the little weight assigned this mitigation by the trial court - whether labeled statutory or non-statutory, that this altered picture would have led to the imposition of a life sentence, outweighing the especially weighty aggravator at issue in this case. Ferrell v. State, 680 So.2d 390, 391 (Fla. 1996) (comparing Songer v. State, 544 So.2d 1010 (Fla. 1989) (death sentence reversed where single aggravating factor of "under sentence of imprisonment" was weighed against three statutory and seven non-statutory mitigators) with Duncan v. State, 619 So.2d 279 (Fla.) cert. denied, 510 U.S. 969 (1993) (death sentence affirmed where

⁶See Lineham v. State, 476 So.2d 1262, 1264 (Fla. 1985).

single aggravating factor of prior second-degree murder of fellow inmate was weighed against numerous mitigators)).

CONCLUSION

Based on the foregoing, all relief should be denied.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to: **Robert T. Strain**, Assistant CCRC, and **Carol C. Rodriguez**, Assistant CCRC, Capital Collateral Regional Counsel - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, by MAIL on May _____, 2003.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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