IN THE SUPREME COURT OF FLORIDA

ALPHONSO CAVE,

Appellant,

vs. Case No. SC03-95

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR MARTIN COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Alphonso Cave, was the defendant in the trial court below and will be referred to herein as “Appellant.” Appellee, the State of Florida, was the plaintiff in the trial court below and will be referred to herein as “the State." Reference to the various pleadings and transcripts will be as follows:

Record on direct appeal- “DA [vol.] [pages]”

Record on direct appeal of the 1996 resentencing- “RA [vol.] [pages]”

Supplemental direct appeal record - “SR [vol.] [pages]”

Postconviction record - “PCR [vol.] [pages]”

Supplemental postconviction record - “SPCR [vol.] [pages]”

STATEMENT OF THE CASE AND FACTS

This case has a long procedural history. In 1983, Cave was convicted of first-degree murder, robbery with a firearm and kidnapping. See Cave v. State, 476 So.2d 180 (Fla. 1985). He was sentenced to death for the first-degree murder and to life on the other convictions. Both his convictions and sentences were affirmed on direct appeal. Id. Thereafter, Cave filed his first motion for post-conviction relief in the trial court, seeking to vacate his judgments and sentence. The trial court denied relief and that denial was affirmed on appeal. See Cave v. State, 529 So.2d 293 (Fla. 1988).

Cave then filed a Petition for Writ of Habeas Corpus in federal district court, and the court ordered a new sentencing hearing based upon its finding that Cave's trial counsel was ineffective because she did not fully understand the elements of felony-murder, which prejudiced him at sentencing. The Eleventh Circuit affirmed the district court's grant of a new sentencing hearing. See Cave v. Singletary, 971 F.2d 1513 (11TH Cir. 1992). Attorney Jeffrey Garland was appointed, upon remand, to represent Cave on re-sentencing (R 7-8). Garland testified at the evidentiary hearing that the first issue he encountered in representing Cave was the State's failure to resentence him within 90 days[1], as mandated by the Eleventh

[1] Garland testified that Cave had to be resentenced within 120 or 30 days, he couldn't remember (T1 8). The Eleventh

Circuit (R 8-10). According to Garland, the State was required to conduct Cave's resentencing within 90 days or sentence him to life. He litigated the issue up to the United States Supreme Court, but lost (R 8-10).

Cave's first resentencing was held in 1993 (R 9-10). Garland described the efforts he took in preparing for the 1993 resentencing as follows. First, he collected all the available materials held by the different attorneys who had represented Cave over the years and conferred with those attorneys (R 11). Second, he collected the transcripts from all of the proceedings involving the three co-defendants and conferred with all of their counsel (R 11). After conferring with counsel, he explored psychological/psychiatric issues with Cave with regard to the 1993 resentencing. He reviewed Dr. Sheldon Rifkin's records, who has performed an initial interview after Cave's arrest. Garland believed that Rifkin had a conflict because he had also examined a co-defendant, but the conflict didn't concern him because it benefitted Cave, not the co-defendant (R 14). It corroborated Cave's version of events, which Garland explained had remained remarkably constant over time, while the versions by co-defendants have differed. Cave was neither the shooter nor the stabber (R 14). Garland also reviewed Dr. Krop's findings (R 12-13).

Circuit opinion, however, states that the time period was 90 days. See Cave v. Singletary, 84 F.3d 1350 (11th Cir. 1996).

Garland agreed that the case had already been worked up for mitigation when he took over because there had been a first sentencing, Karen Steger represented Cave at that one (R 153). No mitigation was introduced at the first sentencing (R 153). Counsel was found to be ineffective for not putting on any mitigation (R 153). Garland noted that her investigation was very good and included witness interviews, family interviews, Dr. Krop's psychological report, and Dr. Rifkin's work (R 153).

Garland explained that, at the 1993 re-sentencing, he put on mental health mitigation through Dr. Rifkin, but he was limited to putting on only IQ testimony (R 154). At that time, Florida courts were litigating whether the State could have the defendant examined, Garland's position was that it could not (R 22). The judge ordered Cave to submit to psychological examination by Dr. Cheshire (a psychiatrist), but he refused, and the sanction was that Cave was not allowed to use psychological tests for any issues except IQ. Garland noted he was quite limited in 1993 re-sentencing because of that (R 22-24).

Garland remembered discussing Dr. Krop's report with him (R 21). He didn't have notes of meeting in front of him, but remembered that he compared Krop's report with other information and ultimately made the decision to not have him appointed in

the 1993 case (R 21). Garland didn't use a psychiatrist because he didn't see any issues requiring one (R 25). Garland doesn't request a psychiatrist unless there is something of a medical/physical nature or something to indicate an organic condition (R 25). He opined that nothing in Cave's history suggested that he'd been abused as a child or suffered some personal injury, nothing about his affect or behavior suggested an organic problem (R 25). The other attorneys kept telling him how polite and appreciative Cave was and that he was able to relate to the attorneys (R 25).

Garland tried to get school records, but St. Lucie County, didn't keep any (R 29). He thought he got some records and that Cave's IQ fell in the boderline retarded range, the records he received were consistent with that--they showed poor performance and assignment to special education classes (R 29). Garland thought the fact that Cave didn't perform well in school had more to do with family (lack of support for educational endeavors) than with his native intelligence (R 29-30). Cave performed better than IQ test showed.

Garland first met with Cave in 1992 or 1993 (R 31). Cave was able to read and write by the time he met Garland (10 years after the murder), but at time of arrest, he had little ability to read and write (R 31). Neither his insight or overall educational levels were high, but Garland thought that Cave had

educated himself in prison, his opinion is that IQ testing can change over time. Garland thought he presented argument on this to the jury in 1993 (R 31). Dr. Cheshire's position was that IQ is really a measure of performance and motivation, if someone doesn't do well in school, it's because of lack of support structure at home, not lack of intelligence (R 32).

Garland argued that the evidence supported the fact that Cave didn't do well in school, but he took the time in prison to better himself (R 33). Garland's opinion is that scores can change over time and it's a matter of will and motivation as well as native intelligence (R 33). Garland opined that in recommending death, jurors look at whether a person is salvageable, whether what they did was out of character (R 34). To Garland, it was important to show that Cave bettered himself in prison, they were asking the jury to consider him as a whole (R 34).

The main piece of evidence relied upon by the State at the 1996 re-sentencing was Cave's confession, wherein he admitted robbing the store, wielding a gun in the store, and kidnaping the victim at gunpoint, placing the victim in the car, being in the car as it drove out of Stuart and getting out of the car so the victim could exit (R 156-57). Cave stated that Bush stabbed the victim and Parker shot her (R 157). Cave stated it was unexpected and happened at some distance from the car (R 157).

Garland called approximately fifteen witnesses in mitigation (R 157-58). Cave testified consistent with his confession (R 157-58). Cave also testified that he was a slow learner, had dropped out of school, and could hardly read (R 159). Cave testified that he had a son whom he loved and cherished who had been killed by a drunk driver, that he had saved his cousin's life, and that if he hadn't been drinking and smoking pot that night he wouldn't have participated (R 160). Cave denied knowing that Bush was a rapist and that Parker was a criminal (R 160).

Cave explained that he had matured in prison and had been trying to better himself in prison, by improving his reading and religious practices (R 161). Cave's mother, uncle, aunt, sister, neighbors and reverend described him as a smart, nice, caring and polite person (R 163-67). Garland's intent was to humanize his client (R 169). They agreed that Cave's expectation that the victim would not be harmed was unrealistic but that he was on drugs at time and that influenced his thinking (R 36). Garland's opinion was that the statement Cave gave to the State Attorney right after the murder was the closest to being what actually happened (R 36). The officer who made the traffic stop agreed that the person in the rear seat was drunk or nuts and they argued that person was Cave (R 36).

Garland opined that what they presented at the 1996 re-sentencing showed Cave was highly suggestible (R 37). Cave had no significant criminal history, said he didn't know about criminal history of his co-defendants, and thought if they went to a remote area, the victim would be able to make her way back (R 37). Coupling those beliefs with marijuana and alcohol use, Garland stated, shows that what Cave was thinking was not unreasonable (R 37). Garland was not trying to prove that Cave wasn't guilty of crime, he was just trying to get some mitigation (R 37).

Garland looked into all kinds of evidence regarding Cave's suggestability (R 38). The 1996 re-sentencing had to do with suggestability. The first re-sentencing also revolved around that issue, but they couldn't confront it directly because they didn't have the evidence placing Cave in the back seat (R 38). Regarding IQ, Garland's understanding, based on conversations with several different psychologists and psychiatrists in this case, was that it is not a fixed number with a fixed meaning (T 38-39). Rather, it is just one measure of a person's intelligence, but there are many types of intelligence. Cave was working, able to support himself, his son and his girlfriend (R 38-39). Garland opined that experts say IQ number, by itself, is not particularly important (T 38-39).

Rifkin's report states that Cave's street knowledge is adequate

and in his deposition he opined that Cave was not retarded and not led by others (R 174, 176). The gist of Rifkin's report is that straight IQ is not a fair measure, have to look at ability to function in society (R 180). Rifkin also diagnosed Cave as having anti-social personality disorder (R 181). Garland called Rifkin in 1993 but did not want to call him for 1996 re-sentencing (R 184).

The judge ruled after the 1996 re-sentencing that IQ by itself is not really instructive (T 39). Garland agreed that his thinking on IQ changed as he progressed into 1996, he believes it is not important unless it's connected directly to other points (T 39). He would have been more prepared to accept that IQ was an important matter in 1993 (T 40). There are many factors involved in determining school performance, IQ is just one of them (R 40). At the time of the 1993 re-sentencing, Garland believed that IQ was a determining factor, but by the time of the 1996 re-sentencing did not believe it, by itself, is a determining factor. Also, Dr. Alegria tested Cave's IQ and found it to be low average, a score of 90 (R 201).

Regarding what he learned about Cave's drug use, Garland stated that he couldn't recall the specifics, but alcohol and marijuana were relevant to the homicide (R 43). Garland is aware that there had been experimentation with other drugs. Cave had a variety of jobs, real jobs, not day labor stuff. He

had a constant employment. He introduced evidence of his continued employment in 1993, thinks Cave testified to it in the 1996 re-sentencing (R 43). Regarding the amount of Cave's drug use, Garland went by what Cave told him, what was in the psychological reports and his interview with the family (T 43-44). Cave's girlfriend testified at the 1993 re-sentencing regarding Cave's drug use. Garland couldn't give specifics on what Cave's drug problem was at the time of the crime, but knows that Cave experimented with a variety of drugs. On the night of the murder there was a large quantity of alcohol and a bag of marijuana.

After the reversal of the 1993 re-sentencing, Garland's time records show that May 1996 is when he began doing the bulk of the preparation for the 1996 resentencing (R 45). Garland remembered that they had to change their theory because it didn't work at the 1993 resentencing. The State Attorney allowed him to read everything it had, including handwritten work product. Garland was able to get a more complete picture because he also saw information pertaining to the co-defendants' cases (R 45). Garland found a report by a deputy that the person in the rear seat was extremely intoxicated, which corroborated Cave's account (R 47). He also found out just how bad Bush and Parker were.

Garland spent days going through hundreds of boxes. He

wanted to start anew regarding mental health issues for the 1996 resentencing, wanted to get another opinion. He retained Dr. Alegria, from Miami, to look at the issue (R 48). He also sought to involve Dr. Levy from Vero Beach, but he was unavailable. Garland didn't recall if he spoke to Dr. William Weitz, but he knew that his office speaks with him on post-traumatic issues (R 49). For whatever reason, maybe the results of the testing, they chose to not use him. Garland also made an inquiry of Nadir Baksch, from Stuart. It was only an inquiry, he was never consulted. The main medical person Garland was relying upon was Dr. Alegria, a psychologist, at the 1996 re-sentencing (R 50). Dr. Alegria was provided with a comprehensive set of documents that would be relevant to his inquiry. Garland didn't recall how many times Dr. Alegria visited with Cave. Dr. Alegria found that Cave was a very likable young man, who was now becoming older and who did not have a borderline retarded IQ (R 50). Dr. Alegria found a low-normal IQ, a person with a poor educational background who had bettered himself through study and hard work.

Garland explained that he did not have a psychologist testify at the 1996 resentencing so the IQ issue was not addressed by an expert (R 51). The issue was addressed by evaluating Cave when he testified and considering the other evidence that was put in. There was no medical or expert

testimony at the 1996 resentencing, they didn't feel it would add anything useful to the defense they put forth and didn't want to open the door (R 52). Garland consulted with Dr. Alegria frequently up to the time of the hearing and his deposition was taken (R 52).

Garland believed that the psychological issues Dr. Alegria would have added would have also opened doors to issues that they didn't want to come in (R 53). Garland explained that in 1993, they had a different prosecutor, who made Michael Bryant's testimony a feature of his case (R 54).[2] By the time of the 1996 re-sentencing, he had new prosecutors and a new prosecution theory (R 54). He determined that the case would be best handled by compiling as many mitigating circumstances as possible while limiting the State's case to a circumstantial evidence of the aggravating circumstances and trying to challenge the sufficiency of the evidence on direct appeal (R 55). Garland believed this was a viable strategy that would allow them to challenge the sufficiency and weighing on appeal. Unfortunately, the standards for review changed (R 55).

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[2] Garland explained that Michael Bryant claimed he was a cellmate of Cave's, that Cave beat him badly and that he heard Cave hollering from the cell door down to one of his co-defendants "you didn't have to knife her" and the co-defendant replied "well you didn't have to put a cap (bullet) in her head."

Garland explained the testimony created a conflict because the State had previously claimed that Parker was the shooter.

Garland's primary goal at the 1996 re-sentencing was to keep the State's case circumstantial and at the same time to get as much mitigation in as possible (R 56). Garland agreed that he made a considered decision to not put on expert medical, psychological or psychiatric testimony because it would have likely opened doors and even if it didn't, it wouldn't have added much to the case (R 57). Garland believed that Cave was capable of testifying on his own behalf that this was a situation involving his impaired judgment; where because of his inexperience, poor education, and being under the influence of alcohol and marijuana, he found himself in this situation and Garland stated you don't have to be a psychologist to understand the impact of those things (R 57). Garland also didn't want any direct evidence from co-defendants coming in or anything else that would contradict Cave's statement (R 59). Garland wanted Cave's statement to be an unrebutted direct piece of testimony which, if a circumstantial evidence standard applied, the jury would have to accept it (R 59-60).

Garland wanted to avoid any mention of Michael Bryant's testimony at the 1996 re-sentencing because that would have been direct evidence of Cave being the triggerman (R 61-64). It was garland's opinion that, except for Michael Bryant, the State could not impeach Cave with what someone else said at a different time, that would not be proper impeachment (R 65).

Garland explained his thought on circumstantial evidence, saying he read Omelus as requiring that a non-triggerman could not be held responsible unless the circumstantial evidence ws sufficient to prove beyond a reasonable doubt what happened (R 65). On appeal, the Florida Supreme Court said it was a competent substantial evidence standard of review, not circumstantial evidence standard (R 65). Garland believed that was a change in the law, which had a substantial impact in this case because he made his decisions based on what he thought the law was at that time (R 65-67).

While Garland agreed that he might have revisited the IQ issue and psychological testing had he known the standard of review that would be employed, he made clear that it didn't necessarily mean the decisions would have been different (R 74). Garland noted there is little to be gained by calling a psychologist to say Cave was under the influence of drugs and alcohol, was highly suggestible and wasn't too bright, particularly when its all based on what Cave says (R 77). It had no impact on mitigation witnesses he presented (R 76). He would have explained to Cave that any evidence would be upheld and only Cave could answer whether that would have made a difference to him (R 77).

Garland noted that Cave testified on his own behalf and he thought he did a good job, as well as the mitigation witnesses

(R 78). He also put on evidence that Cave's sone was killed by a hit and run driver and that Cave risked his life when he was young to save his nephew's life (T 78). This was all done to humanize Cave.

Garland agreed that Cave was offered a life sentence during the 1996 resentencin0g, the agreement was that he would have to waive time served, and would have a 25 yr. mandatory minimum (T 82). Cave elected to reject the offer (R 87-88). Garland thought that Cave's mother spoke with him momentarily about the life offer (R 93). He could not recall whether his mother was in agreement on the life sentence (R 93). Garland didn't think Cave would ever get parole, so he wasn't being offered much (R 94). Garland explained that to Cave (R 95).

Garland agreed that he engaged in litigation to produce co-defendant Bush as a witness (R 99). Bush was about to be executed and Garland filed a habeas corpus petition to save his life based on Cave's right to present a defense. Court's ruling was that Cave could perpetuate Bush's testimony, but not his life. Garland had Bush's prior statements to police which were not altogether favorable to Cave (R 100). However, through Bush's attorney, He received a statement, akin to a deathbed statement, that Cave was not the triggerman. Garland could have called Bush's attorney to testify about the deathbed statement, ultimately did not because it would have opened the door to

Bush's prior statements which were not favorable to Cave (T 100).

It was Cave who ultimately made the decision to testify (R 104). Garland knew about an arrest of Cave in Pennsylvania, he knew there was no conviction and that the charges were dropped under vague circumstances (R 116). Garland agreed that he elicited testimony about the Pennsylvania arrest (R 118). He and Cave decided to pursue the mitigator of "no significant prior criminal history," so he brought up the prior arrest because it always came out when they ran through Cave's testimony (R 121). He agreed that he could have been softening th eblow of it by bringing it up first (R 225). Garland felt there was nothing to hide, it was not inconsistent with the pertinent facts and Cave's credibility was more important. he didn't want the jury to think Cave was hiding something and not being honest (R 121-23).

Garland agreed the State brought out on cross-examination that it was a rape allegation (R 124). Garland didn't recall whether he objected, if he didn't he should have (R 124). Garland noted that the co-defendants statements were internally inconsistent (R 125). He characterized Cave as a good person who was in a bad spot at a bad time. Garland agreed that he put on evidence of the criminal histories of co-defendants Parker, Bush and Johnson (R 125).

One of the reasons Garland allowed Cave to testify was because he didn't think he could be impeached with prior inconsistent statements of his co-defendants (R 126-27). By not bringing up the co-defendants' statements, the State could only ask Cave about his own prior statements (R 129). His theory of defense was to rely upon the circumstantial evidence rule and have the defendant take the stand and make a good impression (R 129). He thought he accomplished his goal (R 129).

The jury recommendation in 1996 was 11-1 for death. It was 10-2 in 1993 and had been only 7-5 by the counsel deemed wholly ineffective (R 129). The jury recommendations kept getting worse.

In Garland's opinion, Cave should have taken the plea, he recommended that cave accept the plea (R 130).

Regarding heroin use, he didn't have any evidence of heroin use before the 1996 re-sentencing (R 132). He spoke to Cave's mother many times, and was sure they touched on drug use. Cave's brother Alonzo was in prison, Garland couldn't recall if he actually spoke with him (R 133). He spoke with Cave's girlfriend, who he was living with at the time of the murder (R 134). His primary contact with her was before the 1993 re-sentencing because she testified at that one (R 133-34). He spoke with her about Cave's drug use, there was no doubt that he had experimented with a variety of illegal drugs, including

heroin and cocaine. Garland doesn't know that Cave characterizes himself as a heroin addict in the 1970's. That is not contained in either Dr. Krop's report or Dr. Rifkin's reports and Cave never made that statement to Garland (R 133). No one in Cave's family told him Cave was a chronic heroin user (R 218). In fact, Rifkin's report has Cave denying the us eof drugs except for reefer and denying that drinking is a problem (R 171). Based on the information he had available to him in 1996, he had no grounds to put on mitigation of chronic heroin abuse (R 219). It also didn't comport with the general theme of mitigation he put on (R 219).

Cave confessed to his girlfriend within 24 hours of the murder and gave her all the money (R 134). She testified at the 1993 re-sentencing to show that he had assumed responsibility as a father and was supporting her and his child. Garland had great difficulty contacting Leutricia Freeman, the mother of Cave's child who was tragically killed (R 134). He was unable to serve her with a subpoena. Garland agreed that it would have been important to know if Cave was a drug addict for a substantial period of time (R 135).

The State's position at the 1996 resentencing was that Cave was neither the shooter nor the stabber (R 139). Garland explained the reason he didn't depose Bush was because he had a good idea what he was going to say and didn't want the State to

be able to use the deposition if he chose not to (R 142). Decided to introduce it as a dying declaration, but he didn't need it and didn't introduce Bush's other statements that implicated Cave (R 142).

Garland utilized Cave's mother as a witness at both resentencings (R 143). He was aware of a prior statement and had her review it before taking the stand. He explained that lots of witnesses can be impeached with prior statements, but this was Cave's mother, the person who persuaded him to turn himself in and confess to his involvement. The problem Garland had with her testimony was that she wanted to see her son as brighter and more intelligent than they were trying to portray him, so she didn't help (R 144). Also, in Garland's opinion, Cave's mother could not read but wouldn't admit it (R 145). She would pretend to read the documents they showed her, he tried to have someone read it to her but she yelled (R 145). Anyone could put any words in her mouth because she wouldn't admit that she couldn't read and she'd agree it said what they represented (R 146). She was provided with her deposition, but would not have them read it to her, because in her mind she could read (R 147). According to Cave's cousin, who is a school teacher, one reason Cave had such a hard time in school is because neither of his parents could read, they had very low levels of education, and very low expectations (R 147). In Garland's opinion, the

mother offered a variety of other information and he believed she was an effective witness at the 1993 resentencing (R 148-49).

Cave also presented testimony from Leutricia Freeman at the evidentiary hearing. She testified that she was 13 or 14 years-old at the time Cave impregnated her (R 277). Cave was about 19 or 20 at the time (R 278). She told her mother that she was having a sexual relationship with Cave and her mother did not approve (R 280). She lived with him for a short period of time in the late 1970's (R 281). She supported them, using her sister's social security number to work at Ramada Hotel and her mother helped them (R 284). She agreed the picture of cave she is painting is that he impregnated a 13 year-old child and then let her support him while he stayed home shooting heroin (R 285). Ms. Freeman admitted to being a convicted felon, who's served prison time (R 286-88).

Dr. Gutman, Cave's expert psychologist, agreed on cross-examination, that an expert's opinion is only as good as the material he relies upon (R 309-10). He agreed that regarding Cave's heroin use, he relied heavily upon the report of Leutricia Freeman and the evaluation of Cave. It is true that at the time the murder occurred, Leutricia had not been living with Cave for 3 ½ yrs. He agrees that Cave told Rifkin he had been living with a 23 yr old woman for 3 ½ yrs. Dr. Gutman did not

know that current girlfriend reported that there was no heroin use and she was around him (R 309-10).

SUMMARY OF ARGUMENT

Issue I - The trial court correctly denied Cave's claim, after an evidentiary hearing, that counsel was ineffective for failing to preserve the testimony of co-defendant Bush. The trial court's factual findings are supported by competent, substantial evidence and its legal conclusion that ineffective assistance was not established comports with the dictates of Strickland v. Washington, 466 U.S. 688 (1984). Further, the testimony does not qualify as "newly discovered" evidence.

Issue II - Florida's capital sentencing scheme is not rendered unconstitutional by Ring v. Arizona

Issue III - There is competent, substantial evidence supporting the trial court's denial of Appellant's ineffectiveness claim.

Issue IV - There is competent, substantial evidence supporting the trial court's denial of Appellant's ineffectiveness claim.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DENIED CAVE'S CLAIM, AFTER AN EVIDENTIARY HEARING, THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE THE TESTIMONY OF CO-DEFENDANT BUSH (Restated).

Cave argues that the trial court reversibly erred by failing to order a new guilt phase and sentencing after it was presented with evidence, through the testimony of co-defendant Bush's attorney, Mr. Steven Kissinger, that Cave allegedly had attempted to dissuade his co-defendants from murdering the victim and had communicated his withdrawal to his co-defendants, withdrawing to the car when unable to dissuade them (IB 20). According to Cave, trial counsel was ineffective for not presenting this exculpatory testimony to the jury at re-sentencing. Alternatively, Cave argues this testimony must be treated as "newly discovered evidence." (IB 27). The trial court's factual findings are supported by the record and its legal conclusion that ineffective assistance was not established comports with the dictates of Strickland v. Washington, 466 U.S. 688 (1984). Further, as will be fully explained below, the testimony does not qualify as "newly discovered" evidence. This Court should affirm.

The standard of review for ineffective assistance of counsel claims raised in postconviction proceedings, is that "the appellate court affords deference to findings of fact based on competent, substantial evidence and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So.2d 319, 323 (Fla. 2003). See Davis v. State, 28 Fla.L.Weekly S835, S836 (Fla. November 20, 2003); Stephens v. State, 748 So.2d 1028, 1033-34 (Fla. 1999) (requiring de novo review of ineffective assistance of counsel, but recognizing and honoring "trial court's superior vantage point in assessing credibility of witnesses and in making findings of fact"); State v. Riechmann, 777 So. 2d 342 (Fla. 2000); Cherry v. State, 781 So.2d 1040, 1048 (Fla. 2000) (announcing appellate court's "review the prongs of ... ineffective assistance of counsel as questions of mixed law and fact."); Sims v. State, 754 So. 2d 657, 670 (Fla. 2000); Rose v. State, 675 So. 2d 567 (Fla. 1996). "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).

To prove ineffective assistance of counsel, Cave must demonstrate both deficient performance and prejudice arising from that performance. Strickland, 466 U.S. 668. Proving

deficiency requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment" and "that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. Continuing, the Court defined "deficient" as:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it 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. 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.

Id. at 689 (citation omitted).

This Court has noted that the Strickland analysis requires:

> First, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. *See Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989). Second, the deficiency in counsel's performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. *See id.; see also Rutherford v. State*, 727 So. 2d 216, 219 (Fla. 1998) ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.") (quoting *Strickland*, 466 U.S. at 686).

Davis, 28 Fla. L. Weekly at S836.

Here, Cave argued in Claim XVII of his Supplement to his 3.850 motion, that trial counsel, Mr. Jeffrey Garland, was ineffective for failing to preserve co-defendant Bush's testimony, among other things (R 544-551). In its Response, the State contended that the issue of whether counsel was ineffective for not preserving co-defendant Bush's testimony was procedurally barred as it had been raised on direct appeal.[3] The State also argued that summary denial was appropriate because Cave had failed to establish prejudice resulting from the failure to take Bush's deposition since Bush would have been impeached with his prior inconsistent statements had he testified. Despite the State's arguments, the trial court held an evidentiary hearing on the issue.

At the evidentiary hearing, Cave's trial counsel, Mr. Jeffrey Garland, testified that he filed a habeas petition, approximately two weeks before co-defendant Bush's scheduled execution, to keep Bush alive so that he could testify at Cave's 1996 resentencing that Cave was not the triggerman (R 99, 242,

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[3] Cave argued on direct appeal that he was denied the opportunity to present a defense because the trial court refused to stay co-defendant Bush's execution (Initial Brief Direct Appeal, p.90). In its Answer Brief, the State pointed out that Cave had the opportunity to depose Bush and failed to do so (Answer Brief Direct Appeal, p. 93). This Court did not specifically address the issue on direct appeal, but ruled that the claim was without merit. Cave v. State, 727 So.2d 227 (Fla. 1998). Based on those facts, the State argued that the claim was procedurally barred as it was use of a different argument to re-litigate the same issue. Id.

385). The petition was denied, the court ruling that Garland could perpetuate Bush's testimony, but not his life (R 99). Garland appealed the denial of the petition all the way to the United States Supreme Court (R 99, 242). Garland explained that after the appeals were completed and it was merely a matter of time until Bush would be executed, he requested Mr. Kissinger get a "death bed" statement from Bush regarding what happened the night of the murder (R 100-101). Mr. Kissinger relayed to Garland that Bush's "death bed" statement was that Cave was not the triggerman (R 102). Garland stated that was the "critical" aspect of what was relayed to him, acknowledging that Bush was not a "boy scout" and they did not want to rely upon what he might say for their defense (R 102).

Garland explained that he did not depose Bush because he had a good idea what Bush would say and didn't want the State to be able to use the deposition if he decided not to use it (R 142). He decided to present the testimony, if he needed to use it, as a "dying declaration" through Bush's lawyer, Mr. Steven Kissinger. Garland opined that one way to deal with Bush's prior statements that implicated Cave was to present Bush's "dying declaration" through his nice looking, reasonable sounding attorney, instead of directly from Bush (R 102). This was all in preparation for something that did not happen (R 102). Garland explained that at the time he was litigating to

save Bush's life, he did not know whether the State would argue, as it had at the 1993 re-sentencing, that Cave was the shooter (R 243-44). Garland wanted Bush's testimony to rebut that, but the issue became moot once the State did not argue, at the 1996 resentencing, that Cave was the shooter (R 243-44). That's why Garland decided not to call Kissinger to testify at the 1996 resentencing. He also did not want to open the door to Bush's prior inconsistent statements, which implicated Cave, since the State had not presented Bush's prior damaging statements at the resentencing (R 100,103). Garland testified that even if he had kept Bush alive, he only would have called him to testify under dire circumstances (R 245).

Bush's lawyer, Mr. Steve Kissinger, testified at the evidentiary hearing about what Bush told him before he was executed. Kissinger testified, over the State's objection,[4] that Bush was distraught because he felt responsible for Cave's predicament (R 391-92). Bush stated that after committing the robbery, kidnapping the victim and taking her to a remote

[4] The State objected to Kissinger's testimony on the ground that Bush's statements did not constitute a "dying" declaration as contemplated by the statute. Specifically, the State argued that the rule was not intended to cover something that happened years before. Instead, it was meant to cover only statements concerning what the declarant believes is the cause of his/her impending death (R 388-90). Because the testimony was admitted and relied upon by the trial court in its analysis of the ineffectiveness issue, the State will include it in its argument, but does not agree that the testimony was admissible.

location, they had no specific plan as to what they were going to do (R 392). Parker directed Cave to give him the gun and Cave complied (R 392). It was clear that Parker was running the show (R 392-93). Parker made a statement to the effect that "he was going to do what he had to do or something along those lines." (R 393). Cave became upset and told Parker "that he didn't have to do this" (R 393). When Cave was not successful in convincing Parker, he left them and went back into the car (R 393). Parker then told Bush to stab the victim, which he did and Parker shot her to death (R 393-94).

Following Bush's execution, Kissinger contacted Garland and told him about all of the statements Bush made the night before his execution, including the "new" statements not previously known to Garland (R 401, 404). On cross-examination, the State impeached Kissinger with a post-conviction motion he filed just prior to Bush's execution in which he alleged that Cave was more culpable (R 397). The State also established that Bush had previously stated that Cave handed him the knife and told him to kill the victim (R 396). The State further established that Bush and Parker had implicated each other as the shooter (R 400-403).

In denying Cave's claim that Garland was ineffective for not deposing Bush and for not calling Kissinger as a witness, after evidentiary hearing, the trial court concluded "it was

reasonable trial strategy for counsel to not perpetuate Bush's testimony and not to call Kissinger as a witness." (R 1055). The trial court noted it was unrebutted that Garland made a conscious decision to not depose Bush or call Kissinger **after** consultation with Cave (R 1054-55). The court further reasoned that Bush's statement to Kissinger about Cave's innocence was in stark contrast to Bush's initial statements to the police and his statement to the parole board, both of which implicated Cave (R 1054). Garland did not want to open the door to Bush's other statements (R 1054).

It is well settled that "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken 'might be considered sound trial strategy.'" Chandler v. United States, 218 F.3d 1305, 1314 (11th Cir. 2000) (quoting Darden v. Wainwright, 477 U.S. 168 (1986)). Calling of particular witnesses and not others is the "epitome of a strategic decision." Chandler, 218 F.3d at 1314 n.14, quoting Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995). Further, the ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial. Patton v. State, 784 So. 2d 380 (Fla. 2000)(precluding appellate court from viewing issue of counsel's performance with heightened perspective of hindsight); Rose, 675 So. 2d at 571 (holding disagreement with counsel's

choice of strategy does not establish ineffective assistance); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(concluding standard is not how current counsel would have proceeded in hindsight); Rivera v. State, 717 So. 2d 482, 486 (Fla. 1998); Occhicone v. State, 768 So. 2d 1037 (Fla. 2000).

The United States Supreme Court made it clear in Williams v. Taylor, 529 U.S. 362 (2000) that the focus is on what efforts were undertaken in the way of an investigation of the defendant's background and why a specific course of strategy was ultimately chosen over a different one. The inquiry into a trial attorney's performance is not an analysis between what one counsel could have done in comparison to what was actually done:

> The standard for counsel's performance is "reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *accord Williams v. Taylor*, --- U.S. ----, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000) (most recent decision reaffirming that merits of ineffective assistance claim are squarely governed by *Strickland*). The purpose of ineffectiveness review is not to grade counsel's performance. *See Strickland*, 104 S.Ct. at 2065; *see also White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992) ("We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."). We recognize that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable.

> But, the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled."[12] *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)(emphasis added).
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> [12] "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is ... whether what they did was within the 'wide range of reasonable professional assistance.' " *Wate*rs, 46 F.3d at 1518 (en banc) (citations omitted)(emphasis added).

Chandler, 218 F.3d at 1313 n. 12. It is always possible to suggest further avenues of defense, especially in hindsight; however, the focus must be on what strategies were employed and whether that course of action was reasonable in light of what was known at the time.

Here, the evidence adduced at the evidentiary hearing shows a reasonable defense strategy for not deposing Bush and not calling Kissinger as a witness. Garland explained that he did not depose Bush because he had a good idea what Bush would say and didn't want to give the State the opportunity to use the deposition if he chose not to. Garland decided it was better to present Bush's testimony, if he needed it, as a "dying declaration", through Bush's lawyer, Mr. Steven Kissinger. However, Garland discovered he did not need Bush's testimony once the State did not pursue the theory that Cave was the triggerman. The only reason Garland needed Bush's testimony was

to rebut the notion that Cave was the triggerman. Once the State failed to pursue the theory that Cave was the triggerman, Bush's testimony became moot. Consequently, Garland decided not to call Kissinger to testify at the 1996 resentencing. By not calling Kissinger, Garland avoided opening the door to Bush's prior inconsistent statements, which implicated Cave.

The trial court's factual findings that Garland's decisions to not depose Bush or call Kissinger as a witness were reasonable "strategy" decisions must be given deference as they are supported by substantial, competent evidence. A finding that counsel's decision was reasonable "strategy" shows her/his performance was not deficient. See Zakrzewski v. State, 28 Fla.L.Weekly S826 (Fla. 2003)(noting that trial court's decision that lawyer made reasonable strategic decisions in failing to object showed counsel's performance was not deficient), citing Wiggins v. Smith, 123 S.Ct. 2527, 2535 (2003) (quoting Strickland and reiterating that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"). Garland cannot be deemed deficient for not deposing Bush or calling Kissinger as a witness given the non-necessity of the testimony and the risks inherent in presenting it.

Likewise, Cave cannot establish that he was prejudiced by Garland's failure to present the testimony. The inclusion of

Bush's alleged "death bed" testimony would not have produced a life recommendation. The evidence, at both the guilt and re-sentencing, included Cave's taped confession, wherein he admitted that he committed the armed robbery (DA 2028-90, RA 1250-70, 1420-21, 26-27).[5] Cave admitted: (1) that he was with Bush, Parker and Johnson on the night in question; (2) that they had "cased" the Lil' General store before robbing it; (3) that he held the gun on the victim during the robbery; (4) that he led the victim out of the store, into the car, at gunpoint; and (5) the he got into the back seat with the victim and that she pleaded for her life during the car ride, offering to do anything to be let go (DA 2028-90, 2716-17, 2753-56, SR 1-11), RA 1250-70, 1420-21, 26-27).

Based upon Cave's confession, this Court found, on direct appeal, that there was competent, substantial evidence to support the trial court's finding that Cave was the ringleader. See Cave, 727 So.2d at 227. Nothing in Bush's alleged "death bed" statements--including alleged "new" statements that Cave attempted to dissuade his co-defendants from murdering the victim and then withdrew to the car when unsuccessful--negate Cave's culpability for the murder or this Court's finding that Cave was a ringleader. Cave played a leading role in the robbery and kidnapping of the victim, which were the direct

[5] Cave also testified at the 1996 re-sentencing making the same admissions he had in his confession (RA 1318-1434).

causes of the victim's death. He is liable for her death as a principal.

Cave's argument that Bush's alleged "death bed" statements preclude his conviction and death sentence on a felony-murder basis is meritless. It must be remembered that Cave has attempted to argue, from the time of his initial direct appeal, that his participation in the murder was "relatively minor," that he did not actually commit the offense and that Enmund v. Florida, 458 U.S. 782 (1982), precluded imposition of the death penalty in this case. This Court rejected those claims finding this case clearly distinguishable from Enmund:

> In *Enmund*, the Court held that the death penalty was impermissible under circumstances where an accomplice defendant aided and abetted a felony during which a murder was committed by others but who himself did not kill, attempt to kill, or intend that a killing take place or that lethal force be employed. The instant case is clearly distinguishable. Appellant Cave was the gunman who admits to holding the gun on the clerk during the robbery and forcing her into the car; he was present in the car during the thirteen-mile ride and heard her plead for her life; and he was present when she was forcibly removed from the car in a rural area, stabbed, and shot in the back of the head. Under these circumstances, it cannot be reasonably said that appellant did not contemplate the use of lethal force or participate in or facilitate the murder.

Cave v. State, 476 So.2d 180, 187 (Fla. 1985). Cave's Enmund/Tison claim was also rejected by the Eleventh Circuit Court of Appeals during federal habeas review. Cave v. Singletary, 971 F.2d 1513, 1515 n.1 (11th Cir. 1992). Cave raised the same argument on direct appeal from the 1996 re-

sentencing, arguing that his status as the non-triggerman, the fact that he did not know his accomplices were going to kill Frances Slater, the fact that he relinquished the murder weapon, the fact that he did not remove the victim from the car at the murder scene, and the fact that he did not participate in the actual stabbing or shooting of the victim (RA 21, 1265-66), all precluded the trial court from sentencing him to death under Enmund and Tison v. Arizona, 107 S.Ct. 1676 (1987). This Court again rejected that argument. Cave, 727 So.2d at 229.[6]

Contrary to Cave's assertions, Bush's alleged "death bed" statements--including "new" statements that Cave attempted to dissuade his co-defendants from murdering the victim and then withdrew to the car when unsuccessful–do not negate his guilt as a principal, do not render his conviction void and do not make it likely that the jury would have recommended a life sentence had it heard this testimony. Regarding his conviction, Cave's reliance upon Ring v. Arizona, 536 U.S. 584 (2002), (IB 21) and section 777.04(5)(c), Florida Statutes (2003), is misplaced. The portion of Ring relied upon by Cave cites to Enmund/Tison, but, as already noted, both this Court and the 11th Circuit have rejected Cave's Enmund/Tison arguments. Cave was a "major participant" in the felony committed who demonstrated a

[6] Just last week this Court issued an opinion in Parker v. State, 2004 WL 112875 (Fla., Jan. 22, 2004), affirming Cave's culpability in this murder.

"reckless indifference" to human life and therefore, may be executed even though he did not kill or attempt to kill. Bush's "death bed" statements do not change that fact. Nor does section 777.04(5)(c) require vacation of Cave's conviction or death sentence. As Cave admits, the defense is not available to him because he was not able to dissuade his co-defendants from committing the crime (IB 28).

Moreover, nothing in Bush's "death bed" statements call his death sentence into doubt. The jury would not have recommended life had it heard Bush's "death bed" statements. First, Cave's defense has always been that it was not his plan/intent to murder Frances Slater and that he did not take part in the shooting or stabbing. Thus, Bush's "death bed" statements do really present anything new. Further, Cave's actions the night of the murder overwhelmingly establish his leading role in the robbery/kidnaping and his knowledge/intent that lethal force was going to be used. He and his gang first went into the Li'l General store but they did not take the gun inside. Although the clerk was alone and opportunity was ripe, they did not rob the store at that time.[7] When they went into the store the second time, Cave walked up to Frances Slater, pointed the gun at her and told her it was a robbery. He then walked Frances Slater to the cash register and demanded that she give him the

[7] Appellant testified that he did not know why they did not rob the store at that time (TV 22, 1409).

money, which she did. When Cave asked where the rest of the money was, Frances Slater pointed to the floor safe and Cave told her to open it. It was Cave who took Frances Slater from the store at gunpoint and placed her in backseat of their car. It was Cave who relinquished possession of the gun to J.B. Parker. On that thirteen-mile drive, Cave had Frances Slater put her head down. When they stopped, it was Cave who got out of the car and took Frances Slater with him. It was Cave who sat by as John Bush stabbed Frances Slater and J.B. Parker shot her. His alleged attempt to dissuade them from killing her and his withdrawal to the car before the killing do not diminish his culpability. The fact remains that his actions in robbing and kidnaping her were the direct cause of her death. After the killing, Cave continued back to Fort Pierce with the rest of his gang and divided the stolen money (TV 21, 1331/10, 1332/21).

These facts clearly demonstrate that Cave knew and intended that lethal force was to be used during the robbery and kidnaping of Ms. Slater. At the very minimum, these facts support the finding that Cave was a major participant in the underlying felonies of robbery and kidnaping, and that his overall actions supported a finding of reckless indifference to human life. See Dubois v. State, 520 So. 2d 260, 266 (Fla. 1988) (finding death sentence permissible under Enmund/Tison where defendant participated in underlying felony and was

present when victim was killed); State v. White, 470 So. 2d 1377 (Fla. 1985); Bush v. State, 461 So. 2d 936 (Fla. 1984) (same).

Newly discovered evidence

Cave makes an alternative argument, that Bush's alleged "death bed" statements should be treated as "newly discovered evidence." The State's first argument is that Cave has failed to preserve this claim for appeal. Cave never argued to the trial court, either in his 3.851 motion, at the evidentiary hearing or in his written closing argument, that the testimony was "newly discovered evidence." Rather, he argued it showed that counsel was ineffective for failing to perpetuate Bush's testimony. Cave waited seven (7) months, until **after** his post-conviction motion was denied, to argue for the first time, in a motion for rehearing, that Kissinger's testimony constituted "newly discovered evidence" (R 1056-1062).[8] However, a motion for rehearing cannot be used to make new arguments to the court. Instead, it is limited to showing points of law or fact that the court overlooked in its ruling. See Fla.R.App.P. 9.330(a). As

[8] Cave's post-conviction motion was filed on September 27, 2000 and his supplement to that motion was filed on March 15, 2001. The evidentiary hearing was held on March 6-7, 2002 and Cave's written closing argument was filed on May 6, 2002. Cave filed a supplement to his written closing argument, on June 7, 2002, stressing that Bush's deathbed statements showed that Cave withdrew from the criminal enterprise before the murder and that counsel was ineffective for failing to bring these statements out to the sentencing jury (R 929-30). Importantly, Cave did not argue that Bush's "deathbed" statements were "newly discovered" evidence.

such, Cave's new argument was not properly presented in a motion for rehearing. Consequently, he cannot raise the "newly discovered evidence" argument for the first time on appeal. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Assuming arguendo that this Court reaches the merits, the argument is not persuasive. As this Court explained in Wright v. State, 857 So.2d 861 (Fla. 2003), newly discovered evidence is evidence that existed at the time of the trial but was unknown by the trial court, the defendant and his counsel, and could not have been discovered by the defendant or his counsel by the exercise of due diligence. The second requirement is that "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992) (quoting Jones v. State, 591 So. 2d 911, 915 (Fla. 1991)). The same standard is applicable if the issue is whether a life or a death sentence should have been imposed. Kight v. State, 784 So. 2d 396, 401 (Fla. 2001), citing Jones v. State, 591 So.2d 911, 915 (Fla. 1991). Evidence which comes into existence **after** sentencing may not be considered as aggravation or mitigation. Porter v. State, 653 So. 2d 374, 379-80 (Fla. 1995) (holding that "newly discovered evidence, by its very nature, is evidence which existed but was unknown at the time of sentencing").

Here, Cave is offering Bush's alleged "death bed" statements

to Mr. Kissinger as the "newly discovered evidence." There are several problems with his argument. First, Cave admits in his brief that the evidence cannot be "newly discovered" because Garland "could have and should have located the information and would have but for his ineffectiveness." (IB 22 f.n.2). Evidence is "newly discovered" only if it could not have been discovered by the defendant or his counsel by the exercise of due diligence. Here, Cave admits the evidence could have been discovered by counsel and it is clear he had to be aware of the evidence at the time of trial. If Cave had, in fact, attempted to dissuade his co-horts from murdering Frances and had withdrawn to the car, he knew of that from the time of the crime, so the evidence cannot be "newly discovered."

In Walton v. State, 847 So.2d 438, 454 (Fla. 2003), this Court dealt with a similar situation. In that case, the defendant alleged, as Cave has here, that the trial court failed to consider newly discovered evidence which showed that Walton was not the ringleader and was merely a bystander. In support of his contention, Walton pointed to various statements by co-defendant Terry Van Royal in which Van Royal disavowed earlier statements he made asserting that Walton was the mastermind or leader of the group committing the murders. Additionally, Walton introduced testimony from two Capital Collateral Regional Counsel attorneys that Van Royal told them that Walton was not

the leader of the group which killed the victims and that the murders were entirely unexpected.

Rejecting Walton's claim that this type of testimony constitutes "newly discovered evidence," this Court reasoned:

> It is plain that Van Royal was available at the time of trial. He was available to be deposed, all parties were aware of his existence because he was a charged codefendant, and he gave multiple statements to the police which were available to counsel. **What Walton has presented as "newly discovered evidence" is simply a new version of the events from a witness/participant who has presented multiple stories since the time of the occurrence of the events themselves.**

Walton, at 454-55. This Court noted that even if Van Royal's newest version of the events surrounding the murders qualified as newly discovered evidence, "it is obvious that this evidence is composed of statements made by an extremely untrustworthy person. If Van Royal's new statements were introduced into the current body of evidence in the instant case--subject to impeachment through introduction of prior inconsistent statements--its effect would likely be negligible."

The same is true here. Bush's alleged "death bed" statements cannot constitute "newly discovered" evidence because Bush was available at the time of trial, was available to be deposed, and all parties were aware of his existence. As in Walton, what Cave characterizes as "newly discovered" evidence is simply a new version of the events from Bush, different from the numerous statements he gave to police and had

made over the years. Further, contrary to Cave's assertions, Bush was as untrustworthy as Walton. Had his "new" statements been introduced--subject to impeachment through introduction of prior inconsistent statements--its effect would have been negligible. See Lightbourne v. State, 742 So.2d 238, 247 (1999) ("[R]ecanted testimony can be considered newly discovered evidence, but ... the trial court must examine all of the circumstances of the case.") (internal quotation marks omitted).

Moreover, Cave cannot show that the evidence "would probably produce an acquittal on retrial." As already discussed under the prejudice prong of the ineffectiveness claim, Cave cannot demonstrate that this new testimony would have produced a life recommendation. Consequently, this claim must be denied. See Blanco v. Dugger, 702 So. 2d 1250, 1252 (Fla. 1997)(upholding denial of claim of newly discovered evidence after an evidentiary hearing since evidence is totally inconsistent with evidence adduced at trial); Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324 (Fla. 1992) (upholding denial of newly discovered evidence of alibi where new evidence was in total contradiction of evidence presented at trial); compare Johnson v. Singletary, 647 So. 2d 106, 110 (1994)(remanding for an evidentiary hearing where challenged testimony is not rebutted by other evidence); Scott v. Dugger, 634 So. 2d 1062, 1064 (Fla. 1993)(upholding

summary denial of newly discovered evidence claim where evidence does not exonerate defendant); LeCroy v. Dugger, 727 So. 2d 236, 238 (Fla. 1999) (upholding summary denial of newly discovered evidence claim as there was "plethora of physical and circumstantial evidence" of defendant's guilt).

POINT II

FLORIDA'S CAPITAL SENTENCING SCHEME IS NOT RENDERED UNCONSTITUTIONAL BASED UPON RING V. ARIZONA AND APPRENDI V. NEW JERSEY (Restated).

Cave argues that Florida's capital sentencing scheme is unconstitutional in light of Ring v. Arizona, 122 S.Ct. 2443 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000). According to Cave Ring applies to Florida's capital sentencing scheme and requires that the aggravating circumstances be pled in the Indictment and found unanimously by the jury. Cave further argues that Ring invalidated Mills v. Moore, 786 So. 2d 532 (Fla.), cert. denied, 523 U.S. 1015 (2001) and that Amendarez-Torres v. U.S., 523 U.S. 224 (1998) did not survive Apprendi.

The State's first argument is that this claim is procedurally barred. Although Cave filed a Motion to Dismiss the Indictment for failing to list the aggravators (RA 8-15) on direct appeal and challenged the constitutionality of section 921.141, Florida Statutes (RA 25-27, 28-39), he failed to raise the precise arguments claimed herein or to challenge the statute

in Sixth Amendment terms. Even though Ring was not decided until after the evidentiary hearing on Cave's 3.850, the basic argument that the Sixth Amendment requires jury sentencing in capital cases is not new or novel and in fact, was available prior to Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing). See Hildwin v. Florida, 490 U.S. 638 (1989) (noting case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida" and determining it does not); Spaziano v. Florida, 468 U.S. 447 (1984); Chandler v. State, 442 So.2d 171, 173, n. 1 (Fla. 1983). "Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." Muhammad v. State, 603 So.2d 488, 489 (Fla. 1992); Spencer v. Crosby, 842 So.2d 52, 60-61 (Fla. 2003); Vining v. State, 827 So.2d 201, 218 (Fla. 2002). Thus, the instant challenge to the constitutionality of the death penalty statute could have and should have been raised in the trial court, or on direct appeal. Consequently, Cave is procedurally barred from raising the claim at this juncture. Eutzy v. State, 458 So.2d 755 (Fla. 1984). Cf. Parker v. Dugger, 550 So.2d 459, 460 (Fla. 1989)(finding defendant not entitled to refinement in law on collateral review as issue never preserved); Hunter v. State, 660 So.2d 244, 253

(Fla. 1995)(finding constitutional challenge to Florida's death penalty statute to be procedurally barred for failing to preserve it); Fotopolous v. State, 608 So.2d 784, 794 (Fla. 1992)(same).

The Eleventh Circuit has held that a defendant was procedurally barred from raising a Ring claim for the first time in a section 2254 habeas petition because he had failed to raise the claim in state court. See Turner v. Crosby, 339 F.3d 1247, 1283-86 (11th Cir. 2003). Moreover, this Court has applied the procedural bar doctrine to claims brought under Apprendi. See McGregor v. State 789 So.2d 976, 977 (Fla. 2001) (holding that an Apprendi claim was procedurally barred for failure to raise it in trial court); Barnes v. State, 794 So.2d 590 (Fla. 2001) (holding that Apprendi error was not preserved for appellate review).

Second, neither Apprendi nor Ring are subject to retroactive application under Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to Witt, Ring and Apprendi are only entitled to retroactive application if they are decisions of fundamental significance, which so drastically alter the underpinnings of the death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether the standard has been met, the analysis includes a consideration of three factors: the purpose served by the new case; the extent of

reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Ring and Apprendi, which do not directly or indirectly address Florida law, provide no basis for consideration of Ring and Apprendi here.

Indeed, numerous courts, including the Eleventh Circuit Court of Appeals, have rejected the retroactivity of Ring.[9] Turner v. Crosby, 339 F.3d 1247, 1283-86 (11th Cir. 2003) (rejecting retroactive application of Ring); Trueblood v. Davis, 301 F.3d 784, 788 (7th Cir. 2002); Arizona v. Towery, 64 P.3d 828 (Ariz. 2003) (finding Ring is not retroactive); Colwell v. State, 59 P.3d 463 (Nev. 2002) (same).[10] Given that Ring is not

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[9] In deciding Ring, the Supreme Court did not announce that Ring was to be made retroactive. See Tyler v. Cain, 533 U.S. 656, 663 (2001) (holding "new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive").

[10] The correctness of those holdings is supported by the fact the Supreme Court has already held that a violation of an Apprendi v. New Jersey, 530 U.S. 466 (2000) claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002) (holding indictment's failure to include quantity of drugs was Apprendi error but did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing that finding something to be structural error would seem to be necessary predicate for new rule to apply retroactively and thus, concluding Apprendi not retroactive). Because Ring is predicated solely on Apprendi, Ring is likewise not entitled to retroactive application.

retroactive, Cave is not entitled to collateral relief.

Third, this Court has expressly and repeatedly held that the statutory maximum for first-degree murder is death, and that determination is made at the guilt phase of trial upon conviction for first-degree murder. Mills, 786 So. 2d at 536-38. Recently, that Court stated:

> Under section 921.141, Florida Statutes (1987), a defendant is eligible for a sentence of death if he or she is convicted of a capital felony. This Court has defined a capital felony to be one where the maximum possible punishment is death. *See Rushaw v. State*, 451 So. 2d 469 (Fla. 1984). The only such crime in the State of Florida is first-degree murder, premeditated or felony. *See State v. Boatwright*, 559 So. 2d 210 (Fla. 1990); *Rowe v. State*, 417 So. 2d 981 (Fla. 1985).

Shere v. Moore, 830 So. 2d 56 (Fla. 2002). See Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (opining, "we have repeatedly held that maximum penalty under the statute is death and have rejected the other Apprendi arguments" that aggravators need to be charged in the indictment, submitted to jury and individually found by unanimous jury). Cave asserts Mills is no longer good law in light of Ring. Yet, neither Ring nor Apprendi called into question Florida's capital sentencing scheme and the Supreme Court has not overruled its prior decisions upholding Florida's capital sentencing statute against constitutional challenges.[11] See, Hildwin, 490 U.S. at 640-41; Spaziano, 468

[11] Rodriquez De Quijas v. Shearson/American Express, 490 U.S. 477 (1989) (noting only Supreme Court can overrule its

U.S. at 447; Proffitt, 428 U.S. at 253.

Subsequent to Ring, this Court rendered Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002). Therein three justices expressly reiterate the fact that death is the statutory maximum in Florida. Bottoson, at 696 n.6 (Wells, J., concurring); Id. at 893 (Quince, J., concurring); Id. at 699 (Lewis, J., concurring). Justice Harding's concurring opinion did not call into question any prior holdings of the Florida Supreme Court, which would necessarily include its prior determination that death was the statutory maximum for first degree murder in Florida. Id. at 695. As such, the determination that death is the statutory maximum remains good law and recent decisions bear out this conclusion. See Conahan v. State, 844 So. 2d 629, 642 n.9 (Fla. 2003); Spencer, 842 So. 2d at 72 (rejecting claim Florida's capital sentencing statute is unconstitutional); Cole v. State, 841 So. 2d 409, 429-30 (Fla. 2003); Anderson v. State, 841 So. 2d 390, 408-09 (Fla. 2003); Lucas v. Crosby, 841 So. 2d 380, 389-90 (Fla. 2003)(same); Bruno v. Moore, 838 So. 2d 485, 492 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002); Marquard v. Moore, 850 So. 2d 417, 431 n.12 (Fla. 2002); Chavez v. State, 832 So. 2d 730, 766-67 (Fla. 2002); Mills, 786 So. 2d at 537; Brown v. State, 803 So. 2d 223 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001); Looney v. State, 803 So.

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precedent - other courts must follow case which directly controls issue).

2d 656 (Fla. 2001); Card v. State, 803 So. 2d 613 n. 13 (Fla. 2001). The law is clear, Ring is inapplicable to Florida's capital sentencing scheme and Cave's argument to the contrary is meritless.

This Court has determined the statutory maximum in Florida is death, meaning that once the jury convicted Cave of first-degree murder, he was eligible for a death sentence, not merely life imprisonment, as in Arizona. Moreover, the judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another opportunity to secure a life sentence; it also enhances appellate review and provides a reasoned basis for a proportionality analysis.

This Court has repeatedly rejected the argument that Ring implicitly overruled its earlier opinions upholding Florida's sentencing scheme. See e.g. Mills, 786 So.2d at 537. In Bottoson, 833 So. 2d at 695, this Court stated:

> Although Bottoson contends that he is entitled to relief under Ring, we decline to so hold. The United States Supreme Court in February 2002 stayed Bottoson's execution and placed the present case in abeyance while it decided Ring. That Court then in June 2002 issued its decision in Ring, summarily denied Bottoson's petition for certiorari, and lifted the stay without mentioning Ring in the Bottoson order. The Court did not direct the Florida Supreme Court to reconsider Bottoson in light of Ring.
>
> Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and . . . has specifically directed lower courts to leav[e] to [the United States Supreme] Court the

prerogative of overruling its own decisions.

See also King, 831 So. 2d at 143.

Ring does not apply because Florida's death sentencing statute is very different from the Arizona statute at issue in Ring. The statutory maximum sentence under Arizona law for first-degree felony murder was life imprisonment. See Ring, 122 S.Ct. at 2437. In contrast, as already noted, this Court has previously recognized that the statutory maximum sentence for first-degree murder in Florida is death, Mills, 786 So.2d at 532, and has repeatedly denied relief requested under Ring. See Duest v. State, 855 So. 2d 55 (Fla. 2003); Pace v. State, 854 So.2d 167 (Fla. 2003); Jones v. State, 855 So.2d 611, 619 (Fla. 2003); Chandler v. State, 848 So.2d 1031 (Fla. 2003); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003); Grim v. State, 841 So. 2d 455, 465 (Fla. 2003); Anderson, 841 So.2d at 390; Cox v. State, 819 So.2d 705 (Fla. 2002); Conahan, 844 So.2d at 629; Spencer, 842 So. 2d at 72; Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002); Doorbal v. State, 837 So.2d 940 (Fla. 2003); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla.), cert. denied, 122 S. Ct. 2670 (2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, 122 S. Ct. 2673 (2002); Looney, 803 So. 2d at 675; Shere, 830 So.2d at 56; Mills, 786 So.2d at 532; Brown v. Moore, 800 So. 2d 223, 224-225 (Fla. 2001); Mann, 794 So. 2d at 599.

The claim of unconstitutionality because the jury's sentencing determination was merely advisory and not unanimous has been rejected repeatedly. Because the sentencing selection conducted during the penalty phase does not increase the punishment for first-degree murder special verdicts and unanimity[12] are not required. See Blackwelder v. State, 851 So. 2d 650, 653-54 (Fla. 2003) (rejecting contention aggravators "must be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict"); Porter, 840 So. 2d at 986; Doorbal, 837 So. 2d at 940; Sweet v. Moore, 822 So. 2d 1269, 1275 (Fla. 2002); Cox, 819 So. 2d at 724-25 n.17; Way v. State, 760 So. 2d 903, 924 (Fla. 2000) (Pariente, J., concurring) (noting jury's recommendation need not be unanimous); Thomson v. State, 648 So. 2d 692, 698 (Fla. 1984) (holding simple majority vote constitutional); Alvord v. State, 322 So.2d 533 (Fla. 1975), receded from on other grounds, Caso v. State, 524 So.2d 422 (Fla. 1988). Apprendi has not altered this position. Card, 803 So.2d at 628 n. 13 (rejecting claim Apprendi invalidates ruling "capital jury may recommend a death

[12] Even in the context of guilt, jury unanimity is not required. Cf. Johnson v. Louisiana, 406 U.S. 356 (1972) (finding nine to three verdict was not denial of due process or equal protection); Apodaca v. Oregon, 406 U.S. 404 (1972) (holding conviction by non-unanimous jury did not violate Sixth Amendment). Schad v. Arizona, 501 U.S. 624, 631 (1991) (plurality opinion) (addressing felony murder and holding due process does not require unanimous determination on liability theories).

sentence by a bare majority vote"); Hertz, 803 So. 2d at 648; Looney, 803 So. 2d at 675; Brown, 800 So.2d at 223 (rejecting argument aggravators must be found by unanimous jury).[13] The instant challenges are meritless.

The claim that the death penalty statute is unconstitutional for failing to require the charging of the aggravators in the indictment is without merit. This issue was not addressed in Ring, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider the Florida Supreme Court's well established rejection of these claims. Sweet, 822 So. 2d at 1269; Cox, 819 So. 2d at n.17. Moreover, the Florida Supreme Court has rejected Cave's arguments post-Ring. See Porter, 840 So. 2d at 986 (rejecting argument aggravators must be charged in indictment, submitted to jury, and individually found by unanimous verdict); Doorbal, 837 So. 2d at 940.

Further, the argument that Amendarez-Torres, did not survive Apprendi and Ring is not well taken. As the Supreme Court reiterated in Rodriquez De Quijas, 490 U.S. at 477, lower courts are to leave to the Supreme Court the task of overruling its precedent and follow those cases which directly control the issue. In this situation, all of the Supreme Court cases

[13] Likewise, unanimity with respect to mitigation has been rejected. McKoy v. North Carolina, 494 U.S. 433 (1990) (determining requirement of unanimous findings of mitigators unconstitutional); Mills v. Maryland, 486 U.S. 367 (1988).

finding Florida's capital sentencing statute constitutional control. Hildwin, 490 U.S. at 638; Spaziano, 468 U.S. at 447; Barclay v. Florida, 463 U.S. 939 (1983); Proffitt, 428 U.S. at 242. Likewise, as noted above, there was no improper burden shifting as the standard instructions were given which have been affirmed repeatedly against such challenges. See Cooper v. State, 856 So.2d 969, 977 n.8 (Fla. 2003) (rejecting allegation jury instructions unconstitutionally denigrated the advisory role of the jury during the penalty phase caused improper burden-shifting); Randolph v. State, 853 So. 2d 1051, 1067 (Fla. 2003) (noting consistent rejection of burden-shifting argument related to penalty phase jury instruction); Demps v Dugger, 714 So.2d 265, 368 (Fla. 1998); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995). There is no question the jury was instructed adequately. The instructions were in compliance with constitutional dictates and are not implicated by Ring. Florida's death penalty statute is constitutional.

Finally, even if Ring were applicable to Florida's sentencing scheme, Cave is not entitled to relief as he was charged with and convicted of contemporaneous felonies--armed robbery and kidnaping in connection with this murder.[14] As such,

[14] The Florida Supreme Court has upheld death sentences in light of Apprendi and Ring challenges even where there was no prior violent or contemporaneous felony conviction. See Davis v. State, 2003 WL 22097428 (Fla. Sept. 11, 2003) (rejecting Ring claim and affirming death sentence upon aggravation of felony probation, heinous atrocious or cruel and cold calculated and

the felony murder aggravator applied. Ring did not alter the express exemption in Apprendi for the fact of a prior conviction ("other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."). Thus, even under Ring, the requirements of same have been met. The jury in the instant case found the contemporaneous convictions of armed robbery and kidnapping. As such, the jury in the instant case actively participated in a finding which was then applied to the sentencing phase, i.e., the contemporaneous felony conviction establishing the felony murder aggravator. Consequently, the dictates of Ring were satisfied as a jury participated in the finding of guilt of those contemporaneous felonies. See Duest, 855 So. 2d at 33; Lugo v. State, 845 So. 2d 74, 119 n. 79 (Fla. 2003)(noting rejection of Apprendi/Ring, claims in postconviction appeals, unanimous guilty verdict on other felonies and existence of prior violent felonies); Doorbal, 837 So. 2d at 963(same); Cf. Kormondy v. State, 845 So. 2d 41, 54 n. 3 (Fla. 2003) (concluding simultaneous convictions of felonies which then form basis for aggravating factor is sufficient to satisfy requirements of Ring); Jones v. Crosby, 845 So.2d 55, 74 (Fla.

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premeditated); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003) (rejecting Ring issue and affirming death penalty upon single aggravator of heinous atrocious or cruel).

2003). Based upon the foregoing procedural and substantive arguments, Cave is not entitled to relief on this claim.

POINT III

CAVE'S CLAIM THAT TRIAL COUNSEL ABROGATED HIS DUTY TO INVESTIGATE AND PRESENT SUFFICIENT MITIGATION FACTS WAS NOT RAISED IN HIS 3.850 MOTION OR EVIDENTIARY HEARING. THE TRIAL COURT PROPERLY DENIED, AFTER EVIDENTIARY HEARING, HIS CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT MEDICAL/PSYCHOLOGICAL EVIDENCE (Restated).

Relying upon Wiggins, 123 S.Ct. at 2527, Cave argues that his trial counsel was ineffective for "abrogating" his duty to investigate and present mitigation to the resentencing jury. Cave argues that counsel presented a "fictionalized" version of a smart, hard-working Cave who used drugs only a recreational basis, rather than the "real" Cave who was mentally retarded and a drug addict who was not gainfully employed for long periods of time.

The State's first argument is that this claim is not preserved for appellate review because Cave failed to present it in either his 3.850 motion or at the evidentiary hearing thereon. As such, he cannot raise the argument for the first time on appeal. Steinhorst, 412 So.2d at 338. The only claims Cave raised in his 3.850 motion regarding mitigation were Claims III and VI. Claim III alleged ineffectiveness of counsel for failing to present expert psychological testimony to establish Cave's drug and alcohol abuse, low intelligence and

suggestibility. Claim VI alleged ineffectiveness for failing to present evidence of Cave's borderline IQ and lack of education.

In order to be entitled to relief on this claim, Cave must demonstrate the following:

> 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.

Strickland, 466 U.S. at 687. The Court explained further what it meant by "deficient":

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it 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. 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.

Id. at 689 (citation omitted). Moreover, the ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial. Patton, 784 So. 2d at 380 (precluding reviewing court from viewing issue of trial counsel's performance with heightened perspective of hindsight); Rose, 675 So. 2d at 571 (holding

disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry, 659 So. 2d at 1073 (concluding standard is not how current counsel would have proceeded in hindsight); Rivera, 717 So.2d at 486 (Fla. 1998); Occhicone, 768 So. 2d at 1037 (same).

In rejecting these claims, the trial court noted Garland's testimony, at the evidentiary hearing, that "he did not present expert medical or psychological testimony a the second re-sentencing because 'we' elected not to." (R 1044). In making his decision regarding whether to use mental health testimony, Garland "considered the experts' reports and depositions, and compared them to the facts of the case as he knew them, and to his client's statements. The court quoted Garland's testimony that he "wanted Mr. Cave's statement to be an unrebutted direct piece of testimony which if a circumstantial evidence standard of review 9sic) applied, then the jury would have had to accept it." (R 1045). The court also noted that garland took into consideration the "possibility that expert psychological testimony concenring Cave's meek character or propensity for being led around may have precipitated a negative reaction from the jury." (R 1045). The trial court concluded that Garland's performance was sound trial strategy.

Regarding Cave's cocaine use, the trial court noted the testimony from Ms. Leutricia Freeman that Cave used heroin and

could not hold a steady job and from Dr. Micheal Gutman that Garland's failure to develop Cave's cocaine problem was a significant omission. However, the court noted the evidence presented at the evidentiary hearing was undisputed that Cave had consistently denied a history of significant drug use. Neither cave nor anyone in his family informed Garland or the expert witnesses employed by Garland that Cave was a heroin user. The trial court concluded that Garland could not be deemed ineffective for failing to present mitigating evidence which contradicts the evidence presented by the defendant and his family.

The trial court also rejected Cave's assertion that Garland had failed to investigate or prepare for trial, noting that he had four mental health experts involved in the case, Drs. Harry Krop, Sheldon Rifkin, Alegria and Cheshire. After consultaion with Cave, Garland decided not to call Rifkin and Krop and did not call Alegria because of concern that the issues he would have presented would have opened doors that Garland did not want to open.

The trial court's factual findings are supported by substantial, competent evidence. The record of the evidentiary hearing reveals that Garland's decision not to present expert medical or psychological testimony at the 1996 re-sentencing was strategic. Garland testified that he had decided not to use a

psychiatrist, in the 1993 re-sentencing, because he saw nothing in the psychological evaluations that indicated Cave had an organic condition (R 25). Garland made this decision after reviewing the information and talking to other attorneys who had represented Cave (R 26). The common thread that ran through these discussions was that Cave was always polite and appreciative and related to his attorneys in a way that did not suggest that there was a mental impairment that would need a psychiatrist (R 26). In the 1993 re-sentencing, Garland presented evidence regarding Cave's IQ only (R 26). Garland found that Cave's school records showed that Cave had performed poorly in school, but by the time Garland met him, Cave had ample capacity to read and write (R 29-31). Garland's impression was that while Cave had a low IQ, he now performed better than he had tested (R 30). Garland disagreed when defense counsel Bonner asked if Cave's abilities at the time of the crime were more relevant to the jury (R 34). Garland's strategy was to look at Cave as a whole person over the length of his life and ask the jury to consider the same (R 34).

At the 1996 resentencing, he presented mitigation consisting of testimony from friends and family, telling the jury what kind of man Cave is (R 34-35). Garland testified that he was not trying to prove that Cave was not guilty of the crime, he was trying to prove that there was a reason why this man should not

be executed (R 35-37). Garland focused on the fact that Cave had the native ability to work honestly, support his family, support his son and do things that ordinary people do everyday (R 39). See Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997)(finding that strategy of humanizing murder defendant by presenting testimony of close family ties, and positive influence on others did not constitute ineffective assistance of counsel), Rutherford v. State, 727 So. 222, 223 (Fla. 1998)(affirming denial of 3.850 finding that mitigation strategy was to "humanize" the defendant and trial counsel made a tactical decision not to call mental health expert). The experts explained to Garland that IQ is simply a number which by itself is not of great importance (R 39). Garland said that Cave testified at the 1996 resentencing that he had constant employment and supported his son (R 43). Garland stated that with respect to drug use he could only go by what Cave told him and what Cave said to the psychologists, and to his friends and family (R 44). Cave only indicated that he had experimented with drugs, but that on the night of the murder he had only used alcohol and marijuana (R 44). When Garland prepared for the 1996 resentencing he believed that since the jury recommended death in 1993 he had to try something different (R 48). Garland testified that he wanted to start anew and while he had all the information from Dr. Rifkin and Dr. Krop, he retained Dr.

Alegria for a new start (R 48). Dr. Alegria was a psychologist and he found that Cave was a likeable young man who was now becoming older, who did not have a borderline IQ (R 50). Garland said that he did not view Dr. Alegria's findings as bad, rather those finding showed that Cave was a person who could make something better of himself (R 50). Garland did not call Alegria in 1996 because it would not add anything useful to the case, and he did not want to open doors to allow the state to impeach Cave with statements made by Michael Bryant that Alegria reviewed (R 60). Michael Bryant had previously testified that Cave had severely beaten him and that Cave had admitted to being the trigger man (R 61). Garland testified not calling Dr. Alegria was a strategic decision as he wanted to limit the state's case to circumstantial evidence (R 65). Rather than presenting psychological testimony, Cave could testify that he was bettering himself (R 57). Garland reiterated that there was no medical reason to use a psychiatrist (R 58). Garland wanted to keep Cave's testimony unrebutted, if he had presented mental health experts, it could have opened the door to direct evidence that Cave was the shooter (R 59).

Cave presented the testimony of Leutricia Freeman, the mother of Cave's son. She testified that she was never contacted, nor did she attempt to contact Cave's lawyers (R 269). Freeman said that Cave never held a job and she once saw

a heroin needle stuck in his arm (R 270-275). The state elicited the fact that Leutricia freeman was approximately 13 years old and Cave was 19 or 20 when he got her pregnant (R 276-280)[15]. She said she was bad with dates and that they were only together for a short period of time in the late 70's (R 282). Leutricia testified that she told Cave's mother that he was addicted to heroin (R 274). Connie Hines, Cave's mother, testified that Freeman never told her that Cave was on drugs (R 367).

The defendant also presented the testimony of a psychiatrist, Dr. Michael Gutman. Dr. Gutman reviewed the information that defense counsel Bonner provided (R 295). He was told about Freeman's statements, and reviewed the psychological reports of Dr. Krop, Rifkin and Alegria (R 295). Dr. Gutman did not read the transcripts of the 1996 resentencing (T. 329)). Dr. Gutman did not read Cave's confession (T. 330). Dr. Gutman was not told that Freeman's testimony was contradicted by anybody (T. 311). Dr. Gutman testified that he is concerned about the conflict in testimony (T. 312). Dr. Gutman interviewed Cave and determined that Cave was not physically addicted to heroin, rather when Cave did use heroin in the late 70's he could take it or leave it, if heroin was not

[15] Had Garland called Freeman at the 1996 resentencing, the State would have been able to introduce that Cave got her pregnant when she was thirteen.

available he could do without it (T. 342-352).

Furthermore, Dr. Gutman's testimony that Cave was not physically addicted to cocaine would not have added anything to Cave's case. Garlands strategy was to show that Cave was a hardworking man who took care of his family and could make something of himself. Leutricia Freeman's and Dr. Gutman's testimony would have completely undermined Garland's trial strategy.

Hence, based on the record in this case, it is clear that Garland was not deficient, as Cave never told him, nor any of the psychologists that he was a heroin addict. See Rutherford, 727 So. 2d at 222 (affirming denial of ineffective assistance of counsel claim where attorney's discussions with defendant, family, and mental health experts did not uncover mental impairment), Jones v. State, 732 So.2d 313 (Fla. 1999) (mental health examination is not inadequate simply because defendant is later able to find experts to testify favorably based on similar evidence), Asay v. State, 769 So. 2d 974 (Fla. 2000)(affirming trial court finding that mental health mitigation is not rendered inadequate simply because defendant has secured the testimony of a more favorable expert).

Finally, Wiggins is inapplicable. Defense counsel's performance in Wiggins was found deficient because he "never attempted to meaningfully investigate mitigation" although

substantial mitigation could have been presented. Here, it is clear that Garland conducted an extensive meaningful investigation and presented substantial mitigation on Cave's behalf.

POINT IV

CAVE'S TRIAL COUNSEL WAS NOT SO INEFFECTIVE THAT THE DECISIONAL PROCESS WAS GUTTED REQUIRING VACATION OF THE DEATH SENTENCE (restated).

Cave's last claim makes the sweeping allegation that defense counsle was so ineffective that the entire decisional process was gutted requiring vacation of the death sentence. Again, this claim is not preserved for appellate review because Cave failed to present it in either his 3.850 motion or at the evidentiary hearing thereon. As such, he cannot raise the argument for the first time on appeal. Steinhorst, 412 So.2d at 338.

Cave spends the first fifteen (15) pages of this argument re-asserting that he is entitled to a new guilt and sentencing phase because of Bush's alleged "death bed" statements which, he contends, render him innocent of the crime. The State disagrees and relies upon its arguments in Point I on this issue. Cave next argues that Garland was ineffective in jury selection, ineffective for eliciting testimony regarding Cave's prior arrest and his co-defendants' criminal histories, and ineffective for failing to properly prepare Cave and his mother

to testify.

In order to be entitled to relief on this claim, Cave must demonstrate the following:

> 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.

Strickland, 466 U.S. at 687 (1984). The Court explained further what it meant by "deficient":

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it 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. 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.

Id. at 689 (citation omitted). Moreover, the ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial. Patton, 784 So. 2d at 380 (precluding reviewing court from viewing issue of trial counsel's performance with heightened perspective of hindsight); Rose, 675 So. 2d at 571 (holding disagreement with trial counsel's choice of strategy does not

establish ineffective assistance of counsel); Cherry, 659 So.2d at 1073 (concluding standard is not how current counsel would have proceeded in hindsight); Rivera, 717 So.2d at 486; Occhicone, 768 So.2d at 1037.

Garland's alleged ineffectiveness in jury selection for failing to object during voir dire when the State used the hypothetical "if" it were shown that Cave was not the shooter.

Cave contends that Garland was ineffective for not objecting when the State used hypothetical questions–asking "if" it were shown Cave was the shooter. In rejecting this claim, the trial court found:

> Mr. Garland testified that by the time of the Defendant's third penalty trial, he had picked approximately 90 to 100 juries. one of these had been a death penalty case. In Garland's opinion, one of the major factors in the jury selection was not his performance, but rather the fact that the State Attorney, Bruce Colton, did an excellent job of seating a jury which tended to have "more clarified feelings in favor of death." Other than arguing that defense counsel should have done better, the defendant presented no evidence in support of his claims of ineffectiveness during voir dire and opening statements.

(R 1052). The trial court concluded that Cave had failed to overcome the "strong presumption" that counsel's performance falls within the wide range of reasonable professional assistance.

The trial court's factual findings are supported by substantial, competent evidence and are entitled to deference. Moreover, it is clear that even if counsel was deficient for

failing to object, Cave suffered no prejudice. The tenor of the voir dire in this case focused on the ability of the venire to apply the death penalty. The defendant's status as the triggerman was never in dispute. The state repeatedly told the jury during opening and closing that Parker was the shooter. Moreover, the jury was instructed with respect to Enmund/Tison, their responsibility to decide on the defendant's moral culpability for the crime, since the offense was committed by another person (RA 1803, 1807). The trial court found in the sentencing order that the defendant was not the triggerman (RA 1288).

Garland's ineffectiveness for eliciting testimony regarding Cave's prior arrest and his co-defendants' criminal histories

Cave contends that counsel was ineffective for asking him about his prior arrest because it allowed the State to improperly elicited that the arrest was for rape, to which Garland did not object. Cave argues that defense counsel's deficient performance was compounded by the state's misconduct in eliciting the fact that the arrest was for rape. In addition, he argues Garland should have moved in limine to prevent the State from raising the issue of Cave's prior bad act.

In rejecting this claim, the trial court noted Garland's testimony at the evidentiary hearing that while he was preparing

for the 1996 re-sentencing, “the prior arrest repeatedly ‘came out.’” (R 1041). As the trial court found “Garland’s theory was that in an effort to bolster Mr. Cave’s impression upon the jury, the defense had nothing to hide and would admit to the previous arrest.” (R 1041). Garland also was relying upon the statutory mitigating factor of “no significant prior criminal history.” (R 1041). Garland admitted that he should have objected to the State’s inquiry into the nature of the arrest and Bush’s background (R 1041).

The trial court noted that once the defendant found that Garland’s decision regarding the prior arrest “was a reasonable trial tactic predicated on his experience, his assessment of Cave’s case and Cave’s agreement to pursue this tack.” In so finding, the trial court relied upon Garland’s testimony at the evidentiary hearing that his preparation for the 1996 re-sentencing was guided by the principle that what they had done at the prior two sentencings hadn’t worked (R 1041). Garland considered and rejected the defense theories that were presented at the prior sentencings. He consulted with Cave about every strategic decision, including whether to admit the defendant’s prior arrest record. The theory of defense at the 1996 re-sentencing was to show that Cave had no significant prior criminal history and no knowledge of Bush and Parker’s past criminal endeavors (R 1041). Garland testified that he wanted

to make the jury aware that Cave had confessed to the crime and felt remorseful.

Citing Walton v. State, 547 So.2d 622, 625 (Fla. 1993), the trial court concluded that the State was entitled to rebut the statutory mitigator of "no significant history of prior criminal activity" with direct evidence of the defendant's prior criminal activity. The trial court also concluded that even if counsel was deficient for failing to object to the state's questioning about the nature of the arrest and equating it with the co-defendant's criminal history, Cave had failed to prove prejudice because the trial court, in fact, found the statutory mitigator of "no significant prior criminal history." (R 1042).

The trial court's factual findings are entitled to deference as they are supported by substantial, competent evidence. At the evidentiary hearing, Garland testified that he was asking for the lack of significant criminal history mitigator at the 1996 re-sentencing (R 123). See Walls v. State, 641 So. 2d 381, 390 (Fla. 1994) (affirming trial courts finding that defendant bears the burden of proving mitigators by a preponderance of the evidence). Garland's strategy was to show that Cave was credible and had nothing to hide (R 122). Every time Garland and Cave would talk about the defense, the arrest would always come out (R 122). While Garland said that he should have objected when the state asked what the arrest was for, he

admitted that he raised the issue of the prior arrest because he was asking for the mitigator of no prior significant history (R 122-123). On cross examination by the State, Garland testified that his strategy was to keep it simple and not enter into evidence any records of the arrest rather have Cave testify that he was once arrested and the charges were dropped (T. 229). Garland also acknowledged the body of case law that allows the state to rebut the mitigator, but maintains his position that he should have objected (T. 229-230). See Dennis v.State, 817 So.2d 741 (Fla. 2002)(finding that trial court properly admitted testimony regarding physical abuse of witnesses, for which Dennis was not arrested, as state is not limited to convictions to rebut the mitigator of no prior significant criminal history).

It is clear that arrests and other evidence of criminal activity may be used to rebut the mitigator of no prior significant criminal history. Stein v. State, 632 So. 2d 1361, 1367 (Fla. 1996), Lucas v. State, 568 So. 2d 18 (Fla. 1990), Walton v. State, 547 So.2d 622 (Fla. 1989), cert. denied, 493 U.S. 1036 (1990), Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937 (1979). Garland acknowledged that the records of the arrest show that it was an allegation of gang rape and the charges were not filed because the victim of the rape had refused to testify (T. 229-231). Therefore, based

on Dennis, the state could have called the victim to testify to the facts surrounding the rape at the 1996 resentencing.

The evidence supports the trial court's finding that Garland was not deficient. Garland testified that the trial strategy was that Cave had nothing to hide, as his theory was introduce the arrest, show that it was dropped, and ask for the no significant criminal history mitigator. See Rose, 675 So. 2d at 571. Hence, Cave bore the burden of proving that the mitigator existed. Had Cave testified that he was never arrested, the State would have impeached him with the records of the prior arrest which detailed that it was a gang rape which was nolle prossed because the victim would not testify. Moreover, even if Garland was deficient for not objecting to the nature of the arrest being elicited and compared with co-defnedant Bush's criminal history, Cave has failed to prove prejudice, as the trial court found because the re-sentencing court found that the statutory mitigator of no prior significant criminal history had been proven (RA 1908).

Garland's alleged ineffectiveness for failing to properly prepare Cave and his mother, Connie Hines, to testify

Cave's last claim is that Garland was ineffective because he did not prepare Cave nor his mother, Connie Hines, to testify. The trial court rejected this claim as "conclusively refuted by the record." The trial court noted Garland's

testimony that he consulted with his client on the issue of whether he would testify and it was ultimately cave's decision (R 1048). "Garland's testimony that he and cave had 'been knocking that [the decision of whether Cave should testify] around since I first met him,' went unrebutted." (R 1048). The trial court noted it was Garland's opinion that "Cave was the one to present evidence to the jury of his remorse, of his attempt to better his life in prison, and his attempts to help others reform their lives." (R 1048). Garland discussed Cave's testimony on every available opportunity and encouraged his client to be himself, tell the jury what hppened and why he confessed. (R 1048).

The trial court's factual findings are supported by substantial competent evidence. The record shows Garland testified at the evidentiary hearing that the decision to put Cave on the stand was mutual (R 104). Garland explained that it was always Cave's decision to testify, all he had to do was say no (R 232). Ultimately, Cave made the final decision (R 104). See U.S. Burke 257 F. 3d 1321 (11th Cir. 2001) (finding that a defendant has the ultimate authority to make fundamental decisions for his case); Jones v. Barnes, 463 U.S. 745 (1983) (finding that the decision to testify is fundamental). Garland had talked with Cave about testifying since the first time they met (R 105). Every time there was a hearing they discussed the

possibility of Cave testifying (R 106). Garland's strategy was to show why he liked Cave. Right before it was time for Cave to testify, Garland told him he was next, but Cave knew it was coming (R 108). Garland wanted to present Cave to the jury as the man he is today (R 111). Garland presented Cave as a witness because it was useful to the case (R 232). See Bush v. Singletary, 988 F. 2d 1082, 1093 (11th Cir 1993) (finding that trial counsel was not ineffective where defendant refused to follow counsel's trial strategy and insisted on testifying). In sum, Garland's unrebutted testimony establishes that he prepared Cave to testify.

Regarding Cave's mother, Connie Hines, the trial court noted Garland's testimony that he and Mrs. Hines were "fully up to speed" about her testimony before she testified at the 1996 re-sentencing (R 1049). The court found credible Garland's testimony that he gave her a copy of every statement she had made and talked about her testimony on several occasions (R 1049). Garland noted that Mrs. Hines, would not admit that she could not read and became resistant when offered help. The trial court found Mrs. Hines testimony to the contrary to not be credible (R 1049). The court concluded that Garland made a "reasonable" strategic decision, after careful consideration, that Mrs. Hines should testify "for good or bad" because she presented "relevant information about Cave's upbringing and

other mitigating factors," even though she gave "damaging" information about Cave's admission that the victim was begging for her life (R 1049). The court noted that Garland could not be deemed ineffective for failing to overcome Mrs. Hines resisitance ot assistance.

The trial court's factual findings are supported by substnatial, competent evidence. At the evidentiary hearing, Garland testified that he had spoken to Connie Hines often (R 233). Garland and Ms. Hines were fully up to speed about her testimony before they ever got to St. Petersburg (R 144, 232). Garland said that while Hines gave damaging testimony about Cave telling her that Francis begged for her life, this testimony was cumulative to the testimony of Detective Lloyd Jones (R 233).

Connie Hines testified that she spoke to Garland about the 1996 resentencing, but he gave her the transcript of her prior testimony fifteen minutes before she was supposed to testify (R 371-374). Hines said that the testimony she gave in 1996 was truthful (R 375). Hines stated that Garland contacted everybody he just didn't take up enough time with everybody (R 378). Hines admitted that she had seen the information Garland gave her at the resentencing before when she was at Garland's office.

It is clear from the record that Garland properly prepared both Cave and his mother to testify at the 1996 resentencing. It is unrebutted that Garland prepared Cave and they had been

discussing his taking the stand for years. Moreover, Connie Hines had previously testified. Hines admitted that Garland gave her the testimony from the 1993 resentencing. Hines never expressed any concerns about her testimony, nor explained what Garland could have done. Moreover, her damaging statement about Cave admitting that Francis begged for her life, was harmless at best as it was cumulative to the testimony of Detective Lloyd Jones.[16] Relief should be denied.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State requests that this Honorable Court **AFFIRM** the trial court's order denying Appellant's motion for postconviction relief.

Respectfully submitted,

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[16] It is well settled that even incorrectly admitted evidence is deemed harmless and may not be grounds for reversal when it is essentially the same as or merely corroborative of other properly considered testimony at trial. Erickson v. State, 565 So.2d 328 (Fla. 4th DCA 1990); Clausell v. State, 548 So.2d 889, 890-91 (Fla. 3d DCA 1989); Burr v. State, 550 So.2d 444, 446 (Fla.1989).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was sent by United States mail, postage prepaid, to Mary Catherine Bonner, Esq., 207 SW 12th Court, Fort Lauderdale, Florida 33315, this 29th day of January, 2004.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

_____
DEBRA RESCIGNO
Assistant Attorney General