IN THE SUPREME COURT OF FLORIDA

ERNEST WHITFIELD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. SC04-651
Lower Tribunal No. 95-1588 CF

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Citations to the direct appeal record will be referred to by the volume number with the appropriate page numbers (V#/#). Citations to the postconviction record will be referred to as PCR with the appropriate volume and page number (PCR-V#/#).

STATEMENT OF FACTS

The State of Florida cannot accept the Appellant/Defendant's "Statement of the Facts," which is replete with conclusory allegations, impermissible argument, and which fails to contain any citations to the record and transcripts below. See, Rule 9.210(3), Fla. R. App. Proc. Therefore, the State relies on the following:

In Whitfield v. State, 706 So. 2d 1 (Fla. 1997), this Court previously summarized the trial court proceedings as follows:

> At trial, evidence was presented to establish the following. In early June 1995, Whitfield went to the home of Claretha Reynolds. He asked Reynolds, Willie Mae Brooks, and Estella Pierre for money. Pierre was Whitfield's former girlfriend. When none of them would give him any money, he tried to snatch Pierre's purse. Reynolds grabbed Whitfield in a headlock and forcibly ejected him from her home. Whitfield told them as he left: "I'm going to kill all three of you bitches."
>
> Several weeks later, in the early morning hours of June 19, 1995, Whitfield attempted to get Willie Mae Brooks to let him in Reynolds' house. Brooks refused and went back to sleep in the bed she shared with her one-year-old child. Whitfield subsequently unlawfully entered Reynolds' home. Armed with an eight-inch knife, he entered the bedroom in which Brooks was sleeping and raped Brooks, indicating that he would stab her and her child if she screamed. Whitfield then went into a different room where Reynolds and her five children were located. About ten minutes later, Reynolds stumbled into Brooks's room and asked her to lock the door. She was bleeding profusely from her wounds and told Brooks that she was dying and that Ernest had stabbed her. Brooks and one of Reynolds' children, a twelve-year-old, climbed out the window and ran to a neighbor's house to call police. Whitfield fled the scene. Reynolds died shortly after

police arrived.

After he was apprehended, Whitfield admitted stabbing Reynolds and led police to the murder weapon.

The medical examiner testified that Reynolds was stabbed twenty-one times; seven of the wounds were potentially lethal and many of the wounds were seven inches deep. He further stated that, after Reynolds was stabbed, she was still fully conscious and aware that she was dying.

Whitfield's defense was based on voluntary intoxication by cocaine. A clinical psychologist, Dr. Regnier, testified regarding Whitfield's cocaine abuse and his 1991 Baker Act hospitalization. He stated that Whitfield exhibited symptoms consistent with the classic pattern of cocaine abuse. He further testified that there was no reason to believe that Whitfield was not under the influence of cocaine during the incident and that there was reasonable doubt about premeditation.

The State's psychiatrist, Dr. Sprehe, testified in rebuttal that Whitfield was able to form a specific intent to commit murder, pointing out that Whitfield was arrested within two hours of the incident and was not considered to be intoxicated at that time. Further, he stated that Whitfield's actions during the course of the crimes showed planning ability: He entered the house, obtained a kitchen knife, used the knife to rape Brooks, threatened Brooks not to make noise, entered another room to kill Reynolds, left the house, and disposed of the knife. He also stated that cocaine psychosis resulting from long-term use of cocaine does not go away in a matter of hours.

Whitfield was convicted of armed burglary, sexual battery with a deadly weapon, and first-degree murder.

During the penalty phase, evidence was admitted regarding Whitfield's prior aggravated battery convictions. Testimony was presented that during both of the prior aggravated batteries Whitfield threatened to kill the victims if they called police. Whitfield presented evidence to show that he had recently been shot and severely wounded but that he forgave his assailant; that he was chronically dependent on drugs; that he suffers from major depression; that he suffered from a deprived childhood; that he was mentally ill and under the influence of crack cocaine when he entered Reynolds' home; and that he was not in

> complete control of his emotions at the time of the murder.
>
> The jury recommended death by a seven-to-five vote. The trial judge followed the jury's recommendation. He found three factors in aggravation: prior violent felonies (two prior aggravated batteries and contemporaneous sexual battery of another victim in this case); commission in the course of a burglary; and that the murder was heinous, atrocious, or cruel. He found no statutory mitigating circumstances, but he found the following nonstatutory circumstances: cooperation with authorities (little or no weight); impoverished background (considerable weight); crack cocaine addiction (substantial weight); Whitfield's abandonment by his father and his mother's alcoholism (some weight); and that Whitfield was the victim of a near fatal shooting but forgave his assailant (little or no weight).

Whitfield, 706 So. 2d at 2-3.

Postconviction Proceedings

Defendant Whitfield asserted 21 claims in his postconviction motion. On May 22, 23, and 27, 2003, the Circuit Court conducted an evidentiary hearing on the majority of Whitfield's postconviction claims (PCR-V-8/916-1389; V9-11;T1-T476). On March 17, 2004, the Circuit Court entered a 60-page written order denying postconviction relief. (PCR-V5/826-885, plus attachments at 884-1389).

The Circuit Court's written order set forth the following summary of testimony presented at the postconviction hearing:

Charles Williams

Charles Williams[1]* ("Williams") has been an attorney since 1983. (PC-R 8-9). His professional experience included working for the State Attorney's Office in the juvenile division for one year, working for the Public Defender's Office for ten years, and working in private practice for three years. (PC-R 9). While at the Public Defender's Office, Williams served in the misdemeanor division for two years, and then in various positions, including felony division chief, beginning in 1989.[2]* (PC-R 9-10). As felony division chief, he handled serious felony trials and supervised other attorneys in the felony division. (PC-R 10-11).

Williams assisted in defending Monty Gian Francisco in a capital murder case.[3]* (PC-R 13-14). Williams attended the trial but was primarily responsible for preparing for the penalty phase, including obtaining discovery, background information, and obtaining witnesses and experts. (PC-R 14-15). He estimates that from arrest until trial, approximately two years passed due to preparation time. (PC-R 15). The jury found Francisco guilty of a lesser-included offense; therefore, he is not on death row. (PC-R 15).

Williams left the Public Defender's Office in 1994, to begin a law practice with Charlie Ann Scott Syprett ("Syprett"). (PC-R 16). Williams' name was placed on the conflict attorney list, and he was one of approximately six attorneys on the conflict list, who qualified for handling a capital case. (PC-R 17-18).

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[1]* [footnote 4 in trial court's order] Charles Williams was appointed as a Circuit Court Judge for the Twelfth Judicial Circuit in 1998. (PC-R 8; 65).

[2]* [footnote 5 in trial court's order] Williams testified that he attended the following seminars while at the Public Defender's Office: trial advocacy, life over death, death penalty seminars, and expert witness seminars. (PC-R 64-65; 96).

[3]* [footnote 6 in trial court's order] State of Florida v. Monty W. Gian Francisco, Manatee County Case No. 1985 CF 000327A.

On June 19, 1995, at approximately 7:00 a.m., authorities arrested Whitfield. (PC-R 18; 20-21; 70). On June 20, 1995, the court entered an order appointing Williams to represent Whitfield, and Williams' office entered a notice of appearance on the following day. (PC-R 18-20; 70-73). Williams' billing records indicate that on June 20, 1995, Williams also prepared, filed, and set for hearing motions to appoint a psychiatrist to determine the Defendant's competency and a motion to appoint Keith Steele as an investigator. (PC-R 72-73). His records further reflect that he met with Whitfield at the jail on June 22, 1995. (PC-R 20; 73-74). In addition, Williams conferred with Dr. Lawrence, the psychiatrist appointed by the Court to examine Defendant for competency. (PC-R 74). Approximately one week after Whitfield's arrest, a search warrant for Whitfield's blood, saliva, and hairs was executed.[4]* (PC-R 77).

Williams estimates that the State provided discovery to him on approximately July 19, 1995, and that the investigator would not have spoken to any witnesses before this time. (PC-R 103-104). Williams' billing records reveal that he scheduled depositions and reviewed supplemental discovery during August 1995, although he estimates that he was involved with the discovery from the onset of the case. (PC-R 105-106).

Williams filed a motion on July 27, seeking an early trial date, and on August 4, he filed a demand for speedy trial. (PC-R 25-27). Early in the proceedings, Whitfield insisted upon having a speedy trial. Williams essentially informed him that demanding a speedy trial would be a mistake. (PC-R 27-28). Williams also became aware of mental health issues involving his client,[5]* such as cocaine intoxication or addiction. (PC-R 28-29; 95). Williams opined, however, that Whitfield was competent to insist upon having a speedy trial, and he believed

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[4]* [footnote 7 in trial court's order] Williams agreed that he could have obtained his own blood samples. (PC-R 101).

[5]* [footnote 8 in trial court's order] On redirect examination, Williams agreed that Whitfield suffered from PTSD and a mental disability. (PC-R 95-96).

it was his responsibility to advocate his client's position.[6]* (PC-R 96-98).

Williams testified that he believed he was ready for Whitfield's trial "as best as [he] could under the circumstances." (PC-R 21). In an earlier deposition, Williams indicated he had not been ready due to the speedy trial issue. (PC-R 21-22). He recalls researching speedy trial issues including competency to demand speedy trial and being concerned with the wisdom of demanding speedy trial due to its impact on trial preparation. (PC-R 23-25).

As Whitfield's attorney, Williams realized that even if Whitfield insisted upon a speedy trial, Williams could waive speedy trial on his client's behalf. (PC-R 29-30). According to Williams, Whitfield insisted upon a speedy trial, and it was not a defense strategy to demand speedy trial. (PC-R 31-33; 96). Williams told Whitfield he was concerned over his attempt to rush the case to trial. (PC-R 32). He also told Whitfield that the likelihood of his conviction would be greater if he chose to testify. (PC-R 33). As a trial attorney, Williams preferred to take as much time as necessary to prepare a case. (PC-R 33).

Based on the facts in Whitfield's case, including Whitfield's statements and history, Williams chose to pursue a voluntary intoxication defense to negate the specific intent element of the charged crime. (PC-R 34-35). According to billing records, on June 21 and 22, 1995, telephone conferences occurred with Smith-Cline Labs regarding possible blood tests for Whitfield. (PC-R 36-37; 73-74; 111-112). Although Williams has no independent recollection of speaking with a toxicologist regarding the presence of drugs in Whitfield's system, the billing records indicate that Syprett may have. (PC-R 37-38). Further, Williams did not consult a toxicologist concerning the motion to suppress. (PC-R 112-113).

Williams utilized Keith Steele, an investigator, to investigate and contact witnesses. (PC-R 38).

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[6]* [footnote 9 in trial court's order] Both Dr. Lawrence and Dr. Regnier found Whitfield competent to stand trial. (See Forensic Psychological Evaluation of Dr. Regnier; PC-R 124; 429-31).

Williams recalls that in preparing the case, he primarily worked on the guilt phase and Syprett handled preparations for the penalty phase, although both attorneys worked on the case together. (PC-R 39). Williams further recalls that because of the speedy trial, they continued with preparations during the trial and after the guilty verdict. (PC-R 40).

Dr. Regnier ("Regnier") assisted the defense primarily with competency issues and was court appointed on approximately August 3, 1995. (PC-R 41). Regnier found Whitfield to be competent. (PC-R 92). In preparing for trial, the defense met with Regnier to discuss the applicable law, facts, and strategy for the case, and Regnier was present during most of the courtroom proceedings as a defense consultant and to calm Whitfield. (PC-R 92-93). He further assessed Whitfield during trial to inform the Court of Whitfield's continuing competency. (PC-R 93). Whitfield was not always cooperative with Regnier. (PC-R 93).

According to Williams, Regnier, a forensic psychologist was the defense's most important witness, both at trial and the penalty phase, because of his testimony concerning Whitfield's background, addiction, and state of mind on the day of the crimes. (PC-R 42-43). Regnier and law enforcement officers were used to establish the voluntary intoxication defense at trial. (PC-R 44). Regnier also recommended that Dr. Negroski, a neurologist examine Whitfield, and he performed an evaluation and submitted a report on September 23, 1995. (PC-R 44-46; 52; 93).

During trial, Regnier testified that Whitfield had sustained a possible head injury. (PC-R 47). In his report, Negroski made the following findings: Whitfield passes out when he smokes cocaine; Whitfield has auditory hallucinations; and Whitfield should receive a CT scan. (PC-R 48-49). Williams agreed that these findings would be relevant in the guilt and penalty phases and for establishing voluntary intoxication and that a CT scan was never performed, and further that Negroski did not have Regnier's findings available. (PC-R 48-51). Williams did not have Negroski's findings by the close of the guilt phase of the trial. (PC-R 53). Williams was unable to have additional tests run due to the speedy trial

time constraints. (PC-R 94).

Williams recalls that the attorneys and Regnier needed additional time to prepare for trial[7]* and that Regnier no doubt informed him of his need for more time. (PC-R 53-54; 99). At trial, the Court accepted Regnier as an expert, and he testified concerning his knowledge of drug addiction, the specific facts in Whitfield's case, and how drugs may have affected Whitfield in asserting a voluntary intoxication defense. (PC-R 54-55). Regnier, however, could not answer whether Whitfield could form specific intent due to a lack fo time to prepare. (PC-R 57-58; 99).

Concerning the State's closing argument, Williams could not recall objecting to the State's argument and whether the State raised nonstatutory aggravators, although he believes he would have made appropriate objections. (PC-R 59-64).

On cross-examination, Williams agreed that because of the speedy trial demand, the State made its witnesses available for depositions; therefore, the defense took all necessary depositions. (PC-R 66). Further, the State provided all discovery[8]* prior to trial, and the defense often communicated with Regnier about the trial strategy, including voluntary intoxication. (PC-R 66-67). Regnier was able to evaluate Whitfield and further served as a calming influence on him. (PC-R 67).

Williams further testified on cross-examination that he demanded speedy trial in response to a letter written by Whitfield and following a hearing before Judge Rapkin, in which Whitfield expressed his desire for a speedy trial. (PC-R 67-68). While Williams agreed he could have waived speedy trial, he testified that he chose to follow his client's right to a speedy trial based on his client's wishes. (PC-R 68; 95). Whitfield even requested that the court remove his

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[7]* [footnote 10 in trial court's order] Williams testified on redirect examination that under the circumstances presented in this case, he could not have been better prepared. He further agreed that attorneys generally are responsible for preparing witnesses. (PC-R 99).

[8]* [footnote 11 in trial court's order] Witness lists were provided to the defense on July 19, 1995. (PC-R 104-105).

defense attorneys if they did not demand a speedy trial. (PC-R 94).

According to Williams, the defense attorneys and Regnier were hampered by Whitfield's lack of cooperation prior to and during trial. (PC-R 69). Whitfield would not communicate with Williams and failed to provide background information. (PC-R 108; 110). Whitfield's lack of cooperation was evident in his later refusal to communicate with the defense attorneys and even the Court at times. (PC-R 69). Williams relied upon his investigator to obtain mitigation evidence, including medical records, and witnesses. (PC-R 86-87; 108). He recalls that Whitfield even directed him not to investigate or prepare for the penalty phase and failed to provide names of witnesses or work history. (PC-R 69-70; 87).

Williams interviewed Whitfield's prior employer, William Peterson, although he chose not to call Peterson to testify. (PC-R 87-88). Williams does not believe that Fred Atkins' name was ever mentioned in preparing for trial, and Williams believes he would have remembered it if it had been because he knew of Atkins' position.[9]* (PC-R 88; 107-108). Williams was unaware of any connection between Atkins and Whitfield. (PC-R 111). Further, Williams does not recall that the name Evelyn Ford was ever brought to his attention during the investigation. (PC-R 89).

At the beginning of his representation, however, Williams was able to write to Whitfield's sister, and he attempted to contact other family members. (PC-R 75). Williams had a conference with Whitfield's mother and sister on July 13, 1995, although, in general, Williams described Whitfield's family members as not being cooperative or supportive as other families had been. (PC-R 75-76; 98-99; 108-110). An example of their lack of cooperation was the defense's problem in securing clothing for Whitfield to wear during trial. (PC-R 76). He described Whitfield's family as being poor, but stressed that his office did not expect the family to buy new clothes for Whitfield

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[9]* [footnote 12 in trial court's order] Williams recalled that Atkins served on the Sarasota City Commission and may have been serving in that position at the time of Whitfield's trial. (PC-R 106-107).

but asked that they bring some of his clothes from home. (PC-R 109-110).

Williams prepared appropriate motions to have Regnier and Steele paid, and these motions detail the amount of time spent with family members and others in conference. (PC-R 89-90). Upon review of the billing records for Steele, Williams agreed that Steele did not begin billing until July 21, 1995, although he had been appointed in June. (PC-R 101-103). Further, Steele did not bill for the month of August, although he did bill for time spent on the case in September. (PC-R 103-105).

At trial, Williams attempted to establish Whitfield's degree of cocaine intoxication; therefore, he would have questioned witnesses about their interaction with Whitfield on the crime date. (PC-R 78). While Williams could not recall specific details about the information possessed by Whitfield's sister Dinah Giles and his mother Leola Rich, he recalls deciding not to call them as witnesses at trial. (PC-R 79-80). Regnier and Steele interviewed Giles and Rich and learned family background. (PC-R 79-80). Williams recalls that Rich appeared at Whitfield's trial and appeared to be under the influence of alcohol. (PC-R 80). Williams testified that Harriet Williams, a former girlfriend[10]* of Whitfield was also the victim of a crime perpetrated by Whitfield, and he believed her testimony could have a negative impact on the trial; therefore, he did not call her as a witness. (PC-R 80-81).

Williams made the decision to use Regnier's testimony to develop the defense's case during trial and at the penalty phase. (PC-R 81). Through Regnier's testimony, Williams estimates that he was able to elicit all of Whitfield's family background. (PC-R 81-82). Williams' decision to proceed in this manner was based on Regnier's rapport with jurors, his skills as a psychologist, and his knowledge of Whitfield's personality. (PC-R 81-82). Based on the defense's testimony, Williams was successful in having the Court instruct the jury on voluntary intoxication. (PC-R 82). Williams opined that he was able to argue

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[10]* [footnote 13 in trial court's order] Ms. Williams is actually Whitfield's former spouse. PC-R 389.

voluntary intoxication to the jury, but the jury rejected it in the guilt phase. (PC-R 100).

While representing Whitfield, Williams filed a motion to suppress certain statements made by his client, and based on stipulations, the Court granted this motion. (PC-R 82). Because Williams did not believe he had reasonable grounds to seek the suppression of other statements made by Whitfield, he did not move to suppress them. (PC-R 82-86). Upon review of the State's discovery, Williams estimated that Whitfield made several statements to law enforcement officers and others, including statements and admissions made during a television interview. (PC-R 85-86). Even if Williams had filed a motion to suppress the other statements, including the statements made in the television interview, these statements would not have been subject to suppression. (PC-R 86).

Dr. Eddy Regnier

At the start of Dr. Regnier's testimony, the State and defense stipulated that Regnier is an expert in the field of clinical psychology with a forensic subspecialty. (PC-R 114-15). In 1993, Regnier began his practice in Florida in the area of chemical dependency, and ran the Florida Addiction Treatment Center in Avon Park. (PC-R 116). He has worked in the chemical dependency field for most of his professional life, has had family members who experienced chemical dependency, and knows how to evaluate people for chemical dependency. (PC-R 116).

A few times, Regnier has testified as an expert witness for the defense on the issue of voluntary intoxication. He recounted a particular case in which the defense was utilized for a man, whose blood samples revealed a high level of steroids. (PC-R 117-120). In that particular case, the blood samples had been drawn following the man's admission to an emergency room for treatment. (PC-R 119). The defense utilized Regnier's services, along with a toxicologist, and Regnier estimated that it took approximately six months from his initial workup to reach trial. (PC-R 120-121). Regnier opined that toxicology reports serve as evidence of a defendant's impairment. (PC-R 122).

Regnier recalls that he went to the jail to

evaluate Whitfield on August 11, 1995.[11]* Atthis first meeting, Whitfield behaved "quite erratic" and became angry when Regnier asked him questions. (PC-R 123). Whitfield further asked him to leave his cell and not talk with him, but then changed his mend and asked Regnier to return. (PC-R 123). Regnier characterized Whitfield as very quick tempered and uncooperative. (PC-R 123). He further testified that once he initially interviewed Whitfield, he realized that legal counsel would need the assistance of a mental health professional in working with Whitfield. (PC-R 123-24).

Dr. Lawrence initially evaluated Whitfield and determined that he was competent to proceed, although Regnier testified he did not learn of this evaluation until September 1995. (PC-R 124). Regnier recalled how cooperation was always an issue in working with Whitfield and described the defense attorney's relationship with Whitfield as adversarial. (PC-R 125). Regnier opined that Whitfield's behavior probably resulted from receiving bad advice from jailhouse lawyers[12]* and his paranoia. (PC-R 126). In his opinion, Whitfield's paranoia was due to a personality trait, not to drug intoxication. (PC-R 126). Regnier also attributed Whitfield's issues to posttraumatic stress and abuse. (PC-R 127; 153).

Regnier learned of the speedy trial demand after the court appointed him to the case. (PC-R 128). Regnier testified that he learned about speedy trial, and worked with Whitfield to explain his worry or concern over the lack of time to prepare for trial. (PC-R 128-130). Regnier also explained that Whitfield told him that he knew that if his attorneys were not ready for trial then "neither is the prosecution." (PC-R 130). Whitfield further explained his belief that if he forced a trial on speedy trail grounds that "the case will end in either a mistrial or he will

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[11]* [footnote 14 in trial court's order] The court later entered an order appointing Regnier to evaluate Whitfield. (PC-R 123).

[12]* [footnote 15 of trial court's order] Regnier testified that Whitfield did not trust his attorneys or him. (PC-R 126; 141-42).

have lots of grounds for appeal, and certainly it will not result in a death penalty." (PC-R 130). Further, Whitfield explained his belief that "in America no male ever gets the death penalty for killing just a female and certainly not just a black female" so he was not too concerned that the death penalty would be a possibility. (PC-R 130-31).

Regnier testified that Whitfield's opinions were not rational in light of the evidence presented at trial, such as eyewitness testimony and Whitfield's confession. (PC-R 130-31). Regnier recalled that Williams and Syprett enlisted Regnier to help them change Whitfield's mind about having a speedy trial. (PC-R 131). Regnier testified that neither defense attorney explained to him that they could waive speedy trial. (PC-R 131; 180).

In Regnier's opinion, when the trial began, he still needed more information and had to collect information during the trial. (PC-R 132). During the weeks before trial, Whitfield refused to take tests and played the attorneys against each other and him. (PC-R 132). Regnier described Whitfield's family as "difficult to find" and recounted how he had to rely upon Mr. Steele to locate them and how he only met Whitfield's mother at the trial. (PC-R 133).

Regnier agreed that voluntary intoxication was the main theory of defense in the guilt phase. (PC-R 133-34). When evaluating Whitfield, Regnier also considered the possibility that Whitfield had been suffering from psychosis or another mental disorder. (PC-R 136). Regnier ruled out the insanity defense and advised the attorneys prior to trial that in his opinion, Whitfield was competent. (PC-R 177). Regnier testified that people with paranoia are manipulative, aware of their actions, directed and organized, and that those with other mental disorders are not organized and can be quite irrational. (PC-R 178-80).

On cross-examination, Regnier opined that Whitfield was competent at the time of trial and that he understood the nature of the legal proceedings. (PC-R 165-66). In Regnier's psychological evaluation of Whitfield dated October 11, 1995, he found that Whitfield was uncooperative, alert, goal directed, extremely manipulative, but noted no finding of delusion, psychosis, or thought disorder. (PC-R 167).

Regnier finished this report after the trial but before the final sentencing hearing. (PC-R 176).

Concerning Regnier's finding that Whitfield would likely become disruptive in a court setting, Regnier noted how Judge Rapkin ordered Whitfield to be evaluated for competency during the trial after he refused to cooperate. (PC-R 168). In finding Whitfield competent to proceed at that time, Regnier found Whitfield "perfectly cognizant of his actions and what he was doing in the courtroom."[13*] He recounted that during trial, a recess was taken so that Regnier could evaluate Whitfield to make sure his behavior was not caused by a mental disorder. (PC-R 169). Regnier met with Whitfield in a jury room, and Whitfield's "behavior came to an abrupt end and he was calm." (PC-R 170). During the evaluation, Whitfield further explained his strategy of making his attorneys look bad to help him in mitigation and on appeal. (PC-R 168-71). As before, Regnier determined that Whitfield was competent for trial. (PC-R 170).

In his opinion, toxicology reports, as "unbiased" evidence, would have assisted in presenting the voluntary intoxication defense. (PC-R 134-40). He recalls that at trial, he could not answer whether Whitfield's intoxication negated his intent to commit the crime due to a lack of information and time to form an opinion. (PC-R 140-42). On cross-examination, Regnier explained that at trial, he testified that he could not receive the kind of data he needed from Whitfield to make this determination. (PC-R 156-57; R 1221). Regnier then agreed that had Whitfield cooperated with him prior to trial, "time would not have been an issue: and all of the necessary tests could have been performed. (PC-R 157-58).

Regnier worked hard at building a therapeutic alliance with Whitfield in an effort to have him cooperate more. (PC-R 143-44). By doing so, Regnier hoped that Whitfield would develop a relationship with him. (PC-R 144). In his opinion, over time, Whitfield began to trust him. (PC-R 145). With more time, Regnier believed Whitfield would have been more cooperative. (PC-R 154). On cross-examination,

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[13*] [footnote 16 in trial court's order] See PC-R 169; R 624.

Regnier estimated that during Whitfield's trial, he spent several hours counseling with the defense attorneys, several hours testifying, and other time meeting with Whitfield. (PC-R 162; 174-75).

In preparing for the penalty phase, the defense attorneys and Regnier focused on mental health mitigators, character issues, and background information such as abuse suffered. (PC-R 145-46). In criminal cases, Regnier testified that family members often volunteer information to help defendants. (PC-R 146). Regnier recounted, however, that in Whitfield's case, "no one called unless they were actively pursued." (PC-R 146-47). On cross-examination, Regnier agreed that in preparing for trial, defense counsel cooperated with him, relied upon him, provided case law to him on voluntary intoxication, provided background information to him, and he further agreed that they did everything he asked them to do. (PC-R 163-64). With assistance from the defense, Regnier was able to testify to Whitfield's history of abuse and neglect. (PC-R 165-66). On cross-examination, Regnier also opined that Whitfield still fails to cooperate with counsel and obtains advice from his own sources, although his demeanor has changed.[14]* (PC-R 171-72).

Regnier agreed that he prepared for the penalty phase during the guilt phase of the trial and recalls requesting a neuropsychological evaluation to determine if Whitfield had any deficits. (PC-R 147-48). Dr. Negroski performed the evaluation at the end of the guilt phase and indicated a need to review Regnier's notes and that further tests, such as a CT or PET scan were necessary to make a diagnosis. (PC-R 149-50; 152). On cross-examination, Regnier agreed that Negroski's evaluation found no indication of brain injury. (PC-R 154-56). Regnier agreed that the CT scan would have been "unbiased" evidence but added that the test may not have revealed anything. (PC-R 151; 154). With additional time, Regnier believes more tests, such as neuropsychological evaluations and

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[14]* [footnote 17 in trial court's order] According to Regnier, Whitfield is now grateful, soft-spoken, cooperative, and asks intelligent questions after educating himself. (PC-R 172).

brain imaging would have been possible. (PC-R 154).

Deborah Mash, Ph.D.

Deborah Mash ("Mash") testified that she is a professor of neurology and molecular and cellular pharmacology at the University of Miami School of Medicine, and that her work is funded by grants. (PC-R 188-190). In this position, Mash no longer teaches, and her primary duties involve conducting research on alcohol and drug abuse, especially crack cocaine. (PC-R 189). Mash describes herself as a "cocaine-ologist" and a "nationally recognized expert" in her field. (PC-R 189-90; 196). Mash further has an endowment from the University of Miami to conduct brain studies, and she estimates having published over a hundred articles on cocaine and its effect on the brain. (PC-R 195). The Court determined that Mash is an expert witness in the areas of neurology, pharmacology, and toxicology. (PC-R 197).

As a neuropharmacologist, Mash examines the effects of drugs on the brain and behavior and performs "retrospective psychological autopsies" by examining postmortem brains of those with chronic histories of cocaine abuse, along with performing assays, and interviewing those with knowledge of the deceased individual. (PC-R 190-92). Mash's specialty is cocaine excited delirium syndrome, and she works with law enforcement officers in understanding this condition. (PC-R 192-94).

In 1990, Dr. Mash's laboratory discovered coca ethylene, which is formed by the liver, when a person drinks alcohol and uses cocaine at the same time. (PC-R 194). Mash opined that crack cocaine is the "most addicting substance on the planet" and that it is one of the "most neurotoxic substances" as well. (PC-R 198-99). She explained that crack cocaine, when first used, gives such a pleasurable and intense experience, that once used, persons always want "more" and they chase the "memory of the drug high." (PC-R 198-99). After chronic use, however, Mash testified that a person becomes paranoid and their body is on "automatic overdrive" with a stimulated heart, raised blood pressure, and a disconnected frontal lobe (or a limbic state), with no working memory or ability to determine the consequences of an action. (PC-R 199-201). Chronic cocaine exposure has been shown to

change a person's brain or "remodel" it, and whether the changes are permanent depends upon the chronicity and severity of use. (PC-R 201-02).

Once a person stops using crack cocaine after years of use, Mash opined that the neurochemical effects on the brain may persist for at least a year. (PC-R 202). Mash has also performed neuropsychological testing on patients who are no longer using crack cocaine to determine whether any cognitive deficits exist and how the frontal lobe has been affected, and she has typically found that executive function is decreased in the frontal lobe, and that serotonin levels are down. (PC-R 203-04). Cocaine acts on the serotonin transmitter, in a manner similar to Prozac or Paxil, and Mash has discovered that those who suffer from depression are highly representative of those addicted to crack cocaine. (PC-R 204-05).

When beginning treatment to give up crack cocaine, Mash opined that during the first month of treatment, these individuals cannot pay attention or engage cognitively because of the crack cocaine's impact on the frontal lobe. (PC-R 205-06). She further set forth a 90-day period for obtaining a "red chip" to transition from one level of toxicity to another. (PC-R 206-07). In her opinion, one cannot assign a medical diagnosis within the first month or two months of sobriety, because one has to let the effects of the cocaine wear off enough so that the brain chemistry normalizes, and one can evaluate for other disorders. (PC-R 207-09).

Mash further testified that drugs may be measured in the blood, urine, or hair of individuals, and that crack cocaine also leaves "markers" showing exposure to cocaine. (PC-R 210). Markers of cocaine exposure are present in blood and are the best measurement, although they are not as stable. (PC-R 211-12). Markers in urine are more stable. (PC-R 211-12). With hair samples, one can estimate exposures to different drugs for the past thirty days. (PC-R 211-12).

Mash reviewed information pertaining to Whitfield in preparation for the evidentiary hearing, and concluded that he is a "very severe crack cocaine addict" and while sought treatment and was evaluated, he did not receive chronic help sufficient for his

disorder. (PC-R 215-16). Further, Mash interviewed Whitfield and learned that he began abusing drugs at age 15, and started abusing cocaine when he was 17 and continued to do so until the date of his crime in 1995. (PC-R 216). Due to Whitfield's prolonged exposure to crack cocaine and sever cocaine dependency, she opined that he sustained "serious brain damage" in the form of neurological damage to his brain. (PC-R 216-18).

In Mash's opinion, Whitfield was not able to assist his attorneys in preparing for trial because he was neurotoxic and had diminished capacity, although he was competent. (PC-R 218). She further opined that he would have been more likely to aid in his defense had more time passed between arrest and trial, and that he likely would not have even begun to feel normal for many months and could not make strategic decisions about speedy trial. (PC-R 218-20).

When Regnier testified at the 1995 trial, Mash believes he attempted to establish a voluntary intoxication defense but could not without evidence or knowledge of cocaine toxicology, and she believes it is essential for psychologists and toxicologists to work together on such issues to link toxicant exposure and behavior. (PC-R 220-23). Further, upon review of the documents in Whitfield's case, including information from witnesses who described his behavior, she opines that Whitfield was suffering cocaine paranoia during the time of the crime and that he suffered from a persistent state of crack cocaine-induced paranoia. (PC-R 223-24). According to Mash, when a person suffers from cocaine paranoia, the person loses higher cognitive ability, which explains why much criminal behavior is associated with crack cocaine addiction. (PC-R 224-25). In Mash's opinion, Dr. Regnier did not have sufficient information, including toxicology information, to profile Whitfield's level of cocaine dependence and his other psychological problems. (PC-R 225-26).

Mash testified that it would have been helpful to obtain blood, urine, and hair samples from Whitfield on June 21, 1995, and that any opinion that one could not obtain any toxicology reports after two days from urine or hair is wrong, although it is true regarding a blood sample. (PC-R 225-27). On cross-examination, Mash explained that a urine sample taken on June 21st

would have shown whether an individual had used cocaine in the days immediately prior to the date of the sample, although the cocaine begins to clear from the urine after 3-5 days. (PC-R 228-29). On re-direct examination, Mash explained that a urine sample taken within days after using cocaine will show "footprints" of cocaine and may show "some indication of the level of use," although it is not an absolute measure. (PC-R 235). Mash agreed that having a blood sample taken from Whitfield on June 19th would have been optimal and is the "ultimate" measure. (PC-R 230; 235). In the absence of a blood sample though, she explained that urine or hair samples would have been useful. (PC-R 230; 236-37).

In Mash's experience, when someone, who is severely addicted to cocaine stops using the drug "cold," the person is "hyper-agitated," "can't sit still," "walk[s] around a lot," is "very disruptive," "want[s] to sleep," and cannot derive pleasure from anything in their environment. (PC-R 230-31). Mash further opined that the neurological evaluation of Whitfield was deficient without any CAT scans or an MRI to determine any brain damage. (PC-R 231).

Mash did not administer tests to Whitfield and is not licensed in Florida, nor does she hold board certifications in Florida. (PC-R 232). In forming her opinion, Mash relied upon information provided by Whitfield, and she reviewed Dr. Fisher's deposition, along with medical records, witness statements, police reports, and trial transcripts. (PC-R 232-33). Upon review of medical records, Mash found records indicating that in 1990, Whitfield suffered visual hallucinations, a symptom of chronicity and chest pains, a symptom of crack cocaine use. (PC-R 234).

Dr. Brad Fisher

Dr. Brad Fisher testified that he is a clinical forensic psychologist engaged in private practice in North Carolina,[15*] but that he has experience in assessing clinical issues in capital cases in Florida;

[15*] [footnote 18 in trial court's order] For details concerning Dr. Fisher's education and experience, see PC-R 238-45. Defense counsel tendered Dr. Fisher as an expert in clinical forensic psychology. (PC-R 245).

therefore, he is generally familiar with Florida's capital sentencing law, including aggravating and mitigating factors. (PC-R 245-46). During his career, Fisher has testified in Florida courts concerning capital cases every year since 1978 and estimates that he may have testified in approximately 100 such cases during that time span. (PC-R 246-47). His work included a mix of postconviction, guilt, and penalty phase preparation.[16]*

In preparing for the guilt phase of trial, Fisher has been involved in cases with affirmative defenses of self-defense, voluntary intoxication, mental illness, retardation, and insanity. (PC-R 248). Attorneys have further asked him to render forensic opinions regarding matters such as voluntary intoxication and aggravators and mitigators. (PC-R 249-54). Fisher testified that voluntary intoxication is related to the amount of substance abuse that occurs at a particular time and chronicity. (PC-R 254). In reaching an opinion on voluntary intoxication, he relies upon the history (nature and extent of drug or alcohol abuse problem)[17]* and toxicology information relating to the particular event, and he may consult others such as a toxicologist. (PC-R 256-57). In his experience, it may take six months or longer to obtain this information, depending on other issues involved in the case such as mental illness, drug use or mental retardation. (PC-R 258-61).

Fisher has studied individuals with cocaine psychosis. (PC-R 261). He testified that when asked to evaluate a jailed individual with cocaine psychosis and a mental illness, the clinician must be cautious in treating and making a diagnosis for a period of time after the individual stops using drugs

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[16]* [footnote 19 in trial court's order] Defense counsel also tendered Fisher as a clinical forensic psychologist with an expertise in death penalty litigation. (PC-R 247-48).

[17]* [footnote 20 in trial court's order] Fisher relies upon the following sources for the history: family members, counselors, prior medical records, hospital records, job history, school history, and statements by the defendant. (PC-R 256).

and alcohol. (PC-R 261-64). Because the body chemistry changes during the detoxification period, it is optimal to defer a diagnosis or to qualify it, although at times a clinician does not have that luxury. (PC-R 263-65).

Upon Fisher's review of Whitfield's court, medical, and police records, consultations with Dr. Mash and Dr. Regnier, and following a meeting with Whitfield, Fisher opined that Whitfield has a serious cocaine abuse problem and posttraumatic stress disorder (PTSD) with paranoid personality.[18]* (PC-R 266-69; 273). In testifying about his opinion of PTSD, Fisher described it as occurring when one experiences a trauma "outside the realm of normal human experience"[19]* and the individual experiences flashbacks, irritability, hyperactivity, and hyper vigilance, including paranoia. (PC-R 270-72). According to Fisher, PTSD is a recognized disorder in the DSM-IV TR. (PC-R 272-73).

After reviewing Regnier's testimony at Whitfield's trial, Fisher testified that Regnier did not have enough data to make a conclusion, although Regnier testified that in his opinion Whitfield suffered from paranoia and had PTSD. (PC-R 273-75). Fisher further opined that these two conditions were critical to Whitfield's behavior on the day of the crime. (PC-R 275). Fisher recounted that Whitfield informed him that his drinking and drug abuse began at age 15 and continued as evidenced by his hospital and recovery center visits and the Baker Act commitment. (PC-R 276). Fisher opined that Whitfield's PTSD is evident from his experience of being shot multiple times, and possibly his recollection of his father pointing a gun

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[18]* [footnote 21 in trial court's order] On cross-examination, Fisher admitted that he relied upon Whitfield's self-reporting in reaching his opinion, although Regnier's reports indicated Whitfield's various stories concerning the amount of drugs taken at the time of the crime. (PC-R 303-04). Fisher testified that other witnesses corroborated Whitfield's statements. (PC-R 304).

[19]* [footnote 22 in trial court's order] Fisher further explained this phrase to include events that were traumatic, unexpected, and horrific. (PC-R 271).

at his mother. (PC-R 276-77). Fisher also relied upon LaRue's description of Whitfield on the date of the crime and Whitfield's statement to opine that Whitfield had been taking drugs on that day and that he did not form the requisite intent to commit first-degree murder. (PC-R 277-78; 298). Further, Fisher opined that Whitfield was under the influence of extreme mental or emotional disturbance at the time of the offense. (PC-R 298).

According to Fisher, he based his opinion on three matters not utilized by the defense at the time of the trial: (1) Dr. Mash's findings; (2) Additional information regarding Whitfield's history of drug abuse, chronicity and paranoia; and (3) Passage of time, which allowed Whitfield's body chemistry and thinking to change. (PC-R 280-81; 312). However, on cross-examination, Fisher agreed that most of this information was now new, but merely consisted of additional information Regnier already possessed. (PC-R 299).

Fisher further opined that from the date of Whitfield's arrest until the start of trial, Whitfield was not able to assist in trial preparation or strategy because of his paranoia and the detoxification process, which Fisher described as "stumb[ling] back to reality." (PC-R 281-82; 309-10). He further opined that the defense did not have enough time to prepare because of Whitfield's PTSD and the effects of the drugs. (PC-R 283-84).

On cross-examination, however, Fisher testified that while Whitfield "could" cooperate and provide information up to and during trial, a clinician had to be cautious because of his paranoia and time transition. (PC-R 305-07). Fisher further testified on cross-examination that he was familiar with Regnier's reporting that Whitfield's trial strategy was to make his attorneys look bad to allow an appealable issue if convicted. (PC-R 305-06). On re-direct examination, Fisher testified that during trial, Whitfield attempted to remove his attorneys from his case, but the court refused his request. (PC-R 308-09).

Fisher testified that after reviewing Dr. Negroski's report and billing statement, he is of the opinion that a CT scan and other testing should have been performed to determine whether brain damage

occurred following an earlier head trauma suffered by Whitfield. (PC-R 284-86; 311). Further, Fisher opined that Negroski's findings that Whitfield experienced auditory hallucinations and passing out after cocaine use would have been useful during the guilt phase, and were only noted just prior to the end of trial. (PC-R 285-87). On cross-examination, Fisher agreed that no medical tests have been performed to date that reveal the existence of brain damage. (PC-R 304-05).

Concerning the penalty phase, Fisher recalls that Regnier testified about the following mitigating factors: PTSD, paranoia, history of a dysfunctional family life, impoverished family, and voluntary intoxication, although in Fisher's opinion, Regnier was unable to render a conclusive opinion. (PC-R 288-89; 297-98). In addition, due to the complexity of the issues involved, Fisher believes that the defense did not have enough time to prepare for the penalty phase. (PC-R 289-90).

During Fisher's investigation and preparation, he learned of information not utilized by Regnier, including more detailed information about he neighborhood in Newtown through Fred Atkins and about the "weed and seed" program and of risk factors associated with the area, such as drugs and violence. (PC-R 292-95).

Freddy Lewis Stanley Atkins

Freddy Atkins ("Atkins") has been a Florida resident his entire life and has primarily lived in Newtown, in Sarasota, Florida. (PC-R 316-17). Newtown is predominately an African-American community. (PC-R 317). Atkins served as Sarasota City Commissioner for the Newtown District from 1985 to 1995, and he was re-elected to this position in 2003. (PC-R 318-19).

Prior to his political service, Atkins worked at a satellite office in Newtown for Storefront, Inc., a substance abuse and family counseling program. (PC-R 319). As part of his duties in 1985, Atkins worked as a counselor and outreach worker with Whitfield's family after the court ordered the family to participate in the family life intervention program in approximately 1983 or 1984. (PC-R 319-22; 344). The family never "graduated" from the program but after

Atkins assumed his political office, they were no longer involved in the program. (PC-R 336-37).

When Atkins took over the Whitfield family's case, he identified several issues in Whitfield's family including problems the children had with delinquency, tardiness, truancy, absenteeism, and poor class performance. (PC-R 322; 334). Atkins further noted that Whitfield's mother[20]* was frequently absent, was a binge drinker, and failed to manager her government assistance, the household, and pay bills. (PC-R 322-23). When out of money, Atkins believes Whitfield's mother prostituted herself. (PC-R 343-44).

In his opinion, the biggest obstacle facing Whitfield's family was the mother and her alcoholism. (PC-R 333-34). He further opined "this is the most dysfunctional family I've ever seen in my entire experience in this process." (PC-R 334). Atkins recalled having to personally look for Whitfield's mother and finding her at "shot houses" or suffering from a medical complication due to her drinking and epilepsy. (PC-R 335-36). He even recalls finding her in one of the ditches along Leonard Reid Avenue. (PC-R 335). While Atkins counseled Whitfield's mother to seek treatment, to his knowledge, she never did. (PC-R 336).

Atkins recalled that when he first met the Whitfield family in approximately 1985, they had rented an apartment on Leonard Reid Avenue. (PC-R 324). He agreed that crack cocaine became a problem in Sarasota in approximately 1984 or 1985, and that it was sold in this area during that time. (PC-R 324-326). Often, this area of town served as a refuse dump during that time. (PC-R 324-327). In describing the rental apartment, Atkins recalled that it was a duplex, with two bedrooms, a small kitchen, a small bathroom and a very small living room. (PC-R 328). Whitfield's family had at least five members living in this apartment, and it was in disrepair, and often times, families in this area, who could not pay their rent were thrown out. (PC-R 328-32). Atkins further testified that certain areas near the family's

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[20]* [footnote 23 in trial court's order] Whitfield's mother is identified by several names in the various transcripts, including "Ms. Leola," Ms. Leola Garner," and "Ms. Leola Rich."

apartment were not a safe environment for children. (PC-R 330-333).

In 1986 or 1987, after Atkins became a City Commissioner, Whitfield told him he needed "somewhere to stay" and moved in with Atkins' family for approximately five to six months. (PC-R 338-39). While living with the Atkins, Whitfield began bringing friends over when Mr. Atkins was not home, which led to problems, and Whitfield was told to either stop bringing friends over or leave. (PC-R 339-40). Whitfield moved out within a few days. (PC-R 340). After this time, Whitfield's contact with Atkins was sporadic. (PC-R 341).

In 1995, Atkins still lived in Sarasota, and learned of Whitfield's case through a telephone call from his wife advising him of a newspaper article. (PC-R 341). Because of his involvement with Whitfield's family, Atkins expected Whitfield's attorneys to contact him and dreaded receiving a subpoena, but he never heard from Whitfield's trial attorneys. (PC-R 342; 344). On cross-examination, Atkins agreed that in 1995, he did not contact Whitfield's family, his attorneys, or Whitfield. (PC-R 345-46). He further explained that he did not believe he had a duty to contact them but regrets not becoming involved. (PC-R 347-48). Atkins was not surprised to learn that Whitfield's mother appeared at his trial drunk because whenever there was a crisis, she responded by "getting drunk." (PC-R 346-47).

Dinah Giles

Dinah Giles[21]* testified that she is Whitfield's younger sister. (PC-R 348-49). Their mother had three boys and three girls, but not all of the children had the same father. (PC-R 350-51). A grandmother raised Whitfield and Giles in St. Augustine, and their mother was not a constant presence, although their mother took them when they were 10 or 11 to Sarasota to live for short periods of time. (PC-R 350-53). While living or visiting their mother in Sarasota, Giles recalls that her mother would become involved in fistfights with her drunken

[21]* [footnote 24 of trial court's order] Her family refers to her by the name "Michelle."

boyfriend,[22]* who would then chase her and beat her. (PC-R 352-52). Even when Giles and Whitfield would visit on the weekends with their mother, she would become involved in arguments with her boyfriend, which led to violence. (PC-R 353).

Giles and Whitfield visited with their father on weekends, while they were living with their grandmother. (PC-R 354-55). At times, their father would get angry with Whitfield and threaten to "knock" him out, and one time told Whitfield "I'll take my pistol and I'll blow your brains out." (PC-R 354). When incidents like this occurred, Whitfield became sad and wanted to go home. (PC-R 355).

While living with their grandmother, Giles testified that the children went to school regularly, had enough to eat, and had appropriate clean clothing. (PC-R 355-56). When their grandmother died, however, Giles recalls that their lives changed, and they did not receive the "love and attention that we used to get." (PC-R 356). Their mother was involved with her boyfriends, and the kids were sent to live at approximately five different places in either Sarasota, Jacksonville, or St. Augustine. (PC-R 356-59). The changes resulted in changing schools and not attending school regularly. (PC-R 357).

When they became teenagers, the children were brought back to Sarasota to live with their mother. (PC-R 359). Giles testified that the family was involved with Mr. Atkins' program during this time on a regular basis because of her mother's alcohol problem. (PC-R 360). She recalls that Whitfield did not attend school as much as she did, and that the children did not always have clean clothes to wear, which led them to miss school. (PC-R 361). She recalls that while in Sarasota, they did not live in nice places. (PC-R 362-65).

Prior to 1995, Giles testified that she was aware that Whitfield was using drugs because he had changed. (PC-R 367). He would leave for a few days, return dirty and "smelling" with "glossy" eyes, which was unusual because he had always been neat and clean. (PC-R 367-68). Giles never actually observed

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[22]* [footnote 25 of trial court's order] Whitfield's mother later married this man. (PC-R 353).

Whitfield using drugs and admitted that she had never been around people on drugs, but testified that his whole personality had changed and that he was not working very much. (PC-R 367-70).

Giles testified that she contacted Whitfield's attorneys a few times before his trial, but she does not recall whether she discussed any defense theories or other information with them. (PC-R 365-67). Further, Giles does not recall whether she ever spoke with an investigator in 1995. (PC-R 367). Giles attended her brother's trial, and while she believes Charles Williams told her that she would testify, she was never called. (PC-R 370-73). Giles could not recall whether she spoke to Dr. Regnier or an investigator prior to trial or whether she spoke to anyone else other than Whitfield's postconviction counsel about her family life. (PC-R 373-76).

William Peterson

William Peterson, a general contractor in Sarasota, testified that Whitfield performed work for his roofing business in 1994 and 1995. (PC-R 376-77). In his opinion, Whitfield was a good worker, who was always on time, did not miss work without explanation, and he was very pleased with his work. (PC-R 377-78). He learned of Whitfield's case after he failed to appear for work, and then by reading about the case in the newspaper. (PC-R 378).

Evelyn Ford

Evelyn Ford first met the Whitfields in 1983 and lived in an apartment next door to the Whitfield family in Maple Manor.[23]* (PC-R 380-81). Whitfield's mother babysat her child, and at times when Ford visited their apartment, she noticed that Whitfield would return and looked like he had been out all night. (PC-R 381). At times, Whitfield's mother could not baby sit her child because she had been drinking too much. (PC-R 383). She believes Whitfield was "high" once because he was involved in an argument with his mother and kicked a window out, and on another occasion, he was mad at his stepfather

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[23]* [footnote 26 in trial court's order] The apartment complex is now names Kings Way. (PC-R 381).

and busted his lip. (PC-R 382). Ford also picked Whitfield up one time in an area known for drug sales, and she believes he may have been "high" because he was real talkative. (PC-R 382-83).

Peggy LaRue

Peggy LaRue testified that her sister, Stella Pierre, used to date Whitfield. (PC-R 384). LaRue testified that on the morning of the crime, Whitfield knocked on her door at approximately 7:00 a.m. (PC-R 386). He was agitated, talkative, and hyper, and had "big" and "glossy" eyes. (PC-R 385-86). He was acting differently, and she believed he was high because she had seen him like that before. (PC-R 385-87). After letting Whitfield in her house, he told her "I killed her, I killed her." (PC-R 386). At first she did not believe him, but Whitfield told her to listen for the police. (PC-R 387). Prior to trial, LaRue never spoke to Dr. Regnier, and cannot recall whether she spoke to the defense attorneys or their investigator. (PC-R 387-88).

Harriet Miller

Harriet Miller testified that Whitfield is her ex-husband.[24*] (PC-R 389). Miller dated Whitfield for approximately one year before they married. (PC-R 389). During that time, Miller described him as "real good" and explained that he provided for Miller and three of her children, and helped with the children. (PC-R 389-90). After they married, Miller testified that things changed, and Whitfield would have mood changes and then went on binges for about three days. (PC-R 390). When he would return, he was dirty, hyper, had big eyes, and his speech was husky. (PC-R 392). Miller never observed Whitfield using drugs but discovered drug paraphernalia used for crack cocaine. (PC-R 391). Further, Whitfield victimized Miller and was convicted of a crime for his actions, although she

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[24*] [footnote 27 of trial court's order] Dr. Regnier noted in his Forensic Evaluation dated October 11, 1995 that Whitfield and Miller married in 1984.

testified she holds no animosity toward him.[25]* (PC-R 390-91). According to Miller, the defense attorneys did not contact her prior to the 1995 trial, and the State did not contact her to give a deposition. (PC-R 392-93).

Leola Rich

Leola Rich testified that Whitfield is her son. (PC-R 394). When Whitfield was born, Rich was not married to his father, Ernest Whitfield Sr, but she was living with him. (PC-R 394-95). Rich testified that Whitfield's father was abusive to her while she was pregnant with their son. (PC-R 395). According to Rich the abuse consisted of beating her with his fists and a board. (PC-R 395). While pregnant with Whitfield, Rich fell while being chased by Whitfield's father. (PC-R 395). As a result of the fall, Rich was hospitalized for a few days. (PC-R 395).

Rich testified that while Whitfield was growing up, they lived with her mother, Leila Mae Elbert, and she cared for the children. (PC-R 396-97). She had two additional children by Whitfield's father over the next three years, and during this time, Whitfield's father continued to beat her. (PC-R 396). Later, Rich moved out and married Phillip Garner, who also abused her. (PC-R 397). Rich recalls that her children witnessed some of the abuse, and that she would warn them to run from him, and at some point, the children went back to live with their grandmother. (PC-R 397-98). In March 1980, their grandmother died, and Whitfield first lived with a family member in Jacksonville. (PC-R 399). After Mr. Garner died, Rich brought the children to Sarasota, and they lived in a two-bedroom apartment. (PC-R 399-400). Later,

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[25]* [footnote 28 of trial court's order] Whitfield was convicted of aggravated battery upon Harriet Williams in 1991. A certified copy of this conviction was admitted during the penalty phase as State's Exhibit 36. (See R 1553-55). During the penalty phase, the investigating officer testified that Whitfield gained entry into Williams' house by knocking on the window in the middle of the night and telling her he needed to talk with her because he was suicidal. Once inside and after speaking with her, Whitfield grabbed her and began to choke her and threatened her not to report the crime. (R 1553-54).

she lived with a man named Ossi and is now married to Johnny Rich. (PC-R 403-04).

Rich testified that Mr. Atkins was one of their counselors for their family problems involving her children. (PC-R 400). Rich explained that she began to drink after she lost her mother and husband because she was too busy raising her kids. (PC-R 401). She believes the family was involved in counseling for about a year. (PC-R 401).

Rich described Whitfield as never fighting in school, although she received some letters from teachers about his "child mind." (PC-R 402). She also recalls that Whitfield had to attend speech therapy and that he talks slow because of his speech problems. (PC-R 402-03). Before his arrest in 1995, Whitfield was shot. (PC-R 409). According to Rich, after the shooting, he acted different and was scared. She noticed, however, that he improved after the shooter was arrested. (PC-R 409).

In 1995, Whitfield lived either with Rich and her husband or with his girlfriend. (PC-R 404). Rich called the police to report that Whitfield had stolen from her to purchase drugs. (PC-R 404-05). Rich testified that Whitfield became involved in drugs through Phillip Garner's children. (PC-R 404-05). Rich worried about her son because he would not come home for a few days, and when he would return he would act differently. (PC-R 406). On the morning of the crime, Whitfield came home and appeared nervous, although it did not appear to Rich that Whitfield was on drugs "because he told [her] he had did [sic] something he was sorry for doing." (PC-R 410-11).

At the time of the trial, Rich was married to her current husband. (PC-R 404). She testified that she did not appear at Whitfield's trial while intoxicated, and that she drinks sometimes but not as much as before because of medications she is taking. (PC-R 407). When she appeared at the trial, she did not expect to be testifying, and recalls speaking with Williams and Syprett, but not an investigator or Dr. Regnier. (PC-R 408).

Charlie Ann Syprett

Charlie Ann Syprett ("Syprett") was known as Charlie Ann Scott when she represented Whitfield. (PC-R 415-16). In 1995, she began working for the

Twelfth Circuit Public Defender's Office, and spent approximately one year in the misdemeanor division and then about seven years in the felony division, during which she served in the capital division during her final year and a half.[26]* (PC-R 416, 418). While serving in the capital division, Syprett served as second chair, and had received requisite training in the Life Over Death seminar, along with other courses. (PC-R 417). Syprett then left to work for a civil firm and then opened her own firm, and mainly practiced criminal defense law. (PC-R 417). While practicing law, Syprett estimates handling approximately 30-50 trials. (PC-R 417).

Syprett worked with Williams at the Public Defender's Office, and they later became law partners for approximately three years. (PC-R 418). While law partners, they tried cases together, and were on the general court appointed list, along with the capital list that contained very few attorneys. (PC-R 418-19). In June 1995, the court appointed Williams to represent Whitfield, although Syprett also worked on the case. (PC-R 420).

Upon review of billing records and a transcript, Syprett determined that once Williams was appointed, she immediately met Whitfield at the jail to interview him and have him sign releases. (PC-R 421; 435-38). The attorneys also sought court appointment of a psychologist[27]* and an investigator.[28]* (PC-R 421). During her initial meeting with Whitfield, Syprett

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[26]* [footnote 29 of trial court's order] After graduating from law school in Syracuse University, Syprett worked for the Department of Labor; then passed the Virginia Bar and worked for a family law firm; then she was admitted to the Florida Bar. (PC-R 416).

[27]* [footnote 30 of trial court's order] Syprett testified on cross-examination that Dr. Lawrence was appointed to determine Whitfield's competency and to explore the insanity defense. (PC-R 438-39).

[28]* [footnote 31 of trial court's order] While a court order appointed the defense investigator on August 3, 1995, Syprett testified that the investigator may have been working on the case before entry of the order. (PC-R 446).

believes she learned of his possible voluntary intoxication defense and the issue of a blood sample to determine intensity or amount of drugs or alcohol in his system. (PC-R 421-22). On cross-examination, Syprett testified that she had used toxicologists while practicing as a criminal defense attorney. (PC-R 464-466).

On the date she first met Whitfield, Syprett made multiple telephone calls[29]* to labs, and she recalls speaking with a toxicologist at Smith Klein, to see if a blood sample from Whitfield would reveal this information. (PC-R 422-23; 439-445). She recalls being told that the blood sample would reveal the presence of alcohol or cocaine but not the intensity because it would be too late to determine this information. (PC-R 422). Further, Syprett recalls searching for a toxicologist outside of the Sarasota area and believes she may have called an office in either Miami or Ft. Lauderdale and that she received the same response that the information would not be ascertainable or obtainable.[30]* (PC-R 422-23; 440; 443). The defense did not send any of Whitfield's records or any blood samples to these individuals and planned to present evidence of Whitfield's voluntary intoxication through other witnesses. (PC-R 444-45; 466-67).

The court appointed Mr. Steele, a private investigator, to assist the defense, and Syprett testified that his responsibilities included, photographing the crime scene, interviewing and

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[29]* [footnote 32 of trial court's order] On cross-examination, Syprett admitted that her billing statements indicate that only one telephone call was placed. She explained, however, that on billing statements, she could only bill in six minute increments, so she would not have listed, in detail, each phone call she made on that date. Syprett further testified she had a working relationship with someone at Smith Kline; therefore, her conversation was no doubt longer than conversations with others working at different labs. (PC-R 439-442).

[30]* [footnote 33 of trial court's order] Syprett testified that this toxicologist had an unusual last name that starts with a "P" and that he advertises in the bare news. (PC-R 440).

locating witnesses, and obtaining pertinent medical and school records. (PC-R 423-24). Upon obtaining this information, the attorneys shared it with Regnier. (PC-R 424). According to Syprett, Regnier had a unique and large role in the case, not only in presenting mitigation factors, but also because he was the only one who could speak with Whitfield and calm him down. (PC-R 424-25).

The defense chose Regnier as their main witness at trial and the penalty phase to present testimony concerning Whitfield's background and medical history, due to his ability to articulate in a firm and convincing manner. (PC-R 425-427). While Syprett conceded that Whitfield's family was well-intentioned, the defense made a judgment call that the family members should not testify because they were not good historians, were inarticulate, and the defense had concerns regarding how they would testify under cross-examination. (PC-R 426).

In spite of Whitfield's lack of cooperation, Syprett opined that the defense "did everything we could" in representing him, and she testified they were "definitely prepared" for the guilt phase and "as prepared as we could be on the penalty phase." (PC-R 427; 454-55). She recounted that Whitfield failed to communicate information to the defense, failed to listen to them, and even engaged in activities such as letter writing and an interview with the television stations against their advice. (PC-R 427). She further recounted that Whitfield wrote a letter to the judge demanding a speedy trial, and that the defense attorneys did not agree with his decision for a speedy trial and made their view known on the record.[31*] (PC-R 428-29; 453).

Syprett detailed that multiple meetings were held with Whitfield on the speedy trial issue, and how they explained to him their desire to save his life and

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[31*] [footnote 34 of trial court's order] On cross-examination, Syprett could not recall the state of the law on speedy trial and waivers of speedy trial, but she testified she would have known the law at the time of the trial. (PC-R 451-452).

that more time[32]* was needed to prepare especially for the penalty phase. (PC-R 429; 447-50; 453). Despite their recommendations, and the presence of Dr. Regnier communicating this information to Whitfield, he still insisted on his right to a speedy trial, and the defense filed a demand for speedy trial. (PC-R 429-31; 454).

Concerning Whitfield's competency to make decisions, such as whether to demand a speedy trial, Syprett testified that the defense relied upon the opinions of Dr. Regnier and Dr. Lawrence that Whitfield was competent. (PC-R 429-31). Prior to trial, the defense also sought a continuance, but the trial judge determined that Whitfield had the right to a speedy trial and denied the continuance. (PC-R 430; 454-461). Syprett opined that case law at the time of Whitfield's trial provided that trial strategy rested with the attorneys and not with a defendant. (PC-R 470).

Syprett testified that she was shocked to see Commissioner Fred Atkins at the courthouse for the evidentiary hearing because she had met him in 1983 and would have taken note of his name had it been presented to her while representing Whitfield. (PC-R 427-28; 468). Further, she does not recall seeing Atkins' name listed in any of Whitfield's juvenile records, and she does not recall Regnier's testimony about a family counselor. (PC-R 468-69).

When Syprett left the law practice in 1997, Williams retained the firm's files. (PC-R 431). Once Williams was appointed as Circuit Judge, Syprett and Williams relocated all of their files to storage, but they have been unable to locate their file on Whitfield. (PC-R 431, 434). On cross-examination, Syprett testified that without their file on Whitfield, she relied upon the billing records, some transcript pages and written documents, and her memory

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[32]* [footnote 35 of trial court's order] Syprett testified on cross-examination that while employed at the Public Defender's Office, she relied upon the fetal alcohol syndrome defense in Danny Wortham's case. See State of Florida v. Daniel Wortham, Manatee County Case Number 1990 CF 001844A. She used this case as an example in explaining to Whitfield that it takes time to prepare capital cases for trial. (PC-R 453-454).

being triggered by seeing the family members at the courthouse to prepare for the evidentiary hearing. (PC-R 434-35).

APPLICATION OF THE STRICKLAND STANDARDS

Whitfield's claims of ineffective assistance of trial counsel must be evaluated under Strickland v. Washington, 466 U.S. 668, 687 (1984). In Howell v. State, 877 So. 2d 697, 702 (Fla. 2004), this Court reiterated the two-prong test for claims of ineffective assistance of counsel:

> The Sixth Amendment to the United States Constitution guarantees a defendant in a criminal case the right to assistance of counsel. A defendant seeking to establish a denial of this right because of counsel's ineffectiveness must make a two-pronged showing of deficient performance by counsel and resulting prejudice. See Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). 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 Rutherford v. State, 727 So. 2d 216, 219 (Fla. 1998). Second, the deficiency must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. See id. The two prongs are related, in that "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." Id. (quoting Strickland, 466 U.S. at 686) (alteration in original).
>
> Howell v. State, 877 So. 2d at 702.

This Court has repeatedly emphasized that:

> In evaluating whether an attorney's conduct is deficient, "there is 'a strong presumption that

> counsel's conduct falls within the wide range of reasonable professional assistance,'" and the defendant "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Brown v. State, 755 So. 2d 616, 628 (Fla. 2000) (quoting Strickland, 466 U.S. at 688-89). This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected. See Shere v. State, 742 So. 2d 215, 220 (Fla. 1999). Moreover, "to establish prejudice [a defendant] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1511-12, 146 L. Ed. 2d 389 (2000) (quoting Strickland, 466 U.S. at 694); see Rutherford, 727 So. 2d at 220.1.
>
> Valle v. State, 778 So. 2d 960, 965-966 (Fla. 2001)

Furthermore, "'[t]here is no reason for a court deciding an effective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.' Strickland, 466 U.S. at 697, 104 S. Ct. 2052. '[A] court need not determine whether counsel's performance was deficient before examining whether the alleged deficiency was prejudicial.' Eutzy v. State, 536 So. 2d 1014, 1015 (Fla. 1989)." Schwab v. State, 814 So. 2d 402, 408-409 (Fla. 2002).

STANDARD OF REVIEW

In reviewing a trial court's order on an ineffectiveness claim, 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 (Fla. 2001).

SUMMARY OF THE ARGUMENT

Issue I: At the time of trial, defense counsel made a reasoned, strategic decision not to call the collateral witnesses. Also, defense counsel promptly investigated the feasibility of toxicology tests, and was uniformly advised that testing would not show the intensity level of drug use at the time of the crimes.

Issue II: Defense counsel requested additional time to prepare for trial, but the trial judge denied the defense request, because of Whitfield's unequivocal and repeated demand for speedy trial. Although defense counsel's preparation was accelerated, their representation was not compromised.

Issue III: The defense team interviewed family members and witnesses and presented evidence of Whitfield's background, drug use, and mental health history through the testimony of Dr. Regnier. Any alleged shortcomings are directly attributable to Whitfield's refusal to cooperate.

Issue IV: Whitfield's Simmons claim is procedurally barred. Moreover, the jury was repeatedly informed of the sentencing option of "life without parole."

Issue V: Trial counsel was not ineffective in failing to object to permissible questions and comments by the prosecutor.

Issue VI: Any substantive Ake claim is procedurally barred.

Whitfield's IAC/Ake claim is also meritless since several mental health experts evaluated Whitfield and assisted defense at trial.

ARGUMENT

ISSUE I

THE "IAC"/VOLUNTARY INTOXICATION CLAIM

Ernest Whitfield's defense at trial "was based on voluntary intoxication by cocaine." Whitfield, 706 So. 2d at 2. Whitfield now asserts that his experienced criminal trial attorneys were ineffective in failing to call additional witnesses to allegedly corroborate this defense and failing to hire an expert in the field of toxicology.

Whitfield's multiple IAC/voluntary intoxication claims were the subject of the multi-day evidentiary hearing below; and the Circuit Court entered a comprehensive, fact-specific written order which specifically addressed each of Whitfield's claims and meticulously analyzed those claims under Strickland. Following an evidentiary hearing, this Court has held that "the performance and prejudice prongs are mixed questions of law and fact subject to a *de novo* review standard but that the trial court's factual findings are to be given deference." Porter v. State, 788 So. 2d 917, 923 (Fla. 2001), citing Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). "So long as its

decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court." Id.

In denying Whitfield's multiple IAC/voluntary intoxication claims, the Circuit Court painstakingly explained,

> Claims One, Two, Three, Five, and Twelve
>
> Claims one, two, and three allege ineffective assistance of counsel for failure to adequately investigate and present a voluntary intoxication defense to first-degree murder, armed burglary, and sexual battery with a deadly weapon. Claim five alleges ineffective assistance of counsel in the guilt phase for failure to hire a defense expert in the field of toxicology. Claim twelve alleges ineffective assistance of counsel at the penalty phase of the trial for failure to present evidence to establish that Whitfield was under the influence of controlled substances and alcohol at the time of the offense, which would have established several mitigators.
>
> Initially, the court notes that voluntary intoxication is only a defense to specific intent crimes, such as first-degree murder and armed burglary. Claim three alleged ineffective assistance of counsel for failure to adequately investigate and present a voluntary intoxication defense to sexual battery with a deadly weapon, a general intent crime. Voluntary intoxication is not a defense to general intent crimes, such as sexual battery. See Straitwell v. State, 834 So. 2d 918 (Fla. 2d DCA 2003). For this reason, Whitfield is not entitled to relief as to claim three; therefore, claim three is denied.
>
> Whitfield asserts that trial attorneys failed to locate and utilize several witnesses to corroborate his voluntary intoxication defense: Peggy LaRue, Harriet Miller, and Dinah Michelle Giles. Contrary to Whitfield's allegation, the record indicates that in

fact Peggy LaRue testified at trial.[33]* Her testimony included a detailed description of Whitfield on the morning of the crimes.[34]*

Whitfield asserts that his sister Dinah Giles should have been called to testify at trial concerning his change in behavior after he began consuming large quantities of controlled substances and alcohol. At the evidentiary hearing, Williams testified that he decided not to call Giles to testify because he believed Regnier had knowledge of Whitfield's background and personality and that he would have a better rapport with the jurors. (PC-R 79-82). Syprett echoed this decision and further explained how the defense made a judgment call to not have family members testify because they were not good historians, were inarticulate, and the defense had concerns about how they would testify when cross-examined. (PC-R 426). Based upon this testimony, the Court finds that defense counsel made a strategic decision not to call Giles to testify.

Williams also testified that he made a strategic decision not to call Harriet Miller to testify at Whitfield's trial because Miller had been a victim of an earlier crime[35]* perpetrated by Whitfield, and he believed her testimony could have a negative impact on the trial. (PC-R 80-81).

Further, the Court finds that at trial, substantial evidence was presented concerning Whitfield's use of cocaine. The defense accomplished this through the testimony of lay witnesses and Dr. Regnier. Any additional testimony set forth by any of the witnesses, who testified at the evidentiary

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[33]* [footnote 36 of trial court's order] She testified that on the morning of the crimes, Whitfield was "big eyed," "hyper, and nervous, and that when she had seen him like this before, he had been using drugs and crack cocaine. (R937-38; 947).

[34]* [footnote 37 of trial court's order] See R 937-38; 947.

[35]* [footnote 38 of trial court's order] The 1991 conviction for aggravated battery. Sarasota County Case No. 1991 CF 000170.

hearing would have been cumulative.[36]* Whitfield has failed to demonstrate any prejudice.

In addition, the record reveals that the defense requested, and the court gave the voluntary intoxication jury instruction at trial as a defense to first-degree murder and armed burglary. (R 1281-83; 1421-1422). The Florida Supreme Court further noted "Whitfield's defense was based on voluntary intoxication by cocaine." Whitfield, 706 So. 2d at 2. Because the voluntary intoxication defense was investigated, presented, and considered by the jury at trial, Whitfield is not entitled to relief. See Gilliam v. State, 817 So. 2d 768, 774-75 (Fla. 2002; Atkins v. Dugger, 541 So. 2d 1165, 1166 (Fla. 1989)(Trial counsel not ineffective for failing to present expert evidence that defendant's state of voluntary intoxication negated specific intent to commit murder when substantial evidence of defendant's intoxication was presented and argued to the jury).

To the extent Whitfield alleges his trial attorneys failed to obtain blood, hair or other samples to test for controlled substances or failed to hire a toxicologist to assist with the defense at trial, the Court finds Whitfield is not entitled to relief. At the start of trial, Whitfield raised his attorneys' failure to take samples for testing as a ground to remove his attorneys from representing

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[36]* [footnote 39 of trial court's order] Estella Brooks Pierre testified about Whitfield's problems with drugs and how his eyes were wide and red when he used crack cocaine and how his drug use increased after he was shot. (R 1138-51). Dr. Regnier testified about Whitfield's extensive history of drug abuse, especially crack cocaine, as set forth in medical records and described by Whitfield's family members. (R 1193-95). Further, Dr. Regnier testified that in his opinion, and based on a conversation with Whitfield and a review of depositions and other documents, that Whitfield used cocaine prior to the crimes and "was under a lot of cocaine that day." (R 1218-1222; 1235-1241). Defense counsel was able to obtain testimony through the police officers about statements made by Whitfield concerning the amount of cocaine he had used prior to committing the crimes. (R 893-95; 903-08).

him.[37]* In response to this allegation Syprett informed Judge Rapkin of the following explanations in open court:

> As soon as he advised us about his request to take a urine sample, I spoke to not one but definitely two and possibly three local authorities about what it was he wanted us to do and whether it would show what he thought it would show, and I was advised that it wouldn't show what he wanted to show. R.600
>
> Based upon the information given to us, I believe by the Smith-Kline local lab, we decided that it was not going to serve any useful purpose. R. 601

Judge Rapkin determined that Whitfield failed to demonstrate any deficiency in his attorneys' failure to arrange for a urine sample or other testing. (R. 604; 611).

Further, testimony at the evidentiary hearing demonstrates the effort taken by defense counsel in deciding whether to seek testing for the presence of drugs in Whitfield after his arrest. Syprett testified that after initially meeting Whitfield (approximately two days after his arrest), she learned that he wanted samples drawn to determine the amount of drugs or alcohol in his system. (PC-R 421-23; 439-45). Syprett made several telephone calls and contacted the Smith-Kline Laboratory in Sarasota to discuss the possibility of having tests performed. (PC-R 421-23; 439-45). She further testified that she was informed that the information she was seeking was not obtainable and that while testing might demonstrate the presence of drugs, it would not reveal the intensity. (PC-R 421-23; 439-45).

Concerning the defense experts, who testified at the evidentiary hearing, the Court finds their testimony failed to demonstrate that had defense counsel requested and obtained samples that the result

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[37]* [footnote 40 of trial court's order] R. 472-74; 598-99.

of the trial would have been different. While Dr. Mash opined that Whitfield was experiencing "cocaine paranoia" at the time of the offense, she did not specifically testify that Whitfield could not form the requisite intent necessary to commit first-degree murder and armed burglary. (PC-R 223-25). In fact, she even agreed that had counsel obtained urine samples from Whitfield on June 21, 1995,[38*] the sample may have shown whether he in fact used cocaine in the days immediately prior to the crimes, but that the cocaine clears within a few days, and that this measure is not "absolute." (PC-R 228-29; 235).

While Fisher opined that Whitfield could not form the requisite intent at the time of the crimes, he reached this opinion after reading Whitfield's statements, LaRue's deposition, and other records. (PC-R 276-78; 298; 303). On cross-examination Fisher agreed that with the exception of Dr. Mash's findings, most of the information he testified about was merely additional to other information already possessed by Regnier. Most significant, however, is that Fisher was able to form his opinion without a toxicology report, which again demonstrates a lack of prejudice in trial counsel's failure to obtain toxicology information. (PC-R 299).

Syprett testified that she recalled having a brief conversation with a toxicologist outside of the Sarasota area, who essentially confirmed that the information being sought was not obtainable. (PC-R 421-23; 439-45). Based on Syprett's testimony, a review of the noted transcript excerpts from trial, and a finding that Whitfield's assertions are at best speculative in nature, the Court determines that defense counsel made a strategic decision not to pursue testing for controlled substances. This decision was reasonable at the time, based upon the information Syprett had obtained; therefore, Whitfield is not entitled to relief. See Banks v. State, 842 So. 2d 788 (Fla. 2003); Occhicone v. State, 768 So. 2d

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[38*] [footnote 41 of trial court's order] This date is significant because Judge Rapkin appointed Charles Williams to represent Whitfield on this date, and it would not have been possible for Williams or Syprett to have obtained any samples prior to this date.

1037 (Fla. 2000); Rutherford v. State, 727 So. 2d 216 (Fla. 1998).

Lastly, Whitfield alleges ineffective assistance of counsel at the penalty phase for failing to present evidence that Whitfield was under the influence of controlled substances and alcohol at the time of the offense, which would have established statutory mitigators. As set forth above, LaRue testified at Whitfield's trial, and defense counsel explained their strategic decision not to call Miller and Giles to testify; therefore, Whitfield is not entitled to relief.

While Whitfield's postconviction motion alleged that Mash would provide testimony concerning additional mitigating evidence not presented during the penalty phase, the Court finds that she did not specifically identify any statutory or nonstatutory mitigators that could have been set forth but were not. Judge Rapkin further made the following findings concerning Whitfield's substance abuse in the final sentencing order:

> "I believe that the defendant is a cocaine addict, and that he probably did use cocaine some time shortly before the murder."
>
> "The defendant suffered from chronic crack cocaine addiction."

Whitfield had the burden of demonstrating that "but for counsel's errors he would have probably received a life sentence." Rose v. State, 675 So. 2d 567, 570 (Fla. 1996). He failed to meet this burden. Whitfield is not entitled to relief on these claims. See Occhicone v. State, 768 So. 2d 1037 (Fla. 2000); Rutherford v. State, 727 So. 2d 216, 224-25 (Fla. 1998). (PCR-V5/866-872)

The Circuit Court's comprehensive written order is supported by the following competent substantial evidence; and, for the following reasons, Whitfield's IAC/voluntary intoxication claims were properly denied.

Failure to Call Lay Witnesses: LaRue, Miller, Giles, and Ford

Peggy LaRue did testify at Whitfield's trial as a State witness. On cross-examination, LaRue testified that on the morning of the murder, Whitfield had big eyes, he was not normal, talking unusually and real "hyper." (V6/937-938). She further stated that Whitfield looked like he had been using drugs. She had been around Defendant in the past when he was on drugs and he looked similar to those previous times. He was shaking like he was nervous and talking real fast. (V6/938). On re-cross, LaRue went so far as to testify that she thought that Whitfield had been using crack cocaine the morning of the murder. (V6/947). LaRue also testified at the evidentiary hearing (PCR-V7/1299-1303), and provided the same information she provided previously at trial. Whitfield cannot demonstrate any deficiency and resulting prejudice under Strickland inasmuch as LaRue previously testified at trial and her postconviction testimony simply reiterated that presented at trial.

Evidence of Whitfield's drug use was presented at trial through the testimony of Estella Brooks Pierre and Dr. Regnier, thus, rendering any additional testimony cumulative. At trial, Pierre testified that she was familiar with people on crack. Whitfield exhibited signs of being on crack, such as not being able to be still, having really big, red eyes. He would talk real fast when under the influence of drugs. (V6/1141-1143).

Whitfield sought money for drugs and admitted a drug problem with crack. According to Pierre, Whitfield's drug use got worse after he was shot in April, 1995. (V6/1144).

At trial, Dr. Regnier also testified that Whitfield was likely using cocaine at the time of the murder. However, Dr. Regnier candidly acknowledged that his conclusion that Whitfield was suffering from a "cocaine psychosis" was speculative because Defendant had not cooperated with much of the testing. (V8/1240). On rebuttal, Dr. Sprehe testified that a cocaine psychosis does not go away in a couple of hours. (V8/1255). As this Court noted on direct appeal,

> The State's psychiatrist, Dr. Sprehe, testified in rebuttal that Whitfield was able to form a specific intent to commit murder, pointing out that Whitfield was arrested within two hours of the incident and was not considered to be intoxicated at that time. Further, he stated that Whitfield's actions during the course of the crimes showed planning ability: He entered the house, obtained a kitchen knife, used the knife to rape Brooks, threatened Brooks not to make noise, entered another room to kill Reynolds, left the house, and disposed of the knife. He also stated that cocaine psychosis resulting from long-term use of cocaine does not go away in a matter of hours.

Whitfield, 706 So. 2d at 2.

With respect to Miller and Giles, defense counsel Williams testified that he was aware of both of these witnesses and made a strategic decision not to call either of them at trial. (PCR-V6/993-996). Harriet Miller, the Defendant's ex-wife, had been

a victim of one of the defendant's prior violent felony offenses, and defense counsel Williams believed her testimony could have had a negative impact. (PCR-V6/995-996). Trial counsel cannot be deemed ineffective in failing to call a witness whose testimony might condemn his client. See, Fennie v. State, 855 So. 2d 597, 604-605 (Fla. 2003).

Dinah Giles was listed as a potential witness at the time of trial. (V12/1926). Dr. Regnier testified at trial that he spoke with Giles about Whitfield. (V7/1193-1194). During the penalty phase, Dr. Regnier testified that Giles told him she never saw Whitfield using cocaine and had never been with him when he was using crack. (V10/1626-1627). At trial, Dr. Regnier also indicated that she was a poor historian and her lack of information about the Defendant was "phenomenal." (V7/1633-1634). Giles confirmed at the evidentiary hearing that she never observed Whitfield doing drugs; thus, she could offer nothing to support the voluntary intoxication claim.[39] (PCR-V7/1283).

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[39]With respect to the related IAC/penalty phase claim concerning postconviction witness Giles (see Issue III infra), the Circuit Court found that defense counsel Williams also made a strategic decision against having Giles testify at trial based on his determination that Dr. Regnier knew about Whitfield's background and personality and defense counsel believed that Regnier would have a better rapport with the jurors. (PCR-V6/994-997).

Whitfield also asserts that Evelyn Ford, a former neighbor of the Defendant's mother, would have been corroborative of his pattern of drug use. In denying Whitfield's related IAC/penalty phase claim, the Circuit Court found that the name of Evelyn Ford (Leola Rich's former neighbor) was never provided to the defense at the time of trial in 1995. Whitfield does not contest this dispositive factual determination. Moreover, trial counsel cannot be deemed ineffective in failing to present cumulative evidence of Whitfield's drug use. Finally, Ford's testimony is not beneficial to Whitfield overall. During the postconviction hearing, Evelyn Ford recalled that she met the family in 1983, she sometimes employed Whitfield's mother as a babysitter, she thought Whitfield was "high" every "now and then," and she remembered an incident when "he got mad with his mom," and "kicked the window out." "And another time he was mad with his stepfather about something," and he "busted him in the mouth." (PCR-V7/1295-1297). Whitfield cannot demonstrate any deficiency of counsel and resulting prejudice under Strickland based on the failure to locate an undisclosed witness who could testify that Whitfield committed prior acts of escalating violence against members of his own family when "he got mad." See, Medina v. State, 573 So. 2d 293, 298 (Fla. 1990) (finding no ineffectiveness in not presenting witnesses where it would

have opened the door for State to explore defendant's violent tendencies).

In criticizing defense counsel's failure to call additional witnesses at trial, postconviction counsel is impermissibly second-guessing trial counsel's contemporaneous assessment at the time of trial. Strategic decisions are not subject to being second-guessed in a postconviction proceeding. Strickland; See also, Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) ("Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"). Trial counsel cannot be deemed ineffective where he made a strategic decision at the time of trial to present testimony concerning the Defendant's background via the defense expert, Dr. Regnier. See, Brown v. State, 29 Fla. L. Weekly S764 (Fla. December 2, 2004); Atwater v. State, 788 So. 2d 223 (Fla. 2001) (counsel not ineffective where testimony of the defendant's personal and family history presented through testimony of forensic psychologist).

Failing to Hire a Toxicologist

Prior to trial, defense counsel [Scott] Syprett addressed, on the record, Whitfield's complaint that his attorneys failed to conduct the drug testing he'd requested. Attorney Syprett explained, in Whitfield's presence before the trial court, that

the defense had contacted two or three local authorities and discussed the feasibility of drug testing, and was informed that the tests would not show what the Defendant wished them to show [*i.e,* the level of cocaine intensity] (V5/600-601 and 743).

During this pre-trial hearing, defense counsel explained,

> MS. SCOTT [Syprett]: . . .
> As soon as he advised us about his request to take a urine sample, I spoke to not one but definitely two and possibly three local authorities about what it was he wanted us to do and whether or not it would show what he thought it would show, and I was advised that it wouldn't show what he wanted us to show. And I documented every phone call, I documented who I spoke to and the results to --
>
> THE COURT: Did you explain that to Mr. Whitfield?
>
> MS. SCOTT: Yes.
>
> THE DEFENDANT: No, she didn't explain that to me, Your Honor.
>
> MS. SCOTT: I mean, you were with me.
>
> THE DEFENDANT: I have took urine samples for jobs, all right, and it come back a week later, urine sample for cocaine, marijuana and all kinds of alcohol substance, right, and it come back -- I have went for interviews for jobs and failed these tests because the test came back positive for jobs, and they tell me -- she's telling me that the people told her that the test would have came back negative; it wouldn't have did nothing. I mean, two days I was in here and took that test, it would have showed something.
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> MS. SCOTT: At any rate, if I may continue, Your Honor.
>
> THE COURT: Yes.

> MS. SCOTT: –. . . [Mr. Williams] and I discussed it at length, and based upon the information that was given to us, I believe by the Smith-Kline local lab, we decided that it was not going to serve any useful purpose, and it was explained.

(V5/600-601).

Trial counsel's contemporaneous billing statements also confirmed that, immediately after their appointment on 6/21/95, trial counsel immediately investigated the possibility of obtaining useful drug testing results in this case. (On 6/21/95: "Telephone conference with Smith-Kline Lab regarding possible blood test for client;" Telephone conference with Smith-Kline on 6/22/95; Telephone conference with Smith-Kline on 6/22/95) (PCR-V13/2128). During the postconviction hearing, Attorney Syprett testified that she contacted Smith-Kline Labs and another toxicologist to determine whether toxicology testing could determine the amount of cocaine in Whitfield's system at the time of the murder, not simply whether he was using cocaine. (PCR-V7/1337-1338). Numerous witnesses at trial confirmed Whitfield's frequent use of cocaine. (PCR-V8/1360). However, despite the timeliness of their investigation, the labs informed counsel that it would be impossible to determine how much cocaine was in the Defendant's system at the time of the crimes. In Asay v. State, 769 So. 2d 974 (Fla. 2000), the defendant alleged a claim of ineffective assistance of counsel in the

penalty phase for failure to investigate and present statutory mitigating evidence. In Asay, trial counsel made a tactical decision not to further pursue an investigation after receiving an initial unfavorable diagnosis. Citing Rutherford v. State, 727 So. 2d 216 (Fla. 1998), and Rose v. State, 617 So. 2d 291 (Fla. 1993), this Court held that where counsel did conduct a reasonable investigation prior to trial and made a strategic decision not to present the information, counsel's performance was not deficient. In this case, trial counsel made a strategic decision after receiving uniformly unfavorable responses to their multiple inquiries. Here, as in Asay, no deficiency of counsel has been established. See also, Banks v. State, 842 So. 2d 788, 792 (Fla. 2003) (reiterating that "[w]hile voluntary intoxication or drug use might be a mitigator, whether it actually is depends upon the particular facts of a case.")

Although Whitfield repeatedly argues that Dr. Regnier did not have enough time, Dr. Regnier testified at trial that his lack of information necessary to form an opinion as to intent was attributable to Whitfield's failure to cooperate. (See V8/1226). In contrast to the information provided to trial counsel, the Defendant cooperated with his postconviction team and presented the testimony of toxicologist, Dr. Debra Mash. According to Dr. Mash, hair samples could have been an indicator

of the Defendant's toxic exposure for up to 30 days. (PCR-V6/1126). However, Dr. Mash never indicated that testing a hair sample would provide an indication of exactly how much cocaine Defendant was using on the night of the murder. Given the fact that the defense called witnesses to testify that Whitfield used cocaine regularly and that he seemed high on the night of the murder, any information which could have come from a toxicology report would have been cumulative. Therefore, no prejudice has been shown as a result of the absence of such a report.

Moreover, even without a toxicology report, Dr. Mash opined that Defendant was a severe crack cocaine addict, that he had neurological damage from the persistent use of crack cocaine, and that he suffered from cocaine paranoia on the night of the murder. (PCR-V6/1130-1132,1138). Thus, the lack of a toxicology report did not impede this expert's opinion, further supporting the conclusion that no prejudice occurred from its absence. Nothing set forth in Dr. Mash's postconviction testimony affects the verdict in this case. First, other testimony was presented that Defendant was a severe crack addict. Second, Dr. Mash's belief that Defendant has neurological damage is unsupported by any medical testing. No medical expert opinion or testing supports this conclusion of Dr. Mash. Moreover, she specifically testified that she would

have to rely upon a neurologist's opinion on this topic. (PCR-V6/1137; V7/1146-1147). Further, Dr. Mash's conclusion that Defendant suffered from cocaine paranoia on the night of the murder is based upon the description of witnesses who knew him and his behavior, and who had already provided this same information at the time of trial. (PCR-V6/1138). The only new information she possessed came from an interview with a now cooperative Defendant who provided her information concerning his chemical abuse history. (PCR-V6/1131).

As the Circuit Court specifically found, Dr. Mash never testified as to whether Defendant had the ability to form the requisite intent. While she stated that people, in general, suffering from cocaine paranoia may lose their ability for higher cognitive functioning, (PCR-V6/1139), she provided no opinion on Whitfield's intent on the night of the murder. Consequently, no deficient performance or prejudice has been shown on defense counsel's ability to negate specific intent at the time of trial. Lastly, while Whitfield argued in his postconviction motion that Dr. Mash would provide additional nonstatutory and statutory mitigation, the Circuit Court specifically found that she failed to do so, noting that

> While Whitfield's postconviction motion alleged that Mash would provide testimony concerning additional mitigating evidence not presented during the penalty phase, the Court finds that she did not

> specifically identify any statutory or nonstatutory mitigators that could have been set forth but were not. Judge Rapkin further made the following findings concerning Whitfield's substance abuse in the final sentencing order:
>
> > "I believe that the defendant is a cocaine addict, and that he probably did use cocaine some time shortly before the murder."
> >
> > "The defendant suffered from chronic crack cocaine addiction."
>
> Whitfield had the burden of demonstrating that "but for counsel's errors he would have probably received a life sentence." Rose v. State, 675 So. 2d 567, 570 (Fla. 1996). He failed to meet this burden. Whitfield is not entitled to relief on these claims. See Occhicone v. State, 768 So. 2d 1037 (Fla. 2000); Rutherford v. State, 727 So. 2d 216, 224-25 (Fla. 1998).

(PCR-V5/872)

In this case, as in Gorby v. State, 819 So. 2d 664 (Fla. 2002), the postconviction judge acted well within his discretion in evaluating the testimony regarding the existence *vel non* of statutory mitigating factors. Id., citing Rose v. State, 617 So. 2d 291, 293 (Fla. 1993) (postconviction judge "has broad discretion in determining the applicability of mitigating circumstances and may accept or reject the testimony of an expert witness").

Finally, Whitfield's reliance on Wiggins v. Smith, 539 U.S. 510 (2003) is misplaced. In Wiggins, the jury did not know of Wiggins' "excruciating life history" of severe physical and

sexual abuse by his alcoholic mother and various foster parents. That abuse included going for days without food, his hospitalization for physical injury, and repeated rapes and gang-rapes. All that was offered in mitigation in Wiggins was that the defendant had no prior convictions. 123 S. Ct. at 2533. In Williams v. Taylor, 529 U.S. 362, 395-98 (2000), trial counsel failed to introduce "the comparatively voluminous amount of evidence" of a "nightmarish childhood," offering only a "sole argument in mitigation."

ISSUE II

THE "IAC"/SPEEDY TRIAL CLAIM

At trial, "Whitfield demanded, against the advice of his attorneys, speedy trial. Whitfield's attorneys had expressed to him the need for additional time to prepare for trial and to engage in plea negotiations with the State. Whitfield ignored their advice stating that he was dissatisfied with the possible option of two consecutive life sentences." Whitfield, 706 So. 2d at 3, n. 1. The trial court observed first hand how the Defendant had "the ability to change his behavior as the situation changed." See, Cummings-El v. State, 863 So. 2d 246, 252-253 (Fla. 2003).

Whitfield now claims that his experienced trial attorneys

were ineffective due to the time limits imposed by the speedy trial rule. In denying postconviction relief, the Circuit Court found, *inter alia*, that (1) Whitfield repeatedly demanded a speedy trial over defense counsel's warnings and objections, (2) defense counsel requested a continuance of trial, (3) the trial court denied counsel's motion for continuance, ruling that speedy trial could not be waived without Whitfield's express consent,[40] (4) until Whitfield's postconviction evaluations by Dr. Mash and Dr. Fisher, Whitfield had been uncooperative with his defense attorneys and mental health professionals, (5) trial counsel requested and obtained additional time to prepare for the penalty phase, and (6) trial counsel also received additional time within which to file a written sentencing memorandum which asserted three statutory mitigators and six nonstatutory mitigators.

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[40]In Florida v. Nixon, 125 S. Ct. 551 (2004), the U. S. Supreme Court recently reiterated that "[a]n attorney undoubtedly has a duty to consult with the client regarding "important decisions," including questions of overarching defense strategy. Id., citing Strickland, 466 U.S. at 688. However, that obligation does not require counsel to obtain the defendant's consent to "every tactical decision." A defendant has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Id., citing Jones v. Barnes, 463 U.S. 745, 751 (1983); Wainwright v. Sykes, 433 U.S. 72, 93, n. 1 (1977) (Burger, C. J., concurring). Thus, in those four categories, "an attorney must both consult with the defendant and obtain consent to the recommended course of action." Id.

In denying postconviction relief on Whitfield's IAC/speedy trial claim, the Circuit Court's cogent written order states, in pertinent part,

> Claim Six
>
> Claim six alleges ineffective assistance of counsel in the guilt and penalty phase for failure to adequately investigate, prepare, and present the defense case due to the time limits imposed by the speedy trial rule. Before a defendant is entitled to relief on an ineffective assistance of counsel claim for failure to properly prepare for trial, a defendant must demonstrate how the alleged deficiencies in his counsel's performance prejudiced the case. See Vento v. State, 621 So. 2d 493 (Fla. 4th DCA 1993). Central to the defense's claim is an allegation that Williams and Syprett made the unwise choice to demand speedy trial, and that this "strategy" was solely within their discretion. A full and thorough review of the record, as detailed below, however, refutes this allegation.[41]*
>
> As early as July 12, 1995, the court was informed of Whitfield's desire that his attorneys demand a speedy trial.[42]* At the next court proceeding on August 4, 1995, Judge Rapkin read a letter written by Whitfield, which contained the following excerpt: **"This letter is my official notification that I intend to exercise my right to a fast and speedy trial. If you office does not file this motion by 7/28/95, please excuse yourself from representing my case."** R. 10-11. (Emphasis added).

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[41]* [footnote 52 of trial court's order] On direct appeal, the Florida Supreme Court found the "the record indicates that Whitfield demanded, against the advice of his attorneys, speedy trial. Whitfield's attorneys had expressed to him the need for additional time to prepare for trial and to engage in plea negotiations with the State. Whitfield ignored their advice stating that he was dissatisfied with the possible option of two consecutive life sentences." Whitfield v. State, 706 So. 2d 1, 3, n.1 (Fla. 1997).

[42]* [footnote 53 of trial court's order] See R. 2-6.

> At this proceeding, Williams informed the Court about the conflict involving the speedy trial issue. In summary, the defense attorneys were clearly against demanding a speedy trial. Whitfield, however, unequivocally demanded that he be allowed to exercise his right to a speed trial[43]* when, in open court, he stated: "I want a formal speedy trial. That's my right."[44]* Whitfield reiterated his position in court again on August 11, 1995, when he told Judge Rapkin: "I want a speedy trial." (R. 31).
>
> Later in the proceedings, when Williams requested a continuance[45]* to better prepare for trial, Judge Rapkin denied his request[46]* and ruled "your client has demanded a speedy trial, which is his right: and "you don't have the right to [waive speedy trial] without his consent." (R 51). Again, in open court proceedings on September 7, 1995, Whitfield demanded

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[43]* [footnote 54 of trial court's order] No less than four times, Whitfield asserted that he was "exercising his right" to demand a speedy trial. Further, Whitfield explained to the Court that a speedy trial was in his best interest and would result in protecting a lot of people. (R. 14-17).

[44]* [footnote 55 of trial court's order] See R 17.

[45]* [footnote 56 of trial court's order] Williams filed a Motion for Continuance on September 5, 1995, detailing Whitfield's continued demand for speedy trial and the potential problems in proceeding to trial later in the month. (See attached).

[46]* [footnote 57 of trial court's order] CCRC-M argues that defense counsel could have waived speedy trial without Whitfield's consent and against his wishes. There appears to be some support for this position in older case law. See State v. Abrams, 350 So. 2d 1104 (Fla. 4th DCA 1977); Earnest v. State, 265 So. 2d 397 (Fla. 1st DCA 1972). In the present case, however, the trial judge denied Williams' request for a continuance after Williams filed a proper motion to continue and a hearing was held. Whitfield has failed to demonstrate what additional actions his attorney could have taken to achieve a continuance since the trial court ruled that Whitfield had a right to a speedy trial. See Turner v. Crosby, 339 F.3d 1247, 1276, n. 22 (11th Cir. 2003).

his speedy trial rights again, despite Williams' warnings and objections. (R 54-57). At this time, Judge Rapkin concluded that "There is only one decision, there's only one ship, there's only one captain, and it's his case, and it's his life. He's the one that chooses the speedy trial." (R. 57). It is unclear to this court, what additional steps defense counsel could have employed, other than what was already attempted and denied by the court, to delay proceeding to trial.

The court is ever mindful that when a defendant demands speedy trial, a trial court should not "second-guess" the trial strategy and strike the demand "simply because the defendant who filed the demand has been charged with first-degree murder and will have to forego discovery in exchange for a speedy trial" or a first-degree murder defendant "effectively would never be able to demand a speedy trial." Landry v. State, 666 So. 2d 121, 127 (Fla. 1995). In Landry, the Florida Supreme Court further suggested that when a tactical decision is made by counsel to not engage in discovery, it would be prudent for the trial court to inquire of the defendant to determine whether the defendant concurs with the strategy. Landry, 666 So. 2d at 128, n. 10. Clearly, Whitfield did not concur with his attorneys desire for a trial continuance. Judge Rapkin clearly informed Whitfield of the strong probability that he would postpone the trial, if Whitfield advised the Court that he wanted his attorneys to take additional depositions. Whitfield responded: "I don't want the trial put off." (R 55-56).

Concerning the penalty phase of trial, testimony at the evidentiary hearing revealed the extent to which Whitfield failed to cooperate with his defense attorneys in attempting to prepare for the penalty phase. (PC-R 69-70; 87; 427; 454-55). Following the guilty verdict, defense counsel requested and was able to obtain additional time to prepare for the penalty phase. (R 1444-46). Then, at the conclusion of the penalty phase, defense counsel was provided additional time within which to file a sentencing memorandum setting forth factors for mitigation. Defense counsel filed a detailed sentencing memorandum on October 6, 1995. The sentencing memorandum contains argument in support of three statutory mitigators and six

nonstatutory mitigators.

In ruling on this claim, the Court is ever mindful of Dr. Regnier's testimony concerning why he was unable to render a final opinion on the crucial voluntary intoxication defense in Whitfield's case. In particular, Regnier clearly testified that his testing was incomplete because Whitfield would not cooperate with him, not because of time constraints, and had Whitfield cooperated, the speedy trial constraints would not have been an issue. (PC-R 156-58). The Court further notes that up until Whitfield's recent evaluations by Mash and Fisher, Whitfield had been uncooperative with his attorneys and mental health professionals.

Regnier also testified that Whitfield informed him of his strategy to make his attorneys look bad, in case an appeal was necessary. (PC-R 170-73). This strategy was evident when, on the morning of the first day of trial, Whitfield attempted to discharge his attorneys, and then refused to communicate reasons for the desired discharge to the court. (R 470-98). Review of this case reveals that Whitfield consistently and repeatedly refused to cooperate with his defense attorneys and Regnier. This lack of cooperation may have hindered the defense but any deficiency present was due to Whitfield's actions, not his attorneys' performance.

Based upon these findings, this Court concludes that defense counsel made bona fide attempts to obtain additional time to prepare for trial, but the trial judge denied the requests for additional time, because of Whitfield's unequivocal and repeated demand for speedy trial.[47*] When faced with proceeding to trial in very difficult and challenging circumstances, defense counsel acted appropriately and did not render ineffective assistance of counsel. See Turner v. Crosby, 339 F.3d 1247, 1276, n. 22 (11th Cir. 2003). Claim Six is denied.

(PCR-V5/874-877)

The Circuit Court's order is supported by the following

[47*] [footnote 58 in trial court's order is blank]

competent substantial evidence; and, for the following reasons, the Circuit Court properly denied Whitfield's IAC/speedy trial claim.

Although Whitfield initially filed a *pro se* demand for speedy trial, defense counsel also filed a formal demand on August 4, 1995. (V12/1801). In fact, this issue was discussed in detail before trial. While the trial court noted that case law allows a *pro se* demand for speedy trial to be treated as a nullity when the defendant is represented by counsel, he was concerned based on the seriousness of the case. (V1/11). While defense counsel indicated his initial problems with seeking a speedy trial, he also indicated his willingness to continue representing Whitfield. (V1/11-12). For example, defense counsel voiced his concern that if he sought speedy trial he would not be able to take depositions. (V1/13). However, defense counsel also indicated that after taking depositions, he might file a demand for speedy trial. (V1/13).

The trial judge then discussed with Defendant his desire to seek a speedy trial. Whitfield stated that only two depositions needed to be taken, and that he wanted a speedy trial. (V1/15). The prosecutor indicated that the State would not preclude defense counsel from conducting depositions within the appropriate window of time. (V1/16). In light of the State's

assurance to cooperate with discovery, defense counsel then indicated he could "... go ahead and do whatever [he could] within the next sixty days." (V1/16). His "biggest concern" was that the State would object to continuing the discovery process. (V1/17). Consequently, defense counsel determined that he would be able to file a formal demand for speedy trial based on the State's representation of cooperation in the discovery process. (V1/17-18). In fact, defense counsel did file a formal demand that same afternoon; and, when trial counsel appeared before the trial court on August 11, 1995, trial counsel explained,

> MR. WILLIAMS: Yes, Judge, and let me preface this by saying a couple of things.
>
> One of the reasons, of course, in -- the decision to file a demand for speedy trial is ultimately trial counsel's in this case; however, because of Mr. Whitfield's insistence that it be done, I filed it because I felt it was very important that Mr. Whitfield and I have a very good working relationship on a case such as this; however, I do want to caution the Court and caution the State that I am doing this with the assumption that I'm going to be able to at least schedule depositions of the majority of the witnesses prior to the trial date. . . (V1/T28).

In this case, although trial counsel did not recall his strategy at the time of the postconviction hearing, his statements at the time of trial addressed his contemporaneous rationale. As the Circuit Court recognized, in Landry v. State, 666 So. 2d 121, 127 (Fla. 1995), this Court clearly faulted the

trial court in that case for second-guessing trial counsel's reasonable strategic decision in asserting a capital defendant's demand for a speedy trial under rule 3.191(b).

Ultimately, when this case was ready for trial, defense counsel stated on the record that he was ready to go to trial in the guilt phase. (V4/492). Additionally, the preparation of the defense team was addressed on the trial record. For example, the same day that this case was assigned to them, the defense obtained releases from Defendant for medical and employment records, although the Defendant was unable to provide specific information. (V5/740). Within a week after their appointment, the defense team already had met with Defendant's family and actually went to his mother's home where he had allegedly fled after the murder. (V5/741). Based upon information from the family, releases were sent out. Within ten days, Dr. William Lawrence was contacted as Defendant's initial psychologist. (V5/741). The defense received initial discovery on July 19, 1995, and scheduled all of the depositions before the trial. (V5/743). All of this was done despite Whitfield's continued and repeated refusals to cooperate with defense counsel. (V5/741-744).

The State recognizes that the "finding as to whether counsel was adequately prepared does not revolve solely around the

amount of time counsel spends on the case or the number of days which he or she spends preparing for mitigation" and that it is a "case-by-case analysis." Brown v. State, 29 Fla. L. Weekly S764 (Fla. December 2, 2004) (quoting State v. Lewis, 838 So. 2d 1102, 1113 n. 9 (Fla. 2002). In this case, trial counsel's time records verify their expedited -- and extensive –- preparation. Trial counsel spent in excess of 550 hours representing this capital defendant. Although defense counsel's preparation necessarily was accelerated, it was not compromised. According to counsel's fee motion, "the entire months of August and September of 1995 were devoted exclusively toward the preparation, trial, and sentencing of this cause. . . Counsel had to virtually shut down his practice to devote himself exclusively to the representation of the Defendant." (See, V13/2125-2137).

Following the guilty verdict, defense counsel requested a continuance of the penalty phase. The trial court granted the defense request from the end of guilt phase on Monday, September 25, 1995, until Thursday, September 28, 1995, before the penalty phase would begin. Defense counsel stated, on the record, that the amount of time given by the trial court would be fine. (V9/1446).

During the postconviction hearing, trial counsel Williams

confirmed that he was aware that he could waive the Defendant's speedy trial rights without the Defendant's consent. (PCR-V5/944). However, after extensive consultation with the Defendant, co-counsel Syprett, and Dr. Regnier, the Defendant continued to insist on a speedy trial. The Defendant specifically explained to Dr. Regnier that he wanted a speedy trial so that the prosecution would not be ready to proceed.[48] Defendant told Dr. Regnier that he understood that his own attorneys would not have time to prepare, but Defendant believed this would result in either a mistrial or avoidance of the death penalty. (PCR-V6/1045-1046). In fact, the Defendant told Dr. Regnier that it was his strategy to make his attorneys look bad in order to give him more grounds for appeal. (PCR-V6/1085-1086).

Even in the face of Defendant's demand for speedy trial, defense counsel filed a motion for continuance. However, the

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[48]Whitfield accurately predicted that the State might be hampered by his speedy trial demand. As the prosecutor explained during the hearing on the State's motion to consolidate:

> For instance, for the record, the State will have no DNA evidence in this case, even though there is blood recovered, even though there has been semen recovered from the rape victim. Because of the time constraints and the need for several months to run a DNA tests, we have not been able to obtain that. So the State has been prejudiced by the defendant's demand. (V1/T97)

trial court denied any continuances. Thus, trial counsel cannot be deemed ineffective in light of counsel's request and the trial court's ruling. See, Turner v. Crosby, 339 F.3d 1247, 1276, n. 22 (11th Cir. 2003) (concluding that trial counsel was not ineffective because counsel attempted to secure more time, only to be denied by the trial court).

The State agreed to provide its full cooperation during discovery and the defense complied with the demand for speedy trial. (PCR-V6/980-981). Ultimately, despite the expedited schedule, defense counsel was ready for trial within the speedy trial window. Whitfield has failed to identify any deficiency of counsel at trial. On postconviction, Defendant offers the same theory of defense, i.e., voluntary intoxication. Further, the Defendant has failed to offer any additional witnesses not known to defense counsel at the time of trial, other than Fred Atkins who merely provided cumulative information concerning Defendant's background. Moreover, had the Defendant provided Atkins' name to defense counsel, both Attorneys Williams and Syprett testified that they would have called him to testify on Defendant's behalf. (PCR-V6/1003; V8/1343).

During the postconviction hearing, Dr. Regnier did not provide any testimony beyond that presented at trial. He stated that his opinion had not changed, and any deficiency in

preparation for trial was caused by the Defendant's lack of cooperation. Additionally, Dr. Regnier admitted that had Defendant cooperated, time would not have been an issue with regard to trial preparation. (PCR-V6/1073, 1082-1086). Finally, Drs. Mash and Fischer based their opinions on the same information that was available to Dr. Regnier at the time of trial. (PCR-V7/1147, 1194-1195).

In fact, the only difference between the trial evidence and that presented at the evidentiary hearing is the Defendant's new-found willingness to cooperate. Trial counsel cannot be found deficient based upon a defendant's refusal to cooperate at the time of trial and his attempts to manipulate the judicial system. See, Gore v. State, 784 So. 2d 418, 438 (Fla. 2001) (finding no ineffective assistance where counsel acted reasonably in seeking out and evaluating potential mitigating evidence and the defendant himself thwarted counsel's efforts to secure mitigating evidence by refusing to cooperate with mental health experts); Hodges v. State, 885 So. 2d 338, 346 (Fla. 2003) (addressing trial court's finding that any deficiencies in counsel's investigation were attributable to an uncooperative defendant and unwilling, absent, or recalcitrant witnesses); Rutherford v. Crosby, 385 F.3d 1300, 1312 (11th Cir. 2004) (finding that to "the extent there were any shortcomings in the

investigation of Rutherford's family life, he is responsible for them. He did his best to hinder his attorneys' efforts.") In this case, Whitfield has failed to demonstrate any deficiency of counsel and resulting prejudice arising from the fact that he received what he steadfastly demanded in 1995 – a trial within the period of the speedy trial rule.

ISSUE III

THE "IAC"/PENALTY PHASE CLAIM

Whitfield asserts that penalty phase counsel was ineffective in failing to investigate and present more evidence concerning his deprived childhood, drug abuse, and mental health. This claim was the subject of the evidentiary hearing below and was correctly rejected on both the prejudice and deficiency prongs as set forth in Strickland v. Washington, 466 U.S. 668, 686 (1984).

Whitfield contends that trial counsel was ineffective in failing to call Fred Atkins (former social worker), Leola Rich (Defendant's mother), Dinah Michelle Giles (Defendant's sister), Evelyn Ford (former neighbor), Harriet Miller (Defendant's ex-wife), and William J. Peterson (Defendant's former employer) during the penalty phase. In denying postconviction relief on this claim after conducting an evidentiary hearing, the trial court ruled:

The remaining sub issue concerns an allegation of ineffective assistance of counsel for failure to investigate and prepare for the penalty phase by not locating the following witnesses and fully developing known testimony:

Fredd Atkins: Defense alleges that Atkins would have been available to testify about many details regarding Whitfield such as Atkins' social work with the Whitfield family, Whitfield's troubled childhood, Whitfield's mother's drinking problem, and how Whitfield lived at his house for a while. On cross-examination, however, Atkins admitted that he never contacted Whitfield, his family or attorneys in 1995, following Whitfield's arrest. (PC-R 345-46). Williams testified that he would have known Atkins' name had Whitfield mentioned it to him, and that he was not aware of any connection between Atkins and Whitfield. (PC-R 88; 107-08; 111). Likewise, Syprett was shocked to learn of the connection between Whitfield and Atkins, and believes she would have taken note of his name had Whitfield told her while she was representing him and preparing for trial. (PC-R 427-28; 468-69).

Based on the testimony of Williams and Syprett, the court determines that trial counsel did not know of Atkins and could not have learned of him based upon Whitfield's lack of cooperation and insistence on a speedy trial, coupled with the family's inability to provide relevant information. See Marshall v. State, 854 So. 2d 1235, 1247 (Fla. 2003).

Leola Rich: While Rich could have provided testimony concerning Whitfield's childhood and his troubled past, the Court finds that Rich appeared at the original trial in what appeared to be an intoxicated condition,59* and would not have been a credible or reliable witness. Syprett further explained how the defense made a judgment call in not having the family members testify because they were not good historians, were inarticulate, and the defense had concerns about how they would testify when cross-examined. (PC-R 426). Further, Dr. Regnier testified that Whitfield's family had been difficult to locate and how "no one [from his family] called

unless they were actively pursued." (PC-R 133; 146-47). The lack of communication and cooperation by the family and Whitfield also contributes to the Court's ruling that defense counsel did not provide ineffective assistance of counsel in failing to call Rich to testify at trial. Based upon this testimony, the Court finds that defense counsel made a strategic decision not to call Rich to testify.

Dinah Michelle Giles: According to Williams' testimony, Steele and Regnier met with Whitfield's sister, Dinah Giles, prior to trial to learn background information about the Whitfield family. (PC-R 79-80). Williams decided against having Giles testify because he believed Regnier had knowledge about Whitfield's background and personality and that he would have a better rapport with the jurors. (PC-R 79-82). Williams further opined that Regnier testified about the pertinent family history. (PC-R 81-82). Syprett further explained how the defense made a judgment call in not having the family members testify because they were not good historians, were inarticulate, and the defense had concerns about how they would testify when cross-examined. (PC-R 426). Based upon this testimony, the Court finds that defense counsel made a strategic decision not to call Giles to testify.

Evelyn Ford: Williams testified that he cannot recall Whitfield ever mentioning the name "Evelyn Ford" during the investigation. (PC-R 89). The Court finds that Whitfield did not provide this name to his defense attorneys, and further he has failed to demonstrate any prejudice in his attorneys' failure to call her as a witness. See Marshall v. State, 854 So. 2d 1235, 1247 (Fla. 2003).

Harriet Miller: Williams testified that he made a strategic decision to not call Miller to testify at Whitfield's trial because Miller had been a victim of an earlier crime perpetrated by Whitfield, and Williams believed her testimony could have had a negative impact on the trial. (PC-R 80-81).

William J. Peterson: Williams testified that he believes the defense spoke with Peterson, but he made a decision not to call him to testify at trial. (PC-R 70; 87-88).

Upon review of this sub-issue, the Court determines that Whitfield failed to demonstrate that

> his trial attorneys provided ineffective assistance of counsel in their preparation and investigation for the penalty phase; therefore, this portion of Claim Seven is denied. See Marshall v. State, 854 So. 2d 1235 (Fla. 2003).
>
> (PCR-V5/878-880)

The Circuit Court's order is supported by competent substantial evidence and should be upheld for the following reasons.

Prior to trial, defense counsel had an investigator appointed and the investigator located and interviewed potential witnesses. Dr. Regnier also spoke with Whitfield and his family members and defense counsel made a strategic decision to present Whitfield's family background, drug use, and history *via* Dr. Regnier.[49]

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[49]Dr. Regnier testified during both the guilt phase and the penalty phase. During the penalty phase, Dr. Regnier testified that Whitfield suffered from several conditions relevant to the extreme mental or emotional disturbance mitigating circumstance (R1589-90). According to Dr. Regnier, Whitfield had been chronically dependent on drugs for the preceding nine years (R1590, 1610, 1632). Whitfield also suffered from post-traumatic stress which originated when he was shot in February 1995 and almost bled to death (R1590, 1605, 1632). Whitfield now has flashbacks and chronic headaches (R1606). Whitfield also has become paranoid and imagines that an attacker will return to shoot him again (R1606-7). Dr. Regnier also concluded that Whitfield has major depression (R1590, 1632). This condition existed for a long time and was manifested by a serious suicide attempt (R1590). In 1991, after binging on cocaine for three days, Whitfield went to his sister's house and put a loaded gun to his head, saying "I can't take it anymore"

Both Attorneys Williams and Syprett testified that they made the strategic decision to present Whitfield's background through Dr. Regnier. Defense counsel was aware of Miller and Giles and made a strategic decision not to call them as witnesses. Additionally, Leola Rich arrived at trial impaired by alcohol. (PCR-V5/995). Trial counsel Williams also testified that counsel made an informed decision not to put on Defendant's

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(R1602-3). As a result, Whitfield was involuntarily committed to the Coastal Recovery Crisis Center under the Baker Act (1603-4).

Dr. Regnier also addressed Whitfield's childhood (R1593-1602). Whitfield's first memory was of his father holding a gun to his mother's head and threatening to shoot her (R1595). His mother abused alcohol (R1594, 1599). His father was a violent drunk who regularly beat Whitfield and his mother (Rl595). Despite this abuse, Whitfield adored his father (R1598). However, the father never believed that Ernest was his biological son and never accepted him (R1595, 1599). When Whitfield's parents separated, the defendant remained with his father (R1599). However, Whitfield's father abandoned him and he was shuffled through a series of relatives (R1599-1600). When his father died, the defendant rejoined the mother in Sarasota (R1598-1600). Three stepfathers with whom the defendant tried to form attachments also died (R1599). Whitfield's background was also impaired by poverty (R1600-2). Several children had to sleep on a single mattress (R1601). He often was hungry because there was little food (R1601). At one point in his childhood, he was hospitalized with an infection caused by worms (R1602). Dr. Regnier testified that he believed that the break-up with Estella "pushed" Whitfield "over the edge" (R1608-9).

Dr. Regnier opined that Whitfield was suffering from mental illness and was under the influence of crack cocaine when he entered Reynolds' residence (R1617). In addition, according to Dr. Regnier, Whitfield was not "in complete control of his emotions" because of the break-up with Estella (R1617).

employment history. (PCR-V5/1002-1003).[50]

None of these uncalled mitigation witnesses provided any significant testimony which was not presented by Dr. Regnier. As such, the failure to call them at trial could not have prejudiced the proceedings. This is especially true where the trial court gave considerable weight to Whitfield's impoverished background. There is no scenario where any additional weight given to this purely nonstatutory mitigator would have outweighed the three strong aggravators of prior violent felony, during the course of a burglary and HAC.

This case involves three substantial, weighty aggravators. See Rivera v. State, 859 So. 2d 495, 505 (Fla. 2003) (noting HAC, felony murder, and prior violent felony aggravators are weighty circumstances); Asay v. Moore, 828 So. 2d 985, 992 (Fla.

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[50]Trial counsel's strategic decisions were reinforced when several of the defendant's postconviction witnesses revealed facts which were detrimental to the defendant or inconsistent with the defense theory at trial. For example, Whitfield's former employer testified at the postconviction hearing that Whitfield was a good worker who was always on time. However, at trial, the defense sought to establish a severe cocaine addiction and that the defendant would binge on cocaine and disappear for days at a time.

During the postconviction hearing, the defendant's mother testified that when Whitfield arrived at her house on the morning of the crimes, Whitfield seemed nervous and admitted that he'd done something bad; there was "something he was sorry for doing." Therefore, her testimony belied a claim of substantial drug impairment/cocaine psychosis. Evelyn Ford also revealed Whitfield's prior violent acts toward members of his own family.

2002); Porter v. State, 788 So.2d 917, 925 (Fla. 2001) (recognizing CCP and prior violent felony are weighty aggravation). This is not a case where the circumstances surrounding the crime were uncertain or the weight of the aggravating circumstances or the evidence supporting them was weak. Whitfield threatened to kill Claretha just weeks before the murder and Claretha apparently was perceived as an obstacle to his reuniting with Estella. As Claretha slept in her bedroom along with her five young children, Whitfield covertly entered her home, armed himself with a knife, threatened Willie Mae and her baby, and raped Willie Mae at knifepoint. Whitfield's criminal actions were not a random attack on an unknown target; Whitfield focused his brutal attack on vital locations which assured Claretha's demise.

Fred Atkins was the only witness unknown to defense counsel at the time of trial. As Defendant's previous social worker, Atkins testified to Defendant's family background. However, Mr. Atkins is a prominent councilman in Sarasota and both defense attorneys knew his name at the time of Defendant's trial. Had the Defendant or anyone else provided this name to defense counsel, they would have pursued his testimony. Moreover, Atkins testified that he was well aware of Defendant's trial, and he purposefully failed to contact defense counsel to support

Defendant. (PCR-V7/1256-1258).

Further, Whitfield never mentioned Fred Atkins. In fact, the Defendant instructed his attorneys not to investigate penalty phase matters. (PCR-V6/984-985). Under these circumstances, "any failure to present additional mitigating testimony [in this regard] was more the responsibility of [Whitfield] than his counsel. He refused to help his counsel develop mitigation ...." See Rutherford v. State, 727 So. 2d 216, 225 (Fla. 1998). In this case, any alleged deficiencies are directly attributable to this defendant's refusal to cooperate with trial counsel and his mental health experts at the time of trial. See also, Hodges v. State, 885 So. 2d 338, 346 (Fla. 2004); Rutherford v. Crosby, 385 F.3d 1300, 1312 (11th Cir. 2004). Given the limitations created by Whitfield, defense counsel made reasonable tactical decisions about putting on the mitigating evidence that was available.

Even with Atkins' testimony, however, no impact would have been found on the outcome of the proceedings. Atkins merely testified to Defendant's history which, for the most part, was cumulative to the testimony provided by Dr. Regnier on that topic. At most, Atkins provided nonstatutory mitigation evidence which was no different than that found by the trial court in the original sentencing order, i.e., that Defendant

came from an impoverished background (given considerable weight) and was abandoned by his parents as a result of their alcoholism (given some weight). (See Sentencing Order filed October 20, 1995).

Morever, the evidence presented during the postconviction proceedings failed to rise to the level of any statutory mitigator. Only Dr. Fisher provided any testimony with respect to the statutory mitigator that Defendant was under the influence of extreme emotional disturbance. However, Dr. Fisher failed to explain what evidence existed concerning Defendant's state of mind at the time of the offense. An expert's testimony alone does not require a finding of extreme emotional disturbance. See, Provenzano v. State, 497 So. 2d 1177, 1184 (Fla. 1986). And, even if this statutory mitigator were established, it would not outweigh the three weighty aggravators applicable to Defendant's case.

In this case, trial counsel was experienced with capital cases and keenly aware of his responsibility to find and introduce mitigating evidence. And, in ultimately determining the defendant's sentence, the trial judge had the additional benefit of the written sentencing memorandum filed by trial counsel which emphasized the mitigation urged by the defense. See, Turner v. Crosby, 339 F.3d at 1279.

As this Court explained in Occhicone v. State, 768 So. 2d 1037 (Fla. 2000):

> In order to obtain a reversal of his death sentence on the ground of ineffective assistance of counsel at the penalty phase, [the defendant] must show "both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different."

Occhicone, 768 So. 2d at 1049 (quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996)).

The lay witness testimony presented at the postconviction hearing is largely cumulative to that which was investigated and presented at trial. See, Maharaj v. State, 778 So. 2d 944, 957 (Fla. 2000) (noting "[f]ailure to present cumulative evidence is not ineffective assistance of counsel."). Similarly, the postconviction mental health testimony is likewise cumulative and any purportedly "new" conclusions are the result of a now-cooperative client. See, Rutherford v. Crosby, 385 F.3d 1300, 1312 (11th Cir. 2004); Asay v. State, 769 So.2d 974, 986 (Fla. 2000) (reasoning "counsel conducted a reasonable investigation into mental health mitigation evidence, which is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert.")

Any bolstering of record evidence the Defendant could hope

to have accomplished with the new experts would not have undermined the Court's findings that the criminal facts of this case refuted the statutory mitigation. The result of the sentencing would not have been different had these witnesses testified. This Court has denied relief in a number of similar cases where despite a substantial presentation of evidence in mitigation, collateral counsel asserts that additional information should have been presented. See, Hodges v. State, 885 So. 2d 338 (Fla. 2004); Brown v. State, 2004 Fla. LEXIS 2173 (Fla. 2004); Sweet v. State, 810 So. 2d 854 (Fla. 2002); Bruno v. State, 807 So. 2d 55 (Fla. 2001); Pietri v. State, 885 So. 2d 245, 266 (Fla. 2004). Finally, the defendant is not entitled to any relief under Wiggins simply on the basis of the 7 to 5 recommendation. See, e.g., Rutherford; Turner, *supra*.

ISSUE IV

THE "IAC"/SIMMONS v. SOUTH CAROLINA CLAIM

Next, Whitfield asserts that trial counsel was ineffective during the penalty phase in failing to request a special jury instruction, based on Simmons v. South Carolina, 512 U.S. 154 (1994), when the jury asked if there was a possibility of Whitfield ever being released. Under Simmons, "[w]here the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life

imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury -- by either argument or instruction -- that he is parole ineligible." 512 U.S. at 178 (O'CONNOR, J., concurring in judgment); Id. at 163-164 (plurality opinion).[51]

Significantly, Whitfield still has not articulated the particular instruction that trial counsel allegedly should have requested in light of the jury's question at trial. Instead, Whitfield summarily asserts that trial counsel and the court "failed to give a proper instruction, violating the dictates of *Simmons* and its progeny." (See, Amended Brief of Appellant at 94). Therefore, the State respectfully submits that Whitfield's conclusory allegations are insufficient to fairly preserve this issue for appellate review. See, Cooper v. State, 856 So. 2d 969, 977, n. 7 (Fla. 2003) (rejecting summary arguments as insufficient for consideration); Sweet v. State, 810 So. 2d 854 (Fla. 2002) ("because on appeal Sweet simply recites these claims from his postconviction motion in a sentence or two,

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[51]As noted in O'Dell v. Netherland, 521 U.S. 151 (1997), four members of the Court joined the plurality opinion in Simmons. JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE and JUSTICE KENNEDY, provided the necessary votes to sustain the judgment. Therefore, concurring in the judgment, JUSTICE O'CONNOR wrote the decisive opinion in Simmons. See, O'Dell v. Netherland, 521 U.S. at 158-159 (holding that Simmons announced a "new rule" under Teague and could not be applied retroactively on collateral review).

without elaboration or explanation, we conclude that these instances of alleged ineffectiveness are not preserved for appellate review.") Assuming, *arguendo*, that Whitfield's claim is adequately preserved, which the State does not concede and specifically disputes, the Circuit Court's order should be affirmed for the following reasons.

In denying Whitfield's IAC/Simmons claim, the Circuit Court applied a procedural bar and also found Simmons distinguishable, "given the nature of the jury instructions given by the trial court." As the Circuit Court's order explained,

> At the Huff Hearing, the Court reserved ruling on Claims VIII through XI. Claim VIII concerns claims of alleged ineffective assistance of counsel for failure of trial counsel to seek a special jury instruction pursuant to Simmons v. South Carolina, 512 U.S. 154 (1994). Claims IX and X rely upon facts set forth in Claim VIII and further allege that the Defendant's death sentence is unreliable and that the jury considered nonstatutory aggravators in making an advisory recommendation. No additional facts or supporting allegations are provided in support of Claims IX and X.
>
> On direct appeal, Mr. Whitfield challenged the trial court's decision to reread the standard jury instructions after the jury submitted a question about the possible sentence the Defendant would receive. The Florida Supreme Court affirmed the trial court's ruling and found, "that the jury instructions adequately informed the jury that the punishment is "either death or life imprisonment without the possibility of parole." Whitfield v. State, 706 So. 2d 1, 5 (Fla. 1997). The Court finds that the issues raised in Claims VIII-X were raised and denied on direct appeal and that it is now improper to raise the same issues, or slight variations of them, in a

> postconviction motion as ineffective assistance of counsel. See Sireci v. State, 469 So. 2d 119 (Fla. 1985). The Court has also reviewed Simmons v. South Carolina, 512 U.S. 154 (1994) and Kelly v. South Carolina, 534 U.S. 246 (2002) and finds that these cases are distinguishable, given the nature of the jury instructions given by the trial court. Claims VIII-X are denied.

The Circuit Court's findings are supported by the following competent, substantial evidence; and, for the following reasons, the Circuit Court correctly denied postconviction relief on Whitfield's IAC/Simmons claim, applying both a procedural bar and also finding that the Defendant's cited cases, Simmons v. South Carolina, 512 U.S. 154 (1994) and Kelly v. South Carolina, 534 U.S. 246 (2002),[52] were "distinguishable, given the nature of the jury instructions given by the trial court." Indeed, in this case, unlike Simmons and Kelly, the jurors repeatedly were informed -- both by trial counsel and by the trial court -- that the penalty was "either death or life imprisonment without the possibility of parole." (See, V10/1524-1525; 1674-1675; 1686; 1690-1692; 1698-1699; 1708-1709).

The Circuit Court found that the defendant's jury

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[52]In Kelly, 534 U.S. 246 at 248, the Court reiterated, "When a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel." (citations omitted).

instruction claim was procedurally barred in this postconviction proceeding inasmuch as it was previously raised and rejected by this Court on direct appeal. Whitfield, 706 So. 2d at 5. Whitfield does not dispute that the defense previously raised a Simmons/jury instruction claim, which was rejected both in the trial court and on direct appeal. Prior to Whitfield's sentencing hearing, trial counsel submitted a comprehensive written sentencing memorandum which specifically relied upon Simmons. (V13/2059-2070, at 2060-2061). Whitfield's trial attorneys also presented extensive arguments to the trial court emphasizing the "life without parole" defense claim. (Hearing held on October 13, 1995; V10/1761-1771; 1792-1793; 1796). On direct appeal, Whitfield challenged the trial court's decision to reread the standard instruction informing the jury that the only alternative to death was life in prison without the possibility of parole. (See, Whitfield v. State, SC Case No. 86-775, Direct Appeal Brief at 52-53).

On direct appeal, this Court addressed the merits of Whitfield's jury instruction claim and found that the trial judge acted appropriately in rereading the instruction to the jury. Whitfield, 706 So. 2d at 5. As this Court explained:

> In his fourth claim, Whitfield contends that the trial judge improperly responded to a question posed by the jury during the penalty phase. The following question was posed by the jury during deliberations:

> "Does life in prison without parole really mean 'no parole' under any circumstances. He will never be allowed back into society again?" Six jurors signed the question. Whitfield asked that an affirmative response be given to the question. The trial judge declined to give an affirmative response, choosing instead to reread the appropriate instruction to the jury.
>
> Whitfield contends that the judge should have answered the question affirmatively based on the law and that, because six jurors asked the question, an affirmative answer could have changed the seven-to-five recommendation for death to a recommendation for life imprisonment. We disagree and find that the trial judge did not abuse his discretion when he reread this standard jury instruction. In Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992), we were presented with a very similar situation wherein, during deliberations, the jury asked the trial judge the following question: "If he's sentenced to life, when would he be eligible for parole? Does the time served count towards the parole?" Rather than answering the question, the trial judge informed the jury that they would have to depend on the evidence and instructions. We concluded that the judge acted properly because the jury instructions adequately informed the jury that a life sentence carried a minimum mandatory sentence of twenty-five years. Similarly, the jury instruction in this case adequately informed the jury that the punishment is "either death or life imprisonment without the possibility of parole." We find that the trial judge acted appropriately in rereading the instruction to the jury.

Whitfield, 706 So. 2d at 5.

See also, Perry v. State, 801 So. 2d 78, 83 (Fla. 2001) (direct appeal addressing capital defendant's *voir dire* limitation claim based, in part, on Simmons, and finding that the trial court properly instructed the jury by providing the

standard instruction during the penalty phase preliminary instruction, as well as twice during the standard penalty phase closing instructions. Moreover, defense counsel was permitted to argue numerous times during closing argument that "life imprisonment meant without the possibility of parole.")

Because Whitfield's underlying jury instruction complaint was previously raised on direct appeal, this claim was procedurally barred on subsequent postconviction review. Additionally, Whitfield's attempt to avoid application of a procedural bar by simply recasting his previously litigated claim under the guise of ineffective assistance of counsel was properly denied. See, Kimbrough v. State, 886 So. 2d 965 (Fla. 2004), citing Maharaj v. State, 684 So. 2d 726 (Fla. 1996); Sireci v. State, 469 So. 2d 119, 120 (Fla. 1985) ("Claims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel.") Furthermore, Whitfield cannot demonstrate any deficiency of counsel and resulting prejudice under Strickland inasmuch as counsel did assert a "life without parole" jury instruction claim under Simmons, and this Court ruled that the instructions adequately informed the jury of "either death or life imprisonment without the possibility of parole."

Moreover, in denying postconviction relief, the Circuit Court also found that Simmons and Kelly were "distinguishable, given the nature of the jury instructions given by the trial court." The trial record provides competent, substantial evidence supporting this conclusion. Unlike Simmons and Kelly, the jurors in this case repeatedly were informed – by both the trial court and defense counsel – that the punishment was "either death or life imprisonment with the possibility of parole." First, at the commencement of the penalty phase, the trial court instructed:

> Ladies and gentlemen of the jury, you have found the defendant guilty of first degree murder.
>
> +-
>
> The punishment for this crime is either death or life imprisonment with the possibility of parole. (V10/1524-1525)(e.s.)

During defense counsel's penalty phase closing, trial counsel underscored the only two sentencing options in this case: the death penalty or life without parole. At the very outset, defense counsel stressed the importance of the jury's recommendation and, in no uncertain terms, trial counsel emphasized,

> . . . this will be perhaps the most important decision that you will have to make, that when you make a decision, and the Judge has told you that your decision will carry a great weight, to consider these four items here and I want you to consider it in terms of what is being asked for, life in prison without the possibility of parole, and what that means is that

> Ernest will die in prison.
>
> There is no issue for you to discuss in terms of well, gee, maybe he'll get out for good behavior, or, gee, maybe he'll be paroled.
>
> The law is clear that if you choose life in prison, Ernest will die in prison. So what we're doing isn't asking for forgiveness. What we're doing isn't asking for you to be compassionate.
>
> We're asking you to choose how you feel Ernest should die and that's the issue. That is the issue.

(V10/1674-1675)(e.s.)

During the midst of his penalty phase closing, defense counsel again implored the jurors to return a vote for "life in prison without the possibility of parole." As defense counsel urged,

> Ask yourself again when you deliberate, if we vote as a jury or you vote individually life in prison without the possibility of parole, if you accomplish these four things, did you accomplish, if you vote life in prison without the possibility of parole, the punishment of Ernest Whitfield? Did you accomplish the protection of society? Did you follow the law? And is your verdict in accordance with justice?
>
> If you find that this is the way that Ernest should die, in prison for the rest of his life being dictated to, being told what to do, being told where to go, being told when to get up, when to go to sleep, until he dies, if you feel that all of these four factors can be accomplished, and if you feel that the mitigating circumstances in this case outweigh the aggravating circumstances, this should be your verdict.

(V10/R1686)(e.s.)

Finally, in conclusion, defense counsel emphatically reiterated,

> . . . I'm asking you to choose life in prison without the possibility of parole and the emphasis,

> because you should be concerned, that society should be protected, of course, you should be. This guarantees it. This guarantees it.
>
> You should be concerned that Ernest should be punished. This guarantees it. He's never getting out of prison. This man, if you choose, is going to die in prison.

* * *

(V10/1690-1692)(e.s.)

Shortly thereafter, following closely on the heels of defense counsel's closing, the trial court instructed the jury:

> The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment without the possibility of parole in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.
>
> If a majority of the jury determine that Ernest Whitfield should be sentenced to death, your advisory sentence will be:
>
> A majority of the jury, by a vote of, and you will insert the numerical vote, advise and recommend to the court that it impose the death penalty upon Ernest Whitfield.
>
> On the other hand, if by six or more votes the jury determines that Ernest Whitfield should not be sentenced to death, your advisory sentence will be:
>
> The jury advises and recommends to the court that it impose a sentence of life imprisonment without the possibility of parole upon Ernest Whitfield.

(V10/1698-1699)(e.s.)

Finally, in response to the jury's question during their deliberations, the trial court reread the standard instruction

and informed the jurors, once again,

> THE COURT: Just take any seat, folks. I'm just going to answer your question best I can. Folks, I'm going to reread what I read to you earlier, you don't have this, before we began the penalty phase.
>
> The punishment for this crime is either death or life imprisonment without the possibility of parole. The final decision as to what punishment shall be imposed rests solely with the Judge of this court. However, the law requires that you, the jury, render to this Court an advisory sentence as to what punishment should be imposed upon the defendant. I will place great weight upon your advisory opinion. . .
>
> (V10/1708-1709)(e.s.)

Future dangerousness is not a statutory aggravating factor in Florida; and, in this case, the trial judge instructed the jury that it was limited to considering only the [three statutory] listed aggravators[53] (V10/1696-1697); and the jury was repeatedly informed that the penalty in this case was "either death or life in prison without the possibility of parole." (V10/1524-1525; 1674-1675; 1686; 1690-1692; 1698-1699; 1708-1709). As the foregoing excerpts confirm, the postconviction order is supported by competent, substantial evidence, the Circuit Court correctly applied this Court's precedent to the

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[53]The three statutory aggravating factors are: (1) prior violent felonies (two prior aggravated batteries and contemporaneous sexual battery of another victim in this case); (2) commission in the course of a burglary; and (3) that the murder was heinous, atrocious, or cruel. Whitfield, 706 So. 2d at 3.

facts of this case; and, therefore, postconviction relief was properly denied on the defendant's IAC/Simmons claim.

ISSUE V

THE "IAC"/PROSECUTORIAL COMMENTS CLAIM

Whitfield's two-page argument on this issue summarily concludes that objectionable evidence was introduced [somewhere] during the examination of the investigating officers and Dr. Regnier. Notably, Whitfield has not provided any citations to the record in order to identify his particular complaints, and he has not cited a single case to ostensibly support his conclusory allegations. (See, Amended Brief of Appellant at 94-95). The State respectfully submits that summarily reiterating arguments which were rejected below does not suffice to preserve issues and, therefore, this claim is waived. See, Cooper v. State, 856 So. 2d 969, 977, n. 7 (Fla. 2003); Sweet v. State, 810 So. 2d 854 (Fla. 2002); Randolph v. State, 853 So. 2d 1051, 1063, n. 12 (Fla. 2003) (reiterating that "[m]erely making references to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.")

Assuming, *arguendo*, that Whitfield has fairly presented this issue on appeal, which the State does not concede and specifically disputes, Whitfield apparently consolidates

postconviction claims #13, 14, and 15 which were presented below.[54] Postconviction claims 13 and 14 alleged ineffective assistance of counsel in failing to object to the introduction of testimony that Whitfield committed his crimes in the presence of children and against women. According to Whitfield, this testimony constituted nonstatutory aggravation. Postconviction claim 15 alleged that the prosecutor's arguments during the penalty phase were inflammatory and improper. On direct appeal, this Court summarized the relevant evidence presented at trial, specifically noting:

> . . . in the early morning hours of June 19, 1995, Whitfield attempted to get Willie Mae Brooks to let him in Reynolds' house. Brooks refused and went back to sleep in the bed she shared with her one-year-old child. Whitfield subsequently unlawfully entered Reynolds' home. Armed with an eight-inch knife, he entered the bedroom in which Brooks was sleeping and raped Brooks, indicating that he would stab her and her child if she screamed. Whitfield then went into a different room where Reynolds and her five children were located. About ten minutes later, Reynolds stumbled into Brooks's room and asked her to lock the door. She was bleeding profusely from her wounds and told Brooks that she was dying and that Ernest had stabbed her. Brooks and one of Reynolds' children, a twelve-year-old, climbed out the window and ran to a neighbor's house to call police. Whitfield fled the scene. Reynolds died shortly after police arrived.
>
> Whitfield, 706 So. 2d at 2. (e.s.)

On direct appeal, this Court also noted that during both of

[54]At page 94 of his amended brief, fn. 20, Whitfield simply states "consolidated claims."

the prior aggravated batteries, Whitfield threatened to kill the [female] victims if they called police. Id., 706 So. 2d at 2. In denying postconviction claims 13 and 14, which alleged ineffective assistance of counsel at the penalty phase in failing to object to the State's use of alleged non-statutory aggravators (that Whitfield committed his crimes in the presence of children and against women), the Circuit Court found a procedural bar and also determined that the prosecutor's actions at trial were entirely appropriate. As the Circuit Court explained,

> Claims Thirteen and Fourteen
>
> Claims thirteen and fourteen allege ineffective assistance of counsel at the penalty phase for failing to object to the State's use of non-statutory aggravators that Whitfield committed his crimes in the presence of children and against women.
>
> Initially, the Court finds that these claims are procedurally barred. See Valle v. State, 705 So. 2d 1331 (Fla. 1998). Further, review of applicable Florida law reveals that at a penalty phase, it is not only permissible, but is appropriate for a prosecutor to introduce details of a defendant's prior violent felony convictions, so that the jury may better evaluate the character of the defendant and circumstances of the crimes. See Hudson v. State, 708 So. 2d 256 (Fla. 1998); Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). These claims are denied.

In first applying a procedural bar, the Circuit Court correctly relied on this Court's decision in Valle v. State, 705 So. 2d 1331, 1335-1336 (Fla. 1998). In Valle, this Court agreed

that the trial court correctly found several claims in Valle's motion were procedurally barred, including the defendant's claim that trial counsel was ineffective in permitting the State to introduce nonstatutory aggravating factors. Valle, 705 So. 2d at 1336; See also, Porter v. State, 788 So. 2d 917, 921 (Fla. 2001), citing Remeta v. Dugger, 622 So. 2d 452, 453-454 (Fla. 1993) (whether the trial court impermissibly relied upon nonstatutory aggravation is procedurally barred in 3.850 proceedings because it could have been raised on direct appeal); Arbelaez v. State, 775 So. 2d 909, 915 (Fla. 2000) (defendant may not relitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel).

Moreover, the circumstances of the underlying crimes charged do not constitute nonstatutory aggravation, and, therefore, counsel cannot be deemed ineffective under Strickland for failing to object. See, Teffeteller v. Dugger, 734 So. 2d 1009, 1023 (Fla. 1999). Likewise, the circumstances of the Defendant's prior violent felony offenses do not constitute nonstatutory aggravation. See, Hudson v. State, 708 So. 2d 256, 261 (Fla. 1998) (agreeing that "[i]t is appropriate during penalty proceedings to introduce details of a prior violent felony conviction rather than the bare admission of the conviction in order to assist the jury in evaluating the

character of the defendant and the circumstances of the crime.")

In this case, the Circuit Court also found that Whitfield was not entitled to postconviction relief on claims #13 and 14 because, in Florida, it is "appropriate for a prosecutor to introduce details of a defendant's prior violent felony convictions, so that the jury may better evaluate the character of the defendant and circumstances of the crimes." Again, the Circuit Court correctly applied this Court's well-established precedent. Id., citing, Hudson v. State, 708 So. 2d 256 (Fla. 1998); Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). After the Circuit Court rendered its order below, this Court, in Power v. State, 886 So. 2d 952 (Fla. 2004), reiterated,

> . . . "details of prior violent felony convictions involving the use or threat of violence to the victim are admissible in the penalty phase of a capital trial." Id., citing Lockhart v. State, 655 So. 2d 69, 72 (Fla. 1995). "Such testimony helps determine whether 'the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the judge and jury.'" Id. (quoting Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977)). We find no abuse of discretion has been demonstrated in the trial court's decision to allow this testimony. To the extent that this testimony helped the jury consider Power's propensity to commit crimes, particularly violent crimes, the challenged testimonies were properly admitted. . . .
>
> Power, 886 So. 2d at 964.

In this case, the prosecutor's penalty phase argument

permissibly focused on statutory aggravating factor of Whitfield's prior violent felony convictions: Exhibit 35, the conviction for throwing a missile into a motor vehicle; Exhibit 36, the aggravated battery conviction on Harriett Whitfield; and Exhibit 37, the aggravated battery on Tonya Kirce. As the State maintained on direct appeal, the fact that Whitfield has chosen women as the targets of his violent criminal offenses cannot be visited upon the State -- only upon the defendant.

Whitfield apparently now concludes that the State should have been required to sanitize the facts of Whitfield's violent crimes and, perhaps, limit its argument to little more than, *Ernest Whitfield entered Claretha Reynolds' home on June 19, 1995, and then she died.* However, during the postconviction hearing, trial counsel Williams agreed that the prosecutor's comments concerning the facts of Whitfield's crimes would not have been objectionable at trial. Likewise, any comments concerning the relevant facts of Whitfield's prior convictions established during the penalty phase would not have been objectionable. In light of trial counsel's confirmation concerning a matter of trial tactics (*i.e.*, a decision not to object based on his belief that a particular comment was unobjectionable), Whitfield cannot establish any deficiency of

counsel and resulting prejudice under Strickland. See, Zakrzewski v. State, 866 So. 2d 688, 692-693 (Fla. 2003) citing, *inter alia*, Ferguson v. State, 593 So. 2d 508, 511 (Fla. 1992) ("The decision not to object is a tactical one.").

Lastly, in denying postconviction claim 15, which alleged that the prosecutor's arguments at the penalty phase were inflammatory and improper, the Circuit Court found that Whitfield's claim was procedurally barred because,

> Claim fifteen alleges that Whitfield was denied a fair, reliable, and individualized capital sentencing proceeding because the prosecutor's arguments at the penalty phase were inflammatory and improper. The Court determines that this claim is procedurally barred because the Florida Supreme Court addressed this issue on direct appeal, and held that any errors made at trial were not fundamental. See Whitfield v. State, 706 So. 2d 1, 4-5 (Fla. 1998); See also Valle v. State, 705 So. 2d 1331 (Fla. 1998). Claim fifteen is denied.
>
> (PCR-V5/881)(e.s.)

On direct appeal, this Court found that any unpreserved comments, even if error, did not constitute fundamental error. As this Court explained on direct appeal,

> In his third issue, Whitfield raises a number of claims in which he asserts that the prosecutor introduced irrelevant evidence or engaged in improper argument during the penalty phase. [n6][55] The majority

[55]On direct appeal, Whitfield argued that "evidence of the sentences he received for prior violent felony convictions was improperly admitted and emphasized; that hearsay evidence that Whitfield threatened to kill the victims of the two prior aggravated batteries was improperly admitted; that the

> of these claims were not properly preserved for review and we do not find the errors, if any, to be fundamental. Upon reviewing the record, we conclude that those claims that were properly preserved did not constitute error when read in context or were harmless, even when considered cumulatively. . .
>
> Whitfield, 706 So. 2d at 5 [citations omitted].

The principle is well-settled that claims which were raised on direct appeal or which could have been raised on direct appeal are not cognizable in a postconviction motion to vacate. See, Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323 (Fla. 1994); Arbelaez v. State, 775 So. 2d 909, 919 (Fla. 2000). The trial court's comprehensive written order is supported by competent substantial evidence and should be affirmed.

ISSUE VI

THE "IAC"/AKE v. OKLAHOMA CLAIM

In his final issue, Whitfield asserts a hybrid IAC/Ake claim [Ake v. Oklahoma, 470 U.S. 68 (1985)], alleging that trial counsel failed to "provide the necessary time and information to the mental health expert." (See, Amended Brief of Appellant at 95).

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prosecutor wrongfully injected information in cross-examining the defense psychologist regarding Whitfield's community control; that the prosecutor wrongfully elicited information regarding remorse; that the prosecutor engaged in an improper "golden rule" argument; and that the prosecutor made gender-biased comments to sway the ten women jurors to vote for a death sentence in this case." See, Whitfield, 706 So. 2d at 5,fn. 6.

To the extent that Whitfield arguably is asserting a true Ake claim, that claim is procedurally barred. See, Moore v. State, 820 So. 2d 199, 203, n. 4 (Fla. 2002) (affirming summary denial of an Ake claim in post-conviction motion because Ake claims should be raised on direct appeal and therefore, are procedurally barred in post-conviction litigation); See also, Marshall v. State, 854 So. 2d 1235, 1248 (Fla. 2003) ("Within his claim for ineffective assistance of counsel, Marshall also alleges that he was deprived of his right to an evaluation by a competent mental health expert pursuant to Ake v. Oklahoma, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985). This claim is procedurally barred because it could have been raised on direct appeal." Id., citing Cherry v. State, 781 So. 2d 1040, 1047 (Fla. 2000) ("[T]he claim of incompetent mental health evaluation is procedurally barred for failure to raise it on direct appeal.").

In denying postconviction relief, the Circuit Court found that Whitfield's current complaints were directly attributable to Whitfield's own refusal to cooperate and his intransigence at trial. As the Circuit Court explained,

> Claim Sixteen
>
> Claim sixteen alleges a violation of Ake v. Oklahoma, 470 U.S. 68 (1985), due to ineffective assistance of counsel for failure to ensure that Whitfield received an adequate mental health examination by failing to provide the necessary time

> and information to the mental health expert.
>
> After reviewing the record and upon consideration of testimony presented at the evidentiary hearing, the Court finds that Whitfield failed to communicate with his trial attorneys and Dr. Regnier. Whitfield's failure to communicate and cooperate, [fn 60[56]] along with the dysfunctional nature of his family, led to defense counsel's failure to discover additional mitigating evidence, such as Whitfield's relationship with Fredd Atkins. Case law provides that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." See Stewart v. State, 801 So. 2d 59, 67 (Fla. 2001). Defense counsel pursued leads provided by Whitfield and his family; however, defense counsel's performance was hindered by Whitfield's lack of cooperation. See Stewart v. State, 801 So. 2d 59 (Fla. 2001). Claim sixteen is denied.
>
> (PCR-V5/881-882) (e.s.)

In reviewing the denial of a claim of ineffective assistance of counsel after an evidentiary hearing, this Court is required to give deference to the lower court's findings of fact to the extent that they are supported by competent, substantial evidence. Stephens v. State, 748 So. 2d 1028, 1033-34 (Fla. 1999). In this case, the trial court's findings are supported by the following competent substantial evidence; and, for the following reasons, the Circuit Court properly denied Whitfield's

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[56]*[footnote 60 in trial court's order] "Dr. Regnier testified that he could not answer whether Whitfield could possess a premeditated design to effect the murder of Ms. Reynolds "because [he] could not get the kind of data from the defendant that [he] need[ed] to make such a determination." (R. 1221). Dr. Regnier agreed that Whitfield would not cooperate by taking tests Dr. Regnier wanted to administer. (R. 1226; 1240)."

IAC/Ake claim.

Relying on Dr. Fisher's retrospective assessment, Whitfield asserts that the time period from August 11 to September 18 was not enough time for Dr. Regnier to prepare this case. (Amended Brief of Appellant at 96). However, at trial and during the postconviction hearing, Dr. Regnier confirmed that had Whitfield "cooperated, time would not have been an issue" in this case. (PCR-V6/1072-1073). At trial, Dr. Regnier testified at length regarding his evaluation of Whitfield and his resulting opinions. With respect to the guilt phase, Dr. Regnier met with Whitfield eight times before trial and continually throughout the trial itself. (V7/1189). Dr. Regnier spoke with Whitfield's sister, read medical records from Sarasota Memorial Hospital and Coastal Recovery Crisis Stabilizing Unit. Dr. Regnier also reviewed depositions of Peggy LaRue and Willie Mae Brooks, as well as Whitfield's own statement. (V8/1218). Ultimately, Dr. Regnier was unable to testify as to an opinion regarding whether Whitfield could possess premeditated design because he could not get the kind of data from Whitfield that he needed. (V8/1221-1222). However, any alleged shortfalls in Dr. Regnier's expert testimony were directly attributable to Defendant's failure to cooperate. (V8/1226).

During the penalty phase, Dr. Regnier opined that Whitfield

suffered from chronic, long term polydrug dependence, posttraumatic stress, and longstanding major depression manifested by a series of suicidal ideation and one serious attempt. (V10/1590). According to Dr. Regnier, Whitfield also suffered from emotional disturbance as a result of his deprived childhood on the morning of the murder. (V10/1633).

Dr. Regnier spent a substantial amount of time with Whitfield, and he spoke to Whitfield's mother and sister. Dr. Regnier also reviewed voluminous materials (over 400 pages of material) in reaching his conclusions, including all of Whitfield's medical records and sworn testimony, and interviews with Whitfield's stepfather, mother and sister. (V10/1591, 1636). However, Whitfield was not always cooperative, very reluctant to speak, at times extremely defensive, and at other times hostile and angry. (V10/1592). Whitfield failed to cooperate and take the basic tests to help Dr. Regnier make his diagnosis. (V10/1640). Yet, even though the family was difficult to reach and Whitfield was uncooperative and hostile, Dr. Regnier stated at trial that he was able to gather the information necessary to reach his opinions. (V10/1592).

In his postconviction motion, Whitfield asserted that Dr. Regnier did not understand his responsibility as Defendant's mental health expert and was not given enough information

necessary for his testimony, and that he would like to do more testing. At the evidentiary hearing, Dr. Regnier provided no testimony concerning what additional information he had received, other than the testimony of Drs. Mash and Fischer. Notably, Drs. Mash and Fischer relied upon the same information available to Regnier at the time of the trial. Moreover, even at the time of the postconviction hearing, Dr. Regnier had not conducted any further testing on the Defendant. As such, Whitfield failed to identify any deficiency with regard to the mental health evidence presented at trial. See, Rivera v. State, 717 So. 2d 477, 486 (Fla. 1998) (finding where defendant fails to present evidence supporting his postconviction claim, relief must be denied).

Moreover, the additional postconviction testimony from Drs. Mash and Fischer does not alter the fact that Defendant received adequate mental health expert assistance at the time of his trial. A mental health examination is not inadequate simply because a defendant is later able to find experts to testify favorably in his behalf. See Jones v. State, 732 So. 2d 313, 320 (Fla. 1999); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); See also, Cooper v. State, 856 So. 2d 969, 976, n. 5 (Fla. 2003). A new sentencing hearing is mandated only where the mental examinations were so grossly insufficient that they

ignore clear indications of either mental retardation or organic brain damage. See Sireci, 502 So. 2d at 1224.

No expert testified that Whitfield is mentally retarded. With respect to any purported organic brain damage, absolutely no medical testing has been presented. The testimony from Dr. Mash cannot support this claim where she is not licensed in the State of Florida and admitted she would have to rely on a neurological expert on this issue. Dr. Mash further admitted that she did no testing on the Defendant which could possibly indicate brain damage. (PCR-V7/1146-1147). Dr. Fisher also admitted that no medical testing had been done on the Defendant at the time of the postconviction hearing. (PCR-V7/1219-1220). Moreover, Dr. Fisher provided no opinion on whether Defendant was brain damaged. As such, a new sentencing hearing is not mandated where neither mental retardation nor organic brain damage have been identified as issues relevant to the Defendant. Under such circumstances, it cannot be said that the examinations conducted prior to trial "were so grossly insufficient that they ignore[d] clear indications of ... brain damage." Sireci, 502 So. 2d at 1224.

Again, even if counsel could be faulted for failing to obtain some evidence, the prejudice prong of Strickland has not been established. See Asay, 769 So. 2d at 988 (determining that

there was no reasonable probability that additional evidence of the defendant's abusive childhood and history of substance abuse would have led to a recommendation of life where the State had established three aggravating factors, including CCP). In this case, three significant aggravators outweighed any non-statutory or statutory mental health mitigation. Morever, the evidence presented failed to rise to the level of any statutory mitigator. Only Dr. Fischer provided any testimony with respect to the statutory mitigator that Defendant was under the influence of extreme emotional disturbance at the time of the offense. However, Dr. Fisher failed to explain what evidence existed concerning Defendant's state of mind at the time of the offense. An expert's testimony alone does not require a finding of extreme emotional disturbance. See Provenzano v. State, 497 So. 2d 1177, 1184 (Fla. 1986). This should be especially true where neither Dr. Regnier nor Dr. Mash opined that any statutory mitigation existed in this case. And, even if this statutory mitigator were established, it would not outweigh the aggravators applicable to Defendant's case.

In sum, trial counsel had two mental health experts appointed in this case. On the first day counsel was appointed, the defense filed a motion to have Dr. Lawrence appointed. Dr. Lawrence worked with Whitfield during the first month; however,

Whitfield "did not like Dr. Lawrence" and he refused to cooperate with him (PCR-V6/1039; V8/1353); and, thereafter, Dr. Regnier was appointed. In this case, trial counsel filed a motion for an additional expert, and a second expert, Dr. Regnier, was appointed to evaluate the Defendant. Whitfield has not demonstrated any deficiency of counsel and resulting prejudice under Strickland. In fact, in Marshall v. State, 854 So. 2d 1235, 1248 (Fla. 2003), this Court denied an IAC/Ake claim, finding no deficiency under Strickland where trial counsel was *unsuccessful* in getting the trial court to appoint an additional mental health expert. In this case, Dr. Regnier became part of the defense team – meeting with counsel, the Defendant, the investigator and discussing law, strategy and defenses. However, Whitfield was uncooperative; he deliberately refused to communicate, he would not complete the psychological tests, and told counsel that he did not want them to present any penalty phase evidence.

Dr. Regnier testified that Whitfield was attempting to manipulate the judicial system from the beginning. Whitfield decided his strategy was to disrupt the proceedings and make his attorneys "look bad" in order to give him a chance at appeal. The new experts retained in this postconviction proceeding have not presented any new factors, just different opinions than Dr.

Regnier. In fact, no new medical tests have been performed and no "new" evidence presented. Significantly, Dr. Daniel Sprehe, a board certified forensic psychiatrist, was the only licensed medical expert who testified in this case. At trial, Dr. Sprehe was presented by the State as a rebuttal witness to Dr. Regnier. Dr. Sprehe opined at trial that Whitfield's actions showed his ability to form specific intent. The only reason more was not accomplished at the time of trial was due to Whitfield's deliberate refusal to cooperate. The Defendant's deliberate lack of cooperation cannot now be shifted to remotely support a claim of ineffective assistance of trial counsel. See, Rutherford v. Crosby, 385 F.3d 1300, 1314 (11th Cir. 2004) (noting that postconviction mental health experts had the benefit of far greater cooperation and, as a result, access to more information than Rutherford's trial counsel had); See also, Rutherford, 727 So. 2d at 225 ("Rutherford's uncooperativeness at trial belies his present claim that his trial counsel was deficient for not investigating and presenting mitigation regarding his harsh childhood and military history.")

Ake requires that a defendant have access to a "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. 68, 83. Whitfield was afforded such

assistance. The defense experts who testified at the postconviction hearing reviewed the same materials relied upon by Dr. Regnier, but they now have the benefit of a more cooperative client. No constitutional deficiency was shown in Dr. Regnier's examinations, nor has Whitfield shown any deficiency on the part of counsel in hiring or providing information to Dr. Regnier. Whitfield's mental health expert's evaluation was thwarted by Whitfield's refusal to cooperate.

As this Court found in Bruno v. State, 807 So. 2d 55, 67-68 (Fla. 2001), where it is the defendant's own failure to cooperate with counsel that prevented counsel from obtaining relevant information pertaining to the penalty phase, counsel's failure to find said evidence does not constitute deficient performance. In the instant case, trial counsel cannot be faulted for failing to present evidence which was thwarted by an uncooperative defendant. See, Rutherford v. State, 727 So. 2d 216 (Fla. 1998); Correll v. Dugger, 558 So. 2d 422 (Fla. 1990); Hodges, supra.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Peter Cannon, Assistant CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136; to Dennis Nales, Chief Assistant State Attorney, Criminal Justice Building, 2071 Ringling Boulevard, Suite 400, Sarasota, Florida 34237-7000; and to the Honorable Donald E. Pellecchia, Circuit Judge, 350 E. Marion Ave., #A-4025, Punta Gorda, Florida 33950-3727, this _____ day of January, 2005.

CERTIFICATE OF FONT COMPLIANCE

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

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