IN THE SUPREME COURT OF FLORIDA

SAMUEL JASON DERRICK,

Appellant,

v. **Case No. SC05-1559**
L.T. No. 87-1775CFAWS

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar No. 0327832
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE

Trial Proceedings

On July 14, 1987, the appellant, Samuel Jason Derrick, was indicted for the murder of a convenience store owner, Rama Sharma.[1] (PCR-V1/1-2). Derrick's jury trial was held on May 9-13, 1988. Derrick was represented by Assistant Public Defenders Stephen Dehnart and Robert McClure. Judge Edward H. Bergstrom Jr. presided over the trial and sentencing proceedings.

During the penalty phase, Derrick presented several witnesses to testify that he was a good husband, father, and person and that he had suffered some physical and sexual abuse as a child. The jury recommended death by a vote of 8-4 and the trial court sentenced Derrick to death. (R1. V6/944, 955, 994-996). Assistant Public Defender Robert F. Moeller represented Derrick on direct appeal.

In 1991, this Court affirmed Derrick's first-degree murder conviction, but vacated the death sentence and remanded for a new penalty phase and sentencing hearing. Derrick v. State, 581 So. 2d 31 (Fla. 1991) [Derrick I].[2]

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[1] Rama Sharma was killed sometime between 10:00 p.m. and 6:30 a.m. on June 24-25, 1987, as he walked home after closing his store. Derrick's friend, David Lowery, notified the police after Derrick confessed to the robbery and stabbing.

[2] The state's first witness in the original penalty phase, Randall James, testified, over objection, that Derrick told him, "I killed the m----f-----, and I'll do it again." Derrick I,

Judge Stanley Mills presided over the second penalty phase held on November 5-6, 1991. Derrick was represented by Assistant Public Defenders Douglas Loeffler and Robin Kester at the second penalty phase resentencing. The jury recommended death by a vote of 7-5 and Derrick was sentenced to death. (R2. V3/452-455).

The trial court found three aggravating factors: (1) the murder was committed while Derrick was engaged in the commission of a robbery; (2) the murder was committed for the purpose of avoiding lawful arrest; and (3) the murder was especially heinous, atrocious, or cruel. §921.141(5)(d), (e), (h), Fla. Stat. (1991).

In mitigation, the trial court found that Derrick was "quite young" [20] at the time of the killing and that he had some potential for rehabilitation. The trial court also found that Derrick helped illiterate inmates in prison and helped his handicapped brother. Derrick v. State, 641 So. 2d 378, 379 (Fla. 1994) [Derrick II].

In 1994, this Court affirmed Derrick's death sentence. Derrick II, 641 So. 2d at 381. Certiorari was denied by the

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581 So. 2d at 34. On direct appeal, this Court found James' testimony was irrelevant to the penalty phase and that it impermissibly showed lack of remorse and the possibility that Derrick would kill again. Id., at 36.

United States Supreme Court on January 23, 1995. Derrick v. Florida, 513 U.S. 1130 (1995).

Post-Conviction Proceedings

Derrick filed a "shell" Rule 3.850 motion to vacate on March 24, 1997. Derrick's *first amended* 3.850 motion was filed on December 7, 1998. During the course of his post-conviction proceedings below, Derrick repeatedly sought prohibition, moved to disqualify the trial court (three times) and continued to extensively litigate public records production. See, Derrick v. State, 728 So. 2d 201 (Fla. 1998) (December 1, 1998, denying Emergency Petition for Writ of Prohibition and Request for Stay of Expedited Filing Date of Rule 3.850 Motion); Derrick v. State, 740 So. 2d 527 (Fla. 1999) (August 6, 1999, denying Petition for Writ of Prohibition, for Extraordinary Relief, and for a Writ of Mandamus, with prejudice); Derrick v. State, 760 So. 2d 946 (Fla. 2000) (March 14, 2000, denying Petition for Writ of Prohibition, with prejudice).

On December 15 2000, June 18, 2001, and July 27, 2001, Derrick's post-conviction counsel took the depositions of specified members of the Pasco County Sheriff's Office concerning records allegedly not provided to the defendant.

Thereafter, Derrick's *second amended* Rule 3.850 motion was filed on December 3, 2001.[3] (PCR-V1/6-61).

On February 14, 2002, the State filed a written response to Derrick's second amended post-conviction motion (PCR-V1/80-143; Index to Exhibits at PCR-V1/144-145; Exhibits at PCR-V1/146-198; PCR-V2/199-400; PCR-V3/401-567). A Huff[4] hearing was held on March 7, 2002. (PCR-Supp.V1/1115-1236).

On July 1, 2002, the trial court entered a written order summarily denying post-conviction claims 1 [public records], ground 2, subissues A, B, C, and D [IAC/guilt phase]; ground 3 [Brady claim], ground 4, subissue C [IAC/penalty phase] and ground 5 [Ake claim]. The trial court granted an evidentiary hearing on post-conviction ground 2, subissue E [IAC/guilt phase: other suspects] and ground 4, subissues A and B [IAC/penalty phase: mitigation from lay and expert witnesses]. Lastly, the trial court's written order stated that "Ground 2, subissue F [cumulative error: guilt phase] and ground 6

[3] On December 10, 2001, the State moved to strike the second amended 3.850 motion on the ground that none of the allegations in the second amended motion were based on records obtained after the first amended 3.850 motion, filed on December 7, 1998. (PCR-V1/62-64). At the Huff hearing, the trial court emphasized that Derrick's public records claim was "not a situation where this horse hadn't been kicked literally to death." (PCR-Supp.V1/1127). The trial court noted that he gave Derrick's post-conviction counsel "tons of records," including "virtually every single, solitary sheet" in the state's boxes of records. (PCR-Supp.V1/1127).

[4] Huff v. State, 622 So. 2d 982 (Fla. 1993).

[cumulative error] will not be considered unless and until the defendant establishes error at the evidentiary hearing." (PCR-V4/568-579; exhibits at PCR-V4/580-637).

An evidentiary hearing was held on June 29, 2005 and June 30, 2005. (PCR-V6/833-V7/1113). On July 15, 2005, the trial court entered its "Final Order on Defendant's Motion for Post-Conviction Relief." (PCR-V5/804-809).

STATEMENT OF THE FACTS

Trial - Guilt phase:

On direct appeal, Derrick v. State, 581 So. 2d 31 (Fla. 1991), this Court set forth the following summary of the facts and evidence presented during the guilt phase:

> On June 25, 1987, at 6:30 a.m., Harry Lee found the body of Rama Sharma in a path in the woods near Sharma's Moon Lake General Store in Pasco County. Blood trailed from the body to a blood puddle twenty feet away. The police found a piece of a tee shirt near the body as well as two sets of tennis shoe prints, one set belonging to Harry Lee. The medical examiner found that Sharma had died from over thirty-one stab wounds and that he had died approximately ten to fifteen minutes after the last wound was inflicted.
>
> Derrick was implicated in the murder by his friend, David Lowry. At trial Lowry testified that he and his wife visited Derrick on June 24 at Derrick's mother's house and that Derrick had knives out. Lowry drove Derrick to another friend's house, at which time Lowry noticed that Derrick had a knife in the back of his pants. At the time, Derrick was wearing a tee shirt, jeans, and tennis shoes. The friend's house was about two blocks from Sharma's store. At approximately 1:30 a.m. on June 25, Derrick showed up

at Lowry's house in a sweaty condition and without a shirt. When Lowry drove Derrick home, Derrick told him that he had robbed the Moon Lake General Store. Derrick gave Lowry twenty dollars for gas. Later that day, after Lowry heard that Sharma had been killed, he asked Derrick whether he had killed him. Derrick admitted killing Sharma, stating that he had stabbed him thirteen times because Sharma kept screaming. Lowry testified that Derrick "kind of laughed and said it was easy." Lowry also noted that on June 25 Derrick had a new car that was worth approximately $200-$300. On June 29, Lowry notified the sheriff's department about Derrick's involvement in the murder.

After being arrested and advised of his rights, Derrick denied any knowledge of the murder to Detective Vaughn. Vaughn then advised Derrick that they had a witness, David Lowry. After denying that Lowry had told them anything, Derrick demanded, "I'd like to have him in front of me. Let him tell me." Vaughn then brought Lowry and Derrick into the same room and Derrick confessed to the murder. He stated that he went to Sharma's store to rob it and jumped Sharma as he left the store. Sharma turned to run back to the store. When Derrick grabbed him, Sharma turned around and saw that it was Derrick. Sharma started screaming and Derrick stabbed him "to shut him up." Derrick then took approximately $360 from Sharma's pocket. Derrick also admitted that he tore off a piece of his tee shirt at the scene because it had blood on it. After the murder, Derrick threw the knife into the woods and ran to Lowry's house. Derrick also stated that he lost the money and that he threw his shoes and some clothing into a pond. The police took Derrick to the Moon Lake General Store, and he showed them where he had attacked and murdered Sharma. The police never located the clothing, shoes, or knife.

At trial, several officers testified to Derrick's confession. They noted that after his initial confession his wife had been brought into the room. He had sobbed to her that he did not know why he killed Sharma and that he could not believe that he stabbed him over thirty times. He also had said that an aunt had always said that he was an "animal" and that she was right.

After the defense had presented two witnesses,

> they announced that they were calling Derrick to testify. At this point, the prosecutor announced that if Derrick testified that he had not committed the murder, he planned to call in rebuttal an inmate named Randall James. The prosecutor said that, after the first defense witness began to testify, he had received a note informing him that Detective Vaughn had just been told by James that Derrick told James that he had killed Sharma and that he would kill again. The prosecutor offered to make James available for a deposition.
>
> Derrick's attorneys, who were public defenders, requested a recess to determine what to do because their office also represented James n1 and they were therefore concerned about the implications of cross-examining James. The prosecutor indicated that it was his understanding that James was willing to waive the attorney-client privilege. After the recess, the judge removed the public defender's office from representing James in an effort to alleviate the conflict. Continuing to express concern over the dual representation, [n2] Derrick's attorneys made a motion for mistrial which was denied. They then decided to rest without calling Derrick as a witness. The jury found Derrick guilty. Derrick's attorneys took James's deposition while the jury was deliberating.
>
> n1 Defense attorney Dehnart was representing both Derrick and James.
>
> n2 Derrick's counsel expressed concern over James's agreeing to waive his attorney-client privilege without the benefit of conferring with new counsel.

Derrick I, 581 So. 2d at 31-34.

First penalty phase: Derrick was represented in the first penalty phase by Assistant Public Defenders Robert McClure and Steve Dehnart. They presented defense witnesses of neighbor Senthia [sic] Hardesty (R1. V5/714-718), wife Sheri [sic: Cherie] Derrick (R1. V5/770-773), mother-in-law Jean Davis (R1.

V5/758-762, 769-770), father Samuel Derrick (R1. V5/728-739), and friend and sexual-molester, Harry Joseph Martin (R1. V5/745-749). The first penalty phase included not only what a helpful person Derrick was to his wife, mother-in-law, and neighbor but, through his father, mother-in-law and sexual-molester friend, that Derrick had experienced hardships of having an alcoholic mother, that he was sexually molested as a young teen by his older friend, Harry Martin, and that Derrick's mother-in-law wanted money from Derrick while he and Cherie lived with her. Derrick did not testify. The first sentencing phase jury recommended death by 8 to 4.

Second Penalty Phase: Derrick was represented in the second penalty phase, November 6, 1991, by Assistant Public Defenders Robin Kester and Douglas Loeffler. They presented penalty phase witnesses David [Travis] Derrick, the defendant's older brother; Pasco Deputy Sheriff Robert D'Antonio, the program coordinator as a corrections officer for the Land 0' Lakes Jail; Pasco County School Board employee Nancy Denaman, coordinator for the Adult Literacy Program; Sethia Hardesty, a neighbor and friend of Derrick; Cherie Lynn Derrick, the defendant's wife and mother of his young son; Evelyn Deal, a friend of Derrick, and her daughter Charlotte Wise, who was also a friend and former neighbor of Derrick. Essentially, they testified to Derrick

being a nice, nonviolent, helpful, and trustworthy person.

Derrick's older brother [David/Travis] described the defendant as better dressed than he was and smarter. As the larger of the two, the defendant would protect David from kids who picked on David at school. Also, the defendant helped David with his school work, reading, writing, and arithmetic, through grammar school, junior high and high school until they both dropped out in the tenth grade. (R2. V2/169-179).

Deputy D'Antonio and School Board Coordinator Denaman testified to Derrick volunteering to assist other inmates by tutoring in the literacy program and completing the five-hour training workshop for tutors. Deputy D'Antonio also knew Derrick as the elected pod representative to present inmate grievances. (R2. V2/183-188, 195-199).

Cherie Derrick testified that Derrick had been a good husband to her and their baby and had gone out of his way to help others. (R2. V2/220-225). Evelyn Deal, Charlotte Wise and Christina Wise testified, as three generations of friends and neighbors of the defendant who had known him to be trustworthy and especially helpful to them and their children. (R2. V2/239-242, 253-265, 273-286). Sethia Hardesty testified as a neighbor for whom Derrick had worked, volunteered chores and befriended her younger son. (R2. V2/209-215). Derrick did not testify.

Based on these witnesses, defense counsel argued to the jury that there was mitigation of Derrick's age, and being a good person, whose family, wife and friends' feelings for him had not changed just because he was convicted of first degree murder. (R2. V3/363-370). The jury returned its recommendation of death with a vote of 7 to 5.

In 1994, this Court affirmed Derrick's death sentence. Derrick II, 641 So. 2d at 381. In rejecting Derrick's challenges to the "avoid arrest" and "HAC" aggravating factors, this Court explained:

> On the evening of June 24, 1987, Derrick attacked the victim on a path near the victim's store. The victim was walking home with a bag containing the day's receipts. Derrick's goal was to steal the victim's money. The record reflects that the victim knew Derrick from previous encounters, and that the victim actually recognized Derrick during the attack. In a statement to the Pasco County Sheriff's Office, Derrick indicated that the victim recognized him and that he killed the victim to "shut him up." Derrick made a similar confession to a friend, stating that he stabbed the victim to keep him quiet. Finally, the trial court found that "the victim's screaming raised the risk that others would have been drawn to the scene and could have interfered with the defendant's efforts to avoid or prevent lawful arrest." The record in the instant case supports the aggravating factor that Derrick committed the murder to avoid arrest.
>
> Regarding the heinous, atrocious, or cruel aggravating factor, the trial court's order states:
>
> > The evidence indicates that the victim's body sustained thirty-three (33) knife wounds, thirty-one (31) of which were characterized as stab wounds and two (2) of which were characterized as puncture wounds. Some of the wounds noted by [the medical

> examiner] were characterized as defensive wounds. The scene of the crime indicated that, after the initial attack, the victim traveled approximately twenty (20) feet, trailing blood along his path of travel, before falling to the ground where he ultimately died from the combination of blood loss and the collapse of his lungs. [The medical examiner] noted that many of the numerous stab wounds would have been extremely painful although [he] was unable to say exactly when the victim lost consciousness, the three defensive wounds noted by [the medical examiner] would indicate that the victim experienced a pre-death apprehension of physical pain and death while making his unsuccessful effort to defend himself . . . .
>
> This Court has consistently upheld the heinous, atrocious, or cruel aggravator where the victim was repeatedly stabbed. Floyd v. State, 569 So. 2d 1225, 1232 (Fla. 1990), cert. denied, 111 S. Ct. 2912, 115 L. Ed. 2d 1075 (1991); Haliburton v. State, 561 So. 2d 248, 252 (Fla. 1990), cert. denied, 111 S. Ct. 2910, 115 L. Ed. 2d 1073 (1991); Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987); Johnston v. State, 497 So. 2d 863, 871 (Fla. 1986). We reject Derrick's contention that the victim may have been unconscious during the attack. This claim is particularly unbelievable in light of Derrick's own confession indicating that the victim was screaming as he was being stabbed.

Derrick II, 641 So. 2d at 380-381.

Post-Conviction Proceedings:

An evidentiary hearing was held in the trial court on June 29, 2005 and June 30, 2005.

Before Derrick's resentencing, attorney Robin Kester had been co-counsel in two other death penalty phase proceedings. In both cases, the juries recommended life. (PCR-V6/1006;

V7/1070). Before resentencing, Attorney Kester spoke with the defendant on a regular basis and she knew that he wanted to present a "positive" case this time because the defense had presented a lot of negative facts about his past in the first penalty phase, and the jury had recommended death. (PCR-V6/990-991; V7/1023-1025). From the defense perspective, the negative information, including the sexual abuse, had not worked the first time; and the defendant felt that it contributed to the fact that "things did not go well" in the first penalty phase, when the jury's recommendation was not life. (PCR-V7/1023; 1025). Attorney Kester did not let the defendant "run the show," but she agreed that a strategy going "positive" was a good decision at the time because the "negative" information had not helped the defendant the first time. (PCR-V7/1023; 1029).

Before the second penalty phase, Attorney Kester spoke with her supervisor/co-counsel, Douglas Loeffler, about this case, she reviewed the Public Defender's files (which included all of their investigation reports, the transcripts, and Dr. Simon's report), she reviewed this Court's opinion on direct appeal, and she spoke with the witnesses before she called any of them to testify. (PCR-V6/1001; V7/1015-1016; 1061; 1067-1068). Kester reviewed what attorneys McClure and Dehnart did in the first trial as a starting point and she knew about the sexual abuse.

(PCR-V7/1022; 1024). Co-counsel Loeffler also sent a memo to Kester on 11/1/91 in which he discussed the sexual molester, Harry Martin, and stated that he felt "very uncomfortable" with Martin and concluded, "I don't think we want to risk something like that coming out." (PCR-V7/1034). Attorney Kester knew about the sexual abuse, believed that it happened, but she chose not to use it during the second penalty phase. (PCR-V7/1025). The sexual abuse testimony did not succeed in achieving a life recommendation at the first penalty phase; therefore, the defense felt that a different tactic was called for the second time. (PCR-V7/1050-1051)

Attorney Kester reviewed Dr. Simon's psychological report in preparation for the resentencing, but she did not want to use Dr. Simon. (PCR-V6/1005; 1038). Dr. Simon evaluated the defendant within a year of the murder. (PCR-V7/1069). Dr. Simon made reference to Derrick having "anti-social" personality disorder and Kester did not want the jury to hear that he had narcissistic and anti-social personality traits. (PCR-V7/1044-1045). In Kester's opinion, these "aren't the kind of mental mitigation" the defense would want. (PCR-V7/1044-1045). Dr. Simon found no evidence of any developmental or organic brain dysfunction and no evidence of any mental confusion or psychosis. (PCR-V7/1045). Dr. Simon's report did not support

either statutory mental health mitigating circumstance. Derrick denied the crime to her and, therefore, the defense could not claim that the defendant was under the influence of extreme mental or emotional disturbance at the time of the crime. Further, Dr. Simon's report negated any suggestion of extreme duress or substantial domination because Dr. Simon's report concluded that the defendant was in control of his emotions. Attorney Kester took one look at Dr. Simon's report and knew why the defense did not call her in the first trial -– Dr. Simon's report was not helpful to the defendant, there was no psychosis, the defendant was identified as anti-social, and calling Dr. Simon would not have helped the defendant, but would have hurt him. (PCR-V7/1048). Further, Attorney Kester knew what the prosecutors frequently "do with that" [expert testimony of an anti-social personality] and "its not usually favorable." (PCR-V7/1049). Derrick was alert, responsive, cooperative, and there was nothing to indicate the defense should have him re-evaluated for the second penalty phase. (PCR-V7/1067).

The defendant did not want evidence of his bad home life presented at the second penalty phase because it went badly for him the first time, since the first jury recommended death, and the defendant didn't want another jury to hear it. (PCR-V7/1043-1044; 1066-1067). Attorney Kester felt that the

defendant's bad home life was a negative factor, and since the first jury had already heard it and come back with a death recommendation, it was part of her strategy not to present evidence of the defendant's bad home life at the second penalty phase. (PCR-V7/1043). Attorney Kester agreed that she decided on a strategy which did not blame the defendant's past, but, instead, accentuated the positive factors in the defendant's life as why the defendant should live. (PCR-V7/1062; 1064; 1066).

Attorney Kester did not call the defendant's younger sister, Carolyn, at the second penalty phase. Attorney Kester had the defendant's prior criminal record and she knew that the defendant had been charged with committing a lewd and lascivious act on Carolyn. (PCR-V7/1063). Attorney Kester did not want the jury to ever hear that there was an allegation that he had sexually abused his sister. (PCR-V7/1072; 1073).[5]

Derrick's postconviction counsel objected to the State calling attorney Bob McClure, who represented the defendant at the first penalty phase. Derrick objected to calling attorney McClure as a witness at the postconviction evidentiary hearing

[5] The trial court also noted that although a prior juvenile disposition might not have been admissible otherwise, the resourceful prosecutor who was handling this case at the time, "might well have gone for the throat by simply saying oh, well, the same person who you say is such a wonderful guy, in fact pled guilty to molesting you as a child." (PCR-V7/1076).

because "there are no guilt phase issues remaining" and McClure's testimony allegedly would not be relevant to the defendant's IAC/penalty phase claim. (PCR-V7/1078-1079; 1083; 1085). The trial court reserved ruling on the defense relevance objection until after McClure testified. (PCR-V7/1082; 1085; 1087). Attorney McClure's handwritten notes showed that McClure interviewed Carolyn Derrick [the defendant's sister] on April 24, 1988. (PCR-V7/1086). McClure recalled that the defendant's parents were both somewhat defensive and both tried to project themselves as "doing the best parenting job they could." (PCR-V7/1088). Attorney McClure hired a confidential expert, Dr. Michael Meir [sic: Maher], a psychiatrist from Tampa. (PCR-V7/1098). The defendant denied committing the crime and Dr. Maher couldn't furnish the defense with any statutory mitigation. (PCR-V7/1088). In addition, the defense hired Dr. Simon, who conducted a psychological evaluation of the defendant and submitted a written report to the defense. (PCR-V7/1088).

The trial court ruled, *inter alia*, that the defense effort to find mental health experts to assist the defendant at the penalty phase was relevant, that there was nothing of any particular value in defense counsel's reliance on Derrick's father at the first trial in lieu of Derrick's mother, and that since Derrick abandoned his remaining IAC/guilt phase claim [the

IAC/other suspects claim] at the postconviction evidentiary hearing, that McClure's testimony concerning Derrick's admission[6] to McClure was not relevant "at this point." (PCR-V7/1090).

Following the evidentiary hearing, the trial court entered a fact-specific written order denying postconviction relief. (PCR-V5/804-809). The trial court's written order noted that the defendant abandoned his remaining point concerning the guilt phase of the trial and no evidence was taken on that point. The only remaining points to be resolved at this hearing were points 4a and 4b [the IAC/penalty phase claims: lay and expert witness testimony].

The trial court found, *inter alia*, that the defendant was raised in deplorable circumstances. The defendant's father inflicted some physical violence on the defendant and his siblings. The defendant's mother ultimately turned to substance abuse and eventually abandoned the family. The defendant and his older brother were sexually abused by a pedophile. All of these factors were presented to the jury in the first penalty phase, and the jury recommended death, by a vote of 8 to 4. Thereafter, "as a result of the perceived failure of the tactics

[6] According to defense attorney McClure, after this case was remanded for resentencing, Derrick indicated that he'd been involved in a killing and he was under the influence of drugs; this was something Derrick had suggested in his initial interview, but he then "backed off from that." (PCR-V7/1089).

utilized in the first penalty phase, the defendant decided that those tactics should be abandoned in the second penalty phase and instructed counsel in the second penalty phase to 'go positive' during the second penalty phase." (PCR-V5/804-805).

The trial court also summarized the testimony presented from "Dr. Dee, a Clinical Psychologist, who first evaluated the defendant some 14 years after the date of the offense. Dr. Dee opined that the defendant may have suffered from a brain injury, but, despite his investigation of the defendant's history, Dr. Dee was unable to point to any incident which may have given rise to such a brain injury. Dr. Dee was unable to say where or when any such brain injury may have occurred. Dr. Dee testified that it was possible, although not likely, that any such brain injury occurred after the defendant's trial. Although Dr. Dee testified that the defendant was suffering from Chronic Brain Syndrome with memory and frontal lobe features, he acknowledged that this would simply result in the defendant having difficulty controlling his impulses. Dr. Dee further testified that drugs and alcohol would not be the likely cause of Chronic Brain Syndrome and that the sexual abuse suffered by the defendant would have had no effect on his Chronic Brain Syndrome. Otherwise, the defendant was demonstrated to have a normal IQ." (PCR-V5/806).

Applying Strickland v. Washington, 466 U.S. 668 (1984), and its progeny, the trial court concluded that "it is impossible for the Court to find that counsel in the second penalty phase made *any* errors of significance, let alone errors that rose to a level that deprived the defendant of his constitutional right to effective counsel. Furthermore, the evidence presented at the hearing in no way undermines the court's confidence in the outcome of the second penalty phase proceeding. A comparison of the results in the first penalty phase and the second penalty phase leaves the Court similarly unable to find that there is a reasonable probability that, but for any alleged deficiency in counsel's performance, the results of the second penalty phase would have been different." Thus, the trial court found that the defendant failed to establish either prong of Strickland. Finally, the trial court found that counsel in the second penalty phase "were simply following the reasonable wishes of their client and, as set forth in Sims [v. State, 602 So. 2d 1253 (Fla. 1992)], counsel cannot be '. . . considered ineffective for honoring the client's wishes.' Indeed, counsel may well have been severely condemned both ethically and legally for having ignored the defendant's decision." (PCR-V5/807-809).

The Strickland Standards

An ineffective assistance of counsel claim has two components: First, a criminal defendant must show that counsel's performance was deficient; and, second, that the deficiency prejudiced the defense. To establish deficient performance, the defendant must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Wiggins v. Smith, 539 U.S. 510, 521 (2003) (quoting Strickland v. Washington, 466 U.S. 668, 687-88 (1984)). A "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Rolling v. State, 825 So. 2d 293, 298 (Fla. 2002) (quoting Strickland, 466 U.S. at 689).

Prejudice in the penalty phase requires a showing that "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Sochor v. State, 883 So. 2d 766, 771 (Fla. 2004) (quoting Strickland, 466 U.S. at 695). Failure to establish either deficiency or prejudice results in the denial of the IAC claim. See, Ferrell v. State, 918 So. 2d 163, 172-73 (Fla. 2005).

SUMMARY OF THE ARGUMENT

Issue I: The defendant's IAC/penalty phase claims were denied after a full evidentiary hearing. At the first penalty phase, the defense presented evidence of the defendant's childhood hardships and sexual abuse by an older friend. The jury recommended the death penalty. When this case was remanded for a new penalty phase, successor defense counsel consulted with the defendant on numerous occasions, reviewed the defense files, trial transcripts, unfavorable report from the mental health expert, and spoke with each of the witnesses before calling them to testify. Trial counsel knew about the defendant's background, including the sexual abuse, and she knew that it had not been successful in achieving a life recommendation at the first penalty phase. Therefore, counsel made an informed strategic decision, one which the defendant emphatically endorsed at the time of the second penalty phase, to forgo the negative testimony presented at the first penalty phase and, instead, focus on the positive aspects of the defendant's life. The defendant failed to establish any deficiency of counsel and resulting prejudice under Strickland.

Issue II: The IAC/guilt phase and prosecutorial misconduct claims were properly summarily denied as conclusively refuted by the record, facially or legally insufficient, or without merit.

ARGUMENT

ISSUE I

THE IAC-PENALTY PHASE CLAIM

Standards of Review

In evaluating claims of ineffective assistance of counsel, this Court affords deference to the trial court's findings of fact based on competent, substantial evidence and independently reviews deficiency and prejudice as mixed questions of law and fact. See, Freeman v. State, 858 So. 2d 319, 323 (Fla. 2003); State v. Riechmann, 777 So. 2d 342 (Fla. 2000); Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 1999).

When evaluating claims that trial counsel was ineffective for allegedly failing to investigate or present certain mitigating evidence, both Strickland and Wiggins emphasized:

> [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. . . . [A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
>
> . . . .
>
> . . . [O]ur principal concern in deciding whether [counsel] exercised "reasonable professional judgmen[t]" is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable. In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," which includes a

> context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time." 539 U.S. at 521-23 (citations omitted) (fifth alteration in original) (first emphasis supplied) (quoting Strickland, 466 U.S. at 688-89, 691).

Trial counsel's decision to not present certain mitigation evidence may be a tactical decision properly within counsel's discretion. See Valle v. State, 705 So. 2d 1331, 1335 n.4 (Fla. 1997).

The Trial Court's Findings

In denying the defendant's IAC/penalty phase claim after an evidentiary hearing, the trial court made the following findings of fact:

> A. The defendant was raised in deplorable circumstances. The family, under the weight of crushing poverty, lived in unkempt substandard housing, faced food shortages and was unable to properly clothe the defendant and his siblings. The defendant's father never properly provided for his family in a financial sense and seldom paid much attention to any members of the family. Although the extent to which this was done is not clear from the evidence, it is clear that the defendant's father inflicted physical violence on the defendant and his siblings. Being as charitable as possible, the defendant's mother was overcome by her circumstances and, receiving no financial or emotional support from her husband, ultimately turned to substance abuse and eventually abandoned the family.
>
> B. As if the defendant's family life was not bad enough, attempts to move the defendant to better circumstances landed him in the villainous clutches of a pedophile. The defendant and his older brother were repeatedly sexually abused by the pedophile, with the defendant having been abused for an even longer period of time than his older brother.
>
> C. All of the foregoing facts were presented to

the jury in the first penalty phase conducted in this case. The result of the first penalty phase was a jury recommendation for death, by a vote of 8 to 4.

D. Apparently as a result of the perceived failure of the tactics utilized in the first penalty phase in this case, the defendant decided that those tactics should be abandoned in the second penalty phase and instructed counsel in the second penalty phase to "go positive" during the second penalty phase. In short, the defendant wished to abandon the tactic of attempting to demonstrate that he should be spared a death recommendation due to the deplorable circumstances of his upbringing, including his victimization by a pedophile. This would appear to be a reasonable course of conduct based upon the disappointing results achieved in the first penalty phase. The defendant's wishes in this regard were clearly communicated to the attorneys handling the second penalty phase proceeding. Evidence of this was uncontradicted in the evidentiary hearing. By "going positive", it was the defendant's desire to emphasize all the positive aspects of his life and demonstrate the reasons a jury should recommend that he'd be permitted to live. The defendant's decision to change tactics between the first penalty phase and the second penalty phase was honored by his attorneys. Although the second penalty phase jury ultimately recommended death, the final vote improved to 7 to 5 and the jury nearly recommended life by a vote of 6 to 6. *See* Derrick v. State, 641 So. 2d 378 (Fla. 1994), in addition to the hearing testimony of Robin Kester, Esq., Assistant Public Defender. Clearly, the change in tactics directed by the defendant was reasonable and came close to succeeding.

E. The defendant's sister, Carolyn Hayney, could have presented some specific examples of the defendant's attempts to protect her, if she had been called as a witness in the second penalty phase and asked the appropriate questions. On the other hand, the defendant's attorneys in the second penalty phase proceeding were faced with the possibility that the defendant's own lewd activities with his sister may have been brought out, at least as a means of casting doubt upon her attempts to characterize the defendant as her protector. This was a legitimate concern. Although Mrs. Haney could have also related the poor

circumstances of the defendant's upbringing, this would have been contrary to the defendant's instructions to abandon the tactics undertaken in the first penalty phase and "go positive" in the second penalty phase.

D. The defendant's attorneys in the second penalty phase proceeding were well aware of the attempts made by the defendant's attorneys in the first penalty proceeding to develop mental health evidence to assist the defendant. The evidence presented to the court demonstrates that these efforts failed and, although they were not repeated by the attorneys in the second penalty phase proceeding, there appears to have been no reason to expect that further efforts along the lines would have any better chance of succeeding. Testimony was presented to this court by Dr. Dee, a Clinical Psychologist, who first evaluated the defendant some 14 years after the date of the offense. Dr. Dee opined that the defendant may have suffered from a brain injury, but, despite his investigation of the defendant's history, Dr. Dee was unable to point to any incident which may have given rise to such a brain injury. In short, Dr. Dee was unable to say where or when any such brain injury may have occurred. In addition, Dr. Dee testified that it was possible, although not likely, that any such brain injury occurred after the defendant's trial. Although Dr. Dee testified that the defendant was suffering from Chronic Brain Syndrome with memory and frontal lobe features, he acknowledged that this would simply result in the defendant having difficulty controlling his impulses. Dr. Dee further testified that drugs and alcohol would not be the likely cause of Chronic Brain Syndrome and that the sexual abuse suffered by the defendant would have had no effect on his Chronic Brain Syndrome. Otherwise, the defendant was demonstrated to have a normal IQ. It should be noted that virtually no evidence was presented demonstrating that the crime was committed while the defendant was under the influence of an *extreme mental or emotional disturbance* or that the defendant's ability to conform his conduct to the requirements of the law was *substantially impaired*. Dr. Dee's testimony demonstrated that the defendant was quite capable of appreciating the criminality of his conduct. The primary value of Dr. Dee's testimony was that of a

non-statutory mitigator.

(PCR-V5/804-806) (e.s.)

So long as the trial court's 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." Arbelaez v. State, 898 So. 2d 25, 32 (Fla. 2005) (quoting Sochor v. State, 883 So. 2d 766, 781 (Fla. 2004)). For the following reasons, the trial court's findings are supported by competent, substantial evidence and the trial court's cogent written order denying the defendant's IAC/penalty phase claim should be affirmed.

Analysis

Trial counsel cannot be deemed ineffective merely because postconviction counsel disagrees with trial counsel's strategic decisions. In Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000), this Court, applying Strickland, emphasized that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." The fact that collateral counsel would have chosen a different strategy does not render trial counsel's decision in the instant case unreasonable in hindsight. See

Cooper v. State, 856 So. 2d 969, 976 (Fla. 2003) ("The issue before us is not 'what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense.'") (quoting Occhicone, 768 So. 2d at 1049).

Derrick had two penalty phases, with separate counsel for each, and he did not testify in either proceeding. Derrick claims that trial counsel was ineffective in failing to present lay witness testimony of a deprived childhood of poverty, an abusive household, sexual molestation by an adult friend, and expert testimony from a mental health witness.

Lay witnesses: childhood hardships and sexual molestation

Derrick was represented in the first penalty phase by Assistant Public Defenders Robert McClure and Steve Denhart. They presented witnesses of neighbor Senthia [sic] Hardesty (R1. V5/714-718), Sheri [sic] Derrick (R1. V5/770-773), mother-in-law Jean Davis (R1. V5/758-762, 769-770), father Samuel Derrick (R1. V5/728-739), and friend and sexual-molester Harry Martin (R1. V5/745-749). The first penalty phase included not only what a helpful person the defendant was to his wife, mother-in-law, and neighbor but, through his father, mother-in-law and the sexual-molester friend, that he had experienced hardships of having an

alcoholic mother, a sexually molesting older friend, and a mother-in-law who wanted money from him while he and his wife lived with her. Derrick did not testify. The first sentencing phase jury recommended death by 8 to 4.

Derrick was represented in the second penalty phase, November 6, 1991, by Assistant Public Defenders Robin Kester and Douglas Loeffler. Before Derrick's resentencing, Attorney Kester had been co-counsel in two other death penalty phase proceedings. In both cases, the juries recommended life. (PCR-V6/1006; V7/1070). Before resentencing, Attorney Kester spoke with the defendant on a regular basis and she knew that he wanted to present a "positive" case this time because the defense had presented a lot of negative facts about his past in the first penalty phase, and the jury had recommended death. (PCR-V6/990-991; V7/1023-1025). From the defense perspective, the negative information, including the sexual abuse, had not worked the first time; and the defendant felt that it contributed to the fact that "things did not go well" in the first penalty phase, when the jury's recommendation was not life. (PCR-V7/1023; 1025). Attorney Kester did not let the defendant "run the show," but she agreed that a strategy going "positive" was a good decision at the time because the "negative" information had not helped the defendant the first

time. (PCR-V7/1023; 1029).

Before the second penalty phase, Attorney Kester spoke with her supervisor/co-counsel, Douglas Loeffler, about this case, she reviewed the Public Defender's files (which included their investigation reports, trial transcripts, and Dr. Simon's report), she reviewed this Court's opinion on direct appeal, and she spoke with the witnesses before she called them to testify. (PCR-V6/1001; V7/1015-1016; 1061; 1067-1068). According to Derrick, the "record and [Attorney Kester's] testimony do not reveal what else she did do." (Initial Brief at 32). Attorney Kester expressed her obvious dismay at the evidentiary hearing because there was "a box missing" in the defense file records provided to her by collateral counsel. (PCR-V6/998-999). According to Kester, she takes "meticulous notes" and she "would have written like crazy in preparation for a hearing of this magnitude," but there wasn't a single note of any conversation or interview that she had with either the defendant, although she spoke with him on a regular basis, or with any of the witnesses, although she spoke with each of them before they testified. (PCR-V6/998-999; 1001; V7/1017).

Attorney Kester reviewed what attorneys McClure and Dehnart did in the first trial as a starting point and she knew about the sexual abuse. (PCR-V7/1022; 1024). Co-counsel Loeffler

also sent a memo to Kester on 11/1/91 about the sexual molester, Harry Joe Martin, and Loeffler stated he was "very uncomfortable" with Martin and concluded, "I don't think we want to risk something like that coming out." (PCR-V7/1034). Attorney Kester knew about the sexual abuse, she believed that it happened, but she chose not to use it during the second penalty phase. (PCR-V7/1025). The sexual abuse testimony did not warrant a life recommendation at the first penalty phase; therefore, the defense felt that a different tactic was called for the second time. (PCR-V7/1050-1051).

The defendant did not want evidence of his bad home life presented at the second penalty phase because it went badly and was unsuccessful the first time, since the first jury recommended death, and the defendant didn't want another jury to hear it. (PCR-V7/1043-1044; 1066-1067). Attorney Kester felt that the defendant's bad home life was a negative factor, and since the first jury had already heard it and come back with a death recommendation, it was part of her strategy not to present evidence of Derrick's bad home life at the second penalty phase. (PCR-V7/1043). Attorney Kester agreed that she decided on a strategy which did not blame the defendant's past, but, instead, accentuated the positive factors in the defendant's life as why the defendant should live. (PCR-V7/1062; 1064; 1066).

Attorney Kester did not call the defendant's younger sister, Carolyn, at the second penalty phase. Attorney Kester had the defendant's prior criminal record and she knew that the defendant had been charged with committing a lewd and lascivious act on Carolyn. (PCR-V7/1063). Attorney Kester did not want the jury to ever hear that there was an allegation that he had sexually abused his sister. (PCR-V7/1072; 1073).

At the second penalty phase, defense counsel presented penalty phase witnesses David [Travis] Derrick, the defendant's older brother; Pasco Deputy Sheriff Robert D'Antonio, the program coordinator as a corrections officer for the Land 0' Lakes Jail; Pasco County School Board employee Nancy Denaman, the coordinator for the Adult Literacy Program; Sethia Hardesty, a neighbor and friend of Defendant; Cherie Lynn Derrick, the defendant's wife; Evelyn Deal, a friend of the defendant; and her daughter Charlotte Wise, a friend and former neighbor of the defendant.

The defendant's older brother [David/Travis] described Derrick as better dressed than him and smarter. As the physically larger of the two, the defendant would protect David from kids who picked on David at school. Also, Derrick helped David with his school work, reading, writing, and arithmetic, through grammar school, junior high and high school until they

both dropped out in the tenth grade. (R2. V2/169-179). Deputy D'Antonio and School Board Coordinator Denaman testified to the defendant's volunteering to assist other inmates by tutoring in the literacy program and completing the five-hour training workshop for tutors. Deputy D'Antonio also knew Derrick as the elected pod representative to present inmate grievances. (R2. V2/183-188, 195-199).

Cherie Derrick testified that Derrick had been a good husband to her and their baby and he had gone out of his way to help others. (R2. V2/220-225). Evelyn Deal, Charlotte Wise and Christina Wise testified, as three generations of friends and neighbors of the defendant who had known him to be trustworthy and especially helpful to them and their children. (R2. V2/239-242, 253-265, 273-286). Sethia Hardesty testified as a neighbor for whom the defendant had worked, volunteered chores and befriended her younger son. (R2. V2/209-215). The defendant did not testify. Based on these witnesses, defense counsel argued to the jury that there was mitigation of the defendant's age, and being a good person, whose family, wife and friends' feelings for him had not changed just because he was convicted of first degree murder. (R2. V3/363-370). The jury returned its recommendation of death with a vote of 7 to 5.

In denying Derrick's IAC/penalty phase claim, the trial

court set forth detailed findings of fact, clearly applied Strickland and its progeny, and ultimately concluded,

> . . . it is impossible for the Court to find that counsel in the second penalty phase made any errors of significance, let alone errors that rose to a level that deprived the defendant of his constitutional right to effective counsel. Furthermore, the evidence presented at the hearing in no way undermines the court's confidence in the outcome of the second penalty phase proceeding. A comparison of the results in the first penalty phase and the second penalty phase leaves the Court similarly unable to find that there is a reasonable probability that, but for any alleged deficiency in counsel's performance, the results of the second penalty phase would have been different. Under the circumstances, the Court finds that the defendant has failed to establish either prong of the test set forth in Strickland. In addition, the Court has found that counsel in the second penalty phase were simply following the reasonable wishes of their client and, as set forth in Sims, counsel cannot be ". . . considered ineffective for honoring the client's wishes". Indeed, counsel may well have been severely condemned both ethically and legally for having ignored the defendant's decision.
>
> (PCR-V5/808-809).

As the trial court recognized, an attorney will not be deemed ineffective for honoring his client's wishes. Brown v. State, 894 So. 2d 137, 146 (Fla. 2004), citing Waterhouse v. State, 792 So. 2d 1176, 1183 (Fla. 2001) (holding that counsel was not ineffective for failing to present certain mitigation evidence where the client instructed him not to pursue that evidence); Sims v. State, 602 So. 2d 1253, 1257-58 (Fla. 1992)

("We do not believe counsel can be considered ineffective for honoring the client's wishes.").

In this case, as in Henry v. State, 862 So. 2d 679, 686 (Fla. 2003), resentencing counsel had the advantage of knowing that the penalty phase strategy the defendant now endorses in postconviction was actually used at the first trial and failed to achieve a life recommendation. Certainly the Public Defender's Office that represented Derrick for both penalty phases should not be faulted for trying a different approach in the second penalty phase to eliminate the hardship portions of Derrick's life and concentrate, instead, on the allegedly good and helpful person that Derrick had been to many people. Such a change in emphasis to attempt a different result than the first penalty phase should not be considered to be outside of the realm of reasonably affective assistance, especially where, as here, it enjoyed some success. In this case, as in Henry, resentencing counsel chose another strategy after examining the prior records and considering the failed alternative. See also, Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) (finding no error in the trial court's finding that, at Rutherford's retrial, defense counsel was aware of possible mental mitigation, but made a strategic decision under the circumstances of his case to instead focus on the "humanization"

of Rutherford through lay testimony); Miller v. State, 926 So. 2d 1243, 1250 (Fla. 2006) (concluding that the trial court did not err in rejecting Miller's argument that trial counsel did not perform a proper investigation since the record supports a conclusion that counsel researched all reasonable areas of mitigation, including the work and research of prior defense counsel).

When evaluating counsel's alleged deficiency, reviewing courts are required under Strickland to make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time. Moreover, under Strickland, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Brown v. State, 894 So. 2d 137, 146 (Fla. 2004), citing Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000) (quoting Strickland, 466 U.S. at 691). In Brown, trial counsel conceded that if he could have presented more mitigation evidence, the jury might not have recommended death. However, in Brown, trial counsel's ability to present more mitigation was limited by the defendant's desire not to involve his family. On postconviction appeal, this Court agreed that trial counsel's inability to present further mitigation cannot be considered ineffective in light of Brown's limitations on counsel's penalty

phase investigation. Brown, 894 So. 2d at 146.

In this case, trial counsel's actions were substantially influenced by the defendant's personal experience and eye-opening consequence of receiving a "negative" death sentence recommendation in the first trial, despite the presentation of testimony of childhood hardships and sexual abuse, and by the defendant's steadfast desire to change tactics the second time and "go positive." Moreover, defense counsel's admission that she might do things differently today is of no consequence. In Duckett v. State, 918 So. 2d 224, 237, n.15 (Fla. 2005), another capital defendant relied, in part, on his trial counsel's admission that it was probably a mistake not to call additional witnesses at the penalty phase. However, as this Court reiterated in Duckett, "an attorney's own admission that he or she was ineffective is of little persuasion in these proceedings." Id. at 237, n.15, citing Kelley v. State, 569 So. 2d 754, 761 (Fla. 1990) (citing Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985) (quoting trial court's order)). Under the facts of this case, Derrick has not, and cannot, demonstrate any deficiency of counsel and resulting prejudice under Strickland.

Mental Health Expert

Derrick also alleges that trial counsel was ineffective in failing to call a mental health expert. Attorney Kester

reviewed Dr. Simon's psychological report in preparation for the resentencing, but she did not want to use Dr. Simon. (PCR-V6/1005; 1038). Dr. Simon evaluated the defendant within a year of the murder. (PCR-V7/1069). Dr. Simon made reference to Derrick having "anti-social" personality disorder and Kester did not want the jury to hear that he had narcissistic and anti-social personality traits. (PCR-V7/1044-1045). In Kester's opinion, these "aren't the kind of mental mitigation" that the defense would want. (PCR-V7/1044-1045). Dr. Simon found no evidence of any developmental or organic brain dysfunction and no evidence of any mental confusion or psychosis. (PCR-V7/1045). Dr. Simon's report did not support either statutory mental health mitigating circumstance. Derrick denied the crime to her and, therefore, the defense could not claim that the defendant was under the influence of extreme mental or emotional disturbance at the time of the crime. Further, Dr. Simon's report negated any suggestion of extreme duress or substantial domination because Dr. Simon's report concluded that the defendant was in control of his emotions. Attorney Kester took one look at Dr. Simon's report and knew why the defense did not call her in the first trial -- Dr. Simon's report was not helpful to the defendant, there was no psychosis, the defendant was identified as anti-social, and calling Dr. Simon would not

have helped the defendant, but would have hurt him. (PCR-V7/1048). Further, Attorney Kester knew what the prosecutors frequently "do with that" [expert testimony of an anti-social personality] and "its not usually favorable." (PCR-V7/1049). Derrick was alert, responsive, cooperative, and there was nothing to indicate the defense should have him re-evaluated for the second penalty phase. (PCR-V7/1067).

In postconviction, Derrick relied on the testimony of Dr. Henry Dee, a more recently hired mental health expert. In Trotter v. State, 932 So. 2d 1045, 1052 (Fla. 2006), this Court rejected another capital defendant's reliance on a "more recently hired mental health expert," and reiterated that mental health investigation and testimony are not rendered incompetent "merely because the defendant has now secured the testimony of a more favorable mental health expert." Id. at 1052, citing Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2002) (quoting Asay v. State, 769 So. 2d 974, 986 (Fla. 2000)).

In neither of the two penalty phases did defense counsel present evidence to the jury from a mental health expert. This Court must determine not whether counsel should have presented mental health mitigation but whether counsel's decision not to present such evidence was a reasonably informed, professional judgment. See, Henry v. State, 862 So. 2d 679, 685 (Fla. 2003).

The suggestion that Derrick's resentencing attorneys allegedly failed to investigate mental health issues is misleading. Derrick was represented in both penalty phases by the Public Defender's Office which had, prior to the guilt phase, requested and been granted, on January 12, 1988, the assistance of mental health expert Nancy Simon. (R1. V6/892-893). This appointment was before the trial in May of 1988, the original sentencing in July of 1988, and resentencing in December of 1991.

Derrick has not shown that the psychological evaluation done by Dr. Nancy Simon was not sufficient for all sentencing proceedings or that there was any change in his psychological state after the first sentencing and before the second sentencing. The psychological report of Dr. Simon establishes that counsel had no viable statutory or nonstatutory mitigation to present via a mental health expert in 1988. Defense counsel Dehnart's cover letter to Dr. Simon wrote that they were interested both in Derrick's state of mind during the homicide and any mental mitigators, if he had committed the crime. Defense counsel supplied Derrick's past criminal history and copies of depositions filed in the case. In addition, Dr. Simon reviewed the autopsy, as well as interviewing Derrick and conducting the battery of psychological tests over a 4½ hour period on January 21, 1988. Derrick denied all charges and

denied confessing, claiming, rather, that he became so exhausted from the seven hours of interrogation that he had answered multiple choice questions so he could "'go to a cell and be left alone.'" (PCR-V1/181). Additionally, defense counsel McClure hired another confidential mental health expert, Dr. Michael Maher, a psychiatrist from Tampa. When Dr. Maher interviewed the defendant, Derrick denied committing the murder and Dr. Maher could not furnish the defense with any statutory mental health mitigation. (PCR-V7/1088). As in Cherry v. State, 781 So. 2d 1040, 1045 (Fla. 2000), Derrick professed his innocence to the mental health expert, and counsel should not be considered ineffective for failure to contradict that position in presentation of alleged mental health mitigation.

Based on the results of the administered tests of the Rorschach, Minnesota Multiphasic Personality Inventory (MMPI), Incomplete Sentences Test, Weschler Memory Scale, and Draw-A-Person and her clinical interview, Dr. Simon concluded that Derrick was of average intelligence, he had no developmental or organic brain dysfunction, no psychosis, had good stress tolerance, good decision-making skills, is a flexible thinker, adaptive, empathetic, decisive and action oriented, with manipulative, narcissistic and antisocial personality traits. She concluded that, given his "emotional make-up and cognitive

capabilities, it is also highly unlikely that Mr. Derrick would be easily manipulated by the police or confused in being questioned by the police." (PCR-V1/181-183). She negated that Derrick would lose control in an emotional situation and found that he "is more likely to increase his control over his emotions than to act out precipitously. Therefore, he would not be the type of person who would typically be associated with a frenzied type of action." Id. Finally, as to the lack of any mitigation, she concluded that "[I]f indeed Mr. Derrick did commit the homicide. . ., my professional opinion is that at that time he would not have been suffering from a mental disease or defect and did have the cognitive ability to socially and morally understand the concept of right and wrong." Id.

At the time of trial, Derrick, himself, negated the possibility of mitigation from controlled substances intake. Derrick related to Dr. Simon that he had had no "street drugs" for the month before his arrest and drank approximately four beers a week. (PCR-V1/180). The mental health expert's report, in the possession of defense counsel at the time of trial and resentencing, refutes that counsel had any statutory or nonstatutory mitigation to have been presented through expert witness at the time of Derrick's trial and resentencing.

Trial counsel's choice in the second penalty phase, to

present Derrick as a good, helpful person, rather than including that he had an alcoholic mother and a sexually abusive older friend, achieved more success. The jury in Derrick's first trial recommended death in the first penalty phase by the vote of 8 to 4, and by the vote of 7 to 5 in the second penalty phase. Defense counsel hired Dr. Maher to evaluate Derrick and also obtained a second confidential psychological expert for Derrick's original sentencing proceedings.

Defense counsel's letter to Dr. Nancy Simon specifically requested her evaluation of mental mitigation and her report specifically addressed that request, finding no indication of "any developmental or organic brain dysfunction." (PCR-V1/181). Dr. Simon found that Derrick had "good stress tolerance" and "able to keep his emotions under control." "Therefore, he would not be the type of person who would typically be associated with a frenzied type of action." (PCR-V1/183). Derrick did not report any abuse of drugs at the time of the crime, and Dr. Simon found from Derrick's ability to relate life incidents and his reported responses to them "reflected cool, calm, rational thought processes." She concluded from the test results and interview that Derrick was not the type who "would be likely to become so overwhelmed by emotion that he would lose control and perform acts which he deems immoral." (PCR-V1/183). Defense

counsel relied, in resentencing, on Defendant's willingness to volunteer to help others, including tutoring his older brother through their grade, junior high and high school lessons in reading, writing and arithmetic, and volunteering while in jail to tutor other illiterate prisoners in a reading program. Dr. Simon found Derrick eager to inform her of his role "as a protector of the vulnerable and less fortunate. For example, he takes great pride in being referred to as 'big brother' by neighborhood children and made sure that I knew that the only reason that he and his wife lived with her parents was because he needed to protect his mother-in-law from her husband." (PCR-V1/182). Derrick had no issue of mental retardation or physical injury affecting his cognitive processes. Dr. Simon was aware of Derrick's history of drug abuse during school, but also that he was able to maintain B and C grades in the ninth and tenth grades after failing the seventh grade, which he said was for drug abuse. From the testing and interview she found no indicators of brain dysfunction, either organic or developmental. (PCR-V1/180-181).

There is no evidence that any pre-trial evaluation of Derrick ignored any clear indications of mental health problems or brain damage. As noted in Asay v. State, 769 So. 2d 974, 985-86 (Fla. 2000) (quoting Jones v. State, 732 So. 2d 313, 320

(Fla. 1999)), this case is similar to Jones, where the defendant had been examined prior to trial by a mental health expert who gave an unfavorable diagnosis. As this Court concluded in Jones, "the first evaluation is not rendered less than competent 'simply because appellant has been able to provide testimony to conflict' with the first evaluation."

The evidence from the evidentiary hearing demonstrates that retrial counsel knew about the mental health evaluations, but concluded that the mental health testimony was not helpful to the defendant. Thus, resentencing counsel decided to humanize the defendant through testimony that Derrick was a helpful young man worth saving. Resentencing counsel's decision was a reasonable strategy after full consideration of the alternative. See, Henry v. State, 862 So. 2d 679, 685-686 (Fla. 2003) (finding no error where retrial counsel knew about availability of mental health testimony available, but concluded that it was likely to do more harm than good and, therefore, counsel decided to try to humanize Henry through testimony that he was a peaceful man), citing Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) (finding no error where retrial counsel was aware of mental mitigation "but made a strategic decision under the circumstances . . . to instead focus on the 'humanization' of Rutherford through lay testimony"); Haliburton v. Singletary,

691 So. 2d 466, 471 (Fla. 1997) (finding no deficient performance in counsel's decision to humanize the defendant rather than use mental health testimony because the expert would say that the defendant was "dangerous" and likely would kill again); Bryan v. Dugger, 641 So. 2d 61, 64 (Fla. 1994) (finding counsel not ineffective for choosing a mitigation strategy of "humanization" and not calling a mental health expert).

In this case, resentencing counsel's decision not to present mental health experts at the second penalty phase was a reasonable strategic decision and the postconviction proceedings did not demonstrate any deficiency of counsel and resulting prejudice under Strickland. The trial court on resentencing found three aggravating factors, including the compelling HAC factor based on the brutal stabbing of the victim. Ultimately, there is no reasonable probability that had the mental health expert testified, the outcome would have been different. See, Haliburton, 691 So. 2d at 471 ("In light of the substantial, compelling aggravation found by the trial court, there is no reasonable probability that had the mental health expert testified, the outcome would have been different.") Moreover, as the postconviction court stated, in pertinent part:

> D. The defendant's attorneys in the second penalty phase proceeding were well aware of the attempts made by the defendant's attorneys in the first penalty proceeding to develop mental health

> evidence to assist the defendant. The evidence presented to the court demonstrates that these efforts failed and, although they were not repeated by the attorneys in the second penalty phase proceeding, there appears to have been no reason to expect that further efforts along the lines would have any better chance of succeeding. Testimony was presented to this court by Dr. Dee, a Clinical Psychologist, who first evaluated the defendant some 14 years after the date of the offense. Dr. Dee opined that the defendant may have suffered from a brain injury, but, despite his investigation of the defendant's history, Dr. Dee was unable to point to any incident which may have given rise to such a brain injury. In short, Dr. Dee was unable to say where or when any such brain injury may have occurred. In addition, Dr. Dee testified that it was possible, although not likely, that any such brain injury occurred after the defendant's trial. Although Dr. Dee testified that the defendant was suffering from Chronic Brain Syndrome with memory and frontal lobe features, he acknowledged that this would simply result in the defendant having difficulty controlling his impulses. Dr. Dee further testified that drugs and alcohol would not be the likely cause of Chronic Brain Syndrome and that the sexual abuse suffered by the defendant would have had no effect on his Chronic Brain Syndrome. Otherwise, the defendant was demonstrated to have a normal IQ. It should be noted that virtually no evidence was presented demonstrating that the crime was committed while the defendant was under the influence of an *extreme mental or emotional disturbance* or that the defendant's ability to conform his conduct to the requirements of the law was *substantially impaired*. Dr. Dee's testimony demonstrated that the defendant was quite capable of appreciating the criminality of his conduct. The primary value of Dr. Dee's testimony was that of a non-statutory mitigator.
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> (PCR-V5/806) (e.s.)

In Hendrix v. State, 908 So. 2d 412, 422-423 (Fla. 2005), this Court agreed that the mere fact that Hendrix found mental

health experts with "more favorable testimony" did not invalidate the testimony of the mental health experts who were relied upon by trial counsel. Further, in both Hendrix and Pace v. State, 854 So. 2d 167, 173-74 (Fla. 2003), this Court rejected a claim that counsel was ineffective for making a strategic decision not to present evidence regarding the defendant's drug usage. The Court has often recognized that trial counsel cannot be considered ineffective for failing to present evidence of drug usage, particularly in light of other evidence which showed that the defendant was quite capable of reasoning. See, Hendrix, *supra*.

Derrick failed to establish any deficiency and resulting prejudice in regard to any unpresented mental health testimony. First, trial counsel made an informed strategic decision at the time of trial not to call the confidential mental health expert, Dr. Simon. "An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword." Reed v. State, 875 So. 2d 415, 437 (Fla. 2004). Second, "[i]n assessing prejudice, 'it is important to focus on the nature of the mental health mitigation' now presented." Asay v. State, 769 So. 2d 974, 986 (Fla. 2000) (quoting Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998)). Even now, Dr. Dee's postconviction testimony was

not sufficient to establish any statutory mental health mitigation or mitigation which would, in all reasonable probability, have outweighed the significant aggravators in this case. See, Suggs v. State, 923 So. 2d 419, 435 (Fla. 2005) (finding defendant was not prejudiced by failure to obtain an additional psychological evaluation in preparation for the penalty phase when postconviction expert found defendant suffered from a significant neurological impairment in the executive functions of the brain but had an "average IQ [of 102]" and "did not suffer from any major psychiatric disorder").

In Morris v. State, 931 So. 2d 821, 835 (Fla. 2006), Dr. Dee testified for another capital defendant *at trial* and discussed how Morris's background affected him as a child, but Dr. Dee did not discuss whether Morris's IQ level, ADHD, or drug abuse affected him as an adult. However, Dr. Dee did not render an opinion *at trial* as to whether these factors were likely to have affected Morris at the time he committed the murder. Similarly, in this postconviction case, Dr. Dee did not render any opinion linking any of the defendant's purported mental health factors to the time of the murder.

In the instant case, there is competent, substantial evidence to support the trial court's factual findings, and the defendant has failed to show that the trial court made any legal

errors in its conclusions regarding prejudice under Strickland. Thus, the defendant's IAC/penalty phase claim must be denied.

ISSUE II

THE POST-CONVICTION CLAIMS SUMMARILY DENIED

Standards of Review

Florida Rule of Criminal Procedure 3.850(d) provides that a postconviction claim may be denied without an evidentiary hearing where "the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Mungin v. State, 932 So. 2d 986, 996, n.8 (Fla. 2006).[7] "To support summary denial without a hearing, a trial court must either state its rationale or attach to its order those specific parts of the record that refute each claim presented in the motion." Id., citing Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993).

[7] In Mungin, 932 So. 2d at 996, n.8, this Court noted that "[f]or all death case postconviction motions filed after October 1, 2001, Florida Rule of Criminal Procedure 3.851 requires an evidentiary hearing 'on claims listed by the defendant as requiring a factual determination.' Fla. R. Crim. P. 3.851(f)(5)(A)(i); see also Amendments to Fla. Rules of Criminal Procedure 3.851, 3.852, & 3.993, 802 So. 2d 298, 301 (Fla. 2001). However, prior to the 2001 amendments to rule 3.851, rule 3.850(d) applied to the summary denials of postconviction motions in both death and nondeath cases. See McLin v. State, 827 So. 2d 948, 954 n.3 (Fla. 2002)." In this case, as in Mungin, because the defendant's motion for postconviction relief was filed in 1998, the summary denial standard set forth in rule 3.850(d) applies in this case.

When the trial court denies postconviction relief without conducting an evidentiary hearing, this Court must accept the defendant's factual allegations as true to the extent they are not refuted by the record. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999). However, the defendant still has the preliminary burden of establishing a legally sufficient claim. See Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000). Postconviction claims which are either procedurally barred, conclusively refuted by the record, facially or legally insufficient as alleged, or without merit as a matter of law may be summarily denied. See, Knight v. State, 923 So. 2d 387, 391-392 (Fla. 2005). A trial court's summary denial of a motion to vacate will be affirmed where the trial court properly applied the law and competent, substantial evidence supports its findings. Diaz v. Dugger, 719 So. 2d 865, 868 (Fla. 1998).

Analysis

Derrick asserts that the trial court erred in summarily denying the following postconviction claims: (1) IAC-guilt phase (alleged failure to adequately challenge Derrick's confession and hire a confessionologist); (2) IAC-guilt phase (Randall James); (3) Prosecutor Comment (double-edged knife); (4) Cumulative Impact (guilt phase); and (5) Prosecutorial Misconduct (Randall James). The trial court's order summarily

denying these post-conviction claims carefully explained its rationale, found the defendant's claims to be either facially or legally insufficient as alleged, conclusively refuted by the record, or without merit as a matter of law, and attached those specific parts of the record that refuted the defendant's claims. The trial court's order summarily denying Derrick's IAC/guilt phase and alleged prosecutorial misconduct claims should be affirmed for the following reasons.

The IAC/Guilt Phase Confession Claim

The trial court's order denying relief on this postconviction claim stated, in pertinent part:

> **B. Failure to present evidence or challenge evidence at motion to suppress confession**
>
> Defendant alleges that defense counsel failed to call witnesses, impeach the State's witnesses, or to retain experts to present testimony or challenge testimony at the 1988 Motion to Suppress hearing. Defendant alleges that the interrogation practices of Detective Vaughn were flawed and coercive, that there is no documentation or memorialization of Defendant's confession even though Detective Vaughn routinely used recording devices, and that a confessionologist should have been called as an expert to testify regarding the interview techniques used by the police. Defendant also alleges that counsel failed to question Detective Vaughn regarding Mirandizing Defendant, and failed to call witnesses who could contradict Detective Vaughn's version of events.
>
> Defendant does not directly allege in his motion that he did not confess, nor does he allege that he was not read his Miranda [n2] rights. Defendant instead hints at the possibility that the confession was either falsified or coerced. In doing so, Defendant argues inconsistencies in detail between witnesses as to time, location, and content. Although

those inconsistencies may be considered with regard to the credibility of the witnesses, they would not lead to a suppression of the confession as not being made freely and voluntarily. As Defendant has failed to establish a basis for the suppression of his confession, he has failed to establish that counsel was ineffective in his efforts to obtain such suppression.

n2 Miranda v. Arizona, 384 U.S. 436 (1966).

(PCR-V4/569-570) (e.s.)

At page 51 of his initial brief, Derrick again alleges that his trial counsel was ineffective for failing to present a "confessionologist" to testify that some confessions can be false. Derrick's postconviction claim remains facially and legally insufficient. First of all, Derrick did not show that such testimony would have been admissible at his suppression hearing. See, Beltran v. State, 700 So. 2d 132, 133-34 (Fla. 4th DCA 1997) (affirming exclusion of neuropsychologist's testimony that some people give false confessions and questioning whether an expert's assessment that a confession is involuntary is ever admissible). More importantly, Derrick never alleged below that his confession to Detective Vaughn was false.[8] A similar claim of failing to hire a "forensic

[8] At the postconviction evidentiary hearing, Derrick's original defense attorney, McClure, proffered that Derrick indicated that he had been involved in a killing when he was under the influence of drugs. (PCR-V7/1089). Derrick then "backed off from that." (PCR-V7/1089). The trial court ruled that since Derrick abandoned his remaining IAC-guilt phase claim at the

communications expert" was summarily denied and affirmed by this Court in LeCroy v. State, 727 So. 2d 236, 240 (Fla. 1998), as only a conclusory allegation and failing to show that the outcome would have been different. More recently, in Bryant v. State, 901 So. 2d 810, 821-822 (Fla. 2005), this Court also affirmed the summary denial of an IAC/guilt phase claim based on the alleged failure to obtain a "false confession expert." In Bryant, this Court explained:

> Bryant next claims that trial counsel was ineffective for failing to obtain a false confession expert. This claim is legally insufficient. We recently held that when a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, a defendant is "required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have testified prejudiced the case." Nelson v. State, 875 So. 2d 579, 583 (Fla. 2004). Neither in his pleadings below nor in his brief before this Court does Bryant allege specific facts about which a confession expert would testify. He has not provided proposed testimony and does not even claim to have obtained an expert. Bryant merely concludes that an expert could testify that "[Bryant's] confession is typical of those which are false." Without more specific factual allegations, such as proposed testimony, this claim is insufficient under Nelson.
>
> The claim that trial counsel should have called Bryant's family members who saw him just before he was interrogated by police is similarly insufficient.

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evidentiary hearing, that Derrick's admission to McClure was "not relevant at this point." (PCR-V7/1090) Inasmuch as Derrick has not abandoned his IAC-guilt phase claims on appeal, the State submits that Derrick's admission to counsel is indeed relevant "at this point."

> Nowhere does Bryant describe the substance of any proposed familial testimony . . .
>
> Bryant, 901 So. 2d at 821-822 (e.s.)

Moreover, Dr. Nancy Simon's psychological report of her testing and interview of Derrick on January 21, 1988, refuted that Derrick's confession would have been coerced or false, although he denied to her that he had confessed voluntarily. "Although he may consciously or unconsciously present himself in certain ways so as to receive the kind of attention and recognition he wants, it is unlikely that with his level of cognitive abilities he would confess to a crime he did not commit just to brag or puff himself up. Given his personality dynamics, however, it is possible that because of his strong need to be accepted and admired by others, and his tendency to at times think before he acts, he could unintentionally make self-incriminating statements which he might later regret." (PCR-V1/183). This followed the discussion of Derrick's narcissistic, manipulative personality and good decision-making skills. (PCR-V1/182). Dr. Simon's analysis was that Derrick did not lose control in a stressful situation, and would not have been coerced by police questioning. "[G]iven Mr. Derrick's emotional make-up and cognitive capabilities, it is also highly unlikely that Mr. Derrick would be easily manipulated by the

police or confused in being questioned by the police." Id.

Derrick's confession to Detective Vaughn of having robbed and stabbed the store owner was also heard by Detective Johnson and Sergeant Carpenter and corroborated by Derrick's previous confessions to his friend, David Lowery, of having robbed and stabbed the store owner, and by the circumstances of Lowery giving Derrick a ride on the night of June 24, 1987, about 8:30 p.m. to the area of the Moon Lake Store and a ride the morning of June 25, 1987, at 1:00 a.m. from Lowery's trailer to Derrick's mother's house. In addition, Derrick told Lowery on the ride to the Moon Lake Store area of the argument he'd just had with his wife, Cherie, and her mother over him having no job or money, Derrick returned shirtless and was hot and sweaty, Derrick gave Lowery a twenty dollar bill that he took from a rolled-up shirt or bag which he carried. Lowery's wife saw Derrick clip an eight-inch double-edged knife to his pants before her husband drove Derrick to the Moon Lake Store area. Lowery saw that Derrick had a knife with a black handle in his pants when Derrick got out of the car near the Moon Lake Store. Derrick had shown Lowery a six to eight-inch double-edged knife with a black handle among other knives Derrick had at his mother's home. (R1. V2/298-307, 354-355, 374-375; V3/413-420). Derrick failed to allege sufficient facts supporting his claim,

see Bryant, *supra*, or that the outcome would have been different had a "confessionologist" testified at the motion to suppress hearing.

Derrick also alleges trial counsel was ineffective in allegedly failing to investigate Detective Vaughn's interrogation practices "and to show that he commonly used recording devices despite his testimony to the contrary." (Initial Brief at 51). Detective Vaughn's trial testimony, when asked on cross-examination, was that he sometimes used tape recorders and sometimes not, and he could not say that he did most of the time. (R1. V3/389-390, 392-393). Whether he commonly used them could not have affected the outcome of either the motion to suppress the confession or the trial in light of Derrick's confession having occurred in the presence of Detective Carpenter and David Lowery, as well as of Detective Vaughn, and as overheard by Detective Johnson. Defense counsel brought to the jury's attention that Detective Vaughn could have used a recorder and that he was relying on his memory for his trial testimony. (R1. V3/389-390, 412-413, 417).

Derrick also asserts that no witnesses were called by the defense at the suppression hearing and that trial counsel did not tell him that he could testify at the suppression hearing. (Initial Brief at 52). This claim was insufficiently alleged

below because there was no allegation that Derrick even wanted to testify or what he or additional witnesses would have said that would have affected the results of the suppression hearing. (PCR-V1/14-15); See, Asay v. State, 769 So. 2d 974, 982 (Fla. 2000), LeCroy v. State, 727 So. 2d 236, 238 (Fla. 1998), Nelson v. State, 875 So. 2d 579, 583 (Fla. 2004); Bryant, supra.

At page 52 of his initial brief, Derrick alleges that Detective Vaughn's testimony in the suppression hearing was inconsistent with his investigative report, deposition, and later trial testimony. However, there is nothing materially different in the quoted passages from the suppression hearing of R1 1st Supp. Vol./1102-1103 and the deposition, PCR-V1/191-192. In both, Detective Vaughn relates that Derrick denied having anything to do with killing the victim until his friend David Lowery was brought in and told Derrick he could not "take" or "handle" this anymore, and Derrick then admitted the crime after telling the officers present that Lowery had nothing to do with killing the victim.

That the two testimonies varied as to whether it was Derrick's idea or Detective Vaughn's idea to bring Lowery into the room, or that Detective Vaughn supplied Derrick with the method of death as a stabbing, is irrelevant to the merits of the IAC/suppression hearing claim. Neither would have led to

suppression of the confession as showing neither that the confession was coerced nor untruthful. In both the deposition and suppression testimony it is clear that Derrick wanted to hear from Lowery. Derrick had already told Lowery that he'd stabbed the victim thirteen times before Detective Vaughn could have supplied Derrick with the method of death.

At page 54-55 of his initial brief, Derrick alleges there was no cross-examination of Detective Vaughn about his interrogation techniques and that testimony should have been presented, through cross-examination of Detective Vaughn and by calling Derrick's wife, Cherie as a witness, that Derrick was "under great emotional distress. . .as a result of police coercion that should have been taken into account in judging the voluntariness of his alleged confession." (Initial Brief at 54). Derrick adds that Detective Vaughn's deposition included that Derrick was crying when he confessed, but that there was no mention of that during the suppression hearing.

Derrick relies on the deposition of Detective Vaughn without further citation. Detective Vaughn's deposition, taken August 21, 1987, was filed in the trial court on December 31, 1987. In Detective Vaughn's deposition (PCR-V1/191-196), Detective Vaughn related that he read Miranda to the defendant and arrested him for the First Degree Murder of Rama Sharma, and

that Derrick initially denied the crime, but when David Lowery was brought in, Derrick said Lowery had nothing to do with it and related to Detective Vaughn, Detective Carpenter and Lowery that Derrick robbed Rama Sharma of $300.00 and stabbed him in the back and side to shut him up when Sharma recognized him and started screaming. When asked in the deposition about the Derrick's condition, Detective Vaughn answered that he was crying and had started when he began talking about having to stab the victim to shut him up. Derrick did not break down sobbing until his wife came in the room and he was apologizing and saying goodbye to her. Although Detective Vaughn was not asked about this during either his trial or suppression hearing, Detective Carpenter testified at trial that "[t]he defendant kind of broke down and started crying and said, 'I did it.'" (R1. V3/413). Neither the allegation in the postconviction motion or record reflects any legal reason why Derrick's confession to law enforcement would have been suppressed by the addition of the further information of Derrick crying while confessing to stabbing the victim to shut him up or that Derrick told his wife he would not be seeing her and their son again. Derrick's friend, Lowery, surmised during his deposition that Derrick broke down crying only after being told that he'd stabbed the victim 34 times instead of only the 13 that Derrick

recalled. (PCR-V2/217). Detective Vaughn denied during deposition of ever having told Derrick that he would never see his son if he did not cooperate. (PCR-V1/197).

At page 55 of his initial brief, Derrick alleges that defense counsel failed to ask questions during the suppression hearing about Detective Vaughn's giving Derrick his Miranda rights. However, the postconviction motion failed to allege under oath that Defendant was not given his Miranda rights; and as noted in Johnson's deposition, they were given.

The Motion to Suppress Statements filed May 6, 1988, alleged, rather, that "the Miranda warning given to the Defendant was fatally defective." (R1. V6/929-930). Detective Vaughn testified in his deposition that he Mirandized the defendant on their arrival at the Sheriff's Office, after Derrick's arrest at the Circle K convenience store. (PCR-V2/216-218). This is consistent with Detective Johnson's deposition that Derrick was read Miranda by Detective Vaughn when they arrived at the Sheriff's Office and that Derrick indicated he understood the Miranda rights. (PCR-V2/207-208). The ellipses from the defense-quoted portion of Detective Johnson's deposition include that the Miranda rights were read to Derrick at the Sheriff's Office and that Derrick said, "yes, he would talk to us." (PCR-V2/208).

At page 57-58 of his initial brief, Derrick asserts that trial counsel was "ineffective in failing to present evidence that Mr. Derrick did not waive Miranda," but he failed to allege below either that Derrick, in fact, did not waive Miranda or what evidence should or could have been presented. Derrick relies on the fact that Derrick did sign the Waiver of Search form but refused to sign the Waiver of Miranda Rights portion of that form. However, the failure to sign the Miranda waiver portion of the search waiver form is of little relevance to whether Derrick was actually administered Miranda rights before giving his confession. Furthermore, the State never relied on a *signed* waiver of Miranda rights. See also, Sliney v. State, 699 So. 2d 662, 668 (Fla. 1997) (finding that the failure to sign the Miranda form in full did not invalidate the waiver). This claim reflects no evidence that could or should have been provided for the suppression hearing that would have resulted in suppression of the defendant's confession.

At page 58, Derrick alleges that "counsel could have benefitted from Johnson's testimony" in his deposition that Derrick denied everything for about an hour before the door was opened and he heard Defendant's confession. (PCR-V2/209-210). Derrick failed to allege how this would have benefitted counsel at the suppression hearing. Detective Johnson explained that he

was not present for all of the time before Derrick was moved from his to Detective Carpenter's office, and never present in Detective Carpenter's office, but understood that Derrick denied everything for the first hour to hour and a half. Derrick had been in Detective Carpenter's office for only about 10 minutes with the door closed before Detectives Carpenter and Vaughn opened Detective Carpenter's door and Detective Johnson walked to the doorway where he heard Derrick's confession for about 10 to 15 minutes. None of the testimony in Detective Johnson's deposition would have "benefitted" defense counsel in the suppression hearing. It did not contradict Detective Vaughn's testimony at the suppression hearing that he gave Derrick the Miranda warnings at the Sheriff's Office, that Derrick denied involvement for 30 minutes to an hour until Lowery was brought in, and that Derrick then admitted killing the victim. (R1. Supp.V1/1100-1103.

At pages 59-60 of his initial brief, Derrick asserts that David Lowery's deposition was inconsistent with Detective Vaughn's suppression hearing testimony as placing the time of Derrick's confession two hours later and as describing Derrick's admissions of stabbing the victim 13 times in the side as inconsistent with the evidence of the victim's having been stabbed 34 times, mostly to the back. At page 60, Derrick

asserts counsel was ineffective for failing to call "these witnesses" (presumably David Lowery, Lowery's wife and Derrick's wife, as the only "witnesses" mentioned in the preceding paragraphs) "to challenge the inconsistencies in Vaughn's testimony." However, no "inconsistencies" in Vaughn's testimony were presented, but only the contradictory time of Derrick's confessing as it appears in Lowery's deposition.

Detective Vaughn's testimony at the suppression hearing was that Derrick was taken to the Sheriff's Office about 10:00 or 11:00 p.m. and he initially denied any involvement, until about 11:30 or 12:30 admitting that he had done it. Detective Vaughn felt that it was prior to 2:00 a.m., because he thought they were on the road with Derrick by that time in order for Derrick to show them the path he had taken to reach the victim. Detective Vaughn explained that the interview with Derrick did not cover the entire time-frame that he was there and had lasted only about 30 minutes to an hour. (R1. Supp.V1/1105-1106). Similarly, at trial, Lowery said he and Derrick had been at the Sheriff's Department "about 30 minutes to an hour" when he told Derrick he couldn't lie for him anymore and Derrick confessed. (R1. V2/309-311). In his deposition, Lowery said he thought the time was about 2:00 or 2:30 a.m. (PCR-V2/211; 214-220). From his trial testimony, it is not at all clear that Lowery would

have adhered to the 2:00 to 2:30 a.m. time frame if further questioned about it. More importantly, it would not have materially impeached Detective Vaughn nor cast any doubt on admissibility of Derrick's confession as freely and voluntarily given. Both in his deposition and trial testimony, Lowery related Derrick's confession to him, as Derrick had to Detective Vaughn, of robbing and stabbing the victim, which he believed to be 13 times. (PCR-V2/212-213; R1. V2/307). Lowery related how Derrick told the police he had stabbed the victim 13 times and then broke down and cried after the police corrected him to say it was 34 times. (R1. V2/311, 339).

Nothing was presented in postconviction to show that Derrick's confession would have been suppressed had defense counsel called other witnesses in addition to the State's witness of Detective Vaughn. The record refutes that calling David Lowery, Lowery's wife or Derrick's wife for the suppression hearing would have shown Derrick's confession to be involuntary or have affected the outcome. The suggestion at page 60 of appellant's initial brief, that only Detective Vaughn and David Lowery established Derrick's confession is demonstrably incorrect and overlooks that both Detective Carpenter and Detective Johnson also testified to Derrick's confession, and that it occurred at about 12:20 a.m. (R1.

V3/413-420). There is no credible basis for Derrick's self-serving conclusion that without Detective Vaughn's testimony, Derrick "would likely have been acquitted." (Initial Brief at 61).

At page 61 of his initial brief, Derrick asserts that trial counsel was rendered ineffective by alleged State "misconduct." Derrick's unsupported allegation is based on a citation to the trial record which discusses a missing page from a police report (R1. V3/403); and, therefore, any issue based on this on-the-record exchange was available for direct appeal. Moreover, discovery of police reports at the time of Derrick's trial in 1988 was not automatic pursuant to Rule 3.220, Fla.R.Crim.P., and only those portions of police reports[9] which were signed

[9] Because police reports were not routinely discovered pursuant to the discovery rules in 1988, defense counsel relied heavily on depositions of law enforcement officers whose names were provided in discovery. Of the twelve law enforcement names listed in Derrick's second amended motion (PCR-V1/31) as officers from whom reports allegedly were not received by the defense, ten were listed in the initial discovery of July 22, 1987: M. Calhoun, S. Fagan, R Fortney, H. Johnson, S. Lenon, A. Manfred [Manfried], A. Murdick, C. Page, and R. Moore (R1. V6/867-868), and R. Haynes on additional discovery of September 8, 1987. (R1. V6/873). Depositions of Officers Manfried and Page were filed October 16, 1987; Calhoun, Fortney and Moore were filed November 19, 1987; Fagan, Johnson and Lenon were filed December 31, 1987; and Haynes filed March 7, 1988. Detective Johnson's report was discovered via discovery of May 3, 1988. (R1. V6/928). Derrick did not allege that the defense was unaware of the information in the police reports of the undeposed officers, G.W. Alland, A. Murdick and M. Schreck. Derrick did not allege that any information in their reports was

witness statements or statements of the officers who were eyewitnesses "or had particularly crucial information pertinent to its [the crime] prosecution." See, Downing v. State, 536 So. 2d 189, 190 (Fla. 1988); Breedlove v. State, 413 So. 2d 1 (Fla. 1982). This Court previously found Florida's discovery rule to provide more to the defense than would be available in federal court and most other states. Perry v. State, 395 So. 2d 170 (Fla. 1981). Derrick demonstrated no misconduct of the State in connection with the discovery of portions of police reports in 1988. See Watson v. State, 651 So. 2d 1159, 1163 (Fla. 1994) (finding no violation of 1988 version of Rule 3.220 in State's withholding of oral statement of expert for penalty phase).

At page 62 of his initial brief, Derrick questions the inclusion in Detective Johnson's police report that he Mirandized the defendant's wife, but is silent about being present when Detective Vaughn Mirandized Derrick. Detective

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unknown to him or would, with a reasonable probability, have changed the outcome.

Detective Johnson's deposition was taken and filed on December 31, 1987. Defendant never alleged that his confession was false and never alleged how Detective Johnson's report could have been used to impeach any unspecified "key" State witness. Detective Johnson's two-page report dated July 1, 1987 contained nothing of impeachment value. See Asay v. State, 769 So. 2d 974, 981-982 (Fla. 2000) (addressing insufficiency of a Brady claim for failure to name the witness who supposedly testified falsely). Additionally, Detective McCallum's name was provided in discovery of September 8, 1987. (R1. V6/873). His deposition was taken, and filed on February 15, 1988.

Vaughn's report included his own conduct in Mirandizing the defendant. Derrick never contested that he'd received Miranda warnings, and did not swear in his postconviction motion that he was not given Miranda warnings.

Lastly, in summarily denying postconviction relief on this IAC/guilt phase claim, the trial court found that the "alleged inconsistencies may be considered with regard to the credibility of the witnesses, they would not lead to a suppression of the confession as not being made freely and voluntarily. As Defendant has failed to establish a basis for the suppression of his confession, he has failed to establish that counsel was ineffective in his efforts to obtain such suppression." (PCR-V4/570). The trial court's cogent written order denying this postconviction claim is supported by the foregoing competent, substantial evidence and should be affirmed.

The IAC-Guilt Phase Claim based on Randall James

At pages 62-64 of his initial brief, Derrick alleges that trial counsel was ineffective in the guilt phase for failing to challenge the State's intended use of Randall James, depose James earlier, and advise Derrick that James should not be able to testify while the public defender represented Derrick. In denying this postconviction claim, the trial court ruled:

C. Failure to address the State's use of Randall James and to advise Defendant

After counsel called Defendant to testify, the State asked to approach and announced that it would call Randall James to testify in rebuttal. James would have testified that Defendant had made incriminating statements to him. On counsel's advice, Defendant elected not to testify to prevent the State from calling James.

Defendant alleges that counsel failed to depose James to determine what his testimony would consist of prior to advising Defendant not to testify. Counsel were allowed a lengthy recess to determine how to proceed, were provided with the opportunity to depose James at the end of the recess, and chose not to do so based on a perceived ethical conflict. ***See Trial Transcript pp. 510-531.*** Therefore, their decision not to depose James was a tactical decision made after considering all the options. Furthermore, this issue has already been considered, albeit indirectly, on direct appeal. In considering Defendant's claim that the Court failed to conduct a proper Richardson n3 hearing, the Florida Supreme Court stated that Defendant's attorneys "made a tactical decision to rely upon the prosecutor's representations of what James's testimony would be and advised [Defendant] not to testify." ***See*** Derrick v. State, 581 So. 2d 31, 35 (Fla. 1991). Tactical decisions of counsel will not be second-guessed in a post conviction proceeding. ***See*** Buford v. State, 492 So. 2d 355 (Fla. 1986). This portion of the claim is denied accordingly.

n3 Richardson v. State, 246 So. 2d 771 (Fla. 1971).

Defendant also alleges that counsel failed to advise Defendant that James could not testify unless Defendant agreed to waive conflict because both James and Defendant were represented by the Public Defender's Office, and failed to correct the Court's stated misconception that removing the Public Defender from representing James would cure the problem. Defendant cites to Guzman v. State, 644 So. 2d 996 (Fla. 1994), for the proposition that James's waiver does not waive Defendant's right to conflict-free counsel. In that case, however, the public defender's office was currently representing both Guzman and the witness in question, and the issue was whether the

> motion should have been granted to allow the public defender to withdraw from representing Guzman. *See* id. In this case, as Defendant acknowledges in his Motion, the public defender was withdrawn from representing James and James waived any attorney-client privilege. Accordingly, any conflict was resolved.
>
> (PCR-V4/570-571) (e.s.)

The trial court's findings are supported by the following competent, substantial evidence and should be affirmed for the following reasons. At trial, defense counsel did challenge the State's eventual use of Randall James. Because Derrick did not testify during the guilt phase, the State did not call James as a rebuttal witness in the guilt phase. However, the State did call Randall James as a penalty phase witness. As reflected in this Court's decision affirming the defendant's conviction, Derrick v. State, 581 So. 2d 31, 33-36 (Fla. 1991), the denial of defense counsel's motion for mistrial concerning Randall James was affirmed, and this Court found no prejudice to Derrick by the trial court's ruling. On May 13, 1988, defense counsel filed a written motion to strike or continue based on Randall James. (R1. V6/956-958). On direct appeal, this Court specifically found that "Derrick's attorneys made a tactical decision to rely upon the prosecutor's representations of what James's testimony would be and advised Derrick not to testify." Derrick I, 581 So. 2d at 35. Derrick's underlying complaint is

procedurally barred as involving an issue raised on direct appeal and one improperly attempted to be converted to an issue of ineffective assistance. See State v. Riechmann, 777 So. 2d 342, 353, n.14 (Fla. 2000).

Furthermore, there is no legal merit to the suggestion that defense counsel would have been in any better position had they taken James' deposition during trial instead of after the guilt phase and prior to the penalty phase, as was done in this case. Anything defense counsel learned during the deposition which was taken prior to the penalty phase about James' credibility as a witness did not suffice to keep the trial court from allowing this evidence, despite defense argument that they needed more time to investigate James to test his credibility, honesty, and competency, based on what they had learned about him. (R1. V4/674-679, 683-684). The trial court's ruling allowing Randall James to testify in the penalty phase was raised on direct appeal and resulted in reversal of the penalty phase, but not for James' capacity to be a witness, nor for any failure of the opportunity to investigate, but for the relevance of the testimony as to the penalty phase. This Court specifically found that James' testimony also would have been admissible in the penalty phase "to rebut evidence of remorse or rehabilitation…" Derrick I, 581 So. 2d at 36. This Court did

not find that James' testimony was inadmissible for lack of capacity, competency or credibility. Credibility was a matter for the jury's determination, and the defense argued to the jury that James should not be believed. (R1. V5/812-814). Derrick did not show how the outcome would have been different merely by taking James' deposition sooner. The postconviction motion did not even allege that the State would have been unable to call James as a witness in the guilt phase had his deposition been taken sooner, but only that the defense would have learned the very same things about James that they learned in his deposition taken after the guilt phase of trial.

Lastly, as the trial court found, Derrick's reliance on Guzman v. State, 644 So. 2d 996 (Fla. 1994) is misplaced. In Guzman,[10] the public defender's office was currently representing

[10] As noted in Snelgrove v. State, 921 So. 2d 560, n.11 (Fla. 2005), Guzman v. State, 644 So. 2d 996 (Fla. 1994), which would have required the trial court to grant a motion to withdraw upon certification from the public defender that a conflict of interest existed, is no longer good law. Section 27.5303(1)(a), Florida Statutes (2004), now allows the trial court to

> inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest without requiring the disclosure of any confidential communications. The court shall deny the motion to withdraw if the court finds the grounds for withdrawal are insufficient or the asserted conflict is not prejudicial to the indigent client.

§ 27.5303(1)(a), Fla. Stat. (2004); see also Valle v. State, 763 So. 2d 1175, 1177 (Fla. 4th DCA 2000).

both Guzman and the key witness in question, and the issue was whether the motion should have been granted to allow the public defender to withdraw from representing Guzman. In this case, as Derrick acknowledged in his postconviction motion, the public defender was withdrawn from representing James and James waived any attorney-client privilege. Accordingly, any conflict was resolved at the time of trial and this underlying issue was available for review on direct appeal.

IAC-guilt phase: Failure to object to prosecutor's argument

In denying Derrick's IAC/guilt phase claim based on the failure to object to the prosecutor's argument, the trial court stated, in pertinent part:

> **D. Failure to object to improper argument**
>
> Defendant claims that counsel failed to object to the prosecutor's improper argument in closing that the medical examiner's opinion that the murder weapon was a single-edged knife was improper. There was evidence that Defendant was seen with both single and double-edged knives. *See Trial Transcript, pp. 300-301, 354, 357.* Furthermore, Defendant stated that he had used a double-edged knife in his confession. *See Trial Transcript, pp. 375, 380, 432, 434.* Therefore, the prosecutor was properly arguing facts in evidence. *See Trial Transcript, pp. 598-600.*
>
> Defendant also claims that the prosecutor elicited prejudicial and damaging opinion testimony from police crime scene technicians, who did not possess the requisite credentials and qualifications to provide expert testimony, regarding blood stain pattern analysis. The testimony of the crime scene technicians did not consist of an analysis of blood pattern evidence, but simply a recitation of their observations of the crime scene and where the blood was located. *See Trial Transcript, pp. 255-261, 272-*

274.

> Defendant further claims that counsel failed to have an independent analysis of the videotape or the actual blood evidence, that no effort was made to preserve or to type the blood to determine if it was the victim's or if belonged to some third party and would, therefore, exculpate Defendant, and that counsel failed to hire an expert to examine a bloody t-shirt found at the crime scene. The victim was stabbed over 30 times at the scene where the blood was located. There was no suggestion that the blood did not belong to the victim, and no evidence that anyone else bled in the vicinity. Therefore, there was no need for counsel to have the blood typed other than mere speculation. Defendant admitted to stabbing the victim and brushing the knife against his t-shirt. *See Trial Transcript, pp. 375.* Defendant has failed to allege what exculpatory information counsel may have obtained by having the bloody t-shirt examined or the videotape analyzed. Accordingly, Defendant has failed to show that counsel's alleged omissions were deficient.

(PCR-V4/571-572) (e.s.)

At page 67 of his initial brief, Derrick again alleges that trial counsel was ineffective in failing to object and request curative instruction to the State's closing argument that the medical examiner's testimony, of the murder weapon as a single-edged knife, was a mistake. Derrick claims there was no evidence to support this argument, and that the prosecutor was giving his own opinion. (Initial brief at 67). However, Derrick's own confession to police included that he had used a double-edged knife to stab the victim. (R1. V2/375, 380; V3/432, 434). A defendant's confession is substantive and

direct evidence. Lamarca v. State, 785 So. 2d 1209, 1215 (Fla. 2001). The Lowerys saw Derrick with both single and double-edged knives shortly before the murder. (R1. V2/300-301, 354). Thus, there was no legal basis for defense counsel to object to the prosecutor's comment in closing argument on matters in evidence.

At pages 67-68 of his initial brief, Derrick alleges prosecutor misconduct and failure to prevent expert opinions from crime scene technicians Magdelina Calhoun and Curtis Page "regarding blood stain spatter analysis." According to Derrick, the technicians allegedly lacked "the requisite credentials and qualifications to provide expert testimony regarding blood stain pattern analysis." (Initial Brief at 68). The prosecutor's misconduct is alleged to be presenting "this misleading and prejudicial testimony and commenting upon it." (Initial Brief at 68, citing R1. V2/258-265). The record pages cited by Derrick, R1. V2/258-265, have no testimony from either technician concerning any bloodstain pattern evidence and reflect only cross-examination questions irrelevant to bloodstain pattern evidence.

Technician Calhoun testified on direct examination that she observed "a trail of blood down that path" and that flags were placed in some of the photographs to mark it. (R1. V2/255).

She showed on a diagram where she had first observed the blood and where it was seen between there and the twenty feet to the body. (R1. V2/256). She testified to having observed another police officer do a test at the scene that determines whether the object is blood and that it was positive. (R1. V2/256-257). On redirect, after the defense elicited that the test did not distinguish between human and animal blood, she testified that she had observed no dead or wounded animal in the area, and the victim's body she observed had blood on it, and that the blood from 18-20 feet away was on the same path. (R1. V2/265-266).

Technician Page testified as to having taken a video of the scene that included the victim's body and showing blood nearby on the ground and leaves and on a rag. (R1. V2/268-273). This is not bloodstain pattern analysis evidence from either witness, but merely a recitation of what they, as trained crime scene technicians, observed. The video, observed by the jurors, was the best evidence of the appearance of the blood at the scene. The State elicited testimony from Detective Fairbanks that he had training in blood spatter evidence and did not conduct such an examination at this scene as impossible due to the location and the weather. (R1. V3/425, 427-428). Thus, Derrick failed to show that defense counsel had any legal basis to prevent this testimony or to show any misconduct of the prosecutor.

Derrick also claims that trial counsel put the court and State on notice at R1. V2/257-258 that "defense counsel lacked any knowledge of blood trail analysis and interpretation." (Initial Brief at 68). Derrick's cited record pages include no such discussion. Instead, they show only defense counsel objecting to hearsay.

At page 68 of his initial brief, Derrick asserts that "[t]he defense provided no independent analysis of the videotape or the actual blood evidence." Significantly, Derrick does not suggest how he allegedly was prejudiced by this, or that an independent analysis of either would have shown anything different than visually obvious. Henry Lee, the citizen who found the victim's body, testified to seeing the blood on the victim, on the path, and in the woods, and that he pointed out to Deputy St. Pierre what he saw, and he was present when the body was photographed. (R1. V2/228-231).

At page 68 of his initial brief, Derrick also claims that trial counsel provided ineffective assistance "during cross examination, investigation, and preparation" because "[n]o effort was made to preserve or to type the found blood to the victim or as exculpatory evidence as to Mr. Derrick." This allegation falls woefully short of even offering a speculation as to what defense counsel could have done differently or used

as exculpatory evidence. There was no suggestion, then or now, that the blood was not the victim's blood. Derrick admitted stabbing the victim 13 or 14 times on the path and wiping the victim's blood from Derrick's knife onto Derrick's shirt sleeve. (R1. V3/419; R1. V2/375). Derrick admitted he had stabbed and killed the victim. (R1. V2/306-307, 374; V3/417-418).

At page 69, Derrick cites R1. V2/266 for the defense allegation that "[c]ounsel also lacked notice that blood evidence would be used during the trial . . ." The page record cited by Derrick, R1. V2/266, does not support any lack-of-notice claim, but shows only defense counsel cross-examining technician Calhoun, as he had earlier at R1. V2/258-259, as to whether she was aware that blood could be typed and her response that it was not her job to do so, although she was aware that blood could be typed. Contrary to Derrick's allegation, defense counsel was on notice of blood evidence in this case. Defense counsel was aware from discovery and depositions regarding the blood evidence, which was addressed in the video and in the testimony of the witnesses who observed it at the scene. (Page Deposition, PCR-V2/233-234; Calhoun Deposition, PCR-V2/235-237, 239-240; Fagan Deposition, PCR-V2/241-245).

At page 69, Derrick cites to R1. V2/266 in making the conclusory allegation that defense counsel "failed to hire a

defense expert to examine a bloody t-shirt found at the crime scene (R 266)." (Initial Brief at 69). This record cite, R1. V2/266, is of defense counsel's cross-examination of technician Calhoun and eliciting from her that "the T-shirt, the material could have been tested to see . . .if it came from that body, couldn't it?" To which she responded that it was not her job. This claim remains insufficiently alleged to show any ineffective assistance of counsel.

The T-shirt material taken into evidence by Ms. Calhoun as State's ex.D, in evidence as ex.16, was consistent with the sleeve portion torn by Derrick from his T-shirt after brushing the knife on it and leaving a bloody imprint. (R1. V2/248-249, 251, 255, 375; R1. V6/987). Because of Derrick's admission to tearing his own T-shirt which contained the victim's blood, no ineffective assistance of counsel is shown by Derrick's conclusory criticism of failing to hire an expert to examine it.

Lastly, at page 69 of his initial brief, Derrick offers the conclusory statement that technician Page "narrated the videotape as it was shown to the jury at the 1991 *resentencing*." This is an insufficient allegation of ineffective assistance of counsel and does not logically relate to any claim of ineffective assistance in the pretrial and guilt phases. Nor does this complaint reflect any legal claim of any kind. See

e.g., State v. Lewis, 543 So. 2d 760, 767 (Fla. 2d DCA 1989), clarified by State v. Lewis, 1989 Fla. App. LEXIS 2285, (Fla. 2d DCA), review denied, Lewis v. State, 549 So.2d 1014 (Fla. 1989).

The IAC-Guilt Phase Cumulative Impact Claim

At pages 69-70 of his initial brief, Derrick asserts an IAC/guilt phase cumulative impact claim. Because defense counsel was not shown to have been ineffective in the pretrial and guilt phases, Derrick's cumulative claim of prejudicial error also fails. See, Suggs v. State, 923 So. 2d 419, 433-434 (Fla. 2005), citing Bryan v. State, 748 So. 2d 1003, 1008 (Fla. 1999) ("Where allegations of individual error are found without merit, a cumulative-error argument based thereon must also fall.") See also, Brown v. State, 846 So. 2d 1114, 1126 (Fla. 2003) (upholding lower court's denial of cumulative error claim when each of the individual claims of ineffective assistance of counsel had been denied).

Prosecutorial Misconduct Brady/Giglio Claim (Randall James)

Lastly, Derrick alleges that the prosecutor violated Brady v. Maryland, 373 U.S. 83 (1963) and/or Giglio v. United States, 405 U.S. 150 (1972) when the prosecutor announced that he'd recently learned of Randall James and that he would call Randall James as a rebuttal witness if the defendant testified. The trial court found that Derrick's underlying claim involved an

issue already raised on direct appeal and, therefore, it œould not be relitigated in postconviction.

As the trial court noted,

> **B. The State withheld evidence regarding Randall James**
>
> Defendant claims that the State withheld evidence regarding Randall James when it disclosed for the first time that Randall James would be called as a rebuttal witness if Defendant testified. This issue has already been raised on appeal to the Florida Supreme Court, which found no Richardson violation and no prejudice to Defendant. *See* Derrick, 581 So. 2d at 34-35. Therefore, this claim cannot be relitigated in a post conviction proceeding.

(PCR-V4/574).

Claims that were raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel. See, Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000). On direct appeal, this Court specifically addressed the State's discovery of Randall James as a rebuttal witness and stated:

> After the defense had presented two witnesses, they announced that they were calling Derrick to testify. At this point, the prosecutor announced that if Derrick testified that he had not committed the murder, he planned to call in rebuttal an inmate named Randall James. The prosecutor said that, after the first defense witness began to testify, he had received a note informing him that Detective Vaughn had just been told by James that Derrick told James that he had killed Sharma and that he would kill again. The prosecutor offered to make James available for a deposition.
>
> Derrick's attorneys, who were public defenders, requested a recess to determine what to do because

> their office also represented James [n1] and they were therefore concerned about the implications of cross-examining James. The prosecutor indicated that it was his understanding that James was willing to waive the attorney-client privilege. After the recess, the judge removed the public defender's office from representing James in an effort to alleviate the conflict. Continuing to express concern over the dual representation, [n2] Derrick's attorneys made a motion for mistrial which was denied. They then decided to rest without calling Derrick as a witness. The jury found Derrick guilty. Derrick's attorneys took James's deposition while the jury was deliberating.
>
> n1 Defense attorney Dehnart was representing both Derrick and James.
>
> n2 Derrick's counsel expressed concern over James's agreeing to waive his attorney-client privilege without the benefit of conferring with new counsel.

Derrick I, 581 So. 2d at 33-34 (e.s.)

Derrick's first claim on direct appeal was that the trial judge violated the principle of Richardson v. State, 246 So. 2d 771 (Fla. 1971), when the prosecutor announced that inmate Randall James might testify during the guilt phase. This Court squarely rejected Derrick's Richardson/discovery violation claim on appeal and explained:

> Under the facts of this particular case, we find no Richardson violation. First, we note that Derrick's attorneys specifically stated that they were not alleging a discovery violation; rather, they only claimed that because the state became aware of the witness so late that Derrick was prejudiced and a mistrial was the only adequate remedy. When the prosecutor disclosed that James might testify, he represented to the court that he had just become aware of James's potential testimony one hour earlier and that James had only spoken to Detective Vaughn that morning. He also stated that James was willing to

> waive his attorney-client privilege. Upon learning of James's potential testimony, the judge allowed the defense attorneys an approximately two-hour recess, with the understanding that at the end of the recess James would be available to be deposed. When court resumed after the recess, the judge removed the public defenders from representing James and the prosecutor again stated that James waived his attorney-client privilege. The public defenders again were given the opportunity to depose James but declined it. We believe these facts demonstrate that Derrick's attorneys were given ample opportunity to remedy any prejudice due to the late listing of James as a witness. When the motion for mistrial was denied, [n4] Derrick's attorneys made a tactical decision to rely upon the prosecutor's representations of what James's testimony would be and advised Derrick not to testify. We have never before held that a defendant was prejudiced by the late listing of a witness who never testifies at trial, and we decline to do so now. The fact that Derrick changed his defense strategy and decided not to testify did not provide grounds for mistrial. Any prejudice Derrick may have suffered by having first announced that he would testify was minimal.
>
> n4 Until James testified, there was no basis upon which it could be said that Derrick was unfairly prejudiced by the late notice of James as a potential witness.

Derrick I, 581 So. 2d at 34-35 (e.s.)

Derrick's alleged Brady/Giglio claim is based on information apparent on the face of the trial record and involves an issue which was addressed on direct appeal; therefore, it is now procedurally barred and not cognizable in postconviction under the guise of ineffective assistance of trial counsel. See, Miller v. State, 926 So. 2d 1243, 1256 (Fla. 2006). Furthermore, Derrick's conclusory "Giglio-by-

proxy" claim, (Initial Brief at 70), is unsupported by the identification of any false testimony allegedly presented at his trial. See, Rodriguez v. State, 919 So. 2d 1252, 1270 (Fla. 2005) (concluding that the summary denial of Rodriguez's Brady/Giglio claim was proper, citing Gorby v. State, 819 So. 2d 664, 676 (Fla. 2002) (rejecting Brady and Giglio claims as insufficiently pled or wholly conclusory)).

A true Brady violation requires that the defendant establish the following elements: "(1) that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the suppression resulted in prejudice." Johnson v. State, 921 So. 2d 490, 507 (Fla. 2005). To establish prejudice or materiality under Brady, a defendant must demonstrate "a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial." Smith v. State, 931 So. 2d 790 (Fla. 2006) (citing Strickler v. Greene, 527 U.S. 263, 289 (1999)).

In Giglio, 405 U.S. at 153-54, the United States Supreme Court extended Brady to claims where a key state witness gives false testimony that was material to the trial. To establish a Giglio claim, it must be shown that (1) the testimony given was

false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Suggs v. State, 923 So. 2d 419, 426 (Fla. 2005). To demonstrate prejudice under Giglio, it must be established that "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976).

In this case, Derrick's Brady/Giglio claim seeks to resurrect a procedurally-barred discovery violation complaint, raises only matters of record, and fails to identify any materially withheld or false evidence allegedly presented at trial. Claims that the State allegedly withheld information may be summarily denied where the record shows that the information was known at the time of trial. See, Downs v. State, 740 So. 2d 506, 508-512 (Fla. 1999). Here, the record confirms that the defense was aware of the State's recent discovery of a potential rebuttal witness, Randall James, at the time of trial. Derrick failed to make a *prima facie* showing that the State withheld any Brady material or that the state knowingly allowed the presentation of any false evidence at trial. Derrick confessed to the robbery and stabbing murder of the victim and nothing in Derrick's motion or appeal supports any Brady or Giglio claim. The trial court's order should be affirmed in all respects. See, Rodriguez v. State, 919 So. 2d 1252, 1270 (Fla. 2005).

CONCLUSION

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

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar No. 0327832
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular mail to the Honorable Stanley R. Mills, Circuit Judge, West Pasco Government Center, 7530 Little Road, New Port Richey, Florida 34654; Harry P. Brody, P.O. Box 16515, Tallahassee, Florida 32317; and to Eric Rosario, Assistant State Attorney, P.O. Box 5028, Clearwater, Florida 33578-5028, this 9th day of October, 2006.

_____
COUNSEL FOR APPELLEE

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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COUNSEL FOR APPELLEE