IN THE SUPREME COURT OF FLORIDA

CONNIE RAY ISRAEL,

Case No. SC05-1739

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On December 19, 2002, this Court affirmed Israel's conviction of first-degree murder and sentence of death for the December 27, 1991, murder of Esther Hagans. *Israel v. State*, 837 So. 2d 381 (Fla. 2002). Israel filed a *Florida Rule of Criminal Procedure* 3.851 motion on or about November 25, 2003, and filed an amended motion on or about February 9, 2004. (R156-217). The State filed its answer to the motion on or about April 8, 2004. (R219-237). A Case Management Conference (*Huff* hearing) was conducted on July 16, 2004, and an evidentiary hearing was conducted on January 20, 2005. (R597-778). The collateral proceeding trial court entered its order denying post-conviction relief on August 9, 2005. (R847-893). Notice of appeal was filed on August 30, 2005. (R905-907).

STATEMENT OF THE FACTS

THE FACTS OF THE CRIME

On direct appeal, this Court summarized the facts of this crime in the following way:

> Connie Ray Israel was charged with burglary of a dwelling with a battery, kidnaping, sexual battery with great force, and first-degree murder arising out of the December 27, 1991, murder of Esther Hagans in her home in Putnam County. At Israel's first trial, the jury was unable to reach a verdict and a mistrial was declared. On February 2, 1999, Israel's second trial began and the evidence revealed the following facts. Neighbors and friends indicated that Esther Hagans was known to carry large amounts of money on occasion. They indicated she rarely missed work unless

she was very ill. On the morning of December 27, 1991, when she did not report for work, a fellow employee went to Hagans' neighbor's house to ask about her. The neighbor noticed that Hagans' car was in the carport and called her house. When Hagans did not respond to the telephone call, the neighbor called the police.

The police found Hagans' front door ajar and discovered her body in the bedroom. Hagans was lying naked on the bed with her legs spread apart and her hands tied behind her back. The medical examiner identified trauma to the left side of Hagans' head, determined that her right eye was full of blood, and described cuts to the left eyebrow and temple, as well as abrasions on the right side of her face. The medical examiner also identified a tear on the right side of Hagans' head that resulted from blunt trauma, which caused major hemorrhage to the brain. The medical examiner stated there were external vaginal injuries consistent with sexual assault. As to the cause of death, the medical examiner explained that Hagans had a weak heart which gave out due to the stress and shock of the beating and sexual assault she had endured.

At the crime scene, the police found footprints on the front porch steps and in a drainage ditch that ran along the front of the house. A screwdriver was found outside a window. Based on these factors it was determined that the point of entry was a window leading into Hagans' bedroom. Sperm and semen stains were discovered on a pillowcase in the Hagans' bedroom. Semen was also found on a slip and a bedspread recovered from the bedroom. The semen on both the slip and the bedspread was consistent with the semen recovered from the pillowcase. Likewise, semen found on vaginal swabs taken from the victim was consistent with the semen from the other items in the bedroom. Human blood was also found on a towel at the scene.

The evidence showed that Israel registered at the Palatka Holiday Inn on December 28, 1991, and paid for two nights in cash. Maryann Pittman testified that she was a prostitute working in Palatka and knew Israel. [FN1] Pittman stated that in December of 1991 she went with Israel to the Holiday Inn where they used crack

cocaine. Pittman took a shower in the hotel room. She indicated that she saw a pair of pants and a shirt in the bathtub and that the water in the bathtub was red. Pittman also saw a black purse under the bed in the hotel room. She testified that Israel had money in his wallet when she looked through it. Israel told her he received the money from the Florida Lottery.

> [FN1]. Maryann Pittman was unavailable for Israel's second trial and thus her prior testimony was read into evidence.

Israel's friend, Melvin Shorter, testified that he saw Israel and Pittman at the Holiday Inn where they were using crack cocaine. Shorter testified that he sold crack cocaine to Israel three or four times that day. Israel paid cash for the crack cocaine with money he retrieved from a wallet under the bed in the hotel room. Israel told Shorter he had "hit the lottery."

Israel also registered at the William Penn Motel on December 30, 1991, and paid for one week in cash. Israel stayed only one night and was given a cash refund, for which he signed a receipt.

Israel and three other individuals were developed as suspects in Hagans' murder. Eventually, the Florida Department of Law Enforcement was solicited to help with the investigation and after more interviews a blood sample was taken from Israel. After DNA testing comparing Israel's blood sample to the semen stains found on the pillowcase and the slip, Israel was identified as the source of the semen stains in Hagans' bedroom and was arrested in 1993.

Arthur McComb, a prisoner who was a legal clerk and who was housed in the same cell with Israel, testified that Israel asked for help with his case. During their discussions, Israel stated he was charged with first-degree murder and that he tried to knock the victim's head off because she tried to "gum him." Additionally Israel indicated that he sexually assaulted the victim and had gone to the victim's house to steal church money and had taken $ 7,000 to $ 10,000.

Israel testified in his own defense, stating he was told by law enforcement officers that when the first

officers arrived on the scene and found Hagans dead, they made it appear Hagans was beaten to death in order to keep $ 5,000 discovered in a dresser drawer. Israel testified he had nothing to do with breaking into Hagans' house. Israel also insisted his semen was not found at the crime scene and that his blood was planted on objects found at the crime scene. He stated that he had only allowed McComb to read the accusations against him but had never confessed.

On March 1, 1999, the jury found Israel guilty as charged. After penalty proceedings, the jury returned a recommendation of death by a vote of eleven to one. Following the *Spencer* [FN2] hearing on May 14, 1999, the trial court sentenced Israel to death on May 28, 1999, finding four aggravating circumstances [FN3] and two statutory mitigating circumstances. [FN4]

> [FN2]. *Spencer v. State,* 615 So. 2d 688 (Fla. 1993).
>
> [FN3]. The aggravating circumstances were: (1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of use of violence to a person; (2) the crime was especially heinous, atrocious or cruel; (3) the crime was committed while the defendant was engaged in the commission of a sexual battery, burglary, and kidnaping; and (4) the capital felony was committed for pecuniary gain.
>
> [FN4]. The mitigating circumstances were: (1) the defendant was under the influence of an extreme mental or emotional disturbance at the time the crime occurred (some credence); and (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (some credence).

Israel v. State, 837 So. 2d 381, 383-385 (Fla. 2002).

THE EVIDENTIARY HEARING FACTS

Dr. Brad Fisher, a forensic psychologist,[1] evaluated Israel on December 17, 2003, and May 11, 2004. (R609, 615). Dr. Fisher reviewed seven volumes of records that included evaluations by other psychologists, interviews with family members, school and medical records, and court records from previous testimony. (R615). Although he tried to administer tests to Israel, "the nature of his personality made it nearly impossible to give tests, and I wasn't able to give any with any kind of completeness." (R616). However, based on his interview and review of records regarding Israel, Dr. Fisher concluded Israel "is paranoid personality, and that is a significant mental impairment, and that he in all probability suffered a head injury resulting in at least some level of neurological impairment at the age of five."[2] (R618). Israel's IQ of 81, which was previously tested by Dr. Krop (who testified at the penalty phase), indicated Israel is "not retarded ... sort of borderline

[1] In most of his capital cases, Dr. Fisher is retained by the defense. (R612).

[2] The "head injury" is based on self-reports and interviews with Israel's mother and sister conducted by trial counsel's investigator. No medical records support this assertion. (R618, 628, 638-39, 640).

territory." (R618, 619, 629). According to the DSM-IV-TR,[3] Israel falls in the range of borderline intellectual functioning. There is no such thing as "borderline mental retardation" in the DSM. (R629). Israel does not have organic brain damage. (R630). Israel has significant "diminished capacity" and serious mental illness that existed in the early 1990's. (R620). Dr. Fisher agreed with Dr. Krop's findings. (R620, 621). Israel's history of polysubstance abuse did not help his paranoia and exacerbated his neurological condition. Israel's paranoia is "replete ... in his history." (R622). Israel's paranoid personality results in "a diminished set of capabilities for doing things like appreciate right, wrong, making judgments in the same reasonable way that a normal person would make them." (R624). Since it was likely Israel was abusing drugs at the time of the crime, and that he had a neurological impairment, this amounted to "serious mental illness and diminished capacity that still exists today." Israel has been evaluated by at least five doctors who have given similar diagnoses. (R625). Israel has a history of violent criminal behavior that includes sexual batteries against elderly black females. (R630). Dr. Krop visited Israel many times and was able to get a good evaluation completed on Israel. (R630). Israel has a history of substance abuse with a personality

[3] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

disorder with antisocial paranoid and hypochondriacal features. (R631). Dr. Fisher did not know if Israel used drugs in the six hours preceding the murder of Ms. Hagans. (R634). Even though the medical records were lacking, Dr. Fisher still made qualified findings. (R636).

Clyde Wolfe, currently a magistrate for the Seventh Judicial Circuit, was Israel's court-appointed trial counsel.[4] (R643-44, 647). Approximately 50 to 75 percent of Wolfe's practice consisted of criminal cases. (R646). Prior to Israel's trial, he was court-appointed to handle several homicide cases, three of which were death penalty cases. (R647-48). After his appointment, Wolfe requested the assistance of an investigator, John O'Malley, an experienced ex-New York Police Department detective and investigator. (R652). In addition he requested the appointment of a mental health expert, Dr. Harry Krop. (R658). Wolfe did not have a second-chair assist him with this case. (R653). After his appointment, Wolfe began an investigation into the facts and conducted several depositions, including one of a DNA expert who was involved in Israel's case. (R654-55). He requested authorization to hire his own DNA expert (Dr. Houseworth) and purchased various publications that dealt with the forensic use of DNA. (R655). Israel denied involvement in the homicide. Consent, self-defense, and insanity were not the

[4] Mr. Wolfe was Israel's fourth court-appointed attorney. (R650).

defense's theories. (R657). He approached the case as a reasonable doubt case and tried to analyze the DNA through an expert and what the witnesses would say. (R657). Initially, Wolfe had contact with Israel's brother, Arthur. Arthur left town and could not be located. (R702). Investigator O'Malley spoke with Israel's mother and sister. (R658). O'Malley was a "good enough investigator" that Wolfe "didn't need to hold his hand and tell him step by step what to do and where to do it." (R659).

Mr. Wolfe hired Dr. Krop because "he is well-known in the criminal field as being a forensic psychologist, forensic mental health specialist. He has been appointed on a number of cases all over the state of Florida, especially in death penalty cases, and is very familiar with what the aggravating and mitigating circumstances, and what non-mitigating factors are. And I believe that he was a good mental health expert to utilize for this case." (R660).

Israel refused to cooperate with Dr. Krop, and Israel's family was not helpful, either. (R662, 663, 702). If Israel's family had testified, it would have been harmful to Israel. (R702, 704). Wolfe only remembered Dr. Krop testifying at the penalty phase -- he was the most favorable witness Israel had. (R663, 703). He wanted Dr. Krop to address the mitigating factors that applied to Israel. (R663). It was difficult for Dr.

Krop to present anything to the jury due to lack of cooperation from Israel. (R665). Dr. Krop's report contained conclusions that were "observational rather than empirical." (R666). The more essential it became for Israel to cooperate with Dr. Krop, the less he cooperated. (R668).

Mr. Wolfe could not specifically recall the reason why he did not mention statutory or non-statutory mitigators to the jury. He said, "All I can say is we only tried to argue what we had, what we were able to show, and argue that to the jury." (R675). He did not need to "re-testify ... to what someone else had already done." (R676). However, Wolfe could not give his specific thought processes on his closing argument from the penalty phase. (R678). During the direct appeal process, the assistant public defender called Wolfe and asked if he felt there were any "reversible error" issues that he could remember. The assistant public defender relayed that he had, in fact, read the record and said, "It was a clean trial." (R681). Wolfe did not argue any non-statutory mitigation dealing with drug abuse as Israel "denied all along ever being involved in the offense ..." (R684).

Mr. Wolfe did present evidence of Israel's drug abuse and brain damage through Dr. Krop's testimony at the penalty phase. (R698). Dr. Krop had information regarding Israel that was harmful and would have been perceived in a negative light by the

jury and judge. (R699). Dr. Krop told Mr. Wolfe that Israel suffered from antisocial personality disorder. (R701).

Dr. Jonathan Lipman, a neuropharmacologist, was retained by the defense to provide information on Israel's drug use as it related to his crimes. (R711, 718). Dr. Lipman reviewed the reports of Dr. Brad Fisher, Dr. Harry McClaren, Dr. Harry Krop, Dr. Robert David, Dr. Matt Amatra, and the interviews and correspondence with Israel and his family. (R718). He reviewed Israel's criminal history record, trial transcripts and Supreme Court opinions. In July 2004, Dr. Lipman interviewed Israel in prison. (R718-19). Israel has an extensive record of drug abuse, although, by self-report, "a very minor drug abuse history." (R720). Cocaine[5] use produces different effects when used "acutely" rather than chronically. (R733). When used acutely, "it cause euphoria, it causes excitation, a feeling of power, competence, alertness, it suppress appetite. It gives the user confidence and energy." (R733-34). It will also produce adverse effects which include "agitation, nervousness, suspiciousness, hypervigiliance, sensitivity to threat, and reactivity to threat also." (R735). When the effects of the drug wear off, the user is depressed. (R734). When cocaine is used chronically, "the person becomes tolerant to some of the pleasure producing effects, so that they have to take larger and larger doses. They

[5] Israel used crack cocaine on a regular basis. (R634).

become, however, sensitized to some of the adverse effects." (R735). A chronic cocaine user exhibits a condition that resembles paranoid schizophrenia. The person hallucinates, becomes quite fearful, and is sleep-deprived. (R736). Although Israel denied any adverse effects of cocaine use, he was a chronic user. (R737-38). Israel used cocaine from 1987 to the time of the offense in 1991. (R740). Chronic crack cocaine usage causes a paranoid psychotic condition, even in a person who does not have an underlying mental disorder. (R744). If Israel has brain damage, cocaine usage will make his condition worse. (R745, 746). Israel was not candid with Dr. Lipman regarding any symptoms he had. Dr. Lipman could not relate any symptoms Israel may have had that would correlate to the time of the offense. (R745-746).

Dr. Harry McClaren, a forensic psychologist, attempted to examine Israel in November 2004. (R748-49, 755). Dr. McClaren spoke with Israel for two hours. Israel was "hypersuspicious, paranoid in the sense of feeling like he had been framed, false evidence planted on him, preoccupied with bad treatment, altered transcripts, crooked police racism in the area, in the area. That's mostly what he wanted to talk about." However, "he did have a good command of his case and was able to communicate it to me in an understandable way." (R755). After a break, Israel refused to speak to Dr. McClaren any further. (R756). Dr.

McClaren reviewed the same documents as Dr. Fisher and Dr. Lipman. He reviewed Israel's DOC "classification file" regarding his past history, behavior, criminal history, medical records, and disciplinary records. (R756). He reviewed various pleadings by the State and the defense. During his incarceration, Israel evolved from a person that was not seen as "very disturbed early in his confinement, but as time progressed, began to be perceived around 1998 or so as possibly having a delusional disorder focusing on bodily functions." (R756-57). Israel complained many times about his health and has an abnormal EKG. He has hypertension, and was perceived as having a major depression with psychosis. He was administered an anti-depressant and antipsychotic medication. At one point, he was admitted for inpatient care in DOC, but was discharged with no major mental illness diagnosed. (R757). He claimed he was "hearing voices and seeing demons." This was not perceived as genuine. (R758). Tests in the early 1990's resulted in invalid test results, an "elevated lie scale." Tests administered by Dr. Krop indicated an IQ score of 80, which is the low average/upper borderline range of intellect. (R758). There was nothing in Israel's records that indicated he was delusional at the time of the murder in December 1991. (R759). According to the DSM-IV-TR, Israel currently meets the criteria for paranoid personality disorder and anti-social personality disorder. In addition, he

could have suffered from polysubstance dependence. (R759, 760). There is no indication that he was under the influence of cocaine at the time of the murder. (R760). Dr. McClaren could not rule out that Israel may have a delusional disorder and suffer from depression. Israel also exhibits Paraphilia, not otherwise specified, which is "a pattern of arousal, abhorrent heterosexual arousal" with a non-consenting partner. In addition, sexual sadism was exhibited due to "the blindfolding, gagging, tying up of some of the victims." (R761-62). Without Israel's cooperation, Dr. McClaren could not make the paraphilia diagnosis, but believed "there could be sexual motivation for these offenses." (R762). Israel had polysubstance dependence, and is not schizophrenic. (R762). He suffers from a personality disorder and a mental disorder. (R763). He suffers from a brain dysfunction which Dr. Krop testified to at the penalty phase. (R763). A review of documents indicated that Israel and his family members said he experienced seizures as a child that did not continue in adulthood. Dr. McClaren could not find any supporting documentation that Israel had ever been hit, run over, or thrown out of a car. (R764). Israel committed his first offense in 1977. Dr. McClaren first heard of crack cocaine being associated with a homicide in 1986. (R765). Dr. McClaren agreed that it may take several weeks for the effects of cocaine to wear off in some individuals. (R768).

SUMMARY OF THE ARGUMENT

The collateral proceeding trial court correctly found that Israel's ineffectiveness of counsel claim based on the "length" of the penalty phase closing argument satisfied neither of the two prongs of *Strickland v. Washington.* Counsel's strategy was not unreasonable, and, when coupled with the fact that Israel has presented no evidence to support the idea that "additional mitigation" could have been found, the ineffectiveness claim collapses because it has no factual basis.

The *Spencer* hearing ineffectiveness claim fails for the same reasons. Israel has identified no additional mitigation that could have been argued or found, and the collateral proceeding trial court's order makes it clear that even if could should have submitted a written sentencing memorandum, it would not have affected the sentence.

The penalty phase ineffective assistance of counsel claim fails because no mitigation evidence that could have been but was not presented at trial has been identified. The state of the record is that the mitigation evidence put forward at the post-conviction stage is the same as the evidence that was before the jury and the sentencing judge. There was no deficiency by counsel, nor was there any prejudice.

The "cumulative error" claim fails because there is no error to "cumulate" in the first place, as the collateral proceeding trial court found.

The *Ring v. Arizona* claim fails because it is not only procedurally barred, but also meritless under Florida law.

ARGUMENT

I. THE PENALTY PHASE CLOSING ARGUMENT CLAIM

On pages 11-23 of his brief, Israel argues that because trial counsel gave a "short" closing argument at the penalty phase of his capital trial, he received constitutionally inadequate representation. The collateral proceeding trial court denied relief on this claim. Under settled law, whether counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), is reviewed *de novo. Stephens v. State*, 748 So. 2d 1028 (Fla. 1999) (requiring *de novo* review of ineffectiveness of counsel claims); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the *Strickland* standard, *i.e.,* deficient performance and prejudice, present mixed questions of law and fact which are reviewed *de novo* on appeal. *Cade v. Haley*, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a district court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, *citing Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir.

1998); *Strickland*, 466 U.S. at 698 (observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact).

The Trial Court's Order.

In denying relief on this claim, the collateral proceeding trial court found as follows:

> The issue in Count XIII is whether the defendant was denied the effective assistance of counsel during the closing argument of the penalty phase. Mr. Israel complains of the length and intensity of the closing argument, *inter alia*. The record shows that Mr. Wolfe addressed Mr. Israel's impaired ability due to drug use and longstanding mental and psychological problems. R at page 3954 and EH at page 102. Mr. Wolfe, in essence, told the jury that a life sentence would guarantee Mr. Israel would die in jail -- they did not need to sentence him to death, "he will be incarcerated for the rest of his life". R at pages 3952-54. He sought a life sentence, advising the jury this human being's life is in the balance and in your hands. R at pages 3954-55. After review of the closing statement this Court cannot say that counsel was deficient in his performance, or that Mr. Israel was prejudiced.

(R855). When the totality of the circumstances are considered, it makes no sense to suggest that trial counsel could have convinced the jury to return a different sentencing recommendation -- the facts of this crime are horrible, and nothing counsel could have said could change those facts. Likewise, nothing counsel could have said could have changed Israel's lengthy, violent, criminal record, nor could anything counsel have said succeeded in creating additional mitigation in

this case. While perhaps counsel's closing argument was not overly animated, the fact that present counsel would have argued the case differently is not the standard that applies under *Strickland*. *Gaskin v. State*, 822 So. 2d 1243, 1251-52 (Fla. 2002); *See*, *Nixon v. State/McDonough*, 31 Fla. L. Weekly S245, 248 (Fla. Apr. 20, 2006); *Davis v. State/Crosby*, 915 So. 2d 95, 126 (Fla. 2005). Counsel's strategy of presenting a quick closing argument is certainly not unreasonable, given that the defense mental state expert had **just** testified that both mental mitigators applied to Israel. (TT3931-33). While counsel did not go far beyond arguing that both of the mental state mitigators were present, in light of the testimony (and the ultimate sentencing findings), there seems to be little to recommend over-arguing the mitigators (especially when the State had presented no counter-expert). To the extent that Israel claims that counsel tried to "distance" himself from his client, that argument seems to be based on a strained reading of the record. The comment that the mitigation evidence is not an "excuse," and that issues of excuse and justification belong in the area of self-defense cases is legally accurate, and was an appropriate argument. To the extent that Israel claims that he is entitled to relief because counsel did not remember (in January of 2005) why he had done certain things during the course of the trial in February of 1999, Israel has the burden of proof, *Walton v.*

State, 847 So. 2d 438 (Fla. 2003), and must overcome the presumption that counsel's actions were taken in the exercise of reasonable professional judgment.[6] *Yarborough v. Gentry*, 540 U.S. 1 (2003) (presumption of competence is controlling even when the reviewing court has "no way of knowing whether a seemingly unusual or misguided action by counsel has a sound strategic motive."); *Massaro v. United States*, 538 U.S. 500, 505 (2003); *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) ("[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect."). He has not carried that burden, and has not demonstrated that counsel's performance was deficient, much less that he was prejudiced in any way.[7]

Taken to its logical conclusion, Israel's argument is that trial counsel must always present a lengthy closing argument that discusses in detail every possible aspect of the case. That is not the law because it fails to recognize the varied, and

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[6] Even when "the evidence does not clearly explain what happened, or more accurately why something failed to happen, the party with the burden loses." *Romine v. Head*, 253 F.3d 1349, 1357-58 (11th Cir. 2001); *accord, Garlotte v. Fordice*, 515 U.S. 39, 46-7 (1995); *Putman v. Head*, 268 F.3d 1223, 1246 (11th Cir. 2001).

[7] Israel has presented no evidence that additional mitigation should have been found, and, from the trial court's order, it is clear that the "other" mitigation was considered and rejected. (R855) ("This Court chose to assign no weight to non-statutory mitigating circumstances.") That finding, coupled with the lack of any "new" mitigation from the evidentiary hearing, is dispositive.

often indefinable, dynamics that occur during trial to which counsel must adjust and attempt to use to the client's advantage. In the context of appellate briefs, Judge Edmonson commented:

> That the custom in death penalty cases is for lawyers to file long briefs with lots of issues means little to me. This kind of "custom" does not define the standard of objective reasonableness. *See Gleason v. Title Guar. Co.*, 300 F.2d 813 (5th Cir. 1962). While compliance with custom may generally shield a lawyer from a valid claim of ineffectiveness, noncompliance should not necessarily mean he is ineffective. Not all customs are good ones, and customs can obstruct the creation of better practices.

Heath v. Jones, 941 F.2d 1126, 1141 (11th Cir. 1991). That observation is equally applicable to closing argument -- when there is no claim (as is the case here) that counsel failed to present **evidence** in mitigation, the claim pressed in Israel's brief becomes nothing more than present counsel's second-guessing of and disagreement with the tactical and strategic decisions made at the time of trial. That is squarely contrary to *Strickland* and the cases following it, and this Court should not change the law as Israel would have the Court do. Israel has shown neither prong of the *Strickland* inquiry, and the trial court should be affirmed in all respects.

II. THE *SPENCER* HEARING INEFFECTIVENESS CLAIM

On pages 23-30 of his brief, Israel argues that trial counsel was ineffective because he did not file a written

memorandum of law prior to the *Spencer* hearing. The collateral proceeding trial court denied relief on this claim. Under settled law, whether counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), is reviewed *de novo. Stephens v. State*, 748 So. 2d 1028 (Fla. 1999) (requiring *de novo* review of ineffectiveness of counsel claims); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the *Strickland* standard, *i.e.,* deficient performance and prejudice, present mixed questions of law and fact which are reviewed *de novo* on appeal. *Cade v. Haley*, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a district court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, *citing Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998); *Strickland*, 466 U.S. at 698 (observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact).[8]

The Trial Court's Order.

In denying relief on this claim, the trial court stated:

[8] On page 29 of his brief, Israel argues that counsel could have argued that Israel's history of drug abuse "coupled with" his paranoia could have resulted in an unintentional killing. Creative as this argument may be, it finds no support in the record and is sheer fabrication -- no evidence supports this assertion.

> Israel argues that he was denied effective assistance of counsel when his trial counsel failed to provide a *Spencer* memorandum as requested by the judge. This court did request such a memorandum from trial counsel that was not provided. While a memorandum is not required under *Spencer* it can be helpful to the Court and this Court's request was not complied with. While this may be considered a deficiency in trial counsel's performance this Court does not find it prejudicial. The Court bears the ultimate responsibility to independently identify and weigh the mitigating and aggravating factors in determining whether to impose the death penalty. As noted above this Court did so finding 4 aggravating factors and 2 mitigating factors in making the determination.
>
> This Court heard and considered testimony presented at various stages of the proceedings going to non-statutory mitigators, including Mr. Israel's drug abuse, brain damage, low intellectual functioning [9] as well as Mr. Israel's character, background, record and other circumstances surrounding the offense. This Court choose to assign no weight to non-statutory mitigating circumstances stating, "[Mr. Israel's] record is bad, his character worse, and the offense itself is horrible". Sentencing Order at page 4. Because there was no prejudice to Mr. Israel his burden as set forth in *Strickland* has not been met.

(R854-55).

There is on Basis for Relief.

The best argument Israel has is that **if** counsel had submitted a written memorandum, it is **possible** that the trial court might have assigned greater weight to the non-statutory mitigation. However, based upon the trial court's order denying post-

[9] The testimony was that Israel's IQ is in the **low average range.** *Israel v. State*, 837 So. 2d at 391. In light of Israel's unwillingness to cooperate with the mental state assessment, it is possible that his IQ score is higher than that revealed by testing. In any event, he is not mentally retarded, and has never claimed to be.

conviction relief, there is no possibility that that would have happened. That order, as quoted above, is self-explanatory, and leaves no doubt about the reasons for rejecting the non-statutory mitigation. Israel has not established either prong of *Strickland.*

Much as he did with the preceding claim, Israel is arguing for the establishment of a *de facto* checklist of required actions by trial counsel which must be followed precisely in order to avoid being found ineffective. That notion is squarely contrary to *Strickland,* which affords great deference to the strategic and tactical decisions of counsel to the point of holding that such decisions are virtually unchallengeable. *Strickland*, *supra*. While counsel certainly **could** have filed a memorandum, the fact that he did not does not mean that his performance was deficient. And, in light of the trial court's clear findings, Israel cannot demonstrate prejudice (as he must do under *Strickland*). The true facts are that the mitigation at issue was considered and rejected by the trial court, and a sentencing memorandum would not have gotten Israel anything in addition -- Israel has not recognized that fact, nor has he argued any reason that establishes a basis for relief. The collateral proceeding trial court should be affirmed.

III. THE PENALTY PHASE INEFFECTIVENESS CLAIM

On pages 30-31 of his brief, Israel argues that trial counsel was ineffective at the penalty phase of his capital trial because he only presented the testimony of Dr. Krop (who is a well-known psychologist). The collateral proceeding trial court denied relief on this claim. Under settled law, whether counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), is reviewed *de novo. Stephens v. State*, 748 So. 2d 1028 (Fla. 1999) (requiring *de novo* review of ineffectiveness of counsel claims); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the *Strickland* standard, *i.e.,* deficient performance and prejudice, present mixed questions of law and fact which are reviewed *de novo* on appeal. *Cade v. Haley*, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a district court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, *citing Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998); *Strickland*, 466 U.S. at 698 (observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact).

The Trial Court's Order.

The collateral proceeding trial court discussed the evidentiary hearing testimony at length, pointing out that **both** of the statutory mental mitigators were found at the time of

sentencing. (R853). ("Trial counsel's success in presenting these mitigating factors discredits Mr. Israel's argument that trial counsel was ineffective in failing to present mitigation evidence."). The Court went on to hold:

> Counsel made a tactical decision not to focus on Israel's drug abuse history as a nonstatutory mitigator believing that juries are not sympathetic to individuals who commit violent crimes to get money for drugs. EH at page 109. As noted above counsel made a strategic decision not to present the testimony of family members.[10]
>
> In support of this claim Israel refers to and relies on the evidentiary hearing testimony and opinions presented by Dr. Brad Fisher and Dr. Jonathan Lipman. Mr. Lipman testified that Israel was "not very forthcoming" so the best he could do would be to offer generalized testimony concerning the effects of cocaine. EH at page 151. Dr. Fisher testified that he agreed with the diagnosis reached by Dr. Krop, who testified at length at Israel's trial as well as at sentencing. EH at page 25. Mr. Wolfe's performance was neither deficient nor resulted in prejudice to Mr. Israel, but in fact was effective in establishing mitigating factors.

(R853).

There is no Basis for Relief.

Given that Dr. Fisher (the post-conviction expert) testified that he agreed with Dr. Krop (the trial expert), there is no legal basis for Israel's claim, and, since the post-

[10] No family members testified at the evidentiary hearing -- there has been a complete failure of proof as to this sub-claim (to the extent that it is contained in Israel's brief.)

conviction evidence matches the trial evidence, he has not demonstrated either prong of *Strickland*.[11]

To the extent that further discussion of this claim is necessary, Dr. McClaren, who evaluated Israel at the request of the State, testified that nothing indicated that Israel was delusional at the time of the murder in December 1991. (R759). Israel currently meets the criteria for paranoid personality disorder and anti-social personality disorder. In addition, while he might have suffered from polysubstance dependence, there is no indication that he was under the influence of cocaine at the time of the murder. (R759, 760). Israel also exhibits Paraphilia, not otherwise specified, in addition to sexual sadism which was exhibited due to "the blindfolding, gagging, tying up of some of the victims." (R761-62). Without Israel's cooperation, Dr. McClaren could not make the paraphilia diagnosis but believed "there could be sexual motivation for these offenses." (R762). Israel had polysubstance dependence. Israel is not schizophrenic. (R762). He suffers from a personality disorder and a mental disorder in addition to a brain dysfunction which Dr. Krop testified about at the penalty phase. (R763). In view of the convergence of the penalty phase

[11] In other words, the post-conviction evidence is the same evidence that is claimed to have been "ineffective" when presented at trial. This claim is unworthy of further discussion.

and post-conviction mental state evidence, Israel has wholly failed to identify any deficiency of any sort. There is no basis for relief.

IV. THE "CUMULATIVE ERROR" CLAIM

On pages 31-34 of his brief, Israel sets out a legally insufficient claim of "cumulative error." Regarding the review of a claim of "cumulative error," this Court has said:

> We find that Porter's claim four and subclaim (f) of claim two, the cumulative error claims, are insufficiently pled under *Strickland* because Porter points to no specific claim of error; instead, he only generally asserts there were errors revealed in the direct appeal, the rule 3.850 motion, the appeal of the denial of the rule 3.850 motion, and this habeas petition. *See Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000) ("The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based."). Regardless of the insufficiency of the pleading, as all of his claims are either meritless or procedurally barred, there is no cumulative effect to consider. *See Mann*, 794 So. 2d at 602. Accordingly, we deny the petition for writ of habeas corpus.

Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003).

The Trial Court's Order.

In denying relief on this claim, the collateral proceeding trial court found as follows:

> Mr. Israel alleges he did not receive the fundamentally fair trial he is entitled to under the United States Constitution as a result of the cumulative effect of all the errors previously raised and addressed in this motion for Post-Conviction Relief. Having found the prior fifteen counts to be without merit this Court cannot then find Mr. Israel

> has received anything less than a fundamentally fair trial.

(R856). That decision should be affirmed in all respects.

There is no Basis for Relief.

The cumulative error claim is insufficiently briefed under *Porter*, and relief should be denied on that basis alone. To the extent that individual claims of error can be identified, it appears that Israel is attempting to aggregate three discrete claims -- the closing argument claim, the sentencing memorandum claim, and a *Ring v. Arizona*, 536 U.S. 584 (2002) claim. The first two claims are not a basis for relief for the reasons discussed herein in argument with respect to those individual claims -- there is no error in the first place, and therefore nothing to "cumulate."

With respect to the *Ring* claim, the collateral proceeding trial court held that Israel's numerous prior convictions for felonies involving the use or threat of violence took his case outside of the scope of *Ring.* (R856). That result is in accord with settled Florida law, and should not be disturbed.

Alternatively, it is debatable whether Israel's brief on direct appeal even raised a *Ring* claim. That claim was a "split jury vote" claim, which did not cite *Apprendi v. New Jersey*, 530 U.S. 466 (2000)[12] -- Israel's argument was that a vote of 11-1

[12] *Ring* had not been decided when Israel filed his brief.

for death resulted in an "unconstitutional" death sentence. That is not the same claim as a *Ring v. Arizona* claim, which has never been fairly presented and is unpreserved.[13] There is no error to "cumulate," and no basis for relief.

V. THE *RING* CLAIM

On pages 35-40 of his brief, Israel argues that he is entitled to relief based upon *Ring v. Arizona* and *Apprendi v. New Jersey*. The brief does not address the trial court's order denying relief.

The Trial Court's Order.

In denying relief on this claim, the trial court held that, under settled Florida law, Israel was not entitled to relief because he had previously been convicted of several violent felonies, which established the "prior violent felony" aggravator beyond a reasonable doubt. (R856). The collateral proceeding trial court did not address the procedural bar defense raised by the State. (R233-35;816-17).

There is no Basis for Relief.

The "split jury vote" claim that was litigated on direct appeal is not the same as the *Ring* claim contained in the post-

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[13] Even the "split jury vote" claim itself is not preserved. Israel made no objection at trial that a unanimous sentencing recommendation was required. The *Ring* claim is barred by a double layer of procedural bars, even assuming *arguendo* that this claim was ever a *Ring* claim at all.

conviction motion. Because that is so, the *Ring* claim is procedurally barred -- relief should have been denied on that basis in addition to the lack of merit relied on by the Circuit Court. Florida law is settled that an *Apprendi v. New Jersey* claim is subject to the procedural bar rules. *Barnes v. State*, 794 So. 2d 590 (Fla. 2001); *McGregor v. State*, 789 So. 2d 976, 977 (Fla. 2001). There is no reason that a *Ring* claim should be treated differently, since, after all, *Ring* is based on *Apprendi*. The claim raised in the post-conviction proceedings is simply not the same as the "split jury vote" claim raised on direct appeal. That is a procedural bar.

Alternatively, under settled Florida law, Israel's *Ring* claim is without merit:

> England makes two arguments related to *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). First, he argues that his individual death sentence is unconstitutional. Second, he argues that Florida's statutory scheme itself violates *Ring*. Both arguments are without merit.
>
> England gives three reasons why his individual death sentence is unconstitutional: (1) the jury did not unanimously find him death-eligible; (2) the aggravating circumstances were not charged in the indictment; and (3) the aggravating circumstances were not found beyond a reasonable doubt by the jury. We address each reason sequentially. First, "[t]his Court has repeatedly held that it is not unconstitutional for a jury to recommend death on a simple majority vote." *Parker v. State*, 904 So. 2d 370, 383 (Fla. 2005); *see also Whitfield v. State*, 706 So. 2d 1 (Fla. 1997); *Thompson v. State*, 648 So. 2d 692, 698 (Fla. 1994); *Brown v.* State, 565 So. 2d 304, 308 (Fla. 1990); *Alvord v. State*, 322 So. 2d 533, 536 (Fla.

> 1975). Second, "we have rejected claims that *Ring* requires the aggravating circumstances to be alleged in the indictment." *Ferrell v. State*, 918 So. 2d 163, 180 (Fla. 2005). A defendant is not entitled to notice of every aggravator in the indictment because the aggravators are clearly listed in the statutes. *Lynch v. State*, 841 So. 2d 362, 378 (Fla. 2003) (*citing Vining v. State,* 637 So. 2d 921, 928 (Fla. 1994)). Third, one of the aggravators in this case is the prior violent felony aggravator, which both the United States Supreme Court and this Court have recognized as an exception to the requirement that the jury must make all the findings necessary to enhance a defendant's sentence. *Ring,* 536 U.S. at 597 n.4; *see also Patton v. State,* 878 So. 2d 368, 377 (Fla. 2004) ("The existence of this prior violent felony aggravator satisfies the mandates of the United States and Florida constitutions . . . ."); *Kormondy v. State,* 845 So. 2d 41, 54 n.3 (Fla. 2003) (finding the prior violent felony aggravator through contemporaneous charges of robbery, sexual assault, and battery included in the indictment and affirmed by the jury satisfies Ring's requirements).
>
> England next argues that Florida's statutory scheme itself violates *Ring*. This Court has previously addressed and rejected this claim. *See, e.g., Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002).

England v. State, 31 Fla. L. Weekly S351, 356 (Fla. May 25, 2006). The *England* decision is dispositive of the claims contained in Israel's brief.[14]

[14] To the extent that further discussion is necessary, the prior violent felony aggravator applies to this case -- because that is so, *Ring* is inapplicable, anyway. *See, e.g., Suggs v. State*, 30 Fla. L. Weekly S812, S819 (Fla., Nov.17, 2005); *Duest v. State*, 855 So. 2d 33, 48049 (Fla. 2003) (rejecting claim that jury is required to find all aggravators supporting death sentence). Finally, to the extent that Israel argues that "special verdict forms" are required, this Court has rejected that claim, as well. *State v. Steele*, 30 Fla. L. Weekly S677,

CONCLUSION

Based on the foregoing, the denial of post-conviction relief should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Robert T. Strain,** Assistant CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619 on this ____ day of June, 2006.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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S678-80 (Fla., Oct 12, 2005); *Gamble v. State*, 877 So. 2d 7006, 719 (Fla. 2004).