IN THE SUPREME COURT OF FLORIDA

RONALD LEE WILLIAMS,

Appellant,

v. CASE NO. SC05-226

STATE OF FLORIDA

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

STATEMENT OF THE CASE

Williams was convicted by an Escambia County jury on four counts of first degree murder, one count of attempted first degree murder, and six counts of armed kidnapping (8TR 1275-78).[1] The jury recommended life sentences on the first degree murder counts (6TR 1042, TR8 1280). The trial court overrode the jury's life recommendation and sentenced Williams to death on each of the four counts of first degree murder (8TR 1313), finding six aggravating factors (prior violent/capital felony conviction; murder committed during felonies of robbery, sexual battery, burglary and kidnapping; avoid arrest; pecuniary gain; HAC; and CCP) and one non-statutory mitigating factor (Williams was loving family member to his mother and son). In separate trials, two of Williams' codefendants, Robinson and Coleman, were also convicted and sentenced to death.

This Court affirmed the convictions and death sentences given to each of the three defendants. Williams v. State, 622 So.2d 456 (Fla. 1993), *cert. denied* 510 U.S.

[1] The State will refer to the original record on direct appeal as "TR" accompanied by the volume number, and to the instant postconviction record on appeal as "R" accompanied by the volume number.

1000 (1993); Robinson v. State, 610 So.2d 1288 (Fla. 1992); Coleman v. State, 610 So.2d 1283 (Fla. 1992).[2]

On or about March 21, 1997, Williams filed a "shell" motion for postconviction relief (3R 289-455). An amended motion for postconviction relief was filed on or about July 30, 1999 (4R 562-647). The trial court conducted a Huff[3] hearing on March 20, 2000 (6R 909-26). On March 23, 2000, the court authorized an evidentiary hearing on four claims of ineffective assistance of trial counsel: (1) counsel erroneously advised Williams regarding his decision whether to testify; (2) counsel improperly conceded that Williams was guilty of drug offense and that he had been properly convicted of such offense; (3) counsel failed to submit mental health mitigation either to the jury or to the court; and (4) counsel failed to obtain an adequate mental health evaluation (6R 927-29). The remaining claims, the court ruled, were "procedurally barred, legally insufficient, or refuted by the record," for reasons that

[2] This Court struck two of the aggravators found in Williams' case (HAC and avoid arrest), but affirmed Williams' death sentence, finding that, "[e]ven with the elimination of two aggravating factors, 'the evidence in this case provides no basis upon which the jury could have recommended life imprisonment in order to prevent disparity in sentencing.'" 622 So.2d at 464 (quoting Thompson v. State, 553 So.2d 153, 158 (Fla. 1989).

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

would be fully addressed in its final order on Williams' motion (6R 928).

An evidentiary hearing was conducted on April 17, 2001 (R 959-1107). Following the evidentiary hearing and submission of written closing argument, Williams sought to amend or supplement his motion for postconviction relief to include citation to and argument based upon Ring v. Arizona, 536 U.S. 584 (2002), and Blakely v. Washington, 542 U.S. 296 (2004) (R 1217-66, 1293-96). The trial court denied relief on all grounds by order dated January 4, 2005 (R 1312-1500).

STATEMENT OF THE FACTS

A. *The trial*

In its opinion on direct appeal from Williams' conviction and sentence, this Court summarized the evidence presented at trial in some detail. Williams, supra. Williams has quoted that opinion in his statement of facts, and the State will not repeat that material here. Stated very briefly, the trial evidence showed that Williams ran a drug trafficking ring; that the victims had stolen money and drugs from him; and that, although Williams was not present when the murders occurred, he was the boss and the murders were committed by his underlings pursuant to his direct order.

B. *The postconviction evidentiary hearing.*

Three witnesses testified at the evidentiary hearing: trial counsel Randall Etheridge, Williams himself, and psychologist Dr. James Larson. Additionally, the court took "judicial notice of the trial proceedings of Williams' co-defendants and, in particular, the prior testimony of Robinson and Coleman at their trials" (9R 1313).

(1) Randall Etheridge

Etheridge testified that, at the time of the trial, he had represented 20 to 25 capital defendants, several of whom had gone to trial (7R 962-63). While he often works with co-counsel in capital cases, he was sole counsel in Williams' case (7R 963). He was assisted in this case, however, by two paralegals and a legal assistant (7R 963). He did not seek the appointment of co-counsel in this case (7R 964).

Etheridge was aware that, before Williams' trial, three of his co-defendants had been tried and convicted, and that, although each of the three co-defendants had received jury life recommendations, Judge Geeker, who would sentence Williams if convicted, had overridden those life

recommendations and imposed death sentences (7R 964-65).[4] Etheridge did not believe this fact or any other would have supported a motion to disqualify Judge Geeker, and he did not file such a motion (7R 965-69).

In Etheridge's view, because Williams was not present at the time of the murders, he "was in a different light . . . than the actual murderers" (7R 970). The defense theory of the case was that the state's witnesses were not credible because they were all getting benefits for their testimony and were "doing anything they could to save themselves at Williams' expense" (7R 1005), when in fact Williams was in Miami "making so much money, there was absolutely no way he would ever jeopardize that enterprise by coming up here and having four people killed for $8,000" (7R 972); at most, all Williams did was tell Frazier to get the money and leave (7R 1011). At the time of trial, Etheridge felt that Williams would not be convicted of first degree murder, but if he were, Etheridge felt "very confident" the jury would not recommend death (7R 971, 1033). In light of the circumstances as Etheridge knew them, he thought that Judge Geeker would not override a life recommendation in this case, even though he had in the

[4] Darryl Frazier's death sentence was subsequently reduced to life in exchange for his testimony in Williams' case (7R 967).

codefendants' cases (7R 971-72). At the least, Etheridge did not think Judge Geeker would be any more likely to override a life recommendation than any other judge in the circuit, and if "we didn't have Judge Geeker, it could have been from the frying pan to the fryer really" (7R 1037). So, while Etheridge had some concern about the codefendant overrides, he did not move to disqualify Judge Geeker (7R 1038).

Etheridge is aware that Florida now has an independent-act standard jury instruction (7R 1039). Despite the absence of a standard instruction at the time of trial, he could have asked for an independent-act jury instruction; "whether you got it or not [at that time] is another story" (7R 1039). He did not request such an instruction in this case (7R 972-73).

Etheridge had Williams evaluated by Dr. Larson, but decided not to present Dr. Larson's testimony or his report at the penalty phase, either to the jury or to the court (7R 973-75). Etheridge testified that, in his opinion, the IQ score of 75 that Williams obtained in Dr. Larson's testing was not accurate, based upon his own close personal interaction with Williams (7R 980-81). Williams, he testified, was "quite bright" and "very likable" (7R 1024). In Etheridge's judgment, as well as that of Dr. Larson

himself, nothing else in Dr. Larson's testimony would have been helpful, and Williams had "plenty of mitigation" without Dr. Larson (7R 977, 1026). Etheridge had "people lined up ready to testify on [Williams'] behalf; neighbors, friends, relatives"; so many, in fact, that Etheridge "had to turn a lot of them away" (7R 1030). These witnesses, Etheridge thought, presented a person who did not deserve to die (7R 1034). Dr. Larson's report and testimony would have just shown "there was really nothing wrong" with Williams; he was "normal" (7R 1035). This may not have hurt, but it would not have helped, either (7R 1035).

Etheridge originally planned to present the testimony of codefendants Coleman and Robinson, who would have exonerated Williams (7R 981-82). However, after Gregory Manning (AKA Biscayne Bob) testified for the defense and fared "[m]iserably" on cross-examination by the State, Williams decided not to testify himself or to call Coleman or Robinson (7R 982-83, 986, 1019-21). Etheridge placed a memo in the record, signed by Williams, documenting Williams' decision not to testify (7R 984-85). The memo contains a "typo" by a secretary "who is not familiar with the law," indicating that Williams was advised that counsel would lose opening and concluding argument if Williams had testified (7R 985-87). Etheridge insisted that he

correctly informed Williams that he would lose opening and concluding only if he put on evidence other than his own testimony (7R 988). He never told Williams that, if Williams testified, the defense would lose opening and concluding arguments (7R 1080). "A first-year law student," Etheridge testified, "knows that a defendant can testify at any time and you still have opening and closing arguments" (7R 1080-81).

Etheridge testified that he expressly acknowledged to the jury that Williams had been convicted of a drug offense because: (a) such acknowledgment was consistent with the defense theory of the case, which was that Williams was making too much money selling drugs to jeopardize his business by ordering a killing over $8,000 worth of drugs, (b) the State's evidence was overwhelmingly going to show that Williams was a drug dealer (a fact central to the State's theory of why the murders were committed), so why not acknowledge that fact and use it for the defense, and (c) acknowledgment of Williams' drug conviction allowed the defense to argue that Williams was being punished for being a drug dealer, and should not be punished for a murder he wasn't involved in (7R 990). Etheridge's comment to the jury that Williams deserved to be in prison on the drug conviction is one he ordinarily would not have made, but

was the product of a tactical decision designed to create sympathy for the defense on the unique facts of this case (7R 993-94, 1009). His opinion at the time of trial was that "a jury would think this guy's a bad fellow," so he wanted to make sure the jury know that "he's being punished for being a bad fellow," so the jury could focus on whether the State's evidence was sufficient to prove that he was guilty of ordering murder (7R 1046-47).

(2) Ronald Williams

Williams testified that he and Etheridge discussed before trial whether he would testify, and they agreed that he would (7R 1049-50). However, after Manning testified, Etheridge told Williams he wanted to have the opening and concluding argument and if Williams testified he would not get it (7R 1051-52). Williams denied that he had decided not to testify (7R 1052-53).

Williams testified that he had asked Etheridge to seek the disqualification of Judge Geeker, but Etheridge told him he could not do it (7R 1054-55).

Etheridge did not discuss arguing his personal belief to the jury, and Williams did not approve such argument (7R 1055). Nor did Etheridge discuss whether he would mention Williams' drug conviction to the jury (7R 1056).

On cross-examination, Williams first stated that, if he had testified, he would have told the jury about his role in the drug operation while denying any role in the murders (7R 1064-65). On reflection, he decided that because his drug conviction had been on appeal at the time, he would have refused to answer any questions about his drug dealing, but would "only answer to what I was being charged for" (7R 1065). He would have taken "the Fifth" with regard to any drug trafficking (7R 1066). Asked if his testimony was simply going to be "I did not kill the people," Williams answered: "That's right" (7R 1066).

Williams further stated that, although he had known Manning (AKA Biscayne Bob) a long time, he would not have answered any questions about their business relationship (7R 1066). Williams was vague about whether Bruce Frazier had ever dealt drugs in Pensacola (saying only that he "may have"), and denied that either of the Fraziers were his underlings (7R 1067-68). Williams would have disavowed "a whole lot of" the testimony that came in about the drug operation (7R 1069). He would have testified that Bruce Frazier ran the drug operation (7R 1072). Williams testified that he could not remember whether he and Etheridge had discussed the drug operation in detail (7R 1074).

(3) Dr. Larson

Dr. Larson, a Ph.D. psychologist licensed in Florida since 1973 (7R 1083), testified that he had examined Williams before trial (7R 1085-86). He issued a confidential report to the defense (reproduced at 7R 1108-1122). In the report, Williams is described as "well oriented" and "lucid," with "good interpersonal skills," "intact" memory and "good" judgment (7R 1111). His parents separated when he was in the second grade, and he was raised in an impoverished home by a single mother with six children (7R 1112). At "age nine or so," Williams' family moved to Miami, where Williams began a "cycle of stealing" which began with Mangos, then bicycles, then pocketbooks, and then breaking into houses (7R 1112). At age 16, "he was sent to Okaloosa School for Boys" on grand theft and larceny charges (7R 1113). When he was released, "he began dealing in drugs and 'stealing a little'" (7R 1113). After committing a series of burglaries, he was convicted and sent to the penitentiary for three years (7R 1113). At age 19 he was released, and soon began selling drugs on a large scale (7R 1113). Williams has a history of drug abuse, primarily cocaine but also alcohol, marijuana, quaaludes, THC and valium (7R 1113). On the Wechsler Adult Intelligence Scale-Revised (WAIS-R), Williams obtained a

verbal IQ score of 77, a performance IQ score of 77, and a full scale IQ of 75, placing him in the borderline range of intelligence (7R 1115). On the Wisconsin Card Sorting Test, however, Williams performed in the average range "in problem solving and maintaining set" (7R 1116). In other testing, significant impairments were noted in Williams' ability to "connect numbers in numerical order," and to "sequentially connect alternating numbers and letters" (7R 1116). Because of the testing conditions, however, Dr. Larson warned that these results should be interpreted with "caution" (7R 1116). Williams had "excellent memory" and good "basic sensory perceptual skills," but his "attention and concentration" were below average (7R 1117). His language ability was in the "normal range" (7R 1117). In summary, his cognitive skills were borderline, but his neuropsychological functioning was in the average range (7R 1118-19). Dr. Larson's report notes that at "several points in the evaluation his abilities seemed higher than the IQ estimates obtained" (7R 1119).

Dr. Larson testified that the WAIS-R is "sensitive to academic exposure; that is, individuals who haven't been in school reliably and regularly, who haven't attended well in school or have a lot of disruption in their family may

actually score somewhat lower on this instrument because of those things" (7R 1090).

Dr. Larson testified that Williams' disruptive family background and his intellectual impairments were the only mitigating factors supported by his evaluation; he observed nothing which would establish statutory mitigation (7R 1093-94). He acknowledged that the difficulty in reconciling Williams' ability to operate a widespread drug operation with the limited cognitive functioning that would have been commensurate with his IQ scores "made me raise questions about the accuracy of those scores" (7R 1101). Dr. Larson was "sure" he related his concerns to Etheridge (7R 1101).

SUMMARY OF ARGUMENT

Williams presents ten issues on appeal:

1. Trial counsel was not ineffective for failing to request an "independent act" jury instruction. No standard independent-act jury instruction existed at the time of Williams' trial, and the jury instructions given adequately addressed the applicable legal standards. Further, because the evidence established that the murders in this case were committed at the expressed behest of Williams, there is no

reasonable probability of a different verdict if an independent-act jury instruction had been given.

2. It was not unreasonable for trial counsel to acknowledge Williams' shortcomings while asking the jury to put them aside as irrelevant and to focus on whether Williams was guilty of murder. By not contesting the obvious, and by indicating to the jury that he shared its attitudes towards drugs, counsel reasonably hoped to enhance the credibility of his argument that, while Williams had his faults, he was not guilty of murder.

3. Trial counsel's failure to object to certain prosecutorial comments as improperly commenting on Williams' failure to testify cannot be deemed deficient performance based on developments in case law occurring years after Williams' trial. Even now, the prosecutor's arguments were not objectionable, as the prosecutor did not argue that the evidence was "uncontradicted" on a point that only the defendant could contradict. The prosecutor's comments about the events at the scene of the murder did not address matters only Williams could contradict, because he was not there. As for who ran the drug operation, the prosecutor merely pointed out that numerous witnesses had testified on that subject and they all agreed that Williams ran it. Furthermore, the defense at trial did not contest

the State's theory that Williams ran the drug operation, and so the prosecutor's comments could not have been prejudicial even if improper.

4. Competent, substantial evidence supports the trial courts' determination that Williams was not misinformed by trial counsel about the consequences of his testifying, and chose not to testify for reasons having nothing to do with the order of closing argument.

5. Trial counsel was not ineffective for failing to move to disqualify the trial judge on the sole ground that he had sentenced Williams' co-defendants to death. That a judge has previously made adverse rulings is not a legally adequate ground for recusal.

6. Trial counsel reasonably chose not to present Dr. Larson's testimony or his report in mitigation. Dr. Larson found no statutory mitigation, and his report contains much that is unflattering to Williams, including a significant criminal history. Counsel had ample mitigation without Dr. Larson, and succeeded in securing a life recommendation from the jury – a fact which repudiates any claim that trial counsel was ineffective. Additionally, the sentencing judge, who in a jury override case is in the "best position" to determine whether any deficiency in

counsel's performance at sentencing was prejudicial, found that Williams had failed to establish prejudice.

7. There is no per se entitlement to co-counsel in capital cases, and Williams made no attempt to demonstrate that his case was so complex that two attorneys would have been required. Williams' request for a "new rule" is inappropriate in the context of this postconviction claim of ineffective assistance of counsel.

8. The trial court properly rejected Williams' claim of "cumulative error."

9. The trial court properly denied Williams' motion to reconstruct the "record," by which Williams apparently meant such portions of the trial judge's office files as were generated during the judicial decision-making process in imposing sentences on Williams' co-defendants. Because Williams has never shown that he would have been entitled to such files if they had existed (they were inadvertently destroyed by a successor judge), Williams cannot demonstrate that he is entitled to attempt to reconstruct them. Nor did the trial court, by ruling on the motion to reconstruct, impermissibly find facts with regard to Williams' motion to disqualify. Finally, there is nothing pernicious about the similarity in the sentencing orders in these cases; they were similar because the facts were

similar. Williams has never identified any facts in his sentencing order that were incorrect or applicable only to a co-defendant, or anything else that would support a reasonable inference that the trial court failed properly to evaluate the facts and circumstances of Williams' case.

10. Williams' Sixth Amendment attack on Florida's capital sentencing procedures should have been raised at trial and on direct appeal. It is barred in these postconviction proceedings. Even if not barred, Ring is not retroactively applicable to Williams' case, which was final long before Ring was decided. Finally, Williams' prior violent felony convictions take his case outside any conceivable ambit of Ring.

ARGUMENT

PRELIMINARY DISCUSSION OF STANDARD OF REVIEW

Williams' first eight appellate issues involve claims of ineffective assistance of counsel. The applicable legal principles and standard of review of such claims are well settled. This Court recently summarized them in Mansfield v. State, 911 So.2d 1160 (Fla. 2005):

> To establish ineffective assistance of counsel, a defendant must first show that counsel's performance was deficient. Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). An attorney's performance is deficient when it falls below an objective standard of reasonableness under

> prevailing professional norms. Id. at 688. The Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Second, the defendant must show that counsel's deficiency prejudiced the defendant, which occurs when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Under Strickland, whether counsel was ineffective and whether there was prejudice are mixed questions of law and fact. The legal issues are subject to a de novo standard of review, and the trial court's determination of the historical facts are given deference as long as they are supported by competent, substantial evidence. Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

I

THE TRIAL COURT CORRECTLY REJECTED WILLIAMS' CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST AN INDEPENDENT-ACT JURY INSTRUCTION

Williams first argues that trial counsel Etheridge was ineffective for failing to request an independent-act jury instruction. He notes that the Florida Standard Jury Instructions incorporate an instruction on independent act. Initial Brief of Appellant at 24-5; Standard Jury Instructions in Criminal Cases (97-1), 697 So.2d 84, 85 (Fla. 1997). However, this "new defense jury instruction" (697 So.2d at 85) was not adopted until July 10, 1997 (id. At 84) – over six years after Williams' trial. Etheridge can hardly be deemed ineffective for failing to request an

instruction which did not exist at the time of the trial. Cf. Thompson v. State, 759 So.2d 650, 655 (Fla. 2000) (trial counsel cannot be deemed ineffective for failing to object to a standard jury instruction which had not been invalidated at the time of the trial).

Moreover, Williams cannot demonstrate that such instruction would be applicable to him, even now. As the trial court recognized in its order denying relief (9R 1338):

> The doctrine of independent act arises from circumstances where, after participating in a common plan or design, one co-felon does not participate in acts, committed by another co-felon, which fall outside of, and are foreign to, the common design of the original collaboration. . . . The thrust of this doctrine is to exonerate one defendant from acts committed outside of the original plan or design by a co-felon.

Dell v. State, 661 So.2d 1305 (Fla. 3rd DCA 1995). However, the doctrine does not apply to homicides committed to further the original criminal design:

> We have stated that "an act in which a defendant does not participate and which is 'outside of and foreign to, the common design' of the original felonious collaboration may not be used to implicate the nonparticipant in the act." Parker v. State, 458 So. 2d 750, 752 (Fla. 1984) (quoting Bryant v. State, 412 So. 2d 347, 349 (Fla. 1982)), *cert. denied*, 470 U.S. 1088 (1985). Felons, however, are generally responsible for the acts of their co-felons. Adams v. State, 341 So. 2d 765 (Fla. 1976), *cert. denied*, 434 U.S. 878 (1977). As perpetrators of an underlying

> felony, *co-felons are principals in any homicide committed to further or prosecute the initial common criminal design*. Adams; Hampton v. State, 336 So. 2d 378 (Fla. 1st DCA), *cert. denied*, 339 So. 2d 1169 (Fla. 1976). "One who participates with another in a common criminal scheme is guilty of all crimes committed in furtherance of that scheme regardless of whether he or she physically participates in that crime." Jacobs v. State, 396 So. 2d 713, 716 (Fla. 1981).

Lovette v. State, 636 So. 2d 1304, 1306 (Fla. 1994) (emphasis supplied). The scheme herein was a drug business and the recovery of drugs and money stolen from that business; the killings were committed pursuant to and in furtherance of that scheme.

Moreover, this Court has consistently upheld the denial of a request for a special independent act instruction where the charge given adequately addresses the applicable legal standard. See, e.g., Stephens v. State, 787 So.2d 747, 755-56 (Fla. 2001); Ray v. State, 755 So.2d 604, 609-10 (Fla. 2000); Alston v. State, 723 So.2d 148, 159 (Fla. 1998). Because the instructions given in this case adequately addressed the applicable legal standards, a special-act jury instruction would have been denied if requested by trial counsel.[5] This would have been

[5] The trial court instructed the jury that the deaths of the victims must have been "caused by the criminal act or agency of Ronal Lee Williams" (5TR 915-16); that Williams was guilty as a principal only if he "knew what was going to happen," and "intended to participate actively or by

especially so at the time of Williams' trial, since there was at that time no standard special-act jury instruction. Stephens, supra at 755 ("The standard jury instructions are presumed correct and are preferred over special instructions.").

Finally, for reasons set forth by the trial court in its order, Williams has failed to demonstrate prejudice:

> Moreover, even if an independent act instruction had been given, there is no reasonable probability that the outcome of the trial would have changed. The evidence at trial established that Coleman, Robinson and the Frazier brothers acted at Defendant's behest in retrieving drugs and money which had been stolen from Defendant. Darrell Frazier testified that Defendant ordered them to kill the victims. Such testimony was bolstered by the similar fact evidence that Defendant had ordered other attempted killings in Jacksonville. Having failed to establish [a reasonable probability] that the outcome of his trial would have been different had an "independent act" instruction been given, Defendant is not entitled to relief on this claim.

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sharing in an expected benefit," and "actually did something by which he intended to help commit or attempt to commit the crime" (5TR 936); that Williams was guilty of felony murder only if "the death[s] occurred as a consequence of and while Ronald Lee Williams was engaged in the commission of a kidnapping" or if he did "knowingly aid, abet, counsel, hire or otherwise procure the commission of kidnapping" (5TR 917-19).

(9R 1339) (footnotes omitted). The trial court correctly denied relief on this claim.[6]

II

THE TRIAL COURT PROPERLY REJECTED WILLIAMS' CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR ADMITTING IN CLOSING ARGUMENT THAT WILLIAMS WAS IN PRISON FOR DRUGS "WHERE HE BELONGS" WHILE URGING THE JURY NOT TO FIND WILLIAMS GUILTY OF MURDER

In his postconviction motion, Williams claimed that Etheridge was ineffective for acknowledging that Williams was guilty of a drug conspiracy and for stating his personal belief that Williams belonged in prison (4R 578-79). In his post-hearing written closing argument, he argued that Etheridge was ineffective for conceding that Williams "was guilty of trafficking in cocaine" and for

[6] Williams cites Lewis v. State, 591 So.2d 1046 (Fla. 1st DCA 1991) and Bryant v. State, 412 So.2d 347 (Fla. 1982). Neither supports the grant of relief. Lewis was a postconviction appeal of the summary denial of relief on a claim of ineffective assistance of counsel; the district court did not grant relief on the merits, but remanded with instructions to the trial court either to hold an evidentiary hearing or to attach portions of the record demonstrating conclusively that Lewis was not entitled to relief. Here, although an evidentiary hearing was not specifically granted, Williams elicited testimony on this issue. Additionally, the trial court cited to the record in support of its conclusion that the instruction was not warranted under the evidence and that Williams had in all events failed to demonstrate prejudice (9R 1339). Bryant neither addresses the jury instructions actually given in that case nor any issue of effective assistance of counsel or prejudice.

stating that he was "in prison" where "he needs to be for that conviction" (8R 1171-72). On appeal, he complains about "Counsel's injection of personal beliefs in opening and closing statements that defendant deserved to be in prison." He cites to the transcript and to Clark v. State, 690 So.2d 1280 (Fla. 1997) and concludes by stating: "The infliction of defense counsel's personal belief and fact of defendant's conviction (not in evidence) transcended the bounds of defense advocacy." Initial Brief of Appellant at 30-31 (emphasis deleted).

There are three potential areas of complaint discernable in Williams' various pleadings on this issue: (1) the concession that Williams was guilty of drug trafficking; (2) the volunteered information that Williams had been convicted of and was in prison on drug charges; and (3) the expression of opinion that Williams deserved to be in prison for his drug offenses. Argument (2), above, is not clearly pled in the postconviction motion, and Williams appears to have abandoned any claim regarding argument (1). In all events, however, his claim, as originally pled and as elaborated upon since, was properly rejected by the trial court.

Initially, the State would note that criminal defense attorneys routinely concede certain facts while contesting

others. This is so not only because it is generally better strategy to focus one's attack on the opponent's weakest points rather than attack on all fronts, but also because reasonable defense attorneys generally believe that defense credibility is enhanced by the concession of facts they cannot reasonably contest anyway, and diminished by the presentation of inconsistent defenses.[7]

In this case, the State presented massive evidence that Williams was involved in a drug trafficking operation. Etheridge testified that he did not feel he could raise any doubt about that aspect of the State's case (7R 990, 1043), and Williams has not suggested how this evidence might have been refuted; on the contrary, Williams himself admitted at the evidentiary hearing that he had been involved in a drug trafficking operation and had been convicted of drug trafficking (7R 1064-65). Trial counsel's strategy, reasonably enough, was not to contest this massive

[7] Imagine, for example, a murder trial in which the defense argued that the victim was not killed, but if he was killed it was not murder because he was not a human being, but if he was a human being he was not killed in Florida, but if he was killed in Florida the defendant was not the killer, but if he was the killer the killing was justifiable homicide, but if it was not justifiable homicide the defendant was insane, but if he was not insane the killing was something less than murder in the first degree.

evidence, but to attempt to use it to his advantage by arguing, inter alia:

> And I would like to start off on this vein if I may. I think all of you will agree, as well as I do, that cocaine is a big problem in our community. And it's a plague and it's killing people and it's sending most of our country into disarray with young people, blacks, whites, and it covers the whole spectrum. This man right here has been tried and found guilty of that already. He's in prison right now, where personally I think he needs to be, for that conviction. He is not on trial for being a cocaine trafficker. He is on trial today before you for being a murderer.
>
> The State, the prosecution in their opening argument indicated to you well, he's not charged with being a cocaine trafficker and really has nothing to do with this case. We – you can't find him guilty of that. Well, why did they bring it up? Why was it such a focal point throughout the entire case? Why was it such a focal point throughout this entire case? Why do we have these allegations by witnesses as to Don Vito and the boss of bosses and the Miami boys and all of this money being flashed around and going to Miami and going to the Pro Bowl and going to Las Vegas? He's been convicted of that. He got 15 years' minimum mandatory meaning that he will be doing – he's going to do 15 years day for day in the state prison system followed by another 15 years. He has 30 years. He's been convicted of that. So please don't find him guilty of murder because he's a drug trafficker. We admit that. We told you in our opening argument. We give you. You got us. There is no doubt about that.

(5TR 856).

> And we heard a bunch of evidence, a bunch of evidence. It was quite confusing to me, and I have been on this case for quite some time. . . . And let's get back to the issues. Okay. Let's

> cut through the meat of the matter to the bone, what those two issues that I talked about. That's what you're here today on to decide those two issues. One, did Ronald Williams ever kill anyone? And two, did Ronald Williams ever hire anybody to kill anyone? And once again issue No. 1 is answered for you. It's rather simple, and he never killed anyone. There is nobody on this witness stand that came forward that said Ronald Williams shot me, stabbed me, tortured me, raped me, nobody. So the first issue you can set aside.
>
> And that brings you back to the crucial issue that is before your today, and that is whether this man hired four people to go to Pensacola to kill the four people that were killed. That's it. You don't have to think about Jacksonville. You don't have to think about this cocaine business. And the bottom line, the meat, the bone that we're trying to cut through to, did this man hire anybody to kill anyone? And that's it.

(5TR 857-58).

> As we admitted and as the prosecutor has attempted to keep hammering and hammering and hammering is that fact that Ronald was a cocaine dealer. He had cars. He had money. Built a huge fortune and was making lots of money, incredible amounts of money. Why would he ruin it by having four people killed over 8,000 bucks? Is that reasonable to you? Does that make sense?

(5TR 882).[8]

As has been noted, "candor may be the most effective tool available to counsel." People v. Gurule, 51 P.2d 224 (Cal. 2002) (trial counsel conceded that defendant was

[8] This was a small portion of a lengthy closing argument in which Etheridge attacked the credibility of the State's witnesses and its theory of guilt in a variety of ways.

guilty of robbery and murder, but argued that his acts were not so serious as to warrant the death penalty). Thus, "if you make certain concessions showing that you are earnestly in search of the truth, then you comments on matters that are in dispute will be received without the usual apprehension surrounding the remarks of an advocate." Yarborough v. Gentry, 540 U.S. 1, 9-10 (2003) (quoting J Stein, Closing Arguments Section 204, p. 10). See also Nixon v. Florida, 543 U.S. 175 (2004) (even a complete concession of guilt can benefit a capital defendant by enhancing defense credibility at the penalty phase).

In Yarborough, the Supreme Court recognized that acknowledging a defendant's shortcomings can benefit the defense case:

> The Ninth Circuit criticized [trial counsel] for mentioning "a host of details that hurt his client's position, none of which mattered as a matter of law." [Cit.] Of course the reason counsel mentioned those details was precisely to remind the jury that they were legally irrelevant. That was not an unreasonable tactic. See F. Bailey & H. Rothblatt, Successful Techniques for Criminal Trials § 19:23, p 461 (2d ed. 1985) ("Face up to [the defendant's] defects . . . [and] call upon the jury to disregard everything not connected to the crime with which he is charged"). The Ninth Circuit singled out for censure counsel's argument that the jury must acquit if Gentry was telling the truth, even though he was a "bad person, lousy drug addict, stinking thief, jail bird." [Cit.] It apparently viewed the remark as a gratuitous swipe at Gentry's character. While confessing a

> client's shortcomings might remind the jury of facts they otherwise would have forgotten, it might also convince them to put aside facts they would have remembered in any event. This is precisely the sort of calculated risk that lies at the heart of an advocate's discretion. By candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case.

540 U.S. at 9.

To the extent that Williams does not complain about Etheridge's concession that Williams was involved in a large drug operation, but only about the concession that Williams was in prison, where "he belonged," the answer remains that this argument was legitimate trial strategy. Counsel not unreasonably believed that jury would have felt that Williams deserved to be punished for his role in a massive drug operation. Counsel's concession not was designed not only to enhance his own credibility, Yarborough, 540 U.S. at 11 ("See P. Lagarias, Effective Closing Argument §§ 2.05-2.06, pp 99-101 (1989) (citing Aristotle's Rhetoric for the point that '(a) speech should indicate to the audience that the speaker shares the attitudes of the listener, so that, in turn, the listener will respond positively to the views of the speaker'"), but also to enhance whatever doubt the jury might have had about Williams' guilt of murder by eliminating any possible

concern that an acquittal in this case would set him free. Other attorneys might have chosen a different tack, but Etheridge's defense strategy cannot be deemed constitutionally unreasonable.

As the trial court found, this case "stands in sharp contrast" to Clark, in which trial counsel had effectively encouraged the jury to find for the State (9R 1332). Here, Etheridge did not concede that Williams was guilty of any crime charged; as to the crimes charged, he effectively and vigorously encouraged the jury to find against the State. The trial court correctly determined that Williams has failed to demonstrate deficient attorney performance or prejudice (9R 1334). Zack v. State, 911 So.2d 1190 (Fla. 2005) (counsel not ineffective for agreeing with State that crime was "messy" and "brutal" to maintain credibility with jury and to dilute damaging testimony before jury).

III

THE TRIAL COURT PROPERLY REJECTED WILLIAMS' CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO PROSECUTORIAL ARGUMENT ALLEGEDLY AMOUNTING TO COMMENT ON WILLIAMS' FAILURE TO TESTIFY

Williams contends that, in his closing argument, the prosecutor "made a number of references to undisputed or uncontradicted testimony." Initial Brief at 32. However, he actually cites only portions of three paragraphs – nine

sentences total – out of a total argument filling some 46 pages of the trial transcript.[9]

To place these comments in context, the State will set forth a slightly greater exposition of the prosecutor's comments. First, in discussing the evidence that Williams ran the drug operation, the prosecutor argued:

> And now, I may repeat that a couple of times as each one of the witnesses testified about that, but let me say at the outset there were one, two, three, four, five, six, at least seven witnesses that took the witness stand, every single one of them said the money and the drugs belonged to that man, period. That's who it was. Everybody knew it, undisputed, uncontroverted. Nobody took the witness stand and said, oh, no, they belonged to Jit, they belonged to Yoge. No, nobody said that. Every single witness knew who the boss was.

(5TR 827-28). Thereafter, in discussing what happened at the scene, the prosecutor argued:

> Let me say at the outset what happened – the details of what happened at the scene are really not relevant to whether or not Ronald Williams is guilty. The fact that Tina . . . thought Yoge was first in the door and Amanda thought Big Red was in the door, what difference does that make in terms of this man's guilt? The fact that one of them said Jit brought Milfred Baker in and one of them thought somebody else brought Mildred Baker in, what difference does that make in terms of this man's guilt?
>
> There are some undisputed facts about what happened, and they all went in, they all made everybody take their clothes off, and they

[9] The prosecutor's initial argument is at 5TR 818-854; his rebuttal is at 5TR 895-905.

> started hitting and kicking and cutting and torturing the people there. And very quickly Tina raised her hand. And they took Tina in the back room and they started to question her . . . and Tina tells them what happened . . . and I submit to you the information that they got from Tina was sufficient to kill everybody in that house.
>
> They got whatever information they wanted from Tina, and then they decided they were going to get their drugs. So they bring her out and get her dressed. And this is undisputed. Two people take Tina Crenshaw . . . to her house . . . and they get the drugs out of the car . . . and the money out of the closet. . . .

(5TR 836-38).

Williams contends his trial counsel was ineffective for not objecting to this argument, which he characterizes as an impermissible comment on his failure to testify, citing Rodriguez v. State, 753 So.2d 29 (Fla. 2000).

Initially, the State would note that Rodriguez was decided nine years after Williams' trial. Moreover, in Rodriquez, this Court observed that previous decisions on this issue were in "tension," 753 So.2d at 37-38, and criticized its decision in White v. State, 377 So. 2d 1149 (Fla. 1979). Relying "on cases that held that a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence," White approved prosecutorial comment that the jury had not "heard one word of testimony to contradict what [a certain eyewitness] has said, other than the

lawyer's argument." "The problem with this analysis," the Court observed in Rodriguez, "is that where the evidence is uncontradicted on a point that only the defendant can contradict, a comment on the failure to contradict the evidence becomes an impermissible comment on the failure of the defendant to testify." 753 So.2d at 38.

At the time of Williams' trial, this Court's decision in White supported Etheridge's decision not to object to prosecutorial argument that some of the State's evidence was uncontradicted. He cannot be deemed ineffective for failing to anticipate that nine years later this Court might refine and clarify the issue in Rodgriguez. Strickland, 466 U.S. at 694 ("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.").

Even if Rodriquez had existed at the time of Williams' trial, however, Etheridge did not perform in a constitutionally deficient manner by failing to object. Rodriquez does not change the general principle that a prosecutor may point out that the evidence is uncontradicted. Melton v. State, 638 So.2d 927 (Fla.

1994). As noted in the State's argument addressing trial counsel's concessions, above, in *every* trial, *some* facts and issues will not be in dispute. The prosecutor at the very least should be able to identify those facts and issues which are *not* in dispute before addressing those which *are*, and that is what the prosecutor did here.

The prosecutor's characterization of certain events at the scene of the crime as undisputed obviously did not address anything only the defendant could contradict *because he was not present*. Moreover, there were inconsistencies in the evidence, as the prosecutor acknowledged; the prosecutor's point was simply that the witnesses agreed on the matters that were important. This was permissible argument and cannot conceivably have been construed as a comment on Williams' failure to testify.

The question of who ran the drug operation may present a closer question only in the sense that this question involves matters that Williams actually had personally observed. The fact remains, however, that, in contrast to the facts in Rodriguez, in which no witness other than the defendant could possibly identify a second occupant of the apartment, numerous witnesses testified about the drug business and they *all* agreed that Williams ran it. The prosecutor was entitled to comment on their unanimity. As

the trial court found, nothing the prosecutor said "highlighted" Williams' failure to testify, or "suggest[ed] that [Williams] could have presented contrary testimony" if only he had taken the stand (9R 1341).

Finally, Rodriquez makes it clear that improper comments do not warrant automatic reversal. 753 So.2d at 39. As the trial court pointed out in its order denying relief, the defense did not contest that the murders had occurred, or that Williams "was the head of a state-wide drug trafficking operation" (9R 1341). Because the prosecutor's comments related to facts not contested at trial, they were not prejudicial even if improper. The trial court properly rejected Williams' claim of ineffective assistance of counsel.

IV

THE TRIAL COURT PROPERLY REJECTED WILLIAMS' CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR GIVING INCORRECT ADVICE ABOUT THE CONSEQUENCES OF HIS TESTIFYING

Williams argued below that Etheridge erroneously told him that if he testified, the defense would lose the final concluding argument (8R 1167-68). He relied on his testimony at the evidentiary hearing and upon a written memorandum that Etheridge placed into the record (8R 1167-68). Williams relies on the same evidence now, except that

he additionally argues that the trial court's credibility findings on this issue "run in the face of the manifest weight of the evidence," which he describes as the "memo itself." Initial Brief of Appellant at 37. On appeal, however, this Court does not reweigh the evidence; instead, as set out above (in the Preliminary Discussion of Issues and Standard of Review), the Court defers to the trial court's determination of the historical facts so long as that determination is supported by substantial, competent evidence. Mansfield, supra.

The trial court found as follows:

> Defendant alleges that his counsel was ineffective for misinforming Defendant that the opportunity for first and last closing argument would be lost if Defendant presented *any* testimony in his defense. . . . To bolster his claim, Defendant relies on a memo prepared by Mr. Etheridge and his assistant, dated May 9, 1991, which stated,
>
> > "This is a simple memo to the effect that we advised Ronald to testify in his own behalf. He refused and instructed us he would not testify. **He was advised by (Randall J. Etheridge) that the 1st and last closing would be traded for any testimony in his behalf.** (Randall J. Etheridge) and Ronald's family both advised him to testify. Strategy of defense relied on it. He refused with the knowledge of the consequences." (Emphasis added)
>
> Defendant alleges that he declined to testify based on this misinformation, and further alleges that he would have testified that he was

> not in Pensacola at the time of the homicides and did nothing to participate in or procure the commission of those crimes.
>
> Evidence was taken on this point at evidentiary hearing. Mr. Etheridge testified that he did in fact tell Defendant he alone **could** testify and not lose the first and last closing argument, and that throughout the course of trial preparation, Defendant's testifying was a part of the defense strategy. However, he testified that Defendant decided **at trial** not to testify, despite counsel's urging and the urging of family and friends. The Court finds persuasive Mr. Etheridge's evidentiary hearing testimony that he correctly advised Defendant of his options and declines to grant relief on this basis.

(9R 1321-22)(emphasis in original, footnotes omitted). In a footnote, the trial court added:

> In a related point, Defendant states that this aspect of counsel's ineffectiveness was compounded by the calling of Defendant's lone witness, Gregory Manning, and notes that the calling of Mr. Manning resulted in the loss of opening and closing argument. This argument, however, bears on Defendant's allegation that he believed that **any** testimony waived the right to first and last closing argument. If it was indeed this perceived consequence which prevented Defendant from testifying, and he was operating under the assumption that **any testimony** would result in the loss of first and last closing, then logic dictates that he would have felt free to testify if he so desired, after Mr. Manning had testified. Therefore, the Court does not find it convincing that Defendant believed that presenting only his own testimony would waive first and last closing, or that such belief was the sole reason Defendant chose not to testify. Indeed, the record reflects that Defendant's counsel put Defendant's decision not to testify on the record immediately after the conclusion of Manning's testimony.

(9R 1322) (fn. 13) (emphasis in original).

Etheridge testified that the memo was drafted by a secretary who did not know the law. Etheridge insisted that he never told Williams the defense would lose the final argument if Williams alone testified; a first-year law student would know better than that (7R 1080-81). The order of closing argument had nothing to do with Williams' decision not to testify; instead, Williams decided on his own not to testify after the prosecutor "did a good job of destroying" the testimony of defense witness Gregory Manning (7R 983, 1020), and that Williams made this decision against the advice of counsel, who had "confidence" in Williams and thought he "could have helped himself" (7R 1038).

While the single sentence at issue might not be a complete statement of the law in the abstract (because it implies, standing alone, that the defense would lose final closing argument if Williams testified), in context it accurately informed Williams that, because the defense had already put on a witness, the defense would not have the final closing argument – *whether or not Williams testified*. Moreover, the memo also reflects that both trial counsel and Williams' family urged Williams to testify, but that Williams had rejected that advice and had decided on his

own not to testify. Thus the memo itself corroborates Etheridge's testimony, as the trial court noted in its order.

Competent, substantial evidence, including the trial record, the testimony of Randall Etheridge, and the memo itself, supports the trial court's factual determination that Williams was not misinformed by Etheridge and decided *on his own* not to testify, against counsel's advice, for reasons having nothing to do with the order of closing argument. Williams makes no argument for relief on appeal other than to ask this Court to reweigh the trial court's findings of fact. Because competent, substantial evidence supports the court's factual determinations, the denial of relief on this claim should be affirmed.

V

THE TRIAL COURT PROPERLY REJECTED WILLIAMS' CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO SEEK THE DISQUALIFICATION OF THE TRIAL JUDGE BASED UPON THE DEATH SENTENCES HE IMPOSED ON WILLIAMS' CO-DEFENDANTS

Williams argues that Etheridge should have moved to disqualify Judge Geeker because he had sentenced Williams' three co-defendants to death – a fact, Williams argues, that showed Judge Geeker's predisposition to sentence Williams to death and thus to create a well-founded fear in

Williams that he would not receive a fair sentencing from Judge Geeker.

Etheridge testified that he did not file a motion to disqualify Judge Geeker because he did not think any good-faith basis existed to support such a motion. Etheridge (as it turns out, correctly) did not think a jury would recommend death for Williams; however, while he had some concern about the co-defendant overrides, he also did not think Judge Geeker was any more likely to override a life recommendation than any other judge in the circuit. See 7R 965-69, 971-73, 1037-38.[10]

This Court has held that

> the fact that a judge has previously made adverse rulings is not an adequate ground for recusal. Nor is the mere fact that a judge has previously heard the evidence a legally sufficient basis for recusal. Likewise, allegations that the trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that the judge discussed his opinion with others, is generally legally insufficient to mandate disqualification.

[10] As Judge Geeker noted in its order denying relief on this claim of ineffectiveness, this Court affirmed Judge Geeker's overrides in the Coleman and Robinson cases, finding that, based on the records of these cases, no reasonable basis existed upon which the juries could have recommended life sentences (9R 1319). Thus, "it follows logically that the result would likely have been the same under any other judge" (9R 1319). It likewise follows logically that the very determination that Judge Geeker's prior rulings were appropriate compels the rejection of any theory that these rulings indicate his bias.

Kokal v. State, 901 So.2d 766, 775 (Fla. 2005) (quoting Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992)). Jackson had moved to disqualify his trial judge because "he had heard the case no less than five times, including two trials of Jackson's codefendant." 599 So.2d at 107. Kokal had moved to disqualify his postconviction judge because he had presided over another hearing at which he had passed on the credibility of a witness Kokal planned to offer in support of his claim of newly-discovered evidence of innocence. This Court's rejection of the claims of Jackson and Kokal compel the rejection of any claim that Judge Geeker was biased simply because he had presided over the trials of Williams' co-defendants and had sentenced them to death. Accord, Mansfield v. State, 911 So.2d 1160 (Fla. 2005) (judge's comments critical of the State's plea offer in a capital case insufficient to warrant disqualification). Thus, Etheridge did not perform deficiently or prejudicially in failing to move to disqualify Judge Geeker.[11] The court below correctly denied this claim (7R 1318-20).

[11] The two cases cited by Williams are inapposite. Porter v. Singletary, 49 F.3d 1483 (11th Cir. 1995), involves a judge who had stated to others, in the absence of the defendant, his intention to impose a death sentence without regard to the evidence. In this case, by contrast, Judge Geeker merely issued rulings on matters properly before him, after

VI

THE TRIAL COURT PROPERLY REJECTED WILLIAMS' CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT DR. LARSON'S REPORT IN MITIGATION

Williams argues here that Etheridge was ineffective for failing to present mitigation testimony from Dr. Larson, a Ph.D. psychologist who had evaluated Williams at Etheridge's behest. Williams argues that Dr. Larson's evaluation contained findings that would have been mitigating, including: Williams' 75 IQ was in the borderline range; his mental age was 13 to 14; and he had an "impoverished childhood," in which he was beaten by parents who frequently drank to intoxication, lived in a ghetto, and dropped out of school at age 16 after attending infrequently. Initial Brief of Appellant at 42, 45.

Initially, the State would note that no witness testified, and Williams does not argue, that any of this would have amounted to statutory mitigation. Secondly, as the trial court found, this claim can only apply to the

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giving due notice and opportunity to be heard to all relevant parties. Such rulings do not constitute grounds for disqualification. Goins v. State, 708 So.2d 656 (Fla. 4th DCA 1998), is a case in which the trial judge previously had prosecuted Goins on drug charges, and thus would be sentencing a former adversary based upon aggravating circumstances which the judge himself had prosecuted to a conclusion. Judge Geeker has never prosecuted or defended Williams or any of his co-defendants.

trial court's decision as to penalty, not to any failure to present evidence to the *jury*, "as it is clear that trial counsel was successful, through the presentation of other mitigating evidence, in securing a life recommendation from the jury" (9R 1335). See Lusk v. State, 498 So.2d 902, 905 (Fla. 1986) ("the jury's recommendation [of life] cannot be alleged to have been produced by counsel's ineffectiveness"); Buford v. State, 492 So.2d 355, 359 (Fla. 1986) ("Appellant's contention that his trial counsel rendered ineffective assistance of counsel during the penalty phase of the trial is repudiated by the fact that the jury recommended life in this case"). Even as to any claim of ineffectiveness for failure to present information to the *court*, a "jury's recommendation of life imprisonment is a strong indication of counsel's ineffectiveness." Francis v. State 529 So.2d 670, 672 (Fla. 1988). Finally, this Court has held that the original sentencing judge in a jury override case is in the best position to determine whether the failure to present additional mitigation was prejudicial. Francis, 529 So.2d at 673 n. 9.

It bears noting that while Dr. Larson's report does contain information that potentially is mitigating, it also shows that he has a significant criminal history of theft, burglary and large-scale drug dealing dating as far back as

age nine. And while Dr. Larson's report does indicate significantly below average intelligence, it does not indicate that Williams is mentally retarded or that he has any significant emotional or psychological problems. And the low IQ score was questionable, as even Dr. Larson acknowledged. Etheridge testified that he thought Williams was "quite bright" and the IQ score was simply inaccurate, based upon his own interaction with Williams and also the fact that Williams was capable of running a large scale drug business and making huge amounts of money. Likewise, Dr. Larson had reservations about the IQ score in light of the testing conditions, the lack of regular school attendance by Williams, and the inherent contradiction between Williams' demonstrated ability to run a business and the limited cognitive functioning consistent with an IQ of only 75 (7R 1116, 1119, 1101).[12]

[12] The fallibility of IQ scores to measure intellectual functioning has long been recognized. See, e.g., Gibson v. Secretary of Health and Human Servs., 882 F.2d 329 (8th Cir. 1989) (lack of motivation during testing can result in scores 15 points lower than true score); Snow v. State, 469 N.Y.S.2d 959, 962 (N.Y. App. Div. 1983) (IQ scores are "crude barometers" of intelligence); Ronald W. Conley, The Economics of Mental Retardation (1973) (physical conditions of testing, and attitudes and physical alertness of test taker can generate substantial errors in IQ measurement); Paul R. Friedman, The Rights of the Mentally Retarded Persons 25 (ACLU Handbook 1976) (IQ tests are notoriously inaccurate; IQ score is merely one of many factors required for an accurate diagnosis); Stephen Breuning & Vicky J.

As for Williams' mental age, it is rendered questionable by the same factors which call his IQ in question. Furthermore, courts have consistently rejected mental age as relevant mitigation. See, e.g., Penry v. Lynaugh, 492 U.S. 302 (1989) "Mental age" is derived exclusively from IQ, and adds nothing to whatever the IQ score shows. What IQ is supposed to measure is the ability to reason abstractly. That is all that "mental age" measures. Neither IQ nor "mental age" measures emotional maturity, life experience or judgment. Moreover, proffering the "mental age" of an adult in mitigation can be seriously misleading. Beyond the age of 15 or 16, raw scores on intelligence tests "cease to increase significantly with age." Penry. As a consequence, the "mental age" of the average adult at age 15 or 20 or 30 or 50 or even 70 remains constantly at 15-16 years. Ibid. "Mental age" simply measures what IQ measures – no more and

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Davis, Reinforcement Effects on the Intelligence Test Performance of Institutionalized Adults; Behavioral Analysis, Directional Control, and Implications for Habilitation, 2 Applied Res. In Mental Retardation 207, 318-20 (1981) (observing increase in IQ scores of as much as 20 points when test subjects were given positive reinforcement to do well); Bruce Cushna, The Psychological Definition of Mental Retardation: A Historical Overview, in Emotional Disorders of Mentally Retarded Persons 31, 42-43 (Ludgwik S. Szymanski, M.D. & Peter E. Tanguay, M.D. eds., 1980) (discussing Boston school system's misuse of IQ tests alone to erroneously label 2,500 students as mentally retarded).

no less. To the extent that Williams' IQ score is suspect, so is his mental age. To the extent that Williams' IQ score is accepted, the mental age calculated from that score is simply redundant information.

Given all these matters, as well as Etheridge's belief that he had plenty of mitigation without Dr. Larson's report or testimony, counsel's performance cannot be deemed deficient for choosing not to present questionable low IQ scores in mitigation. Pace v. State, 854 So.2d 167 (Fla. 2004).

Finally, the trial court reviewed the testimony presented at the evidentiary hearing and concluded that it had "heard no testimony which would have borne significantly on its decision," and that Williams had failed to carry his burden of establishing prejudice (9R 1335-36). Because the judge below was the sentencer, this finding is entitled to "considerable weight." Francis, supra, 529 So.2d at 674. The court below correctly denied this claim.[13]

[13] The cases cited by Williams stand in sharp contrast to this one. Williams has made no demonstration whatever that trial counsel's investigation was in any way inadequate, or that material mitigating evidence went undiscovered due to the inaction or incompetence of trial counsel.

VII

THE TRIAL COURT PROPERLY REJECTED WILLIAMS' CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST THE ASSISTANCE OF CO-COUNSEL

Williams contends his trial counsel was ineffective for failing to seek the appointment of co-counsel. Additionally, he urges this Court to require co-counsel in all capital cases.

As Williams acknowledges, there is no *per se* entitlement to appointed co-counsel in capital cases. E.g., Larkins v. State, 655 So.2d 95 (Fla. 1995); Ferrell v. State, 653 So.2d 367 (Fla. 1995) and Armstrong v. State, 642 So.2d 730 (Fla. 1994). Co-counsel may be appointed upon a sufficient showing of need. Larkins, Ferrell, Armstrong; see also Fla.R.Crim.P 3.112. Williams' trial counsel had two paralegals and a legal assistant aiding him in trial preparation (R 1338). He successfully persuaded the jury to recommend life in a highly aggravated murder case. Nothing in the record before this Court supports a finding that trial counsel was incapable of handling this case without additional counsel, or did not do so effectively; on the contrary, it appears that trial counsel was quite effective. In any event, Williams "has made no attempt to show that the instant case was so complex that two attorneys would have been required" (9R 1338) (trial

court's order denying relief). Likewise, Williams has made no attempt on appeal to show that the trial court's factual findings or legal conclusions are erroneous. The denial of relief on this claim of ineffectiveness should be affirmed, and Williams' request for a new rule should be rejected.[14]

VIII

THE TRIAL COURT PROPERLY REJECTED WILLIAMS' CLAIM OF "CUMULATIVE EFFECT OF SPECIFIC ACTS OF INEFFECTIVE ASSISTANCE OF COUNSEL" AS SET FORTH IN ISSUES I-VII ABOVE

The trial court denied Williams' "cumulative" claim of ineffectiveness of counsel (9R 1342). Williams makes no attempt to demonstrate how the trial court's judgment was incorrect, or to suggest what deficient performance by trial counsel, considered cumulatively, was sufficiently prejudicial to meet the Strickland standard. In fact, Williams' appellate argument on this point is so cryptic as to be practically nonexistent, and the State cannot respond except simply to say that, for reasons set forth above in

[14] It is inappropriate to seek a new rule in the context of a claim of ineffectiveness of counsel. Williams could not benefit from such a new rule, as his trial counsel cannot have been ineffective for failing to anticipate a change in the rules more than a dozen years after trial. To the extent that Williams seeks a retroactively-applied new rule, his present claim falls entirely outside the ineffectiveness claim he raised below. Even if addressable, he has not begun to explain why such a new rule, if adopted, should be retroactively applied to cases long since final.

the State's responses to the individual claims of ineffectiveness, Williams has not shown a reasonable likelihood that, but for deficient performance by trial counsel considered singly or cumulatively, the result of his trial would have been different.

IX

JUDGE GEEKER CORRECTLY DENIED WILLIAMS' MOTION TO DISQUALIFY AND MOTION TO RECONSTRUCT THE RECORD

On July 30, 1999, Williams' collateral counsel filed a "Motion to Reconstruct Court's Office File and for Discovery Depositions" (4R 648-50). In the motion, collateral counsel noted that Judge Geeker's office files in this case had been destroyed inadvertently by a successor judge, and contended that it was "necessary" that the file be "reconstructed" as to the "preparation and filing of the sentencing order of death entered" in this case (4R 648). Additionally, counsel sought to depose Judge Geeker and "such of his staff who had input into the preparation of the order" (4R 648).

Two weeks later, on August 13, 1999, Williams' collateral counsel filed a motion to disqualify Judge Geeker on the ground that had been pre-disposed to sentence Williams to death, as shown by his overrides in the Robinson, Coleman and Frazier cases, the near-identical

sentencing orders in the four cases, and certain comments Judge Geeker made at Williams' sentencing (4R 652-53). Additionally, Williams sought disqualification on the ground that Judge Geeker would be a material witness at any hearing on Williams' motion to reconstruct Judge Geeker's office files (4R 652).

By written order dated August 24, 1999, Judge Geeker denied Williams' motion to reconstruct the record, finding that Williams had failed to allege any "*concrete* facts" which would warrant relief (4R 657) (emphasis in original). Judge Geeker noted that while there may have been "some overlap in the recitation of facts" in the various sentencing orders "because of the nature of the conspiracy," the record demonstrated that Williams' sentencing order complied with the dictates of State v. Campbell, 571 So.2d 415 (Fla. 1990) (4R 657).

On the same date, Judge Geeker issued a written order denying Williams' motion to disqualify, finding that it was "legally insufficient" (4R 659).

On this appeal, Williams argues that each of these rulings was erroneous. In addition, he argues that, in ruling on the motion to reconstruct, Judge Geeker passed on the truthfulness of certain allegations Williams had made in his motion to disqualify. In so doing, Williams argues,

Judge Geeker impermissibly "passed on the truth of the facts alleged and adjudicated the question of his disqualification," citing Cave v. State, 660 So.2d 705 (Fla. 1995), and thus must be disqualified on this basis alone.

Williams has scrambled all sorts of things together here, with little explication as to any of them; the State will respond as follows:

First, any claim of judicial bias with regard to Judge Geeker's overrides of the jury life recommendations in the co-defendant's cases should have been raised at trial and on direct appeal and is procedurally barred on postconviction. Rodriguez v. State, 30 Fla. L. Weekly S385 (Fla. May 26, 2005). Williams' claim that trial counsel was ineffective for failing to move to disqualify Judge Geeker is addressed above (Issue V). For reasons set forth in the State's argument as to Issue V, even if this claim is not procedurally barred, it is legally insufficient. As discussed above, a court's adverse rulings, even if erroneous, are properly corrected by appeal, not disqualification. Moreover, because this Court affirmed all of the death sentences imposed in this case on direct appeal, Williams cannot demonstrate that the sentences

imposed on him and his co-defendants were even erroneous, much less disqualifying.

Second, because Williams did not identify in his motion the inappropriate comments Judge Geeker supposedly made at Williams' sentencing, his claim was insufficiently pled. Williams does not appear to contend otherwise, as the State is unable to discern that he argues or even mentions these statements in his brief on appeal.

Third, with regard to the motion to reconstruct Judge Geeker's office files, it is not clear just what files Williams wanted to reconstruct. Nor has Williams explained what right he ever had to view written material generated by the judge and his staff during the judicial decision-making process. Williams cites no authority whatever for the proposition that he is entitled to the disclosure of such material, and the State is aware of none.[15] Absent a

[15] See Fla. R. Jud. Admin. 2.051 (c), which states:

> (c) Exemptions. --The following records of the judicial branch shall be confidential:
>
> > (1) Trial and appellate court memoranda, drafts of opinions and orders, court conference records, notes, and other written materials of a similar nature prepared by judges or court staff acting on behalf of or at the direction of the court as part of the court's judicial decision-making process utilized in disposing of cases

demonstration that he would have been entitled to such material if it existed, he cannot establish any error in the court's denial of his motion to reconstruct that material.

Fourth, his argument that Judge Geeker passed on the truth of the facts alleged in his motion to disqualify fails on several counts. While it is true that, "[i]n considering a *motion to disqualify*, a court is limited to determining the legal sufficiency of the motion itself and may not pass on the truth of the facts alleged," Rodriguez (emphasis supplied), Judge Geeker did not address any facts in his order denying the motion to disqualify. The alleged factual finding is contained in Judge Geeker's ruling on Williams' motion to reconstruct the record. Judge Geeker was called upon by Williams to rule on this motion. He did so. Williams has not explained how any factual determination in ruling on this motion violates the prohibition against making factual determinations when ruling on motions to disqualify. Judges are often called upon to find facts when ruling on motions, and, motions to disqualify aside, are not disqualified for having done so.

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and controversies before Florida courts unless filed as a part of the court record.

Moreover, even when addressing a motion to disqualify, a judge may comment on the state of the record. Barwick v. State, 660 So.2d 685, 694 (Fla. 1995). Here, Judge Geeker denied Williams' motion to reconstruct his office file on the ground that it was "clear from the [trial] record" that the court's sentencing order in this case "dealt personally with defendant Williams, and the statutory and non-statutory mitigators applicable to him" (4R 657). This is merely a legal interpretation of an already made record and merely reiterates *what this Court found on direct appeal* when it reviewed Judge Geeker's sentencing order and affirmed Williams' death sentence. As such, it would not constitute an impermissible finding of fact even if it had been considered as part of the ruling denying the motion to disqualify.

Finally, mere similarity of the sentencing orders does not warrant granting the motion to reconstruct or the motion to disqualify. Of course the sentencing orders were similar; the crime was the same in each case. Williams merely alleges "similarity" without elaboration. He has not identified any facts included in his sentencing order that were incorrect or applicable only to one or more of his co-defendants; nor has he identified any facts peculiar to his own case that were excluded from his sentencing

order (or, for that matter, included in a co-defendants' sentencing order). In short, he has alleged nothing that would support a reasonable inference that Judge Geeker failed to differentiate between the various co-defendants or to properly evaluate the facts and circumstances of Williams' own case.

Judge Geeker properly and correctly denied the two motions at issue here. The motion to reconstruct was no more than an irrelevant and unwarranted fishing expedition, and the motion to disqualify was legally insufficient.

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THE TRIAL COURT CORRECTLY REJECTED WILLIAMS' APRRENDI/RING CLAIM

The State will not belabor this claim; it should be denied for a variety of reasons. First, any claim that Florida's capital sentencing procedures violate the Sixth Amendment's right to a jury trial could and should have been raised at trial and on direct appeal. Even if Williams could properly have waited until these postconviction proceedings to raise his Apprendi/Ring[16] claim, it is untimely here because he waited until three years after filing his motion for postconviction relief to assert this claim. See Jones v. Moore, 732 So.2d 313, 321-

[16] Apprendi v. New Jersey, 530 U.S. 466 (2000); Ring v. Arizona, 536 U.S. 584 (2002).

22 (Fla. 2001). Even if not untimely, Williams' prior violent felony convictions take his case outside any possible ambit of Ring. Finally, neither Ring nor Apprendi are retroactively applicable to cases already final when Ring was decided. Rodriguez, supra.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Joseph F. McDermott, Esquire, McDermott Law Firm, P.A., 7116-A Gulf Blvd., St. Pete Beach, Florida 33706, this ____ day of November, 2005.

_____
CURTIS M. FRENCH
Senior Assistant Attorney General

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