

IN THE SUPREME COURT OF FLORIDA

GARY RAY BOWLES,

Appellant,

v.

CASE NO. SC05-2264

STATE of FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF

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PRELIMINARY STATEMENT

So as to maintain consistency with the Appellant, references in the State's brief will be denominated as follows:

Vol. - Refers to the postconviction record

PP. - Refers to penalty phase proceedings

STATEMENT OF THE FACTS AND OF THE CASE

Gary Bowles was sentenced to death, for a second time, for the murder of Walter Hinton. The facts and procedural history underlying Bowles' crime are more fully explained in this Court's direct appeal opinion:

Appellant [Bowles] met Walter Hinton, the victim in this case, at Jacksonville Beach in late October or early November 1994. Appellant agreed to help Hinton move some personal items from Georgia to Hinton's mobile home in Jacksonville. In return, Hinton allowed appellant to live with him at his mobile home.

On November 22, 1994, police arrested appellant for the murder of Walter Hinton. During subsequent interrogation, appellant gave both oral and written confessions regarding Hinton's murder. Appellant stated that upon returning home from going with Hinton to take a friend [Richard Smith] to the train station, Hinton went to sleep and appellant kept drinking. Appellant, Hinton, and the friend had drunk beer and smoked marijuana earlier. At some point in the evening, appellant stated that something inside "snapped." He went outside and picked up a concrete block, brought it inside the mobile home, and set it on a table. After thinking for a few minutes, appellant picked up the block, went into Hinton's room, and dropped the brick on Hinton's head. The force of the blow caused a facial fracture that extended from Hinton's right cheek to his jaw. Hinton, now conscious, fell from the bed and appellant began to manually strangle him. Appellant then stuffed toilet paper into Hinton's throat and placed a rag into his mouth. The medical examiner testified that the cause of death was asphyxia.

Bowles v. State, 716 So. 2d 769, 770 (Fla.

1998).

The grand jury indicted Bowles in December of 1994 on charges of first-degree murder and robbery. Bowles pled guilty to premeditated first-degree murder. The penalty phase proceeded, and following the jury's ten-to-two recommendation for death, the trial court sentenced Bowles to death. On appeal, this Court affirmed the conviction but vacated the death sentence and remanded for resentencing. See *Bowles*, 716 So. 2d at 769. We found that the trial court erred in allowing the State to introduce in the penalty phase evidence of Bowles' alleged hatred of homosexual men. See *id.* at 773. We concluded that the presentation of such evidence was not harmless because it became a prevalent feature of the penalty phase, thereby placing in doubt the reliability of the sentencing proceeding. See *id.*

On remand, the resentencing jury unanimously recommended death. In imposing the death penalty the trial court found the following five aggravating circumstances: (1) Bowles was convicted of two other capital felonies and two other violent felonies; (2) Bowles was on felony probation in 1994 when he committed the murder as a result of a July 18, 1991, conviction and sentence to four years in prison followed by six years probation for a robbery he committed in Volusia County; (3) the murder was committed during a robbery or an attempted robbery, and the murder was committed for pecuniary gain (merged into one factor); (4) the murder was heinous, atrocious, or cruel (HAC); and (5) the murder was cold, calculated, and premeditated (CCP).

The trial court assigned tremendous weight to the prior violent capital felony convictions. On September 27, 1982, in Hillsborough County, Bowles was convicted of sexual battery and aggravated sexual battery. These offenses involved an extremely high degree of violence. The victim, Bowles' girlfriend at the time, was brutally attacked, suffering contusions to her head, face, neck, and chest, as well as bites to her breasts. The victim also suffered internal injuries including lacerations to her vagina and rectum. On July 18, 1991, Bowles was convicted in Volusia County of unarmed robbery. In this offense, Bowles pushed a woman down and stole her purse. On August 6, 1997, in Volusia County, Bowles was convicted of first-degree murder and armed burglary of a dwelling with a battery. In this crime, a few days after

moving into the victim's home, Bowles approached the victim from behind and hit him with a lamp. A struggle ensued during which Bowles strangled the victim and stuffed a rag into his mouth. Bowles then emptied the victim's pockets, took his credit cards, money, keys, and wallet. On October 10, 1996, in Nassau County, Bowles was convicted of first-degree murder. The victim befriended Bowles and allowed Bowles to stay at his home. Bowles and the victim got into an argument and a fight outside of a bar. Bowles hit the victim over the head with a candy dish, and a struggle ensued, resulting in the victim being beaten and shot. Bowles also strangled the victim and tied a towel over his mouth.

The trial court assigned great weight to the HAC and CCP aggravators, significant weight to the robbery-pecuniary gain aggravator, and some weight to the fact that Bowles was on probation for robbery at the time of this murder.

The trial court rejected the two statutory mitigators advanced by Bowles: (1) extreme emotional disturbance at the time of the murder and (2) substantially diminished capacity to appreciate the criminality of his acts at the time of the murder. The trial court found and assigned weight to the following nonstatutory mitigating factors: significant weight to evidence that Bowles had an abusive childhood; some weight to Bowles' history of alcoholism and absence of a father figure; little weight to Bowles' lack of education; little weight to Bowles' guilty plea and cooperation with police in this and other cases; little weight to Bowles' use of intoxicants at the time of the murder; and no weight to the circumstances which caused Bowles to leave home or his circumstances after he left home. The trial court concluded that the aggravating circumstances overwhelmingly outweighed the mitigating circumstances.

Bowles v. State, 804 So. 2d 1173, 1175 (Fla. 2001).

Bowles raised a number of claims on direct appeal. Each was rejected; and this Court affirmed his death sentence. Thereafter he brought a postconviction motion raising nine claims: (1) his trial counsel was ineffective for failing to bring forth statutory and non-statutory mitigation; (2) the trial court improperly denied

Bowles' request that the statutory and non-statutory mitigators be defined for the jury; (3) the trial court erroneously instructed the jury that they could consider victim impact testimony; (4) under *Ring v. Arizona*¹ the jury was required to serve as a fact-finder for every element of the offense charged; (5) Section 921.141, Fla. Stat. was unconstitutional; (6) he was denied his constitutional rights under *Ring* because he was not provided notice as to the nature of the charges against him, nor was every element of the indictment proven; (7) Bowles' death sentence was constitutionally infirm because the jury did not render a unanimous verdict; (8) his trial counsel was constitutionally ineffective because he did not adequately investigate nor present substantive mitigating evidence; and (9) his death sentence was unconstitutional because his trial counsel did not introduce countervailing evidence that would have gone towards rebutting the applicability of the Heinous, Atrocious, or Cruel (HAC) Aggravator.

Following a *Huff*² hearing and a postconviction evidentiary hearing, the court found most of Bowles' claims were procedurally barred. However, the court did more substantively address his last two post-conviction claims, and found that his assertions that his counsel was constitutionally ineffective were without merit.

Bowles now brings this appeal, challenging the denial of his

¹ 536 U.S. 584 (2002).

² *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

postconviction claims.

THE EVIDENTIARY HEARING

A post conviction evidentiary hearing was convened on February 8, 2005. The first witness called by Bowles was Dr. Ronald Keith Wright (Vol. III 6). Dr. Wright stated that he was a forensic pathologist, and that he possessed both a medical and legal degree (Vol. III 8). Wright noted that he was formerly employed as a medical examiner in Dade and Broward Counties (Vol. III 12). Wright stated that he currently worked as a forensic pathologist, and most of his duties included, but were not limited to, assessing the circumstances and surrounding causes of an individual's death (Vol. III 16); he further estimated that had performed more than 12,000 autopsies (Vol. III 13-14). Wright had published several articles on the subject of asphyxia (Vol. III 17); and Wright acknowledged performing thousands of autopsies wherein the central cause of death was a head injury (Vol. III 18). Wright was tendered by Bowles as an expert in forensic pathology (Vol. III 20). Wright testified that he had reviewed the autopsy performed on Walter Hinton (Vol. III 23). Wright also reviewed police reports and numerous photographs that had been taken in conjunction with the autopsy (Vol. III 24-25). Wright provided that the injury to Hinton's head was consistent with being struck by a rock, stone, or brick (Vol. III 28-29). Wright averred that it was likely that Hinton had been lying on his back when he was struck

(Vol. III 30). Wright provided that when an individual is struck on the face, he does not automatically lose consciousness; however, if Hinton were to have suffered a diffuse axonal injury, i.e., an injury directly impacting his jaw area, he would have lost consciousness very rapidly (Vol. III 34-35). Wright stated that for the initial portion of the attack, Hinton was conscious as evidenced by his defensive wounds; and that sometime thereafter, Hinton had a washcloth and toilet paper shoved into his mouth; Wright believed that in the interim between the initial attack, and being gagged, Hinton had lost consciousness (Vol. III 41). Wright believed that Hinton had been struck while he was lying on a mattress - basing his opinion, in part, on the fact that Hinton had suffered facial and frontal fractures (Vol. III 45). Wright answered affirmatively when asked whether a person who is unconscious could sustain broken bones and bruising (Vol. III 47). Wright believed that it was "perhaps possible" that Hinton was conscious immediately after he had been struck with the stone (Vol. III 48); but, further testified that he believed that Hinton had been rendered unconscious when he was struck (Vol. III 50). Wright did not think that Hinton was aware that he was going to die, nor did Wright believe that Hinton had experienced any pain (Vol. III 50).

Wright was cross-examined. Wright conceded that a different pathologist could have analyzed Hinton's autopsy report and reached

a conclusion contrary to Wright's opinion (Vol. III 53). Wright conceded that a determination as to how a victim was killed entails consideration of facts including, a defendant's own story as to how he killed the victim (Vol. III 54). Wright agreed that a medical examiner who actually goes to the crime scene has an advantage over an individual who has not (Vol. III 55). Wright further conceded that the individual who performs the autopsy is better situated to evaluate the circumstances surrounding the death, than would an individual who had not personally performed the autopsy (Vol. III 56). Wright stated that he did not review the statement Bowles' provided to the police, nor did Wright review the homicide report (Vol. III 58). Wright testified that he did not review the testimony of an evidence technician who had testified at the penalty phase proceeding - and who had demonstrated the heaviness of object was that had struck Hinton (Vol. III 61). Wright testified that he would tend to discount an eyewitness account as to how events transpired, particularly when the eyewitness' statement contradicts the physical evidence (Vol. III 62). However, Wright also noted that when a defendant essentially provides a confession detailing the nature of his crime, the confession proves to be "pretty convincing" (Vol. III 63). Wright stated that he did not review the statement that Bowles had given to police because it had not been provided to him (Vol. III 64). Wright was read the statement Bowles provided to police describing the circumstances

surrounding Hinton's death, wherein Bowles stated that he struggled with Hinton; Wright responded that simply because Bowles and Hinton struggled did not evidence that Hinton was fully conscious during the altercation (Vol. III 66). Wright observed that Bowles' police statement was not very descriptive and therefore Wright preferred to rely on physical evidence (Vol. III 67). Wright conceded that Hinton was first struck with the concrete block (Vol. III 70), and then had been manually strangled (Vol III 68-69). Wright testified that Hinton, and then was strangled. Wright acknowledged that Bowles could have strangled Hinton because he (Hinton) had remained conscious after being initially struck; though, Wright opined that there should have been more damage to Hinton's throat had he been fully conscious (Vol. III 71). In Wright's estimation, the nature of Hinton's defensive wounds indicated that he had been struck with the concrete block more than once (Vol. III 72), and he was likely aware, for a portion of the attack, of what was transpiring (Vol. III 73). Wright agreed that the statement that had been provided to the police by Bowles, indicating that he had strangled Hinton with his arm (and not his hands), was consistent with the injuries found on Hinton (Vol. III 74). Wright further agreed that because Hinton had attempted to crawl to the bathroom after being struck, this was evidence that he was conscious for at least some portion of the attack (Vol III. 75). Wright also conceded that it was possible that Hinton was conscious when Bowles stuffed toilet

paper and a rag down his throat (Vol. III 78).

Wright was subjected to redirect examination. Wright testified that a nearly unconscious individual could still make purposeful movements like crawling (Vol III 80). Wright also stated that it was not a certainty that Hinton had experienced pain, observing that individuals who have lost consciousness, lose the ability to feel pain relatively "early in that process" (Vol III 80).

Bowles next called Dr. Harry Krop to testify. Krop was a licensed clinical psychologist, with a specialization in forensic psychology (Vol. III 81-83). Krop evaluated Bowles on three separate occasions between 2003 and 2004 (Vol III 89). Krop reviewed the deposition testimony of Dr. Elizabeth McMahon who had evaluated Bowles prior to the penalty phase (Vol. III 91-92). Krop disagreed with McMahon's neuropsychological assessment of Bowles -- that he was "clean" (Vol. III 100). Krop felt that Dr. McMahon should have conducted more testing to determine whether Bowles had frontal lobe damage (Vol. III 103). According to Krop, based on Bowles' history of being physically abused, in conjunction with his long-standing substance abuse issues, should have necessitated testing for brain damage (Vol. III 106). Krop provided that physical trauma to brain, sustained alcohol abuse, and chronic huffing of paint (all of which were applicable to Bowles) could impair brain functioning (Vol. III 107). Krop agreed

with McMahon's finding that Bowles had difficulty "learning to learn" (Vol. III 108-09). Krop acknowledged that Dr. McMahon had previously stated that she could have subjected Bowles to additional neuropsychological testing, but that she did not believe that such tests would have been a resourceful use of taxpayers' money (Vol. III 111). Krop believed that additional tests could always be beneficial, particularly in the context of a capital case (Vol III. 112). Krop did not agree with McMahon's evaluation that Bowles may have been maligering (Vol. III. 113). McMahon had apparently diagnosed Bowles with some form of mild brain damage, although McMahon provided that she was unable to localize his mental impairment; Krop believed that McMahon's evaluation would have been better served if she had administered a more encompassing neuropsychological evaluation (Vol. III 115-118). Krop asserted that he had administered a comprehensive neuropsychological examination to Bowles which revealed among other things, that Bowles' IQ was in the "low 80's." (Vol. III 118). Kropp stated that he administered the Weschler Memory Scale, and this test revealed that Bowles had serious problems with his memory functioning (Vol. III 118-119). Krop also noted that on a particular IQ subtest that was intended to gauge one's "working memory," Bowles performed quite poorly (Vol. III 119). Krop opined that the results of various tests indicated that Bowles probably had some type of frontal lobe damage (Vol. III 120). According to

Krop, problems with frontal lobe damage could lead to heightened impulsivity (Vol. III 120 - 21).

Krop was then cross-examined. Kropp acknowledged that Dr. McMahon had been deposed on two separate occasions in the Bowles case, once in 1996, and again in 2004 (Vol. III 121-22). Krop agreed that Dr. McMahon was extremely qualified (Vol. III 133). He also acknowledged that he had worked with Dr. McMahon in other cases (Vol. III 134). Krop did note that according to an MRI report, Bowles did not appear to have any "physical structural problems" to his brain (Vol. III 125). Krop believed that although the MRI failed to show structural problems, his neuropsychological evaluation of Bowles evidenced that Bowles had "significant cognitive deficits consistent with frontal lobe impairment" (Vol. III 127). Krop provided that in capital cases, if the results of his testing suggested brain damage, he would usually refer the individual to a neurologist for more tests (Vol. III 128). Krop estimated that MRI tests showed some type of physical damage in only five to ten percent of cases (Vol. III 130). Krop agreed that Dr. McMahon had administered two neuropsychological tests to Bowles, but he (Krop) personally felt that more tests should have been administered to assess Bowles' brain functioning (Vol. III 135). Krop noted that Dr. McMahon did not administer the Category Test, which would have assisted with diagnosing frontal lobe impairment (Vol. III 137). Krop acknowledged that he had diagnosed

Bowles with Anti-Social Personality Disorder (Vol. III 137-38). Krop further acknowledged that he had diagnosed Bowles with a Conduct Disorder (Vol. III 139). Krop agreed that putting forth all of the attendant features of Bowles' Anti-Social Personality Disorder and Conduct Disorder to a jury, in a capital proceeding, would not have been entirely beneficial to Bowles; however, Krop believed that additional testimony could have been brought forth explaining how Bowles' developed these disorders - which would have included evidence of brain damage, his dysfunctional home, and his history of physical and substance abuse (Vol. III 139-40). Krop disagreed with McMahon's analysis that Bowles did not suffer from any brain damage; and Krop felt that Dr. McMahon's evaluation had at least implicitly acknowledged that Bowles' suffered from a cognitive deficit (Vol. III 144-45). Krop testified that the MRI only tends to show physical damage with the brain (Vol III. 147). Krop noted that Bowles' read on a high school level, and spelled and performed arithmetic on the level of a sixth or seventh grader - though he was able to attain his GED (Vol. III 147-48). Krop testified that he administered Bowles a test - which McMahon had not - called the Delis Kaplan Executive Functioning System (D-KEFS); the D-KEFS was a series of subtests which measured, among other things, frontal lobe functioning (Vol III 149-50). Krop noted that Bowles had some memory problems (Vol. III 153), though his long-term memory was good (Vol. III 154). Krop agreed that

Bowles was capable of planning things out (Vol. III 154). Moreover, none of Bowles' apparent brain deficits preventing him from planning and effectuating the murder of Hinton (Vol. III 155). Krop observed that a large degree of murders occur somewhat impulsively (Vol. III 155); he also acknowledged that impulsiveness is an attribute of Anti-Social Personality Disorder (Vol. III 156). Finally, Krop again conceded that there was no evidence that Bowles had any structural damage to his brain (Vol. III 156). Bowles rested.

The State then called Bill White to testify (Vol. III 158). White provided that he was the Public Defender for the Fourth Judicial Circuit, and prior to his appointment, served as Chief Assistant Public Defender for the Fourth Judicial Circuit (Vol. III 159). White was unable to give an exact number as to how many first degree murder cases that he handled (Vol. III 160). White served as lead counsel in Bowles' murder trial, and he was assisted by Brian Morrissey, an attorney also working within White's office (Vol. III 162-63). White stated that he made the ultimate decisions regarding trial strategy (Vol. III 164). White acknowledged that he had received notification that the prosecution intended to pursue Williams Rule evidence regarding murders committed by Bowles in Daytona Beach and Nassau County (Vol. III 164). White testified that his office assigned investigators to gather information about Bowles' background (Vol. III 164).

White acknowledged that his office hired Dr. McMahon as a mitigation specialist (Vol. III 166). White stated that McMahon analyzed Bowles' psychological background; and, that along with White, McMahon interviewed Bowles' family members (Vol. III 166). White testified that he and McMahon flew to Arizona to meet with some of Bowles' family members, including his mother (Vol. III 166). White's co-counsel, Brian Morrissey, investigated Bowles' family history as well, and traveled to West Virginia and Kentucky (Vol. III 166). According to White, Morrissey learned that Bowles' family had a long history of alcoholism; and that Bowles was an alcoholic, who had been abusing both drugs and alcohol from a young age (Vol. III 166). White testified that based on family interviews, he learned that Bowles was abused as a child; and relying on this information, White sought to establish the extreme emotional disturbance mitigator (Vol. III 167). White noted that Dr. McMahon administered both psychological and neurological tests to Bowles (Vol. III 167). In addition, Dr. McMahon conducted extensive personal interviews with Bowles (Vol. III 168). White acknowledged that a decision was made to plead guilty, and to then proceed to the penalty phase (Vol. III 168). White was asked about his decision not to call McMahon as a witness; he stated this was a conscious decision (Vol. III 169). White expressed concern about the fact that the prosecution was threatening to introduce evidence implicating Bowles in several other murders that took place in

Daytona Beach, Nassau County, Savannah, Atlanta, and Maryland (Vol. III 169-70, 174). White was informed by McMahon that in order to maintain her credibility during the penalty phase hearing, she would have had to divulge the fact that Bowles was involved in these five other murders (Vol. III 170). White acknowledged that Bowles had provided inculpatory statements to the FBI and several different local sheriff's offices regarding his involvement in various murders (Vol III 171). White testified that the statements that Bowles provided to law enforcement evidenced that he had sufficient recall of events (Vol. III 172). White agreed that in the instant case, Bowles provided an oral statement to the Jacksonville Sheriff's Office, wherein he (Bowles) acknowledged consciously striking Hinton on the head with a large stone or concrete block (Vol. III 172). White further acknowledged that in Bowles' statement, he admitted that after striking Hinton, Bowles and Hinton engaged in a struggle before Bowles stuffed Hinton's mouth with toilet paper and a rag (Vol. III 172-73). White acknowledged that Bowles also provided the Jacksonville Sheriff's Office with a written statement (Vol. III 173). White stated that he conferred with his co-counsel, Morrissey, regarding which witnesses they intended to put on the stand during Bowles' penalty phase hearing (Vol. III 175). White noted that witnesses called on Bowles' behalf included his brother (also an alcoholic), and his mother - both of whom were to testify regarding the abuse that

Bowles suffered as a child (Vol. III 175-76). Another witness, named Richard Smith, was also called, and the purpose of his testimony was to explain the extent of Bowles' intoxication on the night of the murder (Vol. III 176). Bowles' defense team also called Edward Suarez as a witness; Suarez was a prosecutor who testified that Bowles' had provided some investigatory assistance in a unrelated case (Vol. III 176). White conceded that he went back and forth regarding whether to put McMahon on the stand (Vol. III 177). White wanted McMahon to testify that Bowles was likely encumbered by severe emotional disturbance at the time of the murder (Vol. III 177). However, McMahon was also likely to testify regarding some of her negative conclusions about Bowles - that would have undermined his case for mitigation - therefore a decision was made not to put her on the stand (Vol. III 177). White stated that statutory mental mitigators were argued on Bowles' behalf; in addition, White presented information regarding Bowles' substance abuse issues and the fact that he was abused as a child (Vol. III 178). Further, White reiterated that he did not call McMahon as a mitigation witness because her testimony was likely to be more harmful than beneficial to Bowles' mitigation claims (Vol. III 179). White also testified that he did not present an expert to rebut the testimony of a medical examiner who had testified that Bowles struggled with the victim before he died, because, Bowles had given a confession stating exactly the same

thing (Vol. III 181-82).

White was cross-examined. White acknowledged that he was aware of Bowles' long history of substance abuse, and of the fact that he was abused as a child (Vol. III 183). White also acknowledged being aware that McMahon had found that Bowles had difficulty "learning to learn" (Vol. III 184). White testified that in his discussions with McMahon, she (McMahon) felt that Bowles did not suffer from any structural damage to the brain, and, that any testing difficulties Bowles encountered were due his deprived upbringing, rather than due to any serious neurological impairment (Vol. III 184). White stated that it is not his usual practice to secure a second expert to rebut the findings of his initial expert (Vol. III. 185). White indicated that a second expert might be retained in an instance where White's evaluation of a defendant's cognitive functioning did not coincide with the findings of the retained expert (Vol. III 185-86). However, in Bowles' case, White agreed with McMahon's assessment, and therefore did not feel the need to retain a second expert (Vol. III 186). White acknowledged that a medical examiner had testified that Bowles had struggled with the victim before he died, and, this determination undergirded the HAC aggravator found by the trial court (Vol. III 186-87). White said that retaining a second expert to challenge the medical examiner's findings was not discussed (Vol. III 187). White conceded that he did not put on any

evidence that would have challenged the trial court's finding that Hinton was conscious, and experienced pain, before he died (Vol. III 187). White acknowledged that there was no formal policy in his office regarding under what circumstances a neurologist should be retained to assess the presence of organic brain damage in a defendant (Vol. III 188). White provided that a determination regarding the retention of a neurologist is usually made on a case-by-case basis, in consultation with co-counsel (Vol. III 189). White further provided that a neurologist would likely be called when the accused's account of events was fundamentally at odds with that of the medical examiner's testimony - thereby raising a arguable claim (Vol. III 189). White conceded that Bowles did not acknowledge being aware Hinton was suffering; however, Bowles did tell White that he trying to put Hinton "out of his misery" (Vol. III 189).

On redirect, White stated that Bowles had told the Jacksonville Sheriff's Office, that he fell on the ground and had struggled with Hinton (Vol. III 190).

In lieu of presenting her testimony live, the parties permitted Dr. Elizabeth A. McMahon, who had previously evaluated Bowles, to testify via her October 28, 2004 deposition testimony. McMahon provided that White had retained her to evaluate Bowles' competency to stand trial, his competency contemporaneous to the murder of Hinton, and to develop mitigation evidence on Bowles

behalf (Vol. II 196). McMahon provided that she first met with Bowles on May 5, 1995 for eight hours, wherein she administered various tests (Vol. II 196). McMahon acknowledged also meeting with Bowles on a second occasion, wherein she conducted a four hour interview (Vol. II 198). McMahon administered the WAIS IQ test to Bowles; according to McMahon, Bowles scored in the low-average intelligence range (Vol. II 199). McMahon also administered a variety of other subtests meant to assess Bowles' cognitive functioning (Vol. II 200-01). McMahon found, based on the results of her testing, that Bowles' evidenced some memory problems and failed to learn from his mistakes (Vol. II 203). McMahon stated that individuals who have difficulty "learning how to learn" are usually psychologically immature and somewhat impulsive (Vol. II 204). She also found that Bowles did not learn from past mistakes, nor did he contemplate the future consequences of his present actions - thereby calling into question his adaptive functioning (Vol. II 204-05). McMahon also administered a series of tests to evaluate Bowles' cognitive functioning (Vol. II 206). Based on the results from these tests, McMahon opined that Bowles was likely not working with an "intact brain" and had "some very mild dysfunction" (Vol II. 207). However, in McMahon's clinical opinion, although Bowles had some brain impairment, it was by no means significant (Vol. 208). Other personality tests administered by McMahon evidenced that Bowles had a great deal of hostility and anger

which, McMahon theorized, stemmed from Bowles' abusive childhood (Vol. II 209-10). Bowles' abusive past made it difficult for him to form close interpersonal relationships - as Bowles often perceived that he was being threatened (Vol. II 211). McMahon was asked whether additional neuropsychological tests could have been administered to Bowles; she responded that the tests she administered to Bowles were sufficient for a proper assessment of his neuropsychological functioning (Vol. II 215). McMahon did not believe that alternative memory tests should have been administered to Bowles because, based on her evaluation of him, his memory of past events was "fine" (Vol. II 216-17). McMahon stated that she had interviewed several people who knew Bowles including: his mother, his brothers, his aunt, his cousin, and a friend (Vol. II 215, 220-21). The information that Bowles' family members provided, primarily dealt with the difficulty of his childhood (Vol. II 218). McMahon learned that Bowles' mother was exceptionally neglectful and would often leave her children with their grandmother for months at a time (Vol. II 218). Additionally, Bowles' mother would often choose to live with abusive men rather than with her children (Vol. II 218). Bowles related to McMahon that he often had violent encounters with these men (Vol. II 219). In addition, Bowles told McMahon that he had long history of substance abuse (Vol. II 219-20). McMahon found that Bowles suffered from cortical dysfunction which manifested itself in the

fact that Bowles oftentimes had "less ability to hang on to rationale behavior when he gets very angry" (Vol. II 221). McMahon observed that Bowles showed some evidence of a mild cognitive impairment (Vol. II 222). McMahon did not believe that Bowles had any frontal lobe impairment (Vol. II 223). She also stated that she was aware that he had been abusing drugs and acting as a prostitute since he was a teenager (Vol. II 223). McMahon testified that Bowles prostituted himself because, among other reasons, he sought relatively easy money (Vol. II 224). When asked why she did not administer additional neuropsychological tests, McMahon responded that she did not believe that more tests would have assisted in her evaluation; she noted that an individual with significant brain damage would have evidenced it via the various tests she administered (Vol. II 226-27). McMahon did not believe Bowles' behavioral problems were caused by his brain (Vol. II 227). She felt that his behavior was the byproduct of his "psycho dynamics" (Vol. II 227). McMahon stated that "psycho dynamics" encompassed, among other things, one's perceptions of the world, their internal conflicts, their interpersonal relationships, and how they handle their emotions (Vol. II 227). McMahon found that Bowles' behavior was not the result of any brain deficits (Vol. II 228). She also acknowledged discussing with Bowles' attorney, White, whether she should testify at the trial (Vol. II 228). McMahon and White agreed that McMahon should not be called as a

witness because her testimony would have likely ended up causing Bowles more harm than good (Vol. II 229, 231-32). McMahon described the extent of Bowles' brain impairment as "very mild" (Vol. II 230).

SUMMARY OF ARGUMENT

Bowles raises several arguments following the denial of his postconviction claims. First, Bowles contends that counsel's representation during the penalty phase constituted ineffective assistance of counsel. Bowles argues that during the penalty phase, mitigation evidence should have presented in the form of a mental health expert who would have testified regarding the applicability of two statutory mitigators: (1) that Bowles was unable to appreciate the criminality of his actions; and (2) that he was under the influence of extreme emotional disturbance at the time of the murder.

The mental health expert whom Bowles now claims he wanted to testify during his penalty phase hearing, Dr. McMahon has explained that after having discussions with Bowles' attorneys, it was decided that she should not be called to testify because she would likely have had to provide testimony that would have been harmful to him. Thus, Bowles' counsel made a determination that calling McMahon as a mitigation expert would have had a detrimental impact on his mitigation claims. As this Court has often recognized, purely strategic trial decisions which were reasonable under the

circumstances, should not be challenged on ineffective assistance grounds. Therefore, this claim should be found to be without merit.

Secondarily, Bowles argues that his penalty phase counsel again violated the commands of *Strickland v. Washington*, because, his counsel failed to bring forth evidence that would have gone towards challenging the Heinous, Atrocious, or Cruel (HAC) aggravator. Bowles' ineffective assistance claim is without merit because the basis for the HAC aggravator rested partially with the oral and written confession Bowles provided to the Jacksonville Sheriff's Office. In his confession, he described how he committed the murder, and further asserted that he struggled with Hinton before he died. Therefore, Bowles should not be permitted to argue that his counsel failed to vigorously challenge the HAC aggravator when Bowles' own words supported the aggravator's applicability.

Third, Bowles contends that his postconviction claim asserting ineffective assistance of counsel was improperly denied; and that because the denial occurred summarily - his fundamental rights have been undermined. The State concedes that it finds Bowles' claim of error to be somewhat difficult to decipher. However, it appears as though Bowles is claiming that the postconviction evidentiary court failed to give proper consideration to his claim that he was denied effective assistance of counsel during his penalty phase. This argument appears to simply be a reconstituted version of his

initial claim of error. As will be articulated, his postconviction claims were not improperly denied - as they were legally insufficient.

Fourth, Bowles argues that his postconviction claims brought pursuant to *Ring* and *Apprendi*³ were erroneously denied. This claim should be dispensed with rather briskly. As has been noted by this Court repeatedly, neither *Ring* nor *Apprendi* have been held to have retroactive applicability, therefore the summary denials of Bowles' claims were not improper.

Finally, Bowles raises an argument that appears to suggest that *Crawford v. Washington* should have retroactive applicability. This claim derives from an argument initially raised on direct appeal. Bowles previously argued that the trial court had erroneously allowed a member of law enforcement to testify regarding Bowles' 1982 convictions for aggravated and sexual battery. Bowles now seems to argue that permitting the introduction of this prior crime constituted impermissible hearsay and violated his right to confrontation under the Sixth Amendment. As Bowles has raised a variant of this argument on direct appeal - it should therefore be procedurally barred; additionally, because this court has held that *Crawford* does not have retroactive applicability, his claim is without merit.

STANDARD OF REVIEW

³*Apprendi v. New Jersey*, 530 U.S. 466 (2000).

This matter comes before this Court following the denial Bowles' claims for postconviction relief; accordingly, if "the trial court's findings are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact, likewise the credibility of witnesses as well as the weight to be given the evidence by the trial court." *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997) (citations and internal quotation marks omitted).

ARGUMENT

I. THE DECISION BY BOWLES' ATTORNEY NOT TO PRESENT A MENTAL HEALTH EXPERT (WHO HAD EVALUATED BOWLES) AS A MITIGATION WITNESS WAS A REASONABLE STRATEGIC DECISION BECAUSE BOWLES' ATTORNEY WAS AWARE THE EXPERT WAS PREPARED TO PRESENT TESTIMONY HARMFUL TO BOWLES' MITIGATION CLAIM

Bowles' argues that his penalty phase counsel's decision not to present the testimony of Dr. Elizabeth A. McMahon as a mitigation witness constituted ineffective assistance under *Strickland v. Washington*. McMahon had evaluated Bowles prior to the penalty phase. While McMahon did find that Bowles, perhaps, had a mild brain impairment, it was certainly not significant enough to obviate his culpability for the murder of Walter Hinton. McMahon also did not believe that Bowles was encumbered by frontal lobe damage, and that his behavioral problems did not derive from his brain; rather, she found that Bowles simply had difficulty restraining his impulses, particularly when he became angry.

Bowles now contends that his attorney's representation fell

below constitutional standards because McMahon was not called as a mitigation witness. He believes that McMahon would have provided testimony that would have gone towards supporting two statutory mental mitigators: (1) that Bowles lacked the ability to appreciate the criminality of his actions; and (2) that Bowles suffered from extreme emotional disturbance contemporaneous to the commission of the crime.

Under *Strickland*, an individual claiming that he has been denied effective assistance of counsel must first "identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards." *Maxwell v. Wainright*, 490 So. 2d 927, 932 (Fla. 1986). Thereafter, the claimant must establish that his lawyer's allegedly deficient representation "so affected the proceeding that confidence in the outcome is undermined." *Id.* Upon review of an ineffective assistance of counsel claim, this Court presumes that counsel's representation comported with professional norms. See *Strickland*, 466 U.S. at 690. Ineffective assistance of counsel claims are construed as mixed questions of fact and law wherein this Court independently reviews "the trial court's legal conclusions, while giving deference to the factual findings." *Davis v. State*, 928 So. 1089, 1105 (Fla. 2005).

According to the deposition testimony of McMahon, she intended to discuss the fact that she did not believe Bowles suffered from

a frontal lobe impairment; and, that his propensity towards violence was not due to neurological factors. McMahon averred that, in her opinion, McMahon's behavioral problems were a consequence of his "psycho dynamics," which were an amalgam of external factors that included his familial background and his interpersonal relationships. McMahon was unwilling to testify that Bowles' mild brain dysfunction was akin to a severe neurological disorder.

The fact that the Bowles' attorney, Bill White, chose not to call McMahon to testify was purely a strategic decision that was intended to strengthen, rather than detract from, his mitigation claims. By her own admission, McMahon believed her testimony would have done Bowles more harm than good - a legitimate basis for not calling her at all. *See, e.g., Gaskin v. State*, 822 So. 2d 1243, 1248 (Fla. 2002) ("Trial counsel will not be held to be deficient when she makes a reasonable strategic to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony."). Both White and McMahon acknowledged struggling with whether or not it was appropriate to call McMahon - particularly if her testimony would have subjected her to a withering cross-examination that would have elicited very damaging information. *See, e.g., Cave v. State*, 899 So. 2d 1042, 1055 (Fla. 2005) (recognizing that the decision by Cave's attorney not to bring forth mental health experts who had evaluated Cave

“was a reasonable strategic decision made after fully considering the reports and depositions of . . . [the] experts . . . and weighing the benefits to be gained from presenting such testimony against the damaging information that the State would be able to elicit from the experts on cross-examination”). White’s rationale for not calling McMahon certainly finds strong support in this Court’s jurisprudence.

Perhaps McMahon would have been able to testify regarding some potentially mitigating aspects of Bowles’ life – such as his history of being abused as a child; but, McMahon would have also testified that Bowles was not encumbered by a mental infirmity that lessened his culpability; and further, she would have stated that Bowles’ had a likelihood of future violence. *See, e.g., Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004) (“An ineffective assistance claim does *not* arise from the failure to present mitigation evidence where the evidence presents a double-edged sword.”) (emphasis added). This Court has acknowledged that a decision not to bring forth a mental health expert whose prospective testimony will undermine a capital defendant’s mitigation claims is entirely reasonable under *Strickland*. *See, e.g., Haliburton v. Singletary*, 691 So. 2d 466, 471 (Fla. 1997) (determining that no *Strickland* violation occurred when attorney did not call mental health expert during penalty phase because although the expert would have discussed the fact Singletary was brain damaged, the

expert's testimony would have also encompassed the fact that Singletary was extremely dangerous and would potentially kill again); see also *Reed*, 875 So. 2d at 473 (affirming the denial of *Strickland* claim that was premised on the fact that a particular mental health expert was not called because, as the expert "himself acknowledged[,] certain aspects of his examination and testimony might have been more helpful to the State than the defense").

The record in this case also indicates that Bowles penalty phase counsel, White, had more than twenty years of experience representing capital defendants by the time he served as Bowles counsel; thus his decision not to call McMahon as a mitigation witness proves all the more reasonable. See, e.g., *Provenzano v. Singletary*, 148 F. 3d 1327, 1332 (11th Cir. 1998) ("Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel.").

Consequently, the State respectfully urges this Court to deny Bowles' claim that this counsel was ineffective for failing to call a mental health expert to testify during the penalty phase, as the expert acknowledged that her testimony would have done more harm than good to Bowles' mitigation claims.

II. BOWLES ATTORNEY WAS NOT CONSTITUTIONALLY DEFICIENT FOR FAILING TO BRING FORTH EXPERT TESTIMONY THAT WOULD HAVE GONE TOWARDS REBUTTING EVIDENCE SUPPORTING THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR (HAC) THAT WAS FOUND BY THE TRIAL COURT

Bowles argues that his lawyer also contravened the tenets of *Strickland* because expert testimony was not brought forth that would have gone toward's challenging the applicability of the HAC aggravator. Bowles avers that during the penalty phase, the State brought forth Dr. Margarita Arruza, a medical examiner who analyzed the crime scene and performed the autopsy on Hinton. Arruza testified regarding the circumstances of Hinton's death, and found that, based on the nature of Hinton's injuries, he had been manually strangled (PP. III 550). She also noted that Hinton did not die immediately after being struck in the face by the forty-pound block (PP. III 556-57). Further, Arruza determined that Hinton had defensive arm wounds, and that a rag and toilet paper were stuffed down Hinton's throat; therefore, these factors evidenced that Hinton attempted to fight back and was not immediately rendered unconscious (PP. III 557).

The State believes Arruza's testimony clearly suggested the applicability of the HAC aggravator. In turn, Bowles argues that a medical expert should have been brought forth to refute the testimony of Dr. Arruza. Bowles' brief argues, for example, that the testimony provided by Dr. Ronald Keith Wright at the postconviction evidentiary hearing supports Bowles' contention that Hinton died immediately - thereby calling into question the HAC

aggravator's applicability.⁴

This Court has stated the HAC aggravator is applicable to those murders where the victim is tortured, *i.e.*, wherein the perpetrator's actions were so wanton, remorseless, and egregious as to exemplify a seeming "desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." *Guzman v. State*, 721 So. 2d 1155, 1159 (Fla. 1998) (citation omitted). Moreover, this Court has also recognized that in order to apply the HAC aggravator, the victim must be cognizant of her imminent death. *Way v. State*, 760 So. 2d 903, 919 (Fla. 2000); see also *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988) (observing that the applicability of the HAC aggravator must be assessed from the victim's vantage point "in accordance with a common-sense inference from the circumstances"). Plainly stated, "the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998).

Bowles' averment misapprehends both the totality of the record, and relevant precedent. First, although Bowles couches his argument as an ineffective assistance of counsel claim, he is in essence arguing that the HAC aggravator should not have been found

⁴One should recall that Wright did not perform the autopsy on Hinton, had not been to the crime scene, and prior to testifying at the postconviction evidentiary hearing, had not read Bowles' confession.

applicable to this matter. Despite his semantics, Bowles cannot escape the fact that he has already argued on direct appeal that the HAC aggravator should not have been found. *See, e.g., Bowles v. State*, 804 So. 2d at 1179 (“we find that competent, substantial evidence in the record supports the trial court’s finding that [Hinton] was strangled while conscious for a time sufficient to suffer a physically and mentally cruel and tortuous death . . . [a]ccordingly we affirm the trial court’s finding of HAC”). As such, Bowles ineffective assistance of counsel claim is procedurally barred as he is merely seeking to relitigate this Court’s finding regarding the HAC. *See, e.g., Marquard v. State*, 850 So. 2d 417, 433 (Fla. 2003); *Schwab v. State*, 814 So. 2d 402, 413 (2002).

Moreover, the factual basis underlying the HAC also derived from a confession that Bowles provided to the Jacksonville Sheriff’s Department, wherein Bowles acknowledged that he struggled with Hinton before he died. The confession was transcribed by Jacksonville Sheriff’s Officer, J.P. Collins. At Bowles’ penalty phase proceeding, the confession was read into the record. Bowles’ confession, as read by Collins, provided in relevant part:

I went outside and picked up one concrete block and went into [Hinton’s] room where he was sleeping. I raised the block over my head and dropped it on [Hinton’s] head. [Hinton] fell off the bed . . .and I choked him with my arm. [Hinton] was struggling a little then stuffed a rag - a maroon rag into [Hinton’s] mouth while sitting or kneeling on [Hinton’s] side. I then covered [Hinton] up with bedspread and sheets, walked out of the room closing

the door.

(PP. IV 637-38).

Because “[a] confession is direct evidence in Florida,” *Walls v. State*, 641 So. 2d 381, 390 (Fla. 1994), Bowles’ words evidenced the fact that Hinton was struck with a forty-pound stone, strangled, and gagged before he died – thereby supporting the HAC. See, e.g., *Conde v. State*, 860 So. 2d 930, 956 (Fla. 2003) (recognizing that evidence of strangulation supported HAC aggravator). Thus, even if the struggle lasted only a short period of time, Hinton was cognizant of his imminent death and therefore the HAC was properly found. See, e.g., *Preston v. State*, 607 So. 2d 404, 410 (Fla. 1992) (“fear and emotional strain may be considered as contributing to the heinous nature of the murder, even when the victim’s death was almost instantaneous”).

Accordingly, Bowles’ claim that his counsel was ineffective for failing to challenge the applicability of the HAC aggravator is procedurally barred and should be rejected; however if this Court decides to countenance Bowles’ claims – based on his own admissions – they should still be deemed without merit.

III. THE SUMMARY DENIAL OF BOWLES’ CLAIM THAT HIS TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO BRING FORTH SUBSTANTIVE MITIGATION EVIDENCE WAS A PROCEDURALLY BARRED CLAIM THAT DID NOT REQUIRE BEING ADDRESSED

Bowles’ third claim is drafted somewhat obtusely; however, he argues that the postconviction evidentiary court ruled erroneously

when it summarily denied his claim that his counsel was ineffective for failing to present evidence that would have gone towards, supporting two statutory mitigators: (1) inability to appreciate the criminality of his actions or conform his conduct to the dictates of the law, and (2) that he suffered from extreme mental or emotional disturbance contemporaneous to the crime.

Bowles' present claim derives from his Amended Motion for Post-Conviction Relief, wherein he asserted that during the penalty phase proceeding, the court failed to accord significant weight to his mitigation claims, see, e.g., (Vol I. 30-31) (" . . . Mr. Bowles suffered from extreme mental and emotional disturbance and his ability to appreciate the criminality of his conduct was significantly diminished . . . [the fact that] the trial court in this case deliberately refused to find the two statutory mental mitigators when the evidence clearly supported finding them, was reversible error.").

This claim was summarily denied. Bowles argues that the summary denial of his claim was improper and constitutes reversible error. However, Bowles seems to misapprehend when a summary denial is warranted, as the summary denial of a postconviction claim is entirely appropriate if it is clearly shown that the claimant is not entitled to any relief. See *Garcia v. State*, 2006 Fla. LEXIS 2614, at *20 (Fla. Nov. 9, 2006) ("We have explained 'that a defendant is entitled to a postconviction evidentiary hearing

unless (1) the motion, files, and records in the case conclusively show that the prisoner is not entitled to any relief, or (2) the motion or a particular claim is legally insufficient.'") (quoting *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000)); see also Fla. R. App. P. 9.141(b)(2)(D).

Bowles is essentially arguing that the trial court did not give proper consideration to his mitigation claims, and that his trial counsel failed to vigorously argue certain statutory mitigators - thereby rendering his death sentence invalid. These identical arguments were raised and addressed somewhat at length on direct appeal, see, e.g., *Bowles*, 804 So. 2d at 1180 ("Bowles' ninth claim is that the trial court erroneously rejected two statutory mental mitigating factors . . . [w]e disagree"); therefore the summary denial of these arguments in the Order Denying Defendant's Second Amended Motion for Post Conviction Relief was entirely appropriate. See, e.g., *Jones v. Moore*, 794 So. 2d 579, 590 (Fla. 2001) (observing that argument raised in habeas petition, which essentially challenged the propriety of Jones' death sentence, was procedurally barred because it had been raised on direct appeal); see also *Gorby v. State*, 819 So. 2d 664, 686 n. 39 (Fla. 2002) ("To the extent that Gorby also seeks to reargue the merits of the trial judge's finding of the prior violent felony aggravator, that attempt is procedurally barred because the issue was raised on direct appeal.").

Therefore, this claim should be denied.

IV. THE SUMMARY DENIALS OF BOWLES' POSTCONVICTION CLAIMS BROUGHT PURSUANT TO RING WERE CLEARLY DICTATED BY THIS COURT'S PRECEDENT AND THEREFORE THE DENIAL OF THESE CLAIMS WAS APPROPRIATE

Bowles also seeks to argue that his postconviction claims, falling under the ambit of *Ring v. Arizona*, were summarily denied improperly. However, as this Court has repeatedly recognized, *Ring* is not retroactive to a capital defendant whose conviction and death sentence became final prior to the rendering of that decision. See, e.g., *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006); *Jones v. State*, 928 So. 2d 1178, 1193 (Fla. 2006); *Foster v. State*, 929 So. 2d 524, 531 (Fla. 2006); *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005). Additionally, even if *Ring* was retroactive to Bowles' case, because the prior violent felony aggravator was found - as Bowles conceded to committing multiple murders - he has no basis to rely on *Ring*. See, e.g., *Rodgers v. State*, 2006 Fla. 2542, at *44-45 (Fla. Oct. 26, 2006) ("Rodgers argued on various grounds that the death penalty is unconstitutional under *Ring* . . . we have repeatedly rejected these claims in cases such as this one in which one of the aggravating factors is a prior violent felony conviction.").

Consequently, the summary denials of Bowles' claims brought pursuant to *Ring* were warranted.

V. THE SUMMARY DENIAL OF BOWLES' POSTCONVICTION MOTION SEEKING TO RETROACTIVELY APPLY CRAWFORD v. WASHINGTON WAS

Dictated by this Court's precedent and therefore should be affirmed

Finally, Bowles argues that the postconviction court erroneously refused to consider a Motion to Reopen Testimony, which he brought in an effort to challenge, what he contended, was testimonial hearsay that impermissibly affected his penalty phase proceeding. Bowles had sought to argue, based on *Crawford v. Washington*, 541 U.S. 36 (2004), that Corporal Jan Edenfield of the Tampa Police Department should not have been permitted to testify regarding the underlying facts of Bowles' 1982 conviction for sexual battery and aggravated battery. Edenfield testified regarding the nature of the injuries that the victim suffered via Bowles' attack (PP. IV 681-693). Bowles' counsel raised objections, but Corporal Edenfield was permitted to testify about the 1982 crime during the penalty phase. On direct appeal, Bowles argued Edenfield's testimony constituted impermissible hearsay testimony; however, this Court found that Bowles had had the opportunity to challenge the testimony - and did not; moreover, this Court found that even if allowing the testimony to be heard was improper, it was merely harmless error. See *Bowles*, 804 So. 2d at 1183-84.

Conceding that this claim has already been addressed and rejected by this Court - and is therefore procedurally barred - Bowles nevertheless argues that this Court should take the opportunity to revisit this ruling in light of *Crawford*.

In *Crawford*, the Supreme Court found the admissibility of testimonial statements from an unavailable witness turned on whether the statement had been subjected to some means of confrontation. 541 U.S. at 68-69. Bowles maintains that Edenfield's testimony regarding certain statements made by the victim and about the overarching circumstances of the 1982 crime constituted impermissible hearsay.

Bowles' claims, are not cognizable by this Court because *Crawford* has not been deemed to have retroactive applicability. See, e.g., *Chandler v. Crosby*, 916 So. 2d 728, 731 (Fla. 2005).

Accordingly, this claim must be denied.

CONCLUSION

WHEREFORE, the Appellee respectfully requests that this Honorable Court to affirm the denial of Gary Bowles 3.851 motion seeking postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Frank J. Tassone, Esq. and Rick A. Sichta, Esq., 1833 Atlantic Boulevard, Jacksonville, Fl 32207 this 20th day of November, 2006.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New font 12 point.

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