IN THE SUPREME COURT OF FLORIDA

ALLEN W. COX,

Appellant,

v. Case No. SC05-914

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The direct appeal record will be cited as "DAR" with the appropriate volume and page numbers [DAR V#:page#] and the postconviction record will be cited as "PCR" with the appropriate volume and page numbers [PCR V#:page#].

STATEMENT OF THE CASE AND FACTS

A. Trial Stage

On February 5, 1999, a grand jury indicted Appellant, Allen Ward Cox, for premeditated murder and battery in a detention facility. (DAR V1:1). Appellant initially entered a plea of not guilty to both charges, but subsequently pled guilty to the battery charge. Appellant was represented at trial by Assistant Public Defenders William Stone and Jeffrey Higgins.

This Court summarized the facts in its decision affirming Appellant's judgment and sentence on direct appeal:

> The charges against Cox resulted from a chain of events within the Lake Correctional Institute ("LCI") that culminated in the death of Thomas Baker and an assault upon Lawrence Wood. At trial, the State presented the testimony of numerous corrections officers and inmates regarding the circumstances surrounding the murder of Baker, who was also a LCI inmate. On December 20, 1998, the appellant discovered that someone had broken into his personal footlocker and stolen approximately $500. Upon making this discovery, Cox walked out onto the balcony of his dorm and announced that he would give fifty dollars to anyone willing to identify the thief. He also indicated that when he discovered who had stolen from him, he would stab and kill that person, and that he did not care about the consequences.
>
> During the prison's lunch period on December 21, the appellant called Baker over to him, and then hit him with his fists to knock him down. During the attack, the victim continuously attempted to break free from Cox, and also denied stealing from him multiple times. At a lull in the beating, the appellant said, "This ain't good enough," and stabbed Baker with an icepick-shaped shank three times. After the stabbing, Appellant walked away stating, "It ain't over, I've got one more ... to get." He then walked behind the prison pump house and hid the shiv in a pipe. Cox proceeded from the pump house to his dorm, where he encountered Donny Cox (unrelated to the appellant). There, Appellant questioned him about his

stolen money and told him that if Cox had his money, he would kill him also. Following this exchange, the appellant returned to his cell, where he next attacked his cellmate, Lawrence Wood, advising him that Wood was "lucky I put it up, or I'd get [you]."

While the appellant was returning to his cell, the stabbing victim fled the attack scene and ran to corrections officers in a nearby building. The officers present at the time testified at trial that Baker had blood coming from his mouth, and that he was hysterically complaining that his lungs were filling with blood. Baker also responded to the prison officials' questions regarding who had attacked him by saying, "Big Al, Echo dorm, quad three." Although the corrections officers attempted to expedite emergency treatment of the victim by placing him on a stretcher and carrying him on foot to the prison medical center, Baker died before arriving at the hospital.

Doctor Janet Pillow testified that upon her autopsy of the victim, she found that the victim had been stabbed three times. Two of the wounds inflicted were shallow punctures of the lower torso, but the fatal wound had entered the victim's back and traveled through the chest cavity, between two ribs, and finally pierced the lungs and aorta. She testified that a conscious person with this wound would suffer from "air hunger," and would be aware of the "serious danger of dying." She described the wound as being approximately 17.5 centimeters deep, although only two millimeters wide. Doctor Pillow verified that the shank found by the pump house was consistent with the victim's injuries, despite the fact that the wound was deeper than the length of the weapon. She attributed the discrepancy between the length of the weapon and the depth of the wound to the elasticity of human tissue.

The appellant also testified, contending that all of the previous witnesses were correct, except that they had not seen what truly happened when he, Baker, and Vincent Maynard, a third inmate, were close together. According to Cox, it was he who had in fact dodged Baker and Maynard's attempts to stab him, and it was Maynard who actually stabbed Baker in the back accidentally. In Cox's version of the events, he had only struck the victim because he was defending himself from both of the other attacking men. Following the conclusion of the guilt phase testimony

> and argument, the jury deliberated, apparently rejected the view of the evidence offered by Cox, and found the appellant guilty of first-degree murder.

Cox v. State, 819 So. 2d 705, 709-10 (Fla. 2002) (footnotes omitted), cert. denied, 537 U.S. 1120 (2003).

After hearing the penalty phase testimony presented by both the defense and the prosecution, the jury recommended a sentence of death by a vote of ten to two. Following a Spencer hearing, the trial court followed the jury's recommendation and sentenced Cox to death, finding four aggravating circumstances: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment; (2) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence; (3) the capital felony was especially heinous, atrocious or cruel; and (4) the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The court did not find any statutory mitigation, but considered numerous nonstatutory mitigating circumstances: (1) severe domestic violence in Cox's childhood home; (2) Cox's mother was very cruel and unpredictable; (3) Cox's mother was very cruel to the children; (4) frequently absent father who failed to protect Cox from mother's physical abuse; (5) Cox's mother was emotionally unstable; (6) Cox was forced to haul

firewood as a small child until he dropped from physical exhaustion; (7) Cox's parents divorced and remarried only to divorce again; (8) Cox has no happy memories from his childhood; (9) Cox's mother abandoned him when he was eleven years old, forcing his father to send him to his grandmother's house for her to raise; (10) Cox was the frequent victim of inconsistent and unpredictable patterns of discipline as a child; (11) Cox's mother failed to demonstrate any maternal affection; (12) Cox grew up feeling unwanted, unloved, and worthless; (13) Cox is able to form friendships; (14) Cox suffers from dysthymic disorder, a chronic depressive disorder unrelated to substance abuse; the disorder is amenable to treatment; (15) Cox has been diagnosed additionally with adjustment disorder with depression; major depressive disorder, recurrent and severe; anti-social personality; alcohol dependence; and mixed personality disorder; (16) Cox has been on antidepressant medication since 1991; (17) Cox suffers from severe depression; (18) Cox attempted suicide once in his youth and still has suicidal thoughts; (19) Cox demonstrates brain impairment possibly from a head injury or a congenital birth defect or both; (20) Cox's early childhood left him with feelings of hopelessness, insecurity, rejection, and inadequacy; (21) Cox was severely injured in a motorcycle accident when he was sixteen rendering him unconscious; (22) Cox

suffers from very rigid and repetitive thinking; (23) Cox is alienated and isolated and is distrustful of others; (24) Cox suffers from a severely impaired spectrum of emotional responses; (25) as a result of his childhood, Cox has no sense of moral development; (26) Cox's mental illness could have been treated and controlled with medication or counseling or both; (27) at the time of the offense, Cox's ability to exercise good judgment was impaired; (28) Cox behaved well throughout the court proceedings; (29) Cox's moral development was similar to a retarded person; (30) Cox is able to function and grow in prison; (31) Cox is loved by his family; and (32) Cox is a human being.

B. Direct Appeal

On direct appeal to this Court, Cox raised the following issues: (1) the trial court erred in denying his motion for a mistrial based upon a discovery violation; (2) the trial court erred in denying his motion for a mistrial following a witness' unknowing testimonial violation of the court's order in limine; (3) the trial court erred in ordering Cox's penalty phase mental health expert to turn over her notes and testing materials to the State prior to trial; (4) the trial court erred in refusing to accept Cox's offer to stipulate to his prior violent felony convictions; (5) the prosecutor's misstatements of the law and

allegedly improper argument amounted to fundamental error; (6) the trial court erred by instructing the jury on and in finding that the murder was especially heinous, atrocious, or cruel ("HAC"); (7) the trial court erred by instructing the jury on and in finding that the murder was committed in a cold, calculated, and premeditated manner, without any pretense of legal or moral justification ("CCP"); (8) the trial court erred by failing to consider all available mitigating evidence and in giving little weight to valid mitigation; (9) the death penalty is not proportional in the instant case; and (10) Florida's death penalty scheme violates the Florida and United States constitutions. This Court affirmed the judgment and sentence. Cox v. State, 819 So. 2d 705 (Fla. 2002). Cox petitioned the United State Supreme Court for a writ of certiorari, but on January 13, 2003, the United States Supreme Court denied his petition. Cox v. Florida, 537 U.S. 1120 (2003).

C. Postconviction Proceedings

On January 6, 2004, Cox filed his initial Motion to Vacate pursuant to Florida Rule of Criminal Procedure 3.851. Cox raised three issues for which he sought an evidentiary hearing and also presented two legal claims for which an evidentiary hearing was not requested. (PCR V1:1-71). After conducting a case management conference, the trial court, the Honorable T.

Michael Johnson, issued an order granting an evidentiary hearing on a majority of Appellant's claims. (PCR V1:169-72).

At the evidentiary hearing, Appellant presented testimony from numerous witnesses in support of his ineffective assistance of counsel claims. Betty Gilbert testified that she had a romantic relationship with Appellant's father, Ray Cox, during Appellant's childhood. Ray Cox was married to Appellant's mother, Barbara Edelen, during his affair with Ms. Gilbert.[1] (PCR V3:8-9). Ray Cox moved in with Ms. Gilbert when Appellant was approximately ten years old. During this time period, Ms. Gilbert would see bruises on Appellant when he would come over. (PCR V3:10). When Appellant was approximately ten or eleven years old, he bit his mother. (PCR V3:26). After she was bitten, Barbara Edelen took Appellant to his father's home and dropped him off to live and yelled: "Here he is. You all wanted him, now you can have him. If he ever comes back, I'll kill him."[2] (PCR V3:13). Appellant lived with Betty Gilbert and his father for about two years, and also split his time living with his grandmother, Hazel Cox. (PCR V3:13-14). Ms. Gilbert

[1] Ms. Gilbert subsequently married Ray Cox in 1974 or 1975. (PCR V3:12).

[2] According to Appellant's sister, Barbara Edelen could not control or handle fighting with Appellant anymore because he had gotten too big. (PCR V3:44-45).

testified that Ray Cox beat her often during their relationship. (PCR V3:14-16).

After being married to Ray Cox for approximately three years, Ms. Gilbert moved to Indiana and filed for divorce. She eventually returned to Kentucky and learned that Appellant had been in a motorcycle accident. (PCR V3:20-22). Ms. Gilbert saw Appellant at the hospital and observed large knots on his head. (PCR V3:22). Prior to Appellant's trial, Ray Cox informed Ms. Gilbert that trial counsel was coming to Kentucky to speak with witnesses, and she testified that she wanted to speak with defense counsel. (PCR V3:22-23).

On cross-examination, Ms. Gilbert testified that Ray Cox was a good father to Appellant and they have a loving relationship. (PCR V3:25). Ms. Gilbert never observed Ray Cox inflict any type of physical abuse on Appellant. (PCR V3:25-26). The physical abuse inflicted by Ray Cox on Ms. Gilbert was much worse during the end of their relationship when Appellant no longer lived with them.[3] (PCR V3:28-29).

Appellant's younger sister, Cathy Null, testified at the postconviction evidentiary hearing regarding the abusive environment of her upbringing. (PCR V3:34-35). She recalled an incident where Ray Cox was beating Appellant's mother, and

[3] Ray Cox admitted to beating Betty Gilbert during the time that Appellant lived with him. (PCR V3:138-39).

Appellant picked up a rock and threatened to kill his father if he did not stop beating his mother.[4] (PCR V3:32). She also witnessed an incident when Ray Cox beat Appellant after he stole a car and was placed in the back of a police patrol car.[5] (PCR V3:35-36, 45-46). Ms. Null observed black eyes on Betty Gilbert during the time that Appellant was living with Ray Cox and Betty Gilbert. When Appellant was living with his grandmother, the witness opined that he was not disciplined much and had "free reign." (PCR V3:37-38). When Appellant was approximately 22 years old, he was released from prison and lived briefly with Cathy Null and his younger brother. Appellant moved out after an incident where he hurt his 12-year-old brother badly, resulting in quite a bit of blood on the bathroom walls. (PCR V3:41-42).

Ray Cox, Appellant's father, briefly testified at the evidentiary hearing regarding defense counsel's visit to Kentucky during counsel's investigation of mitigation evidence. Appellant had written to his father and told him to take his attorney to places where his friends would be so that his

[4] The witness, who recalled the rock incident "vividly," was four or five years old when it occurred. (PCR V3:33, 39-41). When the witness was about five years old, Appellant's mother dropped him off to live with Ray Cox and Cathy Null never lived under the same roof as Appellant for any significant period of time after that incident. (PCR V3:41).

[5] The witness testified that, other than this incident, Appellant and his father got along very well. (PCR V3:45-46).

attorney could talk to them. (PCR V3:123). When defense attorney William Stone arrived in Kentucky, Ray Cox took him to a bar to meet some of Appellant's friends. According to Mr. Cox, attorney Stone got so drunk that he got physically ill and could not drive or walk.[6] (PCR V3:124-26). Mr. Cox gave defense counsel numerous names of potential witnesses, including Betty Gilbert. (PCR V3:126). Prior to going to the tavern, Mr. Cox took defense counsel by some people's houses, but they were not home. (PCR V3:134).

Ray Cox also testified regarding an incident when Appellant was slammed into a tree by a mule while working as a logger. According to Ray Cox, Appellant was dazed by the incident, but requested that he not be taken to the hospital. (PCR V3:136-37). After sitting in a truck while other workers ate dinner, Appellant returned to work for a couple of hours. (PCR V3:138).

Dr. Robert Berland, a forensic psychologist, testified that he conducted an evaluation of Appellant and found numerous mitigating factors that defense counsel did not develop or present. Dr. Berland prepared a written outline detailing his findings and his testimony tracked his written documents. (PCR V9:415-25; 433-35). According to Dr. Berland, both statutory

[6] Ray Cox's wife, Lorraine Cox, reiterated Ray Cox's testimony surrounding this incident and testified that she drove Mr. Stone's rental car back to his hotel because he was too intoxicated to drive. (PCR V3:142-46).

mental mitigating factors were applicable in this case: (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, and (2) that Appellant had a substantially impaired capacity to conform his conduct to the requirements of the law. (PCR V3: 59-77). In making these findings, Dr. Berland relied on psychological testing, Appellant's own statements, and interviews with family members and Appellant's ex-girlfriends.[7] (PCR V3:59-60).

In addition to the statutory mental mitigators, Dr. Berland testified that numerous other mitigating factors applied in Appellant's case. Dr. Berland discussed Appellant's brain injuries as a result of a motorcycle accident at age 15,[8] the incident with the mule at age 16,[9] and another incident where Appellant was struck in the head with a bottle and went to the hospital. (PCR V3:77-79). Dr. Berland opined that Appellant's

[7] Dr. Berland gathered information from Teresa Morgan (ex-girlfriend), Betty Gilbert (step-mother), Tina Farmer (ex-girlfriend), Nina Thomas (Tina Farmer's twin sister), Cathy Null (younger sister), Margurite Sallee (maternal grandmother), and Barbara Edelen (natural mother). (PCR V3:63-64).

[8] Appellant was wearing a helmet during the motorcycle accident and was hospitalized for a foot and leg injury. Appellant did not lose consciousness as a result of this accident or complain of nausea, a common symptom of a head injury. (PCR V3:96-98).

[9] Dr. Berland testified that he had a description of the mule incident from "a number of sources who were there" and, according to his testimony, Appellant was knocked unconscious for several hours. (PCR V3:80). As previously noted, however, Appellant's father witnessed this incident and testified that Appellant was not knocked unconscious for any time period.

severe nightmares were a common byproduct of brain injuries. (PCR V3:79).

Dr. Berland briefly discussed Appellant's drug and alcohol use. According to information obtained from Betty Gilbert, Teresa Morgan, and Tina Farmer, Appellant was a heavy drinker who also used marijuana, powder cocaine, and acid. (PCR V3:82). In addition to his alcohol and drug use, Dr. Berland testified that Appellant had severe problems in his genetic history, including a history of inherited mental illness. (PCR V3:89-91).

Dr. Berland further testified regarding Appellant's "unstable home life from birth to adulthood." Dr. Berland focused much of his attention on Appellant's childhood from the time he went to live with his father and Betty Gilbert at the age of 11. Dr. Berland admitted that the information he obtained from Betty Gilbert was confusing. (PCR V3:83-84). Betty Gilbert told the witness that Appellant spent the weekdays with her and Ray Cox, but spent his weekends with his grandmother. Dr. Berland's understanding of Appellant's childhood was that he was never supervised or punished for bad behavior, but was basically allowed to run free without any curfew. (PCR V3:84). During this time period, Appellant was

implicated in numerous crimes in the area and also witnessed his father's abusive relationship with Betty Gilbert.

Appellant also presented the testimony of Dr. Henry Dee, a clinical psychologist with a subspecialty in clinical neuropsychology. (PCR V6:7-35). Dr. Dee reviewed numerous materials in preparation of his testimony and met with Appellant in 2003 and administered a battery of neuropsychological tests to him at that time. (PCR V6:8-10). Dr. Dee found that the instant murder was committed while Appellant was under the influence of extreme mental or emotional disturbance and his capacity to conform his conduct to the requirements of the law was substantially impaired. (PCR V6:11). Dr. Dee detailed Appellant's performance on a number of mental functioning and memory performance tests, and testified that Appellant had a full scale IQ of 89. (PCR V6:11-16).

On cross-examination, Dr. Dee acknowledged that he did not review Appellant's trial testimony when Appellant explained what he perceived at the time of the crime, but he did review Dr. Elizabeth McMahon's penalty phase testimony. Dr. Dee also did not review the Department of Corrections records regarding Appellant's mental health made during the time surrounding the murder. (PCR V6:25-27). Dr. Dee admitted that his interview with Appellant was not as detailed as Dr. McMahon's interview,

and he testified that he did not have any serious disagreements with her opinions that she expressed during the penalty phase. (PCR V6:32). Dr. Dee also opined that Appellant did not have any type of psychosis at the time of the murder. (PCR V6:32-33).

Lead trial counsel, William Stone, testified that he had been an attorney for over thirty years and was the Chief Assistant Public Defender in the Public Defender's Office. (PCR V4:293). Mr. Stone was joined in his representation of Appellant by another Assistant Public Defender, Jeff Higgins. (PCR V4:245, 262). The defense team also utilized the assistance of an investigator, a paralegal, and a secretary. (PCR V4:246-47). Mr. Stone testified that the general theory of defense was that Appellant was not responsible for inflicting the fatal blow to the victim. (PCR V4:247). As defense counsel acknowledged, the defense was hampered by the fact that the altercation occurred in broad daylight in front of 150-200 other inmates so it was difficult to make Appellant "evaporate." (PCR V4:248). Furthermore, Appellant had told his attorneys that he had scuffled with the victim. (PCR V4:249-51).

During his questioning of defense witness Vincent "Pig" Maynard, the witness blurted out that Appellant was serving two life sentences. Defense counsel Stone indicated that he did not

expect Maynard's unresponsive comments. (PCR V4:252-53). After the comment, defense counsel moved for a mistrial which the trial judge denied. (PCR V4:253).

Mr. Stone was primarily responsible for the mitigation aspect of Appellant's defense and he testified that he worked on this portion of the case all along. Defense counsel initially retained Dr. Berland as his mental health expert in July, 1999, but Dr. Berland had to withdraw from the case due to his heavy workload.[10] (PCR V4:254; 272). Mr. Stone then immediately contacted Dr. Elizabeth McMahon and retained her services.[11] Mr. Stone gave Dr. McMahon all of Appellant's medical records, all the deposition transcripts, the investigation reports, a forensic assessment completed by Appellant, and all of defense counsel's notes – essentially the entire defense file. (PCR V4:256). Dr. McMahon interviewed Appellant numerous times, and according to defense counsel, Appellant was much more

[10] Dr. Berland did not inform defense counsel that he had to withdraw from the case until October 18, 1999. Appellant's trial date was November 15, 1999, and as defense counsel indicated, he would have walked to Gainesville at that late date to find an expert because he had no realistic anticipation of receiving a continuance. (PCR V4:272).

[11] Mr. Stone had utilized Dr. McMahon in a couple of previous death penalty cases and was familiar with her excellent work. (PCR V4:255). Defense counsel testified that he thought Dr. McMahon worked 24 hours a day, and she would often call him on the weekends at his home to discuss a case. (PCR V4:274-75). Defense counsel gave Dr. McMahon all the information he obtained from his trip to Kentucky and also encouraged the doctor to contact the witnesses in Kentucky herself.

forthcoming with the expert than with counsel. (PCR V4:256). Based on his conversations with Appellant and Dr. McMahon, defense counsel felt that the most positive influence on Appellant's life was from his grandmother, Hazel Cox, so he made the decision to try to get her assistance. This proved difficult because Appellant did not want his family involved at all and did not want his attorneys to contact any of his family members. Eventually, Appellant agreed to allow Mr. Stone to contact his grandmother. (PCR V4:257; 276-77). Due to her health, Mr. Stone traveled to Kentucky to perpetuate Hazel Cox's testimony and to meet with Appellant's sister, Elizabeth Veatch. (PCR V4:257-58). Mr. Stone did not present any evidence on the statutory mental mitigators because he did not feel that they could be proven based on his discussions with Dr. McMahon and Appellant. (PCR V4:260-61).

On cross-examination, defense counsel Stone testified that Appellant proposed numerous different defense theories during his representation. Initially, Appellant informed counsel that Vincent Maynard should be a defense witness because he would help them. (PCR V4:262-65). On June 13, 1999, Appellant wrote counsel a letter informing him that Maynard was not going to help them anymore and Appellant wanted to discuss three possible defenses: temporary insanity, self-defense, or that another

inmate, Appellant's cellmate, Lawrence Wood, was responsible. (PCR V4:264-65; V7:43). Appellant also at one time suggested that the victim had voluntarily participated in his stabbing.[12] (PCR V4:265-66).

On the forensic assessment form filled out by Appellant, he gave counsel the name and phone number of family members and listed his mother, his step-father, and his father. (PCR V4:278-79). Under the section for medical history, Appellant listed the motorcycle accident and indicated that he broke his foot, but did not list any head injuries. Appellant also did not check numerous symptoms listed on the form, including nausea or vomiting, hearing things not present, or seeing things not present. (PCR V4:280). Regarding his drug history, Appellant indicated that he had smoked marijuana, but he denied being an abuser. (PCR V4:281).

Defense counsel was aware of Appellant's ex-girlfriend, Teresa Morgan, and testified that he had a strategic reason for not calling her. Counsel testified that he did not think she had any relevant information to offer, and because their relationship was rather stormy, he was afraid to present her

[12] Stone and co-counsel Higgins determined that this defense was inconsistent with the factual evidence and was unbelievable. Co-counsel Higgins drafted a memorandum to the file summarizing the defense team's strategic decisions involving this defense, as well as other trial decisions. (PCR V7:48-50).

testimony. Particularly, counsel was afraid that Ms. Morgan's testimony may have been similar to aspects of testimony presented by the State at the penalty phase from Bonnie Primeau, the victim of a brutal rape committed by Appellant. (PCR V4:281-82).

William Stone testified regarding his trip to Kentucky to investigate the mitigation phase of Appellant's trial. (PCR V4:283-85). Counsel met with Ray Cox and drove around the area and took pictures as part of his investigation. Counsel and Ray Cox eventually ended the evening at a tavern where counsel met two individuals that were friends of Ray Cox, but they did not have any particular relevant information regarding Appellant. (PCR V4:285). Counsel had one drink at the bar and began feeling sick on the drive home. Counsel denied being too intoxicated to drive, but speculated that the food in Kentucky was what had made him sick. (PCR V4:286-87).

Co-counsel, Jeff Higgins, testified that he was employed at the Public Defender's Office as a certified legal intern prior to being sworn in as a member of the Florida Bar in April, 1998.[13] (PCR V5:98). Appellant's case was Mr. Higgins' first capital trial, but co-counsel Stone had the final say due to his experience. (PCR V5:100). According to Mr. Higgins, the

[13] Appellant's jury trial took place in March, 2000.

defense theory was that Appellant did not inflict the fatal wound because the shank linked to Appellant could not have caused the fatal wound due to its size. Defense counsel presented Vincent "Pig" Maynard as an alternate suspect because counsel felt the "wasn't me" defense theory would work better if they could point to an alternate suspect. (PCR V5:90-92; 106-07). Defense counsel testified that he never conceded during opening statements, or at any other time, that Appellant was responsible for the fatal blows. (PCR V5:105-09).

In addition to family members, mental health experts, and trial counsel, collateral counsel also presented evidence at the postconviction hearing regarding his claim that trial counsel was ineffective for failing to uncover an alleged pattern of coercion and intimidation of the inmate witnesses by the Department of Corrections. Henry Wheeler testified that he was an inmate at Lake Correctional Institution and was friends with Appellant. Several months prior to the murder in the instant case, Wheeler was transferred to a disciplinary camp. (PCR V3:147-49). According to Wheeler, Appellant's attorneys wanted to depose him and had him transferred to a local jail for a deposition, but he never spoke to any of Appellant's attorneys. (PCR V3:148-49). The next day, Wheeler was transferred back to

Sumter Correctional, but he was soon transferred back to Lake Correctional for a day or two. (PCR V3:150-51).

While briefly housed at Lake Correctional Institution, Wheeler was approached by Department of Corrections Inspector Kenneth Williams who inquired as to why Wheeler was at the Tavares County Jail. (PCR V3:151). According to Wheeler, Inspector Williams asked the inmate if he was doing anything to help Appellant. Inspector Williams "made it very clear" that he did not want Wheeler involved and the inspector could make Wheeler's life very rough if he assisted Appellant. (PCR V3:151-58). Wheeler was then transferred to an air-conditioned prison so he could work as a brick layer. After approximately four months, Wheeler was released on parole. (PCR V3:159).

While on parole, Wheeler was contacted by defense counsel Higgins and asked to testify regarding the events with Inspector Williams.[14] (PCR V3:160). According to Wheeler, a few days prior to Appellant's trial, his parole officer told him that he was still on conditional release and the Department of

[14] Defense counsel Higgins did not recall ever speaking with Wheeler. (PCR V5:84-85). In September, 1999, counsel had filed a notice of taking a deposition of Wheeler, but something occurred and counsel never deposed Wheeler. (PCR V5:85).

Corrections could still make things tough for him.[15] Wheeler decided to call and say that he would not be testifying.

At some point during his parole, Wheeler violated his parole and was sent to Tomoka Correctional Institute where he once again saw Inspector Williams in late 2003. (PCR V3:164-65). Inspector Williams did not say anything, but gave the inmate an "intimidating" look. (PCR V3:165). While at Tomoka, Wheeler had occasion to speak to Vincent "Pig" Maynard regarding the murder of Thomas Baker. Maynard told Wheeler that Appellant owed him $500 for a marijuana transaction that never took place, and Appellant had promised to pay Maynard back $400 that he had in his locker. (PCR V3:167-69). Maynard told Wheeler that the victim Baker and another inmate, Lawrence Wood, broke into Appellant's locker and stole the money that was owed to Maynard. (PCR V3:169). Maynard stated that on the morning of Baker's murder, Maynard got Appellant drunk on homemade wine and gave

[15] The State presented evidence from Wheeler's parole officer refuting his testimony. (PCR V6:37-48). Tanya Folsom Anderson testified that Wheeler came to her office on March 6, 2000, and told her he had a subpoena to testify regarding an incident at Lake Correctional Institution. According to Wheeler, if Appellant was convicted of the offense, he would be contacted and have to appear within a few days to testify. (PCR V6:39). The officer testified that she had no problem with Wheeler leaving the county to testify provided he supplied her with a copy of the subpoena. (PCR V6:40). On March 13, the officer was informed that Wheeler was not needed at the hearing. (PCR V6:40-41). The parole officer denied advising Wheeler not to appear and also denied telling him that there would be any repercussions if he testified. (PCR V6:41).

him a handful of Sinequan, and Maynard obtained some shanks and gave one to Appellant and kept one himself. Maynard stated that he got Appellant worked up into a rage and got Appellant to start a fight with the victim. (PCR V4:217). Maynard stated that Appellant stabbed Baker in the hip two or three times. When Wheeler pointed out that he thought Baker had been stabbed four times, Maynard simply looked back at him with a "devious smile" to make it "clear" who inflicted the fatal blow. (PCR V3:169-73; V4:217-18). Maynard told Wheeler that he hid his shank by the water pump house. (PCR V3:174).

On cross-examination, Wheeler admitted that when he was transported to Tavares County Jail prior to Appellant's trial, he utilized strong language when questioning Appellant's attorneys as to their motivation in bringing him over since he had not even been at Lake Correctional Institution at the time of the murder.[16] (PCR V3:183-84, 224). Wheeler also acknowledged that he was transferred from Lake Correctional to a disciplinary camp because he was under investigation for bringing marijuana into the prison compound. (PCR V3:190-91). Wheeler indicated that he told Appellant's attorneys about Inspector Williams' vendetta against Appellant and his

[16] Wheeler gave contradictory and confusing testimony on this point and ultimately told the judge that he did not talk to anyone from the defense team when brought to the local jail. (PCR V4:237-38, 241-42).

intimidation and threats against Wheeler if he cooperated. (PCR V4:204-09).

After Appellant rested, the State presented the testimony of Department of Corrections Inspector Kenneth Williams to rebut the allegations made by Henry Wheeler. Inspector Williams testified that he investigated a criminal violation within Lake Correctional Institution wherein Wheeler and his father delivered marijuana and alcoholic beverages into the prison facility. (PCR V5:5-6). As a result, Wheeler was placed in confinement, his access outside the perimeter was taken away, and he was ultimately transferred. (PCR V5:7). This incident took place months before Appellant killed Thomas Baker. Inspector Williams denied ever speaking with Wheeler regarding the Baker murder; he was not interested in speaking with Wheeler about the crime because Wheeler was not on the compound at the time. Inspector Williams also denied giving any type of intimidating look to Wheeler prior to the evidentiary hearing, or making any types of threats to Wheeler to transfer him to another facility if Wheeler assisted Appellant. (PCR V5:9-10).

At the evidentiary hearing, the State also presented evidence from Dr. Elizabeth McMahon, the defense mental health expert retained by trial counsel who testified at Appellant's penalty phase proceeding. Dr. McMahon testified that she has

been a practicing forensic psychologist for almost thirty years. (PCR V6:54-55). Dr. McMahon spoke with Appellant three times for a total of approximately eleven hours. (PCR V6:56). She also interviewed a number of Appellant's family members: his mother, Barbara Edelen, his father, Ray Cox, his grandmother, Hazel Cox, and both of his sisters, Elizabeth Veatch and Cathy Null.

Dr. McMahon testified that during her examination of Appellant, she specifically asked him about head injuries, and Appellant never mentioned an incident with a mule. (PCR V6:58). Contrary to Betty Gilbert's evidentiary hearing testimony, Appellant told Dr. McMahon that he lived with his grandmother, Hazel Cox, on a full-time basis during his adolescent years, and Hazel Cox confirmed this information. (PCR V6:58-59). Appellant denied suffering any audio or visual hallucinations. (PCR V6:59).

In 2004, collateral counsel contacted Dr. McMahon and asked her to review a number of additional statements from approximately seventeen different witnesses that collateral counsel had contacted. (PCR V6:60-61). When collateral counsel met with the doctor after she had reviewed the material, she informed counsel that the information did not change her prior opinions expressed at the penalty phase in any manner. (PCR

V6:62, 75-76). After meeting with collateral counsel, the prosecuting attorney provided the doctor with Dr. Berland's and Dr. Dee's depositions and Dr. Berland's written documents. (PCR V6:63-64). Dr. McMahon did not share Dr. Berland's opinion that Appellant was psychotic at the time of the offense or that he was presently psychotic. (PCR V6:64-65). Dr. McMahon testified that the information Dr. Berland relied on was contradictory and did not display a high level of concordance as claimed by Dr. Berland. Dr. McMahon went through each of the witnesses' statements and broke them down to determine who observed certain "symptoms" and who did not.[17] (PCR V6:65-74). For example, Dr. Berland's prime symptom of psychosis was that Appellant talked to himself. Dr. McMahon noted that one person, Betty Gilbert, observed this behavior and noted that Appellant mumbled to himself about a recent event, while seven other people did not observe the behavior. (PCR V6:70). In sum, Dr. McMahon testified that the materials provided to her by collateral counsel in 2004, including Dr. Berland's and Dr. Dee's information, did not change her opinions that she expressed to the jury at Appellant's penalty phase proceeding in 2000. (PCR V6:75-76). In fact, the doctor opined that the information she received actually buttressed her opinions. (PCR V6:76).

[17] Dr. McMahon did not consider the observations relied on by Dr. Berland to be "symptoms" of mental illness. (PCR V6:94).

SUMMARY OF THE ARGUMENT

The lower court properly denied Appellant's claim of ineffective assistance of penalty phase counsel. Trial counsel was not deficient in investigating potential mitigation evidence. Trial counsel was initially hampered by his expert witness' decision to forego working on the case and by Appellant's instructions not to contact any of his family members. Trial counsel managed to retain an eminently qualified mental health expert months before the penalty phase and she conducted a thorough evaluation and investigation into possible mitigation. Trial counsel also managed to convince Appellant to allow him to contact Appellant's family members. Trial counsel spoke to family members and ultimately made the strategic decision to present the best three or four witnesses he had at the penalty phase proceeding. Appellant has failed to demonstrate any deficient performance, and even if he had, there clearly was no prejudice. As trial counsel's mental health expert testified at the evidentiary hearing, the "new" information obtained by collateral counsel during the postconviction process was simply "more of the same," and would not have altered her opinions expressed at the penalty phase in any manner.

The lower court properly denied Appellant's claims of ineffective assistance of counsel based on trial counsel's actions during the guilt phase. Appellant's argument that counsel was ineffective for conceding guilt during his opening statement is clearly without merit and based on an erroneous interpretation of the record. The transcript of the opening statement obviously establishes that counsel did not concede Appellant's guilt. Furthermore, trial counsel testified at the evidentiary hearing that he never conceded that Appellant caused the fatal wounds. Rather, trial counsel conceded that Appellant and the victim engaged in a struggle. Such a concession was reasonable given the overwhelming number of witnesses who observed the struggle and given Appellant's own statements that he fought with the victim.

Appellant failed to demonstrate that counsel was ineffective during voir dire examination. Although the prosecutor made misstatements of the law during voir dire, trial counsel's failure to object did not prejudice Appellant. Likewise, Appellant's argument that counsel was ineffective during opening statements for arguing a defense not recognized by the law is without merit. Appellant has failed to establish deficient performance or prejudice as a result of counsel's

brief comment regarding one of his arguments against the State's ability to prove its case beyond a reasonable doubt.

Appellant makes a number of additional arguments regarding counsel's alleged ineffectiveness during the guilt phase. The State submits that the lower court properly analyzed Appellant's claims and denied them based on Appellant's inability to establish deficient performance and prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984). Trial counsel was not deficient for failing to object to the medical examiner's opinion testimony. The testimony was admissible, thus counsel cannot be faulted for failing to raise an objection. Trial counsel also cannot be faulted for failing to foresee a witness' non-responsive comment to a question during direct examination. Finally, Appellant has failed to demonstrate that counsel was ineffective for failing to present evidence of an alleged pattern of intimidation by State investigators towards inmates. Appellant presented the testimony of one witness to establish this alleged "pattern," and this witness lacked credibility. Accordingly, the State urges this Court to affirm the lower court's denial of Appellant's motion for postconviction relief.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED APPELALNT'S INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM BASED ON HIS ALLEGATION THAT COUNSEL FAILED TO INVESTIGATE AND PRESENT AVAILABLE MITIGATING EVIDENCE AT THE PENALTY PHASE.

In his first issue on appeal, Appellant asserts that the lower court erred in denying his postconviction claim that trial counsel was ineffective during the penalty phase for failing to adequately investigate and present mitigation evidence. The State submits that the trial court properly denied Appellant's claim.

In Davis v. State, 915 So. 2d 95 (Fla. 2005), this Court recently reiterated that, pursuant to the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), a claim of ineffective assistance of counsel, to be considered meritorious, must include two general components.

> First, the claimant must 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. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Id. at 710 (quoting Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986)). Furthermore, as the United States Supreme Court

noted in Strickland, there is a strong presumption that trial counsel's performance was not ineffective. Strickland, 466 U.S. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91 (1955)).

When reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but must review the trial court's ultimate conclusions on the deficiency and prejudice prongs de novo. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the court denied the claim because Appellant failed to meet his burden of proof.

Appellant initially faults trial counsel for waiting until the eve of trial to begin investigating potential mitigation evidence. Appellant erroneously asserts in his brief that defense counsel did not begin investigating potential mitigating evidence until eleven days before the start of Appellant's

trial.[18] Initial Brief of Appellant at 39. Contrary to collateral counsel's assertion, lead trial counsel William Stone testified that he began working on the mitigation case at the very outset of his representation. (PCR V4:253-54; 272). Defense counsel immediately began by investigating Appellant's medical history and attempting to obtain all of his medical records. Defense counsel retained a confidential mental health expert, Dr. Robert Berland, in June or July of 1999 -- approximately eight months prior to Appellant's trial. Dr. Berland did not inform counsel that he would be unable to continue working on the case until October, 1999, at which point defense counsel immediately contacted another expert, Dr. Elizabeth McMahon. Although trial counsel did not begin speaking to Appellant's family members until approximately a month before the penalty phase, this was a result of Appellant's instructions not to contact any of his family members. (PCR V4:257). Defense counsel Stone testified that he eventually convinced Appellant to let him contact his grandmother, Hazel Cox, and sister, Elizabeth Veatch. (PCR V4:257-58).

[18] Appellant also incorrectly asserts that counsel did not have an investigator for the penalty phase. Initial Brief at 41-42. Lead trial counsel William Stone testified that the defense team consisted of co-counsel Jeff Higgins, an investigator, a paralegal, and a secretary. (PCR V4:245-47).

Trial counsel Stone testified that he felt Appellant's grandmother and sister were the most significant witnesses to establish mitigation. Mr. Stone went to Kentucky to videotape Hazel Cox's testimony due to her poor health and inability to travel. While in Kentucky, Mr. Stone met with Appellant's grandmother, sister, and father. Mr. Stone also took photographs of the area which were used in the penalty phase. (PCR V4:283-84). Trial counsel detailed his strategic decision to call three or four good witnesses at the penalty phase in order to get the jury to focus on Appellant, and to that end, he chose Hazel Cox, Ray Cox, Appellant's oldest sister, Elizabeth Veatch, and an expert witness, Dr. Elizabeth McMahon. (PCR V4:287-94).

As the lower court properly found when analyzing this aspect of Appellant's claim, trial counsel's investigation of potential mitigation evidence was reasonable. (PCR V2:371-72); citing Strickland v. Washington, 466 U.S. 668, 689 (1984) (noting that there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"), and Ragsdale v. State, 798 So. 2d 713, 716 (Fla. 2001) (holding that "an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence") (emphasis added). The lower

court correctly noted that the reasonableness of trial counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. (PCR V2:371); citing Stewart v. State, 801 So. 2d 59, 67 (Fla. 2001); see also Strickland, 466 U.S. at 691. Appellant did not initially want his family involved in the trial and trial counsel eventually convinced Appellant to allow him to contact his grandmother and sister. Trial counsel was successful in obtaining some additional names of potential witnesses from Dr. McMahon and Appellant. Defense counsel traveled to Kentucky to investigate Appellant's background and met with members of Appellant's family. The lower court noted that trial counsel made the strategic decision to limit the penalty phase testimony to three or four good witnesses who could establish the mitigators.[19]

Clearly, Appellant's argument that trial counsel waited until the last minute to investigate potential mitigation is without merit given the testimony to the contrary at the evidentiary hearing.[20] Trial counsel began investigating

[19] Defense counsel made the strategic decision not to present the testimony of Teresa Morgan, Appellant's former girlfriend, because they had a "stormy relationship" and counsel was afraid that she would reveal information similar to that involving Bonnie Primeau, a woman Appellant was convicted of brutally raping.

[20] As the lower court noted, "[a]ny alleged delay in completing the penalty phase investigation was due in part to circumstances beyond trial counsels' control, to wit: the client's

potential mitigation from the outset, retained an "eminently qualified mental health expert" in Dr. McMahon (PCR V2:378), and eventually managed to convince Appellant into allowing counsel to contact Appellant's family members. Appellant has failed to demonstrate any error in the lower court's rejection of this claim. Trial counsel was clearly not deficient in handling the investigation of potential mitigation. Furthermore, trial counsel made sound strategic decisions regarding the presentation of the mitigation evidence which does not equate to a finding of ineffective assistance of counsel. See Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.").

In addition to incorrectly asserting that trial counsel waited until the eve of trial to begin investigating mitigation evidence, Appellant also erroneously contends that counsel was ineffective for failing to thoroughly investigate various specific events in Appellant's upbringing. Appellant faults counsel for failing to investigate and interview numerous witnesses that allegedly possessed a "wealth of important

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instructions not to contact his family and Dr. Berland's withdrawal from the case in October 1999." (PCR V2:380).

mitigation:" Margurite Sallee, Josephine Bowen, Virginia Gaskins, Ray Cox, Betty Gilbert, Earl Garrett, Harold Pittman, Pauline Bennett, Elizabeth Ann Veatch, Thurman Bagby, Kent Bland, and Cathy Nulls. Initial Brief at 40. With the exception of the family members, Ray Cox (father), Betty Gilbert (step-mother), Elizabeth Veatch (sister), and Cathy Nulls (sister), these other witnesses were never discussed in any detail at the evidentiary hearing.[21] Trial counsel obviously investigated (and presented evidence from) Ray Cox and Elizabeth Veatch at the penalty phase. Counsel chose to present testimony from Appellant's oldest sister, Elizabeth Veatch, because she was closest to Appellant and she had observed and suffered the same abuse as Appellant.[22] (PCR V4:290-91). Trial counsel's

[21] Dr. McMahon testified that she had reviewed statements from most of these witnesses, but the statements did not change the opinions she expressed at the penalty phase. (PCR V6:61).

Obviously, had these witnesses truly had a "wealth of important mitigation evidence" as alleged by collateral counsel, he would have presented it at the evidentiary hearing. Despite the fact that these witnesses were listed on his witness list, Appellant only called Ray Cox, Betty Gilbert and Cathy Null.

[22] Appellant's younger sister, Cathy Null, testified at the evidentiary hearing, but her testimony was cumulative to that of her older sister's penalty phase testimony. Furthermore, this witness was approximately five years old when Appellant's mother dropped him off to live with his father and grandmother, and she never lived with Appellant for any significant period of time after that incident.

expert witness Dr. McMahon also interviewed a number of these witnesses and provided counsel with her information.[23]

Appellant further alleges that counsel was ineffective for failing to thoroughly investigate a motorcycle accident involving Appellant, an injury sustained from an incident with a mule, or an incident of sexual molestation committed on Appellant during his youth.[24] As to the motorcycle incident, trial counsel was aware of the accident, but Appellant had only informed him that he broke his foot in that accident. (PCR V4:279-80). In fact, although Dr. Berland opined that Appellant had suffered a brain injury in this accident, there is no evidentiary support for this conclusion. Appellant was wearing a helmet during the accident, the hospital records did not mention any head injury, and Appellant did not lose consciousness or complain of nausea, a common symptom of a head injury. Furthermore, when questioned by Dr. McMahon prior to the penalty phase hearing about any history of head injuries, Appellant did not inform Dr. McMahon about the mule incident. The testimony at the evidentiary hearing from Ray Cox, a witness to the mule incident, was that Appellant was not knocked

[23] In addition to reviewing voluminous paperwork relating to potential mitigation, Dr. McMahon testified that she spoke with Ray Cox, Elizabeth Veatch, Cathy Null, Hazel Cox, and Barbara Edelen. (DAR V26:3329-34, 3351).

[24] Appellant did not present any evidence or reference any allegation of sexual abuse at the evidentiary hearing.

unconscious. This directly contradicted Dr. Berland's testimony that Appellant was knocked unconscious for several hours. Obviously, trial counsel was not deficient in investigating any possible brain damage given Appellant's denial of any head injuries.

When addressing this aspect of Appellant's claim, the lower court noted Dr. Berland's opinion that Appellant's brain damage was related to his psychotic thinking. (PCR V2:376). However, after comparing Dr. Berland's opinion to that of the other mental health experts involved in this case,[25] the lower court noted that this Court has held on more than one occasion that "the mental evaluation by one expert is not rendered less than competent simply because a defendant has been able to provide testimony to conflict with the original expert. Jones v. State, 732 So. 2d 313, 320 (Fla. 1999); Correll v. Dugger, 558 So. 2d

[25] The court noted that defense expert, Dr. Henry Dee, testified at the evidentiary hearing that Appellant's ability to conform his conduct to the requirements of the law was substantially impaired. Dr. Dee also testified that he did not find that Appellant was psychotic at the time of the crime and admitted that he had no serious disagreements with Dr. McMahon's testimony at the penalty phase. (PCR V2:376-77).

The court compared the evidentiary hearing testimony from the mental health experts to the testimony presented at the penalty phase, and noted that Dr. Berland's and Dr. Dee's opinions were refuted by the testimony of Dr. Michael Gutman, a psychiatrist specializing in head injuries, Helen Ridenour, a psychological specialist at Lake Correctional Institution, Dr. McMahon, Appellant's medical records, his statements to investigators, and the forensic assessment form he filled out for his attorneys. (PCR V2:377-81).

422, 426 (Fla. 1990)." (PCR V2:379-80). The court ultimately concluded that trial counsel was not deficient in relying on the report and testimony of an eminently qualified forensic psychologist. As the court properly noted, "[m]erely locating another witness whose testimony is more favorable than that of a trial witness does not establish deficient performance. Fennie v. State, 855 So. 2d 597, 606 (Fla. 2003)." (PCR V2:381).

In asserting that trial counsel was ineffective, collateral counsel also argues that co-counsel, Jeff Higgins, was inexperienced and did not meet the minimum qualifications for death penalty counsel. Appellant relies on Florida Rule of Criminal Procedure 3.112, Minimum Standards for Attorneys in Capital Cases, to argue that co-counsel was ineffective. This argument is without merit for a number of reasons. First, the standards set forth in Florida Rule of Criminal Procedure 3.112 did not take effect until July 1, 2000; months *after* Appellant's trial was complete.[26] See In re: Amendment to Florida Rules of Criminal Procedure – Rule 3.112 Minimum Standards for Attorneys in Capital Cases, 759 So. 2d 610 (Fla. 1999) ("This rule shall become effective and apply to the appointment of counsel made after July 1, 2000."). More importantly, as the committee notes to the rule clearly state, the standards set forth in the rule

[26] The trial court recognized that this rule was not in effect at the time of Appellant's trial. (PCR V2:354).

are not intended to establish any legal rights. Rather, the committee specifically noted that in order to establish postconviction relief, a defendant must show ineffective assistance of counsel and Strickland is the controlling precedent for that determination. Additionally, co-counsel Higgins was not involved in the penalty phase investigation or presentation of evidence to any substantial degree. Attorney Higgins testified that his involvement in the penalty phase primarily consisted of performing legal research regarding the potential aggravating factors. (PCR V5:100-01).

Likewise, Appellant's contention that trial counsel Stone's actions in Kentucky are evidence of substandard investigation is also without merit. Appellant faults the lower court for failing to resolve the factual discrepancy between Ray Cox's testimony and attorney Stone's testimony regarding an incident when attorney Stone became sick and vomited one night.[27] Clearly, the reason the court did not address this issue is because it was simply not relevant to the court's determination that counsel was not ineffective. The testimony surrounding this incident demonstrated that one evening after conducting his

[27] Ray Cox testified that attorney Stone became so intoxicated he could not drive and eventually became so ill that he vomited in Mr. Cox's car. Attorney Stone testified that he only had one drink and became ill as a result of the food he ate while staying in Kentucky.

investigation, counsel and Ray Cox went out to dinner at a local tavern. Although there was a discrepancy as to what caused attorney Stone to become ill, the fact remains that Appellant has failed to show how this had any relevance to counsel's mitigation investigation. Trial counsel spent a considerable amount of time in Kentucky interviewing witnesses and taking photographs, and even if Ray Cox's testimony was credited over that of an officer of the court, it fails to demonstrate any deficient performance.

In this case, it is not even necessary to address the second prong of Strickland to determine whether Appellant has made a showing of prejudice because he has failed to establish the deficiency prong. See Strickland, 466 U.S. at 697 ("There is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."). Trial counsel thoroughly investigated the potential mitigation in this case and made the strategic decision to present this evidence via four witnesses, Appellant's grandmother, father, sister, and a mental health expert witness. The lower court found that counsel was not deficient, but even if counsel were deemed deficient, Appellant failed to establish any prejudice. (PCR V2:380-83).

In sum, the trial court properly rejected Appellant's claim that trial counsel was ineffective for failing to investigate or present potential mitigating evidence. The court properly noted that Dr. McMahon's evidentiary hearing testimony summed up the totality of the allegations and evidence presented in the postconviction proceeding as simply "more of the same." (PCR V2:380). As the court correctly noted, the evidence presented at the postconviction proceedings "repeats or expands upon the evidence presented at trial, but does not in any significant way add to what this Court and the jury already knew." (PCR V2:380). Trial counsel conducted an extremely thorough investigation into potential mitigation and hired an extremely qualified mental health expert to assist in the investigation. Counsel made the strategic decision to present testimony from three or four good witnesses at the penalty phase and chose the family members who were most familiar with Appellant and who could best describe his upbringing. In addition to Appellant's grandmother, Hazel Cox, trial counsel also presented the testimony of Appellant's father and sister, and the testimony of the mental health expert, Dr. Elizabeth McMahon. Because Appellant has failed to carry his burden of establishing deficient performance and prejudice, this Court should affirm

the lower court’s order denying Appellant’s claim of ineffective assistance of counsel.

ISSUE II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT P0HASE OF APPELLANT'S TRIAL.

Appellant asserts that the trial court erred in denying his claim of ineffective assistance of counsel in the guilt phase of his trial and raises numerous subclaims. The State submits that the trial court properly denied the motion based on Appellant's inability to establish deficient performance and prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984).

A. Counsel Never Conceded Appellant's Guilt During Opening Statements

Appellant argues that defense counsel Higgins was ineffective for conceding in opening statements that Cox stabbed and killed Thomas Baker. Appellant's argument on this issue is based on the faulty premise that trial counsel conceded Cox's guilt during opening statements. Collateral counsel alleges that trial counsel conceded Appellant's guilt despite the fact that the transcribed opening statement clearly indicates that counsel did not concede guilt and trial counsel testified at the evidentiary hearing that he never conceded Appellant's guilt, in the opening statement, or at any other point during the trial.

The case law is clear that the proper test for attorney performance on this issue is that of reasonably effective

assistance.[28] Strickland v. Washington, 466 U.S. 688 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel and that the deficient performance prejudiced the defense. In any ineffectiveness of counsel case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. 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. Strickland, 466 U.S. at 696. Moreover, "because representation is an art and not a science, [e]ven the best criminal defense attorneys would not defend a particular client in the same way." Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995) (citing Strickland, 466 U.S. at 689).

As a strategic decision, trial counsel's performance is virtually unassailable in postconviction litigation. See Maharaj v. State, 778 So. 2d 944 (Fla. 2000) (recognizing that counsel cannot be ineffective for strategic decisions made

[28] Although Appellant argued below that counsel was ineffective *per* se under United States v. Cronic, 466 U.S. 648 (1984), Appellant concedes that, after the United States Supreme Court's decision in Florida v. Nixon, 543 U.S. 175 (2004), the Strickland analysis applies to this issue. Initial Brief of Appellant at 58.

during a trial). Within the wide range of reasonable professional assistance, there is room for different strategies with no one strategy necessarily "correct" to the exclusion of all others. Felker v. Thomas, 52 F.3d 907 (11th Cir. 1995).

The second, or prejudice, prong required by Strickland is not established by merely showing that the outcome of the proceeding might have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364 (1993). The defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693. Furthermore, a claim of ineffective assistance of counsel fails if either the performance or the prejudice prong of Strickland is not proven. Kennedy v. State, 547 So. 2d 912 (Fla. 1989).

Contrary to Appellant's numerous assertions in his brief, the record clearly establishes that trial counsel Higgins did not concede that Cox fatally stabbed Thomas Baker, but instead, asserted a defense that another individual was responsible for the murder. Trial counsel acknowledged that Cox and Baker had a

fight and Cox allowed the victim to get up, but this was a factual issue that was clearly not in dispute given the fact that the fight was witnessed by numerous inmates at the prison. (DAR V15:962-63). Furthermore, as trial counsel testified at the evidentiary hearing, this version of events was consistent with their client's statements and his subsequent trial testimony. (PCR V4:247-51; V5:90-92).

Prior to trial, defense counsel investigated the case and spoke with their client repeatedly regarding possible defenses. As trial counsel explained at the evidentiary hearing, they made the strategic decision to assert the defense that Cox was not responsible for the fatal stab wounds, despite "conceding the obvious" fact that Cox had been in an altercation with the victim, to maintain credibility with the jury. Counsel's decision to acknowledge this fact was made with the knowledge that the State had at least 25-40 inmate witnesses available who had witnessed the fight between Cox and the victim. (PCR V5:90-92). Counsel specifically testified that they did not concede that Cox was responsible for the fatal stab wound, but asserted the defense that another inmate, Vincent "Pig" Maynard, was responsible for the fatal wound. (PCR V4:249; V5:107).

Appellant additionally contends that Higgins "concessions" were the result of his inexperience. Appellant argues that

Higgins was not qualified pursuant to Florida Rule of Criminal Procedure 3.112 to handle death penalty cases. As noted in Issue I, supra at 39-40, this rule was not in effect at the time of trial. Furthermore, the rule does not equate to a finding of *per se* ineffectiveness, rather, the defendant is still required to meet the standard set forth in Strickland when alleging ineffective assistance of counsel based on a lack of qualifications.

In addressing Appellant's allegations on this issue, the lower court properly analyzed Appellant's claim under the Strickland standard, and found, in pertinent part:

> The Defendant's argument is based on his conclusion that Mr. Higgins conceded that he had inflicted the fatal wound on the victim. The record, however, does not support this conclusion. A careful reading of his opening statement indicates that Mr. Higgins conceded only that a fight had taken place and that the Defendant had held the victim down and then let him up. Mr. Higgins testified that due to the number of inmates who witnessed the fight, he made a strategic decision to concede that the fight took place. Significantly, the Defendant admitted during his testimony that he had been involved in a fight with the victim, a clear indication that he supported trial counsel's theory of defense. Mr. Higgins testified that the defense strategy was based on the contention that Vincent Maynard, and not the Defendant, had inflicted the fatal wound. Accordingly, this Court finds that the Defendant has not overcome the strong presumption that Mr. Higgins' actions were reasonable and a matter of trial strategy.

(PCR V2:357). Appellant has failed to demonstrate any error by the lower court in analyzing and denying Appellant's claim of ineffective assistance of counsel during the opening statements. Accordingly, this Court should affirm the lower court's decision.

B. Alleged Ineffectiveness During Voir Dire

Appellant argues that counsel was ineffective during voir dire for failing to object to the prosecutor's mischaracterization of the law during voir dire. Appellant further asserts that trial counsel also mischaracterized the law and that counsel conducted voir dire in an unprofessional manner because counsel failed to probe into such areas as mental mitigation and questioned one of the potential jurors in front of the venire panel. After conducting an evidentiary hearing on Appellant's claim, the lower court denied the claim. The State submits that the court properly denied Appellant's claims based on a finding that Appellant failed to demonstrate both deficient performance and prejudice as required by Strickland.

On direct appeal to the Florida Supreme Court, Cox raised the substantive claim that the prosecutor's misstatements of the law were reversible error. See Cox v. State, 819 So. 2d 705, 717 (Fla. 2002). This Court analyzed the claim under the fundamental error analysis because trial counsel failed to

preserve the issue by objecting to the mischaracterizations. Nevertheless, this Court found that "the prosecutorial misrepresentation of the law was harmless error, and certainly does not constitute fundamental error." Id. Although the prejudice prong under the Strickland analysis is different from the harmless error standard, Cox is unable to establish prejudice from the failure of trial counsel to object to the prosecutor's misstatements. The second prong of Strickland requires a showing that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

As the lower court properly found when denying this claim, the prosecutor corrected his misstatements later during voir dire and informed the jury that the trial judge would provide them with the applicable instructions.[29] "Therefore, whatever mischaracterization of the law occurred by either trial counsel or the prosecutor, the mischaracterization was cured when the trial court properly instructed the jury on its role in the

[29] The lower court noted that Appellant did not challenge the accuracy of the jury instructions utilized in this case. Moreover, this Court stated in its direct appeal opinion that the instructions were correct statements of the law. (PCR V2:359-60).

proceeding." (PCR V2:360). Accordingly, the lower court properly found that Appellant was unable to demonstrate any prejudice. See also Chandler v. State, 848 So. 2d 1031, 1045-46 (Fla. 2003) (finding that because defendant could not show that the prosecutor's comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the Strickland test in postconviction proceedings).

Appellant also argues that trial counsel was ineffective for conducting voir dire in an unprofessional manner. Collateral counsel asserts that trial counsel's questioning of the venire did not sufficiently probe the panel regarding mental mitigation and mental health issues and further claims that trial counsel was ineffective for questioning jurors in the presence of the entire panel regarding their attitudes on the death penalty. At the evidentiary hearing, trial counsel acknowledged that questioning some of these "ultra-conservative" potential jurors in the presence of the entire panel was not his preference. (PCR V4:269-70). Trial counsel moved for individual voir dire on more than one occasion, but the request was denied by the trial court. (PCR V4:270). Thus, the lower court properly found that Appellant had failed to demonstrate

that trial counsel was deficient in his actions of conducting voir dire. Furthermore, as the lower court noted in denying this claim, Appellant did not allege, much less demonstrate, prejudice in either his written motion or in his closing argument. (PCR V2:360).

C. Alleged Ineffectiveness During Opening Statement

In addition to the argument presented in Issue II, subsection A, supra at 44-49, Appellant further asserts that trial counsel was ineffective during opening statement for arguing that the delay in providing medical care to the victim contributed to his death; a defense that was not recognized by the law. Appellant contends that putting forth a defense not recognized by law damaged the defense's credibility with the jury and shifted focus away from the defense that Vincent Maynard killed the victim.

In addressing this aspect of Appellant's claim, the lower court stated:

> Regarding the Defendant's second argument that counsel was deficient for presenting a defense that was not recognized by law, this Court concludes that the Defendant has not overcome the strong presumption that counsel's actions fell within the reasonable professional standard. An examination of defense counsel's opening statement reveals that Mr. Higgins made the argument to attack the prosecutor's statements that the Defendant had committed the crime with premeditation. Defense counsel stated:
>
> > So we're left to look at the poor medical care and what role that plays in

> Thomas Baker's demise. Again a small detail that could have drastically, drastically changed the picture. And because it could have changed the picture so drastically, it should leave you to wondering where the fall for this case lies. Whether or not this killing was premeditated as Mr. McCune and Mr. Gross would like you to believe.
>
> (TT at 967-68). Immediately following this argument, Mr. Higgins presented his next argument, i.e., that the State would not be able to prove their case beyond a reasonable doubt. (TT at 968).
>
> This Court concludes that defense counsel's argument was part of a strategic decision to attack the element of premeditation and was an aspect of the case that could have blunted premeditation and provided 'grist for consideration' should the jury ever consider[] penalty. 'Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.' Brown v. State, 894 So. 2d 137, 147 (Fla. 2004) (citing Rutherford, 727 So. 2d at 223); State v. Bolender, 503 So. 2d 1247, 1250 (Fla. 1987); Kenon v. State, 855 So. 2d 654, 656 (Fla. 1st DCA 2003) (citing Maharaj v. State, 778 So. 2d 944 (Fla. 2000)). Moreover, this Court finds it significant that defense counsel did not proffer this as his only argument in his opening statement. Accordingly, the Defendant has not demonstrated that trial counsel's performance was deficient in this regard. Even assuming a deficiency, Mr. Cox has not demonstrated prejudice in light of the primary focus of opening argument having been an inability of the State to prove its case.

(PCR V2:361-62). Appellant has failed to show any error in the lower court's analysis of this issue. As the trial court properly concluded, Appellant has been unable to demonstrate deficient performance or prejudice based on trial counsel's brief argument during opening statement regarding the quality of

medical attention given to the victim. See also Ferguson v. State, 593 So. 2d 508 (Fla. 1992) ("although in hindsight one can speculate that a different argument may have been more effective, counsel's argument does not fall to the level of deficient performance simply because it ultimately failed to persuade the jury."). Accordingly, this Court should affirm the trial court's denial of this sub-issue.

D. Appellant has Failed to Demonstrate Ineffective Assistance of Counsel During the Guilt Phase

Appellant raises numerous arguments under this sub-issue. Appellant asserts that: (1) trial counsel was ineffective for failing to object when the State elicited opinions from the medical examiner which did not meet the standards of admissibility under Florida law; (2) counsel was ineffective in the manner in which he cross-examined[30] Vincent Maynard; and (3) counsel was ineffective for failing to investigate and present evidence of a pattern of threats and intimidation utilized by State investigators toward inmates at Lake Correctional Institution in order to obtain trial testimony against Mr. Cox.

1. Failure to object to medical examiner's testimony

Appellant claims that defense counsel was ineffective for failing to object to opinion testimony from the medical

[30] Trial counsel called Vincent Maynard as a defense witness, thus collateral counsel's allegation relates to trial counsel's questioning of the witness during direct examination.

examiner, Dr. Janet Pillow, and for failing to properly cross-examine her opinion that blood could have been wiped from the shank. Trial counsel Stone testified at the evidentiary hearing that he did not object to Dr. Pillow's opinion testimony because he believed that her opinions were within the realm of her qualified expertise. (PCR V4:270-71). With regard to Dr. Pillow's theory that the shank could have been wiped clean, Mr. Stone testified that it was a strategic decision not to object to this opinion because anyone with common-sense would find this opinion "preposterous" and, more importantly, the defense theory was that this shank was not the one used to stab Thomas Baker. (PCR V2:271).

As the lower court properly noted when denying this claim, Appellant is unable to establish either prong under the Strickland analysis. (PCR V2:362-66). First, trial counsel was not deficient for failing to object to the medical examiner's opinion testimony. As trial counsel correctly noted at the evidentiary hearing, Dr. Pillow's testimony was admissible as opinion testimony because it was relevant and within her area of expertise. See Butts v. State, 733 So. 2d 1097, 1101 (Fla. 1st DCA 1999) (stating that expert opinion testimony must be relevant and must meet the standard generally applied to scientific, technical, or other specialized knowledge under

section 90.702, Florida Statutes, to be admissible); Burns v. State, 609 So. 2d 600, 603-04 (Fla. 1992) (stating that trial court acted within its discretion in allowing medical examiner to express opinion on distance from which a gun was fired); see also Charles W. Ehrhardt, Florida Evidence § 704.1 (2004) (stating that "[a]n expert may express an opinion based on reasonable inferences that may be drawn from the evidence."). Thus, as the lower court noted, trial counsel's objection to such testimony would have been futile. Trial counsel cannot be deemed ineffective for failing to object to admissible testimony.

Additionally, trial counsel made a strategic decision not to object to Dr. Pillow's testimony concerning the possibility that blood had been wiped from the shank. Trial counsel's strategic decision was based on his defense theory that the shank was not involved in the murder. As the lower court correctly noted, trial counsel's strategic decision was not unreasonable or below the standard for reasonably competent counsel. (PCR V2:365-66); see Maharaj v. State, 778 So. 2d 944 (Fla. 2000) (recognizing that counsel cannot be ineffective for strategic decisions made during a trial).

Although the lower court was not required to examine the second prong of the Strickland analysis given Cox's failure to

show deficient performance, the court further noted that Cox was unable to establish prejudice. (PCR V2:364); see Strickland, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."). Dr. Pillow testified that the recovered shank was consistent with having caused the victim's injuries, but the State told the jury that it was possible that this was not the murder weapon. (DAR V24:2968-70). In light of the State's argument, Dr. Pillow's opinions could hardly be deemed misleading or prejudicial to the defendant. Furthermore, with regard to Dr. Pillow's testimony that it was possible that the victim was aware of his imminent death, the lower court went into great detail as to why Appellant was not prejudiced by this testimony given the other evidence supporting this opinion. (PCR V2:364-65). Thus, the lower court properly found that Appellant has failed to establish ineffective assistance of counsel based on trial counsel's performance in handling Dr. Pillow's testimony.

2. Counsel was not ineffective for the manner in which he questioned Vincent Maynard

Appellant next claims that trial counsel was ineffective for the manner in which he questioned Vincent "Pig" Maynard. During the defense case-in-chief, trial counsel Stone called

Maynard as a witness, and during his direct examination, Maynard announced to the jury that Cox was serving two life sentences. A review of the record indicates that Maynard's remark was unresponsive to trial counsel's question. (DAR V22:2464). After the remark, this Court gave a curative instruction to the jury and denied Cox's motion for mistrial. (DAR V22:2464-76). On direct appeal, Appellant argued that the trial court's denial of the motion for mistrial was error requiring remand for a new trial. This Court rejected Cox's argument and found that Maynard's remark, which was "wholly unrelated" to trial counsel's line of questioning, was not so prejudicial as to vitiate Cox's trial. Cox v. State, 819 So. 2d 705, 713-14 (Fla. 2002).

At the evidentiary hearing, trial counsel explained his strategy in questioning Maynard. The defense theory of the case was that Maynard had committed the fatal stabbing and defense counsel successfully introduced reverse Williams rule evidence to show the jury that Maynard was a dangerous and nasty individual. (PCR V4:252-53, 268-69). Defense counsel testified that he never anticipated that Maynard would volunteer information about Cox's two life sentences. (PCR V4:252-53). The lower court found that counsel was not deficient in his

questioning of Maynard.[31] (PCR V2:366-67). Trial counsel could not be faulted for his failure to foresee Maynard's unresponsive remark.

In addition to failing to show deficient performance, Appellant was unable to establish any resulting prejudice from the witness' unresponsive remark. The jury in this case was aware that Cox was serving time in prison and he testified that he had eleven to twelve felony convictions. The fact that Cox was serving two life sentences was "certainly not critical to the State's case." Cox, 819 So. 2d at 714. Both this Court and the lower court found that Maynard's unresponsive remark was not so prejudicial as to require a new trial. Furthermore, there is no reasonable probability of a different result had the comment not been made. Thus, because the lower court properly found that Appellant was unable to establish either prong of Strickland, this Court should affirm the court's denial of this claim.

3. Appellant failed to demonstrate any pattern of threats or intimidation allegedly utilized by State investigators towards inmates at Lake Correctional Institution in order to obtain trial testimony against Appellant

[31] The court noted that trial counsel had a duty to aggressively question Maynard, and noted that had counsel failed to do so, collateral counsel would argue that he was ineffective for failing to aggressively question the witness. (PCR V2:366).

Appellant next claims that trial counsel was ineffective for failing to investigate and present evidence of a pattern of threats and intimidation utilized by State investigators toward inmates at Lake Correctional Institution in order to obtain trial testimony against Cox. At the evidentiary hearing, Cox presented evidence from only one inmate, Henry Wheeler. Mr. Wheeler testified that he was incarcerated at Lake Correctional Institution until approximately two months prior to the murder of Thomas Baker. (PCR V3:147-49). According to Mr. Wheeler's direct examination testimony, Cox's trial counsel wanted to question him and they transferred him to the Lake County Jail prior to the trial, but Cox's attorneys never came to speak with him. (PCR V3:149). According to Wheeler, after he came to the local jail, he was transported back to Lake CI where Inspector Williams questioned him about his involvement with Cox's case. Wheeler testified that Inspector Williams "made it very clear that life could be a living hell for [him] if [he] helped Allen Cox in any way." Thereafter, Wheeler was transferred to a Brevard County facility for juveniles to do work laying bricks. (PCR V3:158-59).

Approximately three months after being transferred to the Brevard facility, Wheeler was released on parole. Wheeler testified that, while on parole, he was contacted by someone

with the defense team, possibly attorney Jeffrey Higgins, who wanted him to testify regarding the events that had taken place with Inspector Williams. (PCR V3:159-60; 207-10). Wheeler testified that he changed his mind about testifying after his parole officer reminded him that he still "belonged" to the Department of Corrections, and "you know they can make things rough on you." (PCR V3:160-61).

On cross-examination, Wheeler admitted that he spoke with Appellant's defense team while at the jail and complained to them for bringing him to the jail when he was not even at Lake Correctional Institution at the time of the murder. (PCR V3:183-84). He made it clear to Cox's lawyers that he did not want to testify (PCR V4:224). Later, Wheeler alleged that his parole officer, Ms. Folsom, advised him not to testify or there could be "repercussions" and that it would not be a good idea. (PCR V4:210-11). After he was re-incarcerated, Wheeler testified he talked to Vincent Maynard, who told Wheeler that Cox was drunk, angry at Baker, and stabbed Baker three times. When asked about a fourth stab wound, Wheeler said Maynard just smiled. (PCR V4:215-18).

At the evidentiary hearing, the lower court heard contradictory testimony from Inspector Kenneth Williams and Parole Officer Tanya Folsom Anderson. Inspector Williams stated

that he had investigated Wheeler for introducing contraband into the prison, had seized the contraband, and placed Wheeler in confinement as a result. Inspector Williams further testified that he had no interest in questioning Wheeler about Cox's case because Wheeler was no longer housed at LCI at the time of the murder. (PCR V5:6-8). In fact, Inspector Williams categorically denied all of Wheeler's allegations against him. (PCR V5:8-19). Tanya Folsom Anderson, Wheeler's parole officer, categorically denied that she suggested that Wheeler should not appear and testify at trial. (PCR V6:39-41).

In denying this aspect of Appellant's claim, the lower court noted that not only was Wheeler's testimony contradicted by two witnesses, but Wheeler had numerous prior criminal convictions and a reason to dislike Inspector Williams due to the previous drug investigation.[32] For these reasons, the court found that Wheeler was not a credible witness. (PCR V2:368). Moreover, the court noted that, according to Wheeler, Maynard did not admit to stabbing Baker, but said Cox stabbed Baker three times. As the trial testimony clearly indicated, Baker was in fact stabbed three times. (DAR V14:991). Based upon the foregoing reasons, the court properly found that Appellant had

[32] The court also found it significant that the only witness to testify regarding this "pattern" of intimidation was Wheeler. (PCR V2:368).

failed to establish any deficiency on trial counsel's part for failing to present this evidence. Appellant has failed to demonstrate any error in this regard. Accordingly, this Court should affirm the lower court's denial of Appellant's postconviction motion.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's denial of Appellant's motion for postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Eric C. Pinkard, Assistant Capital Collateral Regional Counsel, Office of the Capital Collateral Regional Counsel – Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, on this 14th day of April, 2006.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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