IN THE SUPREME COURT OF FLORIDA

DUANE OWEN

Appellant,

v.

Case No. SC06-2104
Lower Tribunal No.84-4014 CF

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACHCOUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

CELIA TERENZIO
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0656879
1515 N. Flagler Dr. Suite 900
West Palm Beach Fl. 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5099

COUNSEL FOR APPELLEE

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## STATEMENT OF THE CASE AND FACTS

Owen was convicted for a second time, of the stabbing death and sexual battery of fourteen year old Karen Slattery. By a vote of ten-to-two, Owen was again sentenced to death. Owen v. State, 862 So. 2d 867 (Fla. 2003). This Court's opinion on direct appeal outlines the extensive procedural history of Appellant's prior cases before this Court.

> Duane Owen has an extensive criminal history, with this appeal marking his sixth occasion before this Court. As noted above, Owen first appeared before this Court in 1990 seeking review of the sentence of death he received following the original Slattery murder trial. This Court reversed his conviction on the basis of a Miranda violation. See Owen, 560 So. 2d at 211. There, this Court held that the law enforcement officers questioning Owen about the Slattery homicide violated the dictates of Miranda when they continued to question him after he responded to two of their questions with the answers "I don't want to talk about it" and "I'd rather not talk about it." See id. Following well-established principles of law applicable at the time, this Court explained that "a suspect's equivocal assertion of a Miranda right terminates any further questioning except that which is designed to clarify the suspect's wishes." Id. Applying this rule of law, this Court determined that Owen's responses of "I don't want to talk about it" and "I'd rather not talk about it" were "at the least, an equivocal invocation of the Miranda right to terminate questioning, which could only be clarified." Id. The law enforcement officers continued to question Owen after his responses and failed to clarify his wishes, and, therefore, this

Court held that Owen's right to terminate questioning was violated, and any statements made after his right was violated, namely his confession to the Slattery murder, should have been suppressed. The trial court had failed to suppress the statements, an error that this Court determined was not harmless, which prompted this Court to reverse Owen's convictions and remand for retrial. See id.

Owen's next appearance before this Court came in 1992 in the direct appeal of a sentence of death imposed upon him for the murder of Georgianna Worden. See Owen v. State, 596 So. 2d 985 (Fla. 1992). The facts surrounding the death of Worden were substantially similar to those of the Slattery murder. As this Court detailed, "The body of the victim, Georgianna Worden, was discovered by her children on the morning of May 29, 1984, as they prepared for school. An intruder had forcibly entered the Boca Raton home during the night and bludgeoned Worden with a hammer as she slept, and then sexually assaulted her." Id. at 986. This Court affirmed the conviction and sentence of death in that case and, notably, held that there was sufficient evidence to support the trial court's findings that the murder was especially heinous, atrocious, or cruel and that the murder was committed in a cold, calculated, and premeditated manner. See id. at 990.

In 1997, Owen was again before this Court in connection with a question certified by the Fourth District Court of Appeal, which related to the admissibility of Owen's confession to the Slattery murder. See State v. Owen, 696 So. 2d 715 (Fla. 1997). Following this Court's decision in Owen's first direct appeal for the Slattery homicide, but before his retrial, the United States Supreme Court issued an opinion in Davis v. United States, 512 U.S. 452, 129 L.

Ed. 2d 362, 114 S. Ct. 2350 (1994).As this Court outlined, Davis held that "neither Miranda nor its progeny require police officers to stop interrogation when a suspect in custody, who has made a knowing and voluntary waiver of his or her Miranda rights, thereafter makes an equivocal or ambiguous request for counsel." Owen, 696 So. 2d at 717. Prior to Owen's retrial, the State requested that the trial court reconsider the admissibility of Owen's confession in light of Davis, and the trial court concluded that the confession was inadmissible. See id. The district court of appeal subsequently denied the State's petition for a writ of certiorari because this Court had previously ruled that the confession was inadmissible, thereby making the decision of inadmissibility the law of the case. See id. However, the district court certified the following question to this Court: "Do the principles announced by the United States Supreme Court in Davis apply to the admissibility of confessions in Florida, in light of Traylor v. State?" Id. at 716 (citations omitted).

Initially, this Court held that while the ruling in Davis pertained specifically to requests for counsel, the reasoning upon which the decision was based was equally applicable to requests to terminate interrogation. See Owen, 696 So. 2d at 718. Further, this Court held that Traylor did not control, because in Traylor the defendant made no indication that he wished to invoke his Miranda rights, while Owen made an equivocal request to terminate questioning. See id. at 719. We proceeded to apply the Davis rationale to the issue before us, and, answering the certified question in the affirmative, held that "police in Florida need not ask clarifying questions if a defendant who has received proper Miranda warnings makes only an

> equivocal or ambiguous request to terminate an interrogation after having validly waived his or her Miranda rights." Id.
>
> Finally, we analyzed the law of the case doctrine and determined that "the [United States] Supreme Court's decision in Davis qualifies as an exceptional situation" and therefore the law of the case as to the admissibility of Owen's confession, as determined in Owen's first direct appeal, could be modified. Id. at 720. This Court reasoned: "[R]eliance upon our prior decision in Owen's direct appeal would result in manifest injustice to the people of this state because it would perpetuate a rule which we have now determined to be an undue restriction of legitimate law enforcement activity." Id. This Court refused to retroactively reinstate Owen's prior conviction, but instead noted: "With respect to this issue, Owen stands in the same position as any other defendant who has been charged with murder but who has not yet been tried. Just as it would be in the case of any other defendant, the admissibility of Owen's confession in his new trial will be subject to the Davis rationale that we adopt in this opinion." Id.
>
> Owen's final two prior appearances before this Court pertained to the Worden murder. In 2000, this Court denied Owen's rule 3.850 postconviction motion in that case. See Owen v. State, 773 So. 2d 510 (Fla. 2000). Owen then filed a successive 3.850 motion, which was denied by the trial court. On July 11, 2003, we affirmed the trial court's denial of postconviction relief, and also denied Owen's petition for a writ of habeas corpus. See Owen v. Crosby, 854 So. 2d 182, 2003 Fla. LEXIS 1174, 28 Fla. L. Weekly S615 (Fla. 2003).

Owen, 862 So. 2d at 691-693.

Appellant presented eight claims in his motion for

postconviction relief. (PCR 1-75). Appellant was granted an evidentiary hearing on claims II, IV and VII in their entirety as well as a portion of claim III. Claims I, the remainder of claim III, and V, VI and VIII were summarily denied because they were procedurally barred and/or legally insufficient as pled. (PCR 684-747). Following a case management hearing, Appellant was provided an opportunity to present new law and/or facts to overcome the legal barriers to those claims identified by the Court as being barred or insufficiently pled. He failed to do so. (PCR 312-314).

The evidentiary hearing was held on August 11, 2006. Appellant called Dr, Henry Dee, Carey Haughwout, Esq. (lead counsel/guilt phase counsel), Heidi Guerra (licensed mental health counselor), Hillary Sheehan (private investigator), and six lay witnesses who knew or had contact with Owen in his youth: Fred Morlock, Kenneth Richards, Keith Croucher, Wilma Bailey, Kelly Bragg, and Timothy Cervantes. The testimony is as follows.

Haughwout is the elected Public Defender for the 15th Judicial Circuit with 23 years of criminal defense experience. (PCT 186, 207-208) At the time of Owen’s 1999 re-trial she had been practicing for approximately 16 years. To the present, Haughwout has been involved in approximately 30 to 40 capital

cases. Her first was in 1985/1987. About half of these cases went to trial and Haughwout's sole client to receive the death penalty was Owen. (PCT 184, 189-208). Haughwout is board certified, a member of the State Association of Criminal Defense Lawyers, has attended and taught at the National Criminal Defense College since 1991, and has attended seminars regarding capital matters. The trial practice classes she has taken have included issues involving capital cases. (PCT 208-219). Further, she has been found to be an expert in criminal law and has testified at postconviction evidentiary hearings on the proper manner to conduct a defense. (PCT 210).

When asked about her recollection of the voir dire process in Owens' case, she responded that she could recall nothing beyond what would be contained in the transcript. (PCT 197). She had no recollections of her strategies or filing motions regarding jury instructions, but did affirm that the decision to strike jurors was a group defense decision. (PCT 197-203). When questioned about the option to strike the panel due to the prosecutor's comment that Owen had been in jail, Haughwout agreed that she could have moved to strike the panel. (PCT 203-204).

As preparation for the retrial of Owen, she hired Sheehan to investigate the case, and obtained the services of three

mental health experts, Drs. Berlin, Sultan, and Crown. (PCT 184-186, 215-216). She provided the experts with necessary documentation. (PCT 186, 217). Haughwout spent a significant time with Owen and pursued certain avenues based on what he reported. She found Owen an important source of information and cooperative. It was Haughwout's impression that Owen was forthright with her and was not hiding any history. (PCT 186-187, 212). Owen was also active with his mental health experts - there was give and take in their sessions. Although she spent a significant amount of time with Owen, she claims not to recall what they discussed regarding his substance use. (PCT 191-192, 212). She does admit that she probably would have given any information on substance abuse to the defense experts and the she reviewed Dr. Peterson's notes from the 1988 case which indicated Owen used drugs, and would have had the PSI report from the 1999 trial. (PCT 192-195, 212). Yet, again, Haughwout claimed no memory one way or the other that Owen had a drug issue. (PCT 191-192, 194-195).

Haughwout admitted knowing that Owen's videotaped confession, which was long and detailed, would be admitted and that she needed a good faith defense that did not refute the confession. She also testified that she knows of strategic reasons why drug/alcohol use would not be presented, but would

not say she recalled a strategic reason in the instant case. However, she admitted that drug use can diminish mental health testimony. (PCT 191-196). Haughwout testified that the insanity defense was chosen because it was the truth. (PCT 185, 213-215, 217-218). Also, she explained that generally, she is "not a big fan" of intoxication defenses because they do not work, and admitted that in this case, the facts went against an intoxication defense. (PCT 218). Further, a voluntary intoxication defense merely would reduce the crime to second-degree murder, while the chosen defense, insanity, would be a complete defense. (PCT 218-220). According to Haughwout, she was trying to show Owen as a victim, but she would not go so far as to say that evidence of substance abuse would have diminished the defense strategy because often a victim ends up on drugs/alcohol. (PCT 221-223).

Hillary Sheehan was the private investigator since 1972. Haughwout hired her to investigate Owen's case. (PCT 245-246). By this time, Sheehan had been doing investigations in capital cases for eight years. (PCT 248). In fact, now that Haughwout is the elected Public Defender, she has chosen to employ Sheehan as her Chief Investigator for the Public Defender's office. (PCT 245). According to Sheehan, she put in approximately 200 hours on the case. She traveled to Michigan and Indiana and spoke to

Owen's family, friends, neighbors, and teachers, with the exception of the VFW orphanage staff. Although she tried to gain the cooperation of the VFW staff of the home where Owen resided after the death of his parent, she was unsuccessful. (PCT 246, 248-250). The investigation of Owen's life at the VFW home was stymied by the facility administrator, who even refused to forward letters from Sheehan to those who knew Owen. (PCT 249-250) Sheehan does not recall being asked to do a drug history. However, she may have discussed general drug use at the VFW home. (PCT 247). She does remember trying to find all possible mitigation, both statutory and non-statutory; she did not intentionally avoid any area of investigation nor was she instructed to avoid any particular area. (PCT 248, 250-251). Sheehan spoke to Owen, but does not recall whether he said anything about substance abuse. (PCT 251). It was Sheehan's recollection that she testified at trial and was permitted to summarize the results of her conversations with Owen's family/friends. She agreed that this type of presentation precluded the State from cross-examining the evidence, in particular, the interviewees' accounts. (PCT 252).

Owen also presented several witnesses who testified about his experiences as a teenager and young adult. Fred Morlock knew Owen in 1981/1982 when he resided at the VFW orphanage.

(PCT 136) Morlock recalled counseling Owen on substance abuse and assumed he was on some substance because at times his eyes were not clear, other residents/staff reported Owen took drugs, and Owen self-reported substance abuse. (PCT 138-140, 145). However, Morlock never saw Owen take any drugs, nor did he smell alcohol on Owen's breath. (PCT 140-141, 145-147). Morlock had to admit that some young men experiment with drugs/alcohol, and that Owen just may have been experimenting. (PCT 147). Morlock did recall Owen assaulted a female, choking her, when they resided at the VFW. (PCT 139-146). Also, Morlock recalled Owen had been placed in a psychiatric hospital for a few days for an aspirin overdose. (PCT 140, 146-147). It was Morlock's recollection that he last saw Owen in 1982 and that no one from Owen's 1999 defense team contacted him. (PCT 143, 148-150). Although he admitted being difficult to reach as he does not return phone calls readily, he claims he would have answered calls placed in 1999. (PCT 143-144, 150-151).

Kenneth Richards knew Owen since the late 1960's. (PCT 152, 154). He was contacted by and spoke to Haughwout's investigator, Sheehan regarding Owen's case and substance abuse. When asked by Sheehan, Richards agreed he would testify for Owen, but was never contacted again. (PCT 153-154, 165). Richards recalled that Owen's parents were always intoxicated

and were very permissive with their children, but Richards would leave whenever Owen would be beaten. (PCT 153-154, 157-158, 166-167). It was Richards' recollection that Owens parents were overly permissive with there children, but there was some discipline. However, when it came to Owen's half-brother, Monty, Owen's parents were "downright brutal." (PCT 158). According to Richards, Owen drank beer and vodka from the age of eight or nine years. Owen was seen smoking marijuana in his garage. (PCT 154-156, 158-161, 166).

Keith Croucher testified he was contacted by Owen's postconviction team, and like Richards, testified that Owen's parents were seldom home, but when home the parents were drunk Richards also recalled that when Owen was eleven or twelve years of age he experimented with marijuana, Valium, alcohol, and acid. There was free access to alcohol in the Owen home. (PCT 169).

Wilma Bailey, an employee at the VFW home from 1973 to 1997, knew Owen. (PCT 173). She was first contacted regarding this case in November 2005, but would have been available to testify at the 1999 trial. (PCT 175) However, Bailey admittedly did not have a lot of contact with Owen, but recalled he ran in the "loser group", not with the good students. (PCT 175-176). She claimed Owen smoked tobacco and marijuana, but admitted that

she has no personal knowledge of any drug use by Owen. She also admitted no personal knowledge of the family dynamics Owen experienced with the VFW foster family with whom he was placed.

Kelly Bragg reported knowing Owen since the early 1970's. (PCT 253-254). She knew of his alcohol and marijuana use, but denied that Owen used speed or acid. (PCT 255-256). Bragg never saw Owen's parents; the Owen children were left with no food in the house and to fend for themselves. (PCT 257). Her friendship with Owen ended after his father died. (PCT 258). It was Bragg's testimony that she was not contacted by the 1999 defense team, but would have testified if asked. (PCT 254-258).

Timothy Cervantes, a convicted felon, met Owen in 1974/1975 when Own moved to the VFW home in Eaton Rapids, Michigan. (PCT 263, 269). Cervantes admitted that he had been contacted in 1987 or 1988 by a defense investigator and reported Owen's background as well as his own. (PCT 263-264, 274). He admitted that he and Owen used alcohol and drugs - beer, any hard liquor, marijuana, speed, hash, mushrooms, and LSD. (PCT 265-266, 269). For the most part, this was done on the weekends during parties Cervantes would host for a five dollar fee. (PCT 267, 269). At one point Cervantes noted there was violence perpetrated against girls at the party, and that Owen watched one rape, but then Cervantes noted that it was only rumor that there were "rapes"

at his parties. (PCT 267-269 274). Cervantes, two to three years Owen's senior, admitted that he held sway over the younger children and delivered drugs to friends for a profit. (PCT 272-273).

Licensed mental health counselor/psychotherapist, Heidi Guerra, explained that in 2005, she met with Owen to conduct a substance abuse evaluation. (PCT 224-225, 229). In addition to his self-reporting, she reviewed collateral sources. (PCT 229-230, 241-242). She concluded that Owen used drugs and alcohol from the age of nine, and that in addition to alcohol, the drugs used included mescaline/purple barrels, LSD, downers, methamphetamine, sedatives, cocaine, mushrooms, marijuana, and huffing hair spray and airplane glue. However, she readily admitted that Owen was able to control his usage in college - smoked marijuana during the week and drank and used methamphetamine/cocaine on the weekends. (PCT 232-237, 240). He also controlled himself during his stint in the military where he did not use drugs and remained sober. (PCT 233-234). Guerra gave no opinion on what effect the drugs or alcohol had on Owen's conduct at the time of the crime. (PCT 239).

Dr. Dee, reported that he has been involved in some 24 to 50 capital case, 12 to 20 of which were for the Capital Collateral Regional Counsel, and he believed he testified for

the State more than once, but much less that for the defense. (PCT 117-119). He recalled that his evidence of Owen's substance abuse came from his conversations with Owen and from two items from the first trial, the pre-sentence investigation report ("PSI") and Dr. Peterson's report, wherein Owen reported a history of substance abuse. (PCT 99-100, 103-105, 121-122). It was Dr. Dee's opinion after talking to Owen for approximately 20 hours, reviewing the documents/reports of Drs. Berlin, Sultan, and Crown, and giving Owen a battery of tests, (PCT 99-100) that Owen had cerebral damage in the form of memory damage and impulsivity. However, Owen's memory damage did not impair his ability to relate his history or facts of the crime to his defense counsel, mental health doctors, or the police. (PCT 102, 108-110, 120, 126, 132). The balance of Owen's psychological tests were normal. Dr. Dee thought that the effect of drugs and alcohol use would intensify Owen's mental illness and delusions. (PCT 107-112). Dr. Dee acknowledged that Owen self-reported his substance abuse, and that such was uncorroborated by independent sources. Also, Dr. Dee agreed that there was nothing noticeable in Owen's actions on the night of the murder to indicate impairment by substance abuse. (PCT122-123, 127-131). ). He also admitted that he did not look at Appellant's impulsivity as it applied to the crime. (PCT 218).

## SUMMARY OF THE ARGUMENT

I. Appellant's argues that he is entitled to an evidentiary hearing on all claims he so designates without consideration of any legal defense raised by the state is a misstatement of the law. The trial court's summary denial of several claims because they were procedurally bared and legally insufficient was correct.

II. Trial counsel's performance during voir dire was constitutionally permissible. The record unequivocally established, that counsel was seeking jurors who were amenable to an insanity defense and who could fairly assess mitigating evidence in support of a life sentence.

III. Trial counsel's performance during the penalty phase was constitutionally permissible. The record overwhelming established that counsel did not present evidence of chronic substance and alcohol abuse nor its use at the time of the crime because Appellant did not indicate that such evidence existed. Moreover, the evidence presented at the hearing supported a finding that no significant evidence of intoxication existed.

IV. Trial counsel's performance during the guilt phase was constitutionally permissible. There was no evidence to support a voluntary intoxication defense.

V. The trial court properly denied Appellant's claim that cumulative error warranted a reversal of his conviction and sentence because no error ever occurred.

## ARGUMENT

### ISSUE I

**THE TRIAL COURT PROPERLY DENIED, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S CLAIMS BECAUSE THEY WERE PROCEDURALLY BARRED, OR LEGALLY INSUFFICIENT**

Appellant argues that the trial court's summary denial of several of his claims was improper. He argues that the trial court was without any discretion and in fact Appellant was automatically entitled to an evidentiary hearing on any claim identified in the motion as one which contained a factual dispute. See Fla. R. Crim. Pro. 3.851 (5)(A)(i). Appellant does not present any case law in support of that argument. Instead he relies on the commentary to the 2001 amendment as well as a selected reading of the amended rule. Appellant misstates the law.

Although the rule requires trial courts to conduct evidentiary hearings in cases involving initial motions, the rule was never intended to abrogate current and long standing case law which precludes litigation of any claim that is not legally sufficient as pled or is procedurally barred. Indeed the same rule upon which Appellant relies for support also requires the following:

> The answer shall address the legal insufficiency of any claim in the motion, respond to the allegations of the motion, and address any procedural bars. As to any claims of legal insufficiency or procedural bar, the state shall include a short statement of any applicable case law.

3.851 (3)(A) ii)(emphasis added). Moreover, the rule also requires the trial court to hear oral argument on purely legal claims. See 3.851 (5)(A)(ii).

These provisions make clear that simply because a defendant identifies a claim as one containing a factual dispute requiring an evidentiary hearing, does not end the inquiry. Should the state identify a claim as procedurally barred or legally insufficient, irrespective of a potential factual dispute, the trial court will then make a legal determination based on the representations of the parties. The trial court is permitted to summarily deny any claim it determines is legally sufficient or

procedurally barred. Appellant's argument that the 2001 amendment to 3.851 now precludes summary denial on claims that are procedurally bared or legally insufficient as pled is a misstatement of the law. See Bryant v. State, 901 So. 2d 810, 821 (Fla. 2005)(upholding summary denial of claim of ineffective assistance of counsel for failing to properly present the "shackling issue" because, "[t]he issue was presented on the merits to the trial court and on direct appeal before this Court and is therefore procedurally barred").[1]

As detailed in the Statement of the Case and Facts, Owen presented seven claims in his motion for postconviction relief. Regarding those claims in which he was denied a hearing, the trial court premised the denial on legal grounds alone, i.e., the claim was either procedurally barred or it was insufficiently pled.[2] (PCR 312-314, 732-747, PCT 3-40). Owen was also permitted to amend his motion and include further argument or facts in an attempt to overcome the legal obstacles which were fatal to those claims identified by the court as subject to

[1] Because Bryant filed his initial motion for postconviction relief on November 20, 2002, the 2001 amended version was applicable.

[2] In some instances the trial court alternatively found that the claim to be refuted by the record.

summary denial. (PCR 38-40).[3] The trial court was permitted to summarily deny claims on purely legal grounds. Appellant's argument to the contrary is without merit.

The remainder of this argument will focus on the specific issues Appellant argues were improperly denied without an evidentiary hearing. In his first claim, Appellant challenged the admissibility of his confession. Specifically he identified four separate arguments he claims should have been raised by trial counsel at the motion to suppress hearing. Counsel's failure to do so amounted to ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 688 (1984).[4] The trial court determined that the entire claim was procedurally barred because the voluntariness of Appellant's confession had been litigated previously. (PCR 732-734). That ruling was proper.

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[3] Additionally, Appellant alleges that the trial court somehow precluded him from presenting a proper motion for postconviction relief. That claim is rebutted from the record. Following the filing of his initial motion, Appellant requested ninety days to file an amended motion which would include any new claims and amendments to any existing claims. Although counsel possessed all the additional public records necessary to file his amended motion, he sought the lengthy extension because the record on appeal was so voluminous. (PCT 4, 36). The trial court granted him forty-eight days in which to file the amended motion. (PCT 38-40).

[4] Appellant argued that to the extent trial counsel Carey Haughwout was limited in her representation due to the actions of former counsel, Barry Krischer, Owen is asserting that both prior counsel were ineffective. (PCR 10).

Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996)(precluding use of postconviction proceedings to relitigate issue previously raised on direct appeal).

In the collateral attack of his confession, Appellant claimed that he was "illegally seized" on May 29, 1984, because there was no probable cause to arrest him on the outstanding charges. (PCR 11). Appellant conceded that this issue was raised in the first motion to suppress, and on direct appeal. (PCR 329-330). Owen v. State, 560 So. 2d 207 (Fla. 1990). However because several facts were not included in that motion, he should be entitled to re-litigate the claim in the postconviction proceedings. (Id.). The trial court rejected that reasoning. (PCT 59-61, PCR 312, 732-734). The trial court's determination was proper. See Rivera v. State, 717 So. 2d 477 (Fla. 1998)(upholding summary denial of claims in postconviction because a variation was raised on direct appeal); Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995) (explaining that postconviction proceedings are not to be used as an opportunity to re-litigate old claims under the guise of ineffective assistance of counsel.)

There is no question that the voluntariness of Owen's

confession has been litigated extensively throughout the years.[5] In fact, this Court determined that the finding of voluntariness is law of the case:

> Clearly, when we were first presented with the review of the voluntariness of Owen's confession, we determined that the law enforcement officers who interviewed Owen did not employ improper means to obtain the confession. Despite that holding, Owen is once again before us arguing that his confession was coerced.
>
> We first note that the law of the case doctrine is controlling here. As we have explained:
>
> > Generally, under the doctrine of the law of the case, "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts." Brunner Enters., Inc. v. Department of Revenue, 452 So. 2d 550, 552 (Fla. 1984). However, the doctrine is not an absolute mandate, but rather a self-imposed restraint that courts abide by to promote finality and efficiency in

[5] In the two motions to suppress and the two direct appeals, Owen challenged the admissibility of his confession on the following grounds; 1. the arrest was illegal because it was not based on probable cause and therefore his subsequent confession was tainted; 2. the confession was involuntary because it was psychological coerced through threats and promises; and 3. the police ignored his invocation of his right to remain silent. Owen v. State, 560 So. 2d 207 (Fla. 1990); Owen v. State, 862 So. 2d 687, 693 (Fla. 2003).

> the judicial process and prevent relitigation of the same issue in a case. This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case.
>
> Owen, 696 So. 2d at 720 (citation omitted). As he did in 1990, Owen is continuing to argue that law enforcement officers improperly coerced him into confessing to the Slattery homicide. While it is clearly within our province to reevaluate our original 1990 holding as to the voluntariness of Owen's confession, Owen has not presented any new evidence to justify reviewing the issue again. He has failed to provide this Court with any "exceptional circumstances" to warrant a new review. It is clear that he is simply attempting to relitigate the same issue.

Owen v. State, 862 So.2d 687, 694 (Fla. 2003) (emphasis added). Appellant's attempt to again challenge this finding under the guise of ineffective assistance of counsel was denied properly. Rivera supra; Harvey supra; Bryant supra.

Moreover, this Court also noted that the trial court, although not required to do so, conducted a second motion to suppress hearing.[6] The trial court again found the confession voluntary. On appeal, this Court concluded as follows:

[6] Unlike the first hearing, Appellant testified at this second hearing.

> Finally, a thorough reading of the transcript reveals no instances of threats or improper coercion by the officers. Owen was made fully aware of his constitutional rights, and knowingly and voluntarily confessed to the Slattery homicide on June 21, 1984. Clearly, based upon the evidence presented during the motion to suppress hearing, and the entire record of this case, Owen's confession was unquestionably voluntary, and, therefore, the trial court properly denied Owen's motion to suppress based upon this issue.

Owen, 862 So. 2d at 696. (emphasis added). Summary denial of this sub-issue was proper.

In his next sub-issue, Appellant claims that the trial court erred in summarily denying his Sixth Amendment challenge to the admissibility of his confession. In addition to finding the claim procedurally barred, the trial court also found the claim to be without merit as a matter of law. (PCR 735). Relief was denied properly.

Specifically Appellant claimed that because his Sixth amendment right to counsel had attached in the unrelated burglary charges and because the bail on the burglary charge was significantly increased due to his status as a suspect in this murder, the Sixth Amendment right to counsel was extended to this case. In other words, because Appellant was suspected of committing this murder, his bond in the unrelated burglary was increased. Therefore his Sixth Amendment right to

counsel in this case had attached. That is an incorrect statement of the law. In fact Appellant does not cite to any case for this proposition. The trial court properly determined that the claim was legally without merit. See Texas v. Cobb , 532 U.S. 162 (2001)(rejecting claim that Sixth Amendment right automatically attaches to uncharged crimes even if crimes are "very closely related factually" or are "factually interwoven" with charged offenses); United State v. Johnson, 352 F.3d 339 (8th Cir. 2003)(applying test under double jeopardy to establish that although victims were same in each charge, the two crimes were distinct for purposes of Sixth Amendment).

Because, Appellant's claim was completely void of merit, counsel did not render deficient performance.[7] See Gordon v.

[7] Appellant made a very similar argument on direct appeal, in the Worden case. Following an extensive discussion of United States Supreme Court precedent, this Court rejected the claim as follows:

> In the present case, although Owen's right to counsel had attached and been invoked on the initial burglary charge and outstanding warrants by the time of his first appearance on those offenses, this fact is unrelated to his rights concerning the Worden murder. His rights on the murder charge attached when he attended first appearance on that offense. Because the questioning session during which he confessed took place prior to this first appearance, Owen had no Sixth Amendment right to counsel at that time. Thus, no Sixth Amendment right was violated

Owen v. State, 596 So. 2d 985, 989 (Fla. 1992).

State, 863 SO. 2d 1215, 1219 (Fla. 2003(finding counsel can't be ineffective for failing to pursue motions that were futile). Summary denial was proper.

In his third sub-issue, Appellant argued that that counsel was ineffective for failing to move to suppress his statements because they were made during plea negotiations. In addition to finding the claim to be procedurally barred, (PCR 733), the trial court also found the claim to be refuted from the record. (PCR 736). In fact this Court found the following on direct appeal:

> On direct examination, Owen acknowledged that the officers had told him on several occasions they could not make any promises, yet he asserted that he subjectively believed they could help him. Further, on cross-examination, Owen stated that he was advised of his constitutional rights perhaps fifteen to twenty times over the course of the interrogations. He admitted that he never asserted his right to remain silent at the time he was read his rights, and never invoked his right to an attorney. In fact, when asked, "And you wanted to talk to the detectives and that's why you never invoked your right to remain silent or for an attorney; isn't that true?" Owen responded, "Absolutely." Owen also testified that during the 1984 questioning, Officer Wood, one of the law enforcement officers conducting the interrogations, never promised Owen that he would help him locate a doctor if he confessed. Additionally, Owen conceded that he knew Wood did not have the authority to make any deals with him

Owen, 862 So. 2d at 696.(emphasis added). This Court also noted that Appellant's video taped confession also revealed that he knew that the office should not make any deals with him. The Court noted the following:

> Although Officer McCoy, another law enforcement officer who interviewed Owen, told Owen that he would be able to obtain medical help for his mental health issues through the court system, it was clear that Owen understood that McCoy could not make him any promises. Owen himself said to McCoy, "But still, like I said, you can't guarantee me nothing. You can't make any promises." On several subsequent occasions, Owen was told by the officers conducting the interviews that no promises or guarantees could be made

Id at 697.(emphasis added). This claim is completely rebutted from the record and is therefore void of any merit.[8]

Additionally, the state would note that the voluntariness of Owen's confession is underscored by his own testimony at the second suppression hearing. This Court described it as follows,

> Owen's testimony during the motion to suppress hearing alone supports the conclusion that the officers did not employ improper methods to obtain a statement from

[8] This Court rejected the identical issue in the habeas petition filed by Appellant in his capital case involving victim, Georgianne Worden. Therein, again relying on Owen's taped statements found, "clearly the record shows that Owen knew that the officers could not negotiate a plea in this case." Owen v. Crosby, 854 So. 2d 182, 189 (Fla. 2003).

> him. On direct examination, Owen acknowledged that the officers had told him on several occasions they could not make any promises, yet he asserted that he subjectively believed they could help him. Further, on cross-examination, Owen stated that he was advised of his constitutional rights perhaps fifteen to twenty times over the course of the interrogations. He admitted that he never asserted his right to remain silent at the time he was read his rights, and never invoked his right to an attorney. In fact, when asked, "And you wanted to talk to the detectives and that's why you never invoked your right to remain silent or for an attorney; isn't that true?" Owen responded, "Absolutely." Owen also testified that during the 1984 questioning, Officer Wood, one of the law enforcement officers conducting the interrogations, never promised Owen that he would help him locate a doctor if he confessed. Additionally, Owen conceded that he knew Wood did not have the authority to make any deals with him. Owen also acknowledged that the officers never promised him that if he confessed he would be able to see a doctor or go to a hospital, although he argued that he felt it was indirectly implied.

Owen, 862 So. 2d at 695-696. Summary denial was proper.

In the final sub-issue, Appellant argues that counsel should have presented ”mental health testimony” at the suppression hearing in an effort to demonstrate that the confession was not voluntary. In addition to finding this sub-issue procedurally barred, the trial court also found the claim to be legally insufficient as pled. PCR 736). That determination was proper.

Appellant did not detail what mental health testimony should have been presented and how that testimony would have supported suppression of his statements. His conclusory statements that his mental illness would have supported suppression of his statements were insufficient. Summary denial was proper. LeCroy v. State, 727 So. 2d 236, 239 (Fla. 1998)(affirming trial court's finding that, "[m]ost of the allegations made by the Defendant were wholly conclusory without any basis in fact. Over and over again, the Defendant claimed that a wealth of evidence was available that defense counsel should have presented; yet, in many circumstances, the Defendant failed to detail the nature and/or source of that evidence. Nor has the Defendant come forward with proof of any additional evidence that counsel failed to discover); Parker v. State, 904 So. 2d 370, 379 (Fla. 2005)(same); Bryant, supra(same). Summary denial of the entire claim involving counsels' performances in litigating the motions to suppress was proper.

Appellant next claims that the trial court erred in summarily denying his claim that trial counsel was ineffective for failing to present Dr. Barry Crown, a neuropsychologist, at the guilt phase in support of the insanity defense. Dr. Crown testified at the penalty phase. He opined that Appellant suffered from organic brain damage. The trial court summarily

denied this claim as a matter of law finding that Dr. Crown's testimony would not have been admissible at the guilt phase. (PCT 62-68, PCR 738-739). The record supports the trial court's legal conclusion. Appellant fails to address the legal deficiency in his argument.

Crown's opinion was not based on any physical examination of Owen; no discussions with Owen; no observations of his confession or any assessment of the facts of the crime. (ROA 6507-6508). Crown did not assess him for any mental illness and did not offer any opinion on the subject. (ROA 6509). Dr. Crown's function was to assess Owen's organic impairment. (ROA 5606). He testified that Owen suffered from organic brain damage. Crown did not find that Owen had an organic psychosis. (ROA 5607). In fact, he stated, that he was not expressing any opinion on Owen's sanity. (ROA 6517). Crown explained that neuropsychology focuses on the relationship between brain function and behavior and it is associated with organic problems with the brain, i.e., actual physical damage. (ROA (ROA 6487). 6489).

The sum and substance of his opinions was that Appellant possessed the mental ability of someone in the sixth grade. His ability to process information or make judgments was significantly impaired due to the organic brain damage. He is

impulsive, he can learn from experience but he has difficulty assessing long-term consequences of immediate behavior. (ROA 6520). Owen's brain damage was due in part to a head injury and fetal alcohol syndrome. (ROA 6486-6505). Crown testified that Owen satisfied the requirements of the statutory mental mitigators. This record establishes that Crown's testimony was not in any way relevant to the defense of insanity, and therefore it would not have been admissible. See Pietri v. State, 885 So. 2d 245, 254 (Fla. 2004)(finding counsel not ineffective for failing to present evidence of "metabolic intoxication" at guilt phase were same would be inadmissible); Spencer v. State, 842 So. 2d 52 (Fla. )(finding inadmissible at guilt phase, neuropharmacologist testimony regarding defendant's "dissociative state"); Henry v. State, 862 So. 2d 679 (Fla. 2003)(finding no deficient performance for failing to introduce evidence of intoxication in conjunction with long-term psychotic condition as same is inadmissible under Florida law). Summary denial was proper.

Moreover, even if Crown's testimony would have been admissible at the guilt phase, it would have been very damaging to his defense. Crown explained that Owen's impulsive tendencies would not prevent him from being able to formulate an intent and premeditate a crime. (ROA 6522). His organic

impairment would not prevent him from understanding that his actions were wrong; and would not prevent him from taking steps to avoid detection. (ROA 6522-6525). Clearly this testimony would not have been helpful to the defense. Counsel was not ineffective in failing to pursue admission of Crown's testimony at the guilt phase. (PCR 739). Cf. Van Poyck v. Singletary, 694 So. 2d 686 (Fla. 1997)(finding trial counsel's decision not to pursue mental health evidence based on negative aspects of doctor's report was reasonable strategy); Peterka v. State, 890 So. 2d 219 (Fla. 2004)(finding counsel's decision not to introduce military record as mitigation reasonable given negative aspects of service)yr record Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997)(same).

Appellant also claims that the trial court erred in summarily denying his claim that the state withheld exculpatory/impeachment evidence in violation of Brady v. Maryland, 373 U.S. 83 (1966). The "evidence" are notes written by a counsellor from a mental health program in Michigan. Appellant claimed as follows,

> Mr. Owen submits that he disclosed to a counselor at a mental health program called the C.A.T.'s program, information that Mr. Own suffered from symptoms that showed an early onset of the mental illness that counsel presented in the guilt and penalty phase. Law enforcement took these notes from the counselor. The state never

> disclosed the existence of these notes to trial counsel.

(PCR 67). Appellant further alleged that the "notes" supported his claim that he was suffering from delusions. This would have corroborated his defense and rebutted the state's claim of recent fabrication. (PCR 384). The trial court summarily denied the claim finding it to be legally insufficient as pled. (PCR 742). That finding was correct. In fact this Court upheld a similar finding on this identical claim, in Appellant's capital case for the murder of Georgiann Worden. This Court stated:

> Owen's Brady claim, is insufficiently pled because it is unclear as to when Owen obtained the information he claims that the State withheld. Moreover, Owen fails to allege this material was in the State's possession as required under Brady. See Brady, 373 U.S. 83 at 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194.

Owen, 854 So. 2d at 187-188. Appellant did not present any new facts or case law that would warrant further review of this issue. Appellant never explained what state law enforcement agency withheld this information; he never explained how he came into possession of the notes; he never explained how he could have been unaware of the notes existence given that they were generated from his own therapist; and he has never provided a copy of the notes to demonstrate their materiality. (PCR 743).

Summary denial was proper. Reaves v. State, 862 So. 2d 932, 942 (Fla. 2002)(upholding finding that "Brady" claim is legally insufficient as pled due to defendant's failure to explain how the evidence was helpful); Roberts v. State, 568 So. 2d 1255, 1260 (Fla. 1990)(rejecting as legally insufficient "Brady violation" where "alleged exculpatory evidence is equally accessible to the defense and the prosecution".)

Appellant's final claim involved an allegation that the state intentionally created a false impression that the state's mental health experts were independent "court appointed" experts in contrast to the defendant's experts who were hired by Owen. The trial court summarily denied this claim finding it was procedurally barred and rebutted from the record. (PCR 743-744). The trial court's ruling was correct. Rivera 717 SO. 2d at 480 n. 2 (upholding summary denial on claims that should have been raised on direst appeal)

Moreover, the trial court correctly determined that the issue was completely void of merit. During cross-examination of defense witness, Dr. Berlin, the prosecutor asked Berlin if he were aware that Dr. Waddel was a court appointed expert. (ROA 5395). Owen objected and the court sustained that objection. The prosecutor then clarified his characterization of Waddel's appointment, and stated that Wadddel was being paid by the

county, which would make him a "court appointed expert." (ROA 5396). Berlin replied,

> Mr. Owen's attorney told me the experts in this case are paid by the county, so I was aware because she told me that.

(ROA 5396). On redirect, the issue was again clarified,

> QUESTION: Okay you are being paid by the county at the rates that are set for Dr. Waddle and any other doctors who testify?
> ANSWER: I don't know what Waddel is being paid, but you told me what the county would pay and I told you that I would–- that was acceptable to me.

(ROA 5437). The question of court appointed doctors also was raised during the testimony of Dr. Sultan. On cross-examination the following exchange took place,

> QUESTION: Were you aware that Dr. Waddel, at my request, was court appointed to examine Mr. Owen in this case?
> ANSWER: I was aware that he conducted an evaluation. I wasn't aware of the circumstances of the appointment.
>
> (ROA 5628).

The matter was again clarified in the following manner,

> DEFENSE ATTORNEY: Now, Mr. Chalu asked you about Dr. Waddell's report being provided and about him being court appointed at Mr. Chalu's request. And you also are appointed by the Court at my request, aren't you?
> ANSWER: yes.

(ROA 5665). The record unequivocally demonstrates that there was no false impression created by the state's questioning

during cross-examination. Additionally, the jury was well aware that all the experts were court appointed at the request of respective counsel. (ROA 6512). Summary denial was warranted.

## ISSUE II

### TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL DUIRNG THE VOIR DIRE PROCESS

On appeal, Appellant alleges that lead trial counsel, Carey Haughwout, provided ineffective assistance of counsel during the voir dire process. Specifically, he alleged ineffectiveness arising from: (1) the acceptance of Juror Sharon Knowles who reported that her daughter had been sexually battered; (2) permitting Jurors Prince and Jackson to believe mitigating evidence would be defined for them, and limited to statutory mitigation; (3) the failure to strike Juror Matousek for cause based on her view that the death penalty should be imposed automatically; (4) the failure to object to the prosecutor's comment that insanity could be raised whether it were valid or not; (5) failure to strike the entire panel following the prosecutor's comment that Owen had spent time in jail; and (6) failure to excuse Juror Griffin for her views that the death penalty should be imposed automatically. Owen has failed to

carry his heavy burden of showing both deficient performance and prejudice arising from his counsel's performance during voir dire.

Following an evidentiary hearing on this claim, the trial court denied relief. The trial court determined that Appellant was challenging trial counsel's performance in three main areas: (1). Counsel failed to ensure that jurors could follow the law regarding insanity and the death penalty; (2) trial counsel failed to make objections in response to allegedly impermissible comments by the court and the state; (3) counsel should have moved to strike the entire venire following a comment by the state that referenced Appellant's time in jail. (PCR 690). Before addressing each allegation, the court made the following observations. Owen participated in every bench conference during the voir dire process. And he was asked on two separate occasions by the judge if he agreed with all of his lawyers' decisions in the jury selection process to which he affirmatively responded. (ROA 1625, 1768, 1836, 1950, 1978, 2120, 2348, 2545, 2658, 2832, 2915, 2838, 2855, 2973, 2988, 3063, 3274, 3644, 4345, 4440, 4452). All prospective jurors were required to respond to a detailed questionnaire prior to the actual voir dire questioning, dealing with their views on

the death penalty and the insanity defense among other issues, (PCR 690-691).

Based primarily on the record on appeal and also on the testimony of counsel at the hearing, the trial court found no legal basis to strike Knowles.[9] The court made the same finding with regards to Ms. Matousek, Ms. Griffin, Mr. Prince and Mr. Jackson. Their responses regarding the death penalty would not have warranted a challenge for cause. (PCR 694-702). The court also noted that the comments of counsel and the court were taken out of context. (PCR 702-703). Finally, the court rejected Appellant's contention that counsel should have move to strike the panel once it became known that he was in jail. The court found no prejudice in the comment. (PCR 703). The court's rulings are supported by the record and the law.

In order to be entitled to relief, Appellant has the burden of proving not only that counsel's representation fell below an objective standard of reasonableness, and was not the result of a strategic decision, but also that actual and substantial prejudice resulted from the deficiency. Strickland, 466 U.S. at 688-89. With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate

[9] Knowles never equivocated in her responses. (PCR 693). Her answers were consistent with the answers form other members of the venire who were also chosen. (PCR 694).

the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Appellant did not meet his burden.

At the evidentiary hearing. Appellant presented only Haughwout to testify about the defense teams' performance during voir dire. At the time of the hearing, Haughwout was the elected Public Defender for the 15th Judicial Circuit with 23 years of criminal defense experience. (PCT 183, 207-208). At the time of Owen's 1999 re-trial she had been practicing for approximately 16 years. Haughwout has been involved in approximately 30 to 40 capital cases. Her first was in 1985/1987. About half of these cases went to trial and Haughwout's sole client to receive the death penalty was Owen. (PCT 184, 189-208). Haughwout is board certified, a member of the State Association of Criminal Defense Lawyers, has attended and taught at the National Criminal Defense College since 1991, and has attended seminars regarding capital matters. The trial practice classes she has taken have included issues involving capital cases. (PCT 208-210). Further, she has been found to be

an expert in criminal law and has testified at postconviction evidentiary hearings on the proper manner to conduct a defense. (PCT 210).

When asked about her recollection of the voir dire process in Owens' case, she responded that she could recall nothing beyond what would be contained in the transcript. (PCT 197). She had no recollections of her strategies or filing motions regarding jury instructions, but did affirm that the decision to strike jurors was a group defense decision. (PCT 197-203). When questioned about the option to strike the panel due to the prosecutor's comment that Owen had been in jail, Haughwout agreed that she could have moved to strike the panel. (PCT 203-204). No other witnesses testified on this subject. As a result of Haughwout's lack of recollection, but reliance upon the transcript, this court was required to assess her performance based on the record.

Here, Haughwout was well experienced in capital litigation by the time she defended Owen. The evidentiary hearing evidence did not overcome the "strong presumption" that Haughwout reentered "reasonable professional assistance" and Owen did not prove deficiency or lack of strategy. When Haughwout's representation, as recorded in the transcript, is considered, it is clear that she made the proper inquiry of the potential

jurors, made her selections carefully with Owen's assent and goals in mind, and chose not to move to strike the panel even though the prosecutor made a comment which may have caused an objection under different circumstances.

As the trial record reflects, all prospective jurors were required to respond to a detailed questionnaire prior to the actual voir dire questioning. Included in the questionnaire were various questions pertaining to the jurors' views on the death penalty. For instance, prospective jurors were asked, "what kinds of cases would warrant such a penalty?"; "does the death penalty serve a purpose in society?" The venire was also asked questions regarding their views on an insanity defense. (ROA. 1605, 1628, 2427). The first round of questioning to all prospective jurors involved three inquiries; was there any special circumstances that would prevent that person from serving on this jury; what are your views on the death penalty; and have you heard any news accounts of this case. (ROA 1449-4440). The second round of questions centered extensively on the insanity defense and views on mental health issues and mental health experts. (ROA 1449-4440). This record demonstrates that the entire voir dire process was dedicated to selecting a jury comprised of people amenable to Owen's insanity defense.

Appellant claimed that trial counsel should have stricken either for cause or peremptorily, Juror Sharon Knowles, because her daughter was raped by an un-known intruder in their home in front of Knowles and her grandson. This crime occurred two to three years prior to this trial. Because of her prior experience, Owen claimed that Knowles should have been stricken. Neither the record nor the case law supported Appellant's argument.

There was absolutely no legal basis to strike Knowles' for cause. She was questioned extensively regarding her family's victimization and how, if at all that would impact her ability to be fair and impartial. Knowles without hesitation consistently stated that her daughter's situation would not affect her, and she could be fair. (ROA 3440, 3452-3453, 4283). The stranger who raped her daughter pled guilty and received eighteen years in prison. (ROA 3453). Knowles never had to go to court for the case. She felt that she was treated fairly and stated that she worked through her anger over this situation and resolved it. (ROA 3453, 4352). Inquiry into this area culminated with the following exchange:

> DEFENSE ATTORNEY: And a concern that I have is that because of what you went through, you would have understandably a lot of sympathy for the victim and not that that's bad at all, but whether that would color you or make your view of things–would affect you in viewing the

> testimony and the evidence?
>
> MS KNOWLES: No. I couldn't judge the evidence on what I've [been] through and I would look at the witness and their testimony and the evidence and make my own decision.
>
> What happened to me, I would block that out completely because this a whole different person, a different situation. So I wouldn't - no, I wouldn't let that come onto making my decision.

(ROA 4352). This is not a situation where Knowles expressed the slightest bit of doubt or concern regarding her ability to be fair and impartial. She never equivocated on any of her answers, and never gave inconsistent responses to any statements regarding the potential impact her personal experience may have had on her ability to be an impartial juror.[10] Based on these responses and the applicable case law, a challenge for cause would not have been granted. See Lusk v. State, 446 So.2d 1038, 1041 (Fla.), cert. denied, 469 U.S. 873 (1984)(defining an impartial juror as someone who "can lay aside any prejudices or biases he may have and render a verdict solely on the evidence."). A challenge for cause is not appropriate simply because a person has a strong opinion about any particular subject. See Fitzpatrick v. State, 437 So.2d 1072, 1075 (Fla. 1983) (ruling that strong feelings in favor of death penalty do

[10] It is interesting to note that Knowles served on two other juries in the past. (ROA 4282).

not render prospective juror incompetent in capital cases). As long as jurors indicate they are able to abide by the court's instructions, irrespective of personal feelings, a cause challenge need not be granted. Penn v. State, 574 So.2d 1079 (Fla. 1991).

Moreover, Knowles her "status" as a victim is not a proper basis to strike a juror. Cf. State v. Williams 465 So.2d 1229 (Fla. 1983)(rejecting *pre se* rule that where victim and potential juror are both correctional officers, potential juror must be stricken for cause); Busby v. State, 894 So.2d 88 (Fla. 2004)(same); See State v. Coney, 845 So. 2d. 120, 135 (Fla. 2003); Davis v. State, 928 So.2d 1089, 1118 (Fla. 2005)(denying ineffective assistance of counsel claim for failing to strike juror who knew the judge as the juror stated that it would not affect her impartiality, and therefore, there was no basis for a cause challenge).

In fact the responses provided by Knowles on the issues that were germane to this case, reveal that she was an ideal juror. She had no prior exposure to the publicity in this case and she was not in favor of an automatic death penalty. (ROA 3430, 3432, 3436). Further, she understood the process of weighing relevant factors and emphasized the need to listen to all the witnesses and evidence. (ROA 3436, 3440). Knowles

described her attitude on the death penalty has “middle of the road”; she did not believe in an “eye for an eye”, instead, she would formulate her own opinion. (ROA 3455).

Regarding her opinions on the insanity defense, which was central to Owen’s defense strategy, Knowles stated that in order to render a verdict of not guilty by reason of insanity she would have to draw her conclusion from weighing the evidence, and that she thought it was possible for someone to be so mentally disturbed that he does not know what he are doing. (ROA 4344-4345). She unequivocally stated that she would not fear a defendant’s release should he be found not guilty by reason of insanity; she would trust the judge to make the right decision. (ROA 4345). With respect to the answers Knowles gave which aligned with traditional as well as the specific defense offered here, i.e., insanity, counsel was not ineffective for not removing her. These responses clearly illustrate that Knowles was a favorable juror to the defense. Her responses were consistent with answers from other members of the venire who were also chosen to sit on this jury. Counsel rendered the constitutionally required assistance. Cf. Harvey v. State, 656 So. 2d 1253, 1256 (Fla 1995) (upholding court’s ruling that counsel was not deficient in not striking juror whose responses indicated a receptiveness to penalty phase defense); Davis, 928

So.2d at 1117 (finding no prejudice for failing to question jury about any issues related to the case as, "Davis has not provided evidence that any unqualified juror served in this case, that any juror was biased or had an animus toward the mentally ill or persons suffering from drug addiction. Thus, this claim is without foundation.").

Appellant also argued that because the trial court made a statement to both Juror Prince and Juror Jackson, wherein they were told that mitigating evidence would be defined for them, but in fact that was never done, counsel was ineffective for failing to object to the court's statements. Owen brought forth nothing at the evidentiary hearing supporting his reading of the record. In fact, a review of the transcript establishes that Owen has misread the Court's instructions by limiting his complaint to just two comments from the entire voir dire process that encompassed some three thousand pages and approximately one hundred prospective jurors. Also, Owen misapplies the law, he offered in his motion.

Florida law only requires that the jury be told that their consideration of mitigation is not limited to statutory mitigators. The jury in the instant case was instructed as follows:

> Any of the following circumstances that would mitigate against the imposition of the death

penalty:

A: Any other aspect of the defendant's character, record or background.

B: Any other circumstance of the offense.

(ROA 6887-6888). Clearly, this instruction was proper. See James v. State, 6095 So.2d 1229 (Fla. 1997)(giving of the "catch-all" jury instruction regarding nonstatutory mitigation is all that is required un the constitution); Johnson v. State, 660 So.2d 637 (Fla. 1995)(same); Robinson v. State, 574 So.2d 108 (Fla. 1991)(same); Jones v. State, 612 So.2d 1370 (Fla. 1992); Finney v. State, 660 So. 2d 674 (Fla. 1995).

Moreover, the entire voir dire panel was well aware of the fact that they could consider non-statutory mitigating factors. For instance, at no time was anyone ever told that mitigation was limited to anything in particular, and in fact, Juror Prince recognized the importance of looking at a defendant's background when recommending the appropriate sentence. (ROA 1726). Juror Jackson stated he would want to learn all he could about the defendant's background. (ROA 3102). Further, all prospective jurors were engaged in discussions regarding the relevance of a defendant's overall background, family history, childhood experiences, personal history and abuse. (ROA 1645, 1726, 1906, 1908, 1946, 1947, 2030, 2085, 2087, 2162, 2174, 2257, 2280, 2400, 2489-2490, 2510-2511, 2538, 2616-2617, 2642, 2650, 2698,

3033, 3053, 3087, 3091, 3096-3097, 3102, 3206, 3262).[11] To even suggest otherwise, is a total misreading of the record. There was no reason for counsel to object to any of the comments made by the court or the prosecutor during voir dire. The record reveals that defense counsel explored in detail, the ability of the jurors to consider a myriad of factors centering on the defendant's upbringing.

Also, counsel's penalty phase closing argument left absolutely no doubt regarding what non-statutory evidence was to be considered. Following a detailed discussion of the statutory mitigators, defense counsel argued the following:

> And then the judge will tell you that there are any number of circumstances you can consider that would mitigate against the death penalty, and I've listed some that I think the evidence supports.
>
> The issues about Duane's background. He was raised by alcoholic parents. He was raised in an environment of sexual and physical violence.

(ROA 6876). Counsel further explained what the jury could consider:

> Are you surprised when you heard about Duane's

[11] During voir dire, the defense asked prospective Juror Hut, if he would want to know anything about the person whose sentence he was about to decide. In response, Hut stated, "I think that would play a big part, too. In other words, if I am going to recommend to take a person's life, I'd want to know everything down to his shoe size. Juror Hut sat on Owen's jury. (ROA 2281, 4440).

> background? Of witnessing, as a small child, his mother being raped by his father; at the age of nine being sexually exploited by his older brother's friends, by the home and the degrading that his mother and Monte was treated to? Monte was taken out when things were really bad. So what, do we think went on then? The physical violence that happened between the father and the mother ends the with the children, is surprising to us that the themes of his childhood that are permeated with sexual violence is the theme of why we are here?

(ROA 6877). Defense counsel also outlined for the jurors why they should consider the circumstances of the offense as, "a pretty big mitigating circumstance." (ROA 6878). Counsel detailed all the facts of Owen's other cases, which corroborated the defense theme that Owen was deserving of a life sentence. (ROA 6878-6881).

The record emphatically dispels any notion that counsel in someway left this jury with no guidance, instruction, or definition of what non-statutory mitigating evidence was present and should be considered. The record refutes any notion the jury, especially Prince and Jackson, were in anyway misled regarding what evidence they could consider in mitigation. As noted above, the jurors were instructed properly to consider any other aspect of the offense and anything in Owen's character, record or background for mitigation. Jurors are presumed to follow the law U.S. v. Olano, 507 U.S. 725, 740 (1993) (finding

there is a presumption, absent contrary evidence, jurors follow court's instructions). Having been instructed properly, the jurors followed the law. Owen has failed to show any deficiency or prejudice arising from counsel's actions as defined by Strickland.

Appellant also asserted that Haughwout should have stricken Juror Matousek "for cause or peremptorily", because her personal view on the death penalty was that it should be automatically imposed when it involved premeditation and no mitigation, or when there is more than one victim. Denial of this claim based on the trial record was also proper. Additionally, Owen failed to come forth with any evidence during the postconviction hearing to show that counsel was deficient, and absent the alleged error there would have been a different result.

Owen referenced one statement from this juror regarding her personal feelings that were noted from a questionnaire. All potential jurors have feelings and opinions on a myriad of subjects. Possessing any particular feeling or bias does not mean that a person is presumed unfit for jury duty. The law only requires that a person be able to set aside any personal feelings that would preclude impartiality. See Gore v. State, 706 So.2d 1328, 1332 (Fla. 1997)(explaining that challenge for cause was not required as "[a]lthough [the jurors] expressed

certain biases and prejudices, each of them also stated that they could set aside their personal views and follow the law in light of the evidence presented."). A review of all Matousek's responses demonstrates that she would follow the law. She stated that the death penalty should not be imposed automatically, but rather it should depend on the circumstances. (ROA 2497). In fact, the trial court observed that Matousek's view **corresponded** to Florida law. (ROA 2498).

Irrespective of her personal view, Matousek was able to put aside any of her feelings. Apparently given before she had been educated on the capital punishment process, her isolated comment that the death penalty should be imposed in the absence of mitigation, would not have supported a cause challenge. This is true especially in light of her reiteration that she would want to hear all the evidence before deciding, and characterized her views on the death penalty were "middle of the road." (ROA 2503, 2505). She expressed a belief that mental health issues were important and the focus of sentencing should be on the defendant. In fact, she feared that she would not know all that she could about the defendant. (ROA 2506, 2511). She further stated that she cold not make a major decision without hearing everything, and that people who are insane should be treated differently than those who are not. (ROA 3265, 3266).

Matousek also expressed an ability to find the defendant not guilty by reason of insanity should she have a doubt about his sanity. She could do this without any regard for his future incarceration. (ROA 3267, 3270-3271). Her overall responses were extremely favorable to the defense. She showed such an overall open-mindedness to defense themes (insanity and mitigation) that it is ridiculous to suggest that counsel should have exercised a peremptory challenge. Counsel was not ineffective. Harvey, 656 So.2d at 1256.

Appellant next asserted that Haughwout failed to object to the prosecutor's improper statement that insanity can be raised whether it is valid or not. Owen's argument borders on the frivolous as he took the prosecutor's comment out of context. The prosecutor was questioning Juror Draughon about some of his responses to the questionnaire. The following exchange took place:

> PROSECUTOR: Okay. And with regard to the insanity defense, you say about the defense that this choice, you would have to hear more in the case. And that's basically the law. It's a defense that can be raised, whether its valid or not, in any particular case and depends on the facts of the case?
>
> JUROR: Yes it sure does.
>
> PROSECUTOR: So you'll be able to keep an open mind and listen to all that and make a decision as to what's the best evidence and use your common sense?

> JUROR: Yes, sir, I would.
>
> PROSECUTOR: Okay that's great. And in the appropriate case you could impose the death penalty?

(ROA 2883). Following a complete review of the exchange, it is obvious that the prosecutor's questioning was not an improper comment, thus, there was no basis for an objection. Counsel cannot be faulted for failing to make an objection under these facts and this allegation does not support postconviction relief.

It is Appellant's complaint that Haughwout rendered ineffective assistance when failing to move to strike the entire panel following a comment by the prosecutor that Owen has spent time in jail. Defense counsel objected, the trial court sustained the objection and directed the prosecutor to refrain from any further comments. Defense counsel did not move to strike the panel. Owen alleges that this failure amounted to ineffectiveness. While defense counsel, Haughwout noted in the evidentiary hearing that she should have moved to strike the panel, the State submits that such is not the test and that Owen has failed to carry his burden of proof here.

As noted above, Haughwout had no recollection of voir dire strategies. However, she was an experienced capital defense attorney who received a curative instruction following the

sustained objection and knew her defense would admit to the murder, and that Owen's confession would come into evidence. She moved on with voir dire. Strickland instructs: "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance;" "[c]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment;" and "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. Under these circumstances, the failure to strike the panel was not deficient performance and certainly no prejudice arose from that decision.

It was clear from very early on in voir dire, that Owen was going to admit he murdered Karen Slattery, but that he was insane at the time. Consequently, it cannot be seriously suggested that anyone would think that Owen, an admitted killer, who wants to show this jury that he is seriously mentally ill, would be walking the streets. Clearly, the isolated comment would not have been sufficient grounds to strike the panel. Moreover, a review of the voir dire process demonstrates that this panel, which included most of the final jurors, was comprised of people who were amenable and accepting of an insanity defense and mental health mitigation in general.

Counsel was not deficient in failing to move to strike the entire panel. Harvey, 656 So.2d at 1256.

Furthermore, no prejudice has been shown. Owen confessed to the killing. Whether or not he was in prison at the time pales in comparison to his admission and would have no impact on the jury's decision to convict. Likewise, the prosecutor's statement in voir dire would have no impact on the sentencing decision especially after hearing that this was the second person Owen raped and murdered within a very short period of time.

The final challenge in to counsel's voir dire decisions was her failure to strike Juror Griffin on the basis that her personal view was that the death penalty should be automatically imposed for anyone who has committed more than one murder. This claim is without merit and is refuted from the trial record.

As noted above, all prospective jurors were given a questionnaire which included approximately fifty questions. Question number forty-seven read as follows:

> Do you think the death penalty should be automatically imposed when:
>
> A. A person kills another person.
>
> And B. A person kills more than one person.

(ROA 1547). Griffin answered that she was not sure with regards to "A" but she said "Yes" to question "B". (ROA 1841-1842).

Based on that single answer, Owen claims counsel did not conduct a sufficiently exhaustive colloquy with Griffin regarding that view, and that the failure was especially egregious in this case because the evidence presented at the penalty phase included Owen's conviction for the additional murder of Georginann Worden.

The state asserts that simply because Griffin's personal view, before being instructed on the law, reflected an opinion that is contrary to the law does not disqualify her from service. Further, the record clearly demonstrates that once the law was explained to her, Griffin could set aside her personal feelings and follow the judge's instructions (ROA 1848-1850), which is all that is required to qualify for jury service on this point.

In fact, a fair reading of the record demonstrates that Griffin was not someone who possessed a propensity to recommend a death sentence. Instead she expressed fear over having to make a decision on a person's life. (ROA 1855). She was not sure that she could recommend a death sentence even if it were a horrible crime. (ROA 1856). She also stated she would listen to mental health professionals, and that such testimony would be important. In fact she agreed that mental health information would be something to consider at both phases of the trial and

it certainly could be a basis for a life recommendation. (ROA 1857-1860). In her view, the insanity defense was a good thing to have. She realized that you are not able to detect if someone is insane just by looking at him. (ROA 3084-3085). In her view, mental health professionals do their job, and she would judge their credibility like any other witness. (ROA 2864-2865). She would listen to the experts on this subject and rely on their opinion. She would judge their credibility based on the experience, credentials and length of practice. (ROA 3086-3087). She would like to hear about the defendant's background. (ROA 3087). She accepted the premise that some people are insane when they commit a horrible crime. If she were unsure about a defendant's sanity she would find him not guilty by reason of insanity. (ROA 3090).

Griffin's responses to questioning demonstrated an ability to follow the law, and weigh the evidence presented, including any evidence in support of an insanity defense. She was an ideal juror for the defense. Nowhere in her exchange did she indicate that her personal feelings would interfere with her duty as a juror. Counsel was not ineffective. Harvey, 656 So.2d at 1256.

The record unequivocally demonstrates that counsel provided effective representation during the voir dire process. Counsel

had the venire answer an extensive questionnaire which exposed biases and views on subjects germane to this case. Additionally, counsel effectively questioned jurors about their questionnaire responses as well as other subjects that arose during voir dire. None of the responses of any juror who actually sat would have sustained a challenge for cause. Owen's entire claim is refuted from the record, and he offered no evidence at the postconviction hearing to overcome the strong presumption that counsel rendered effective assistance, much less, that prejudice arose from counsel's actions. Relief must be denied. See Spencer v. State, 842 So. 2d 2, 65 (Fla. 2003)(rejecting claim of ineffective assistance at voir dire, where counsel provided in-depth questionnaire to panel and, follow up questions and responses reveal that all jurors could lay aside their views and follow the law). Cf. Schofied v. State, 914 So. 2d 990 (Fla. 4th DCA 2005)(explaining that reviewing court was unable to apply deference to trial court's ruling because lower court did not identify upon which one of two *inferences* the lower court based its decision); Sochor v. State, 883 So.2d 766, 785 (Fla. 2004) (recognizing that the trial court must resolve conflicting testimony presented at the evidentiary hearing by assigning weight to each witness's testimony).

## ISSUE III

### THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE OF TRIAL

Here, Appellant complains that he received ineffective assistance of counsel due to trial counsel's failure to present evidence of his history of drug/alcohol abuse as well as evidence of his drunkenness at the time of the offense. This evidence, if presented, would have demonstrated how substance abuse "acted in concert with his profound mental illness and brain damage which led to and explained the events in question." **Initial brief at 60.** Had counsel simply asked her client a few basic questions regarding prior drug/alcohol use, she would have uncovered valuable information "that would have added to the mitigation that counsel did present." **Initial brief at 61.** Relying on Rompilla v. Beard, 545 U.S. 374 (2005), Appellant asserts that trial counsel had a duty to investigate his drug history and failed to do so. **Initial brief at 84.** Appellant, granted an evidentiary hearing on this claim, presented the testimony of ten people; six lay witnesses who described his history of drug and alcohol use; two mental health experts; and Appellant's former counsel and investigator. However, the failed

to establish that he in fact had a significant substance abuse problem, and failed to establish that the decision not to present this information was the result of an inadequate investigation.

This is not a case where trial counsel did no investigation nor present a case in mitigation. Indeed, through counsel's penalty phase presentation, the trial court found three statutory mitigators and sixteen non-statutory mitigators. Owen v. State, 862 So. 2d 687,690-691 (Fla. 2003). Appellant focused his challenge on Haughwout's failure to present substance abuse as **additional** mitigation in any effort to bolster the mitigation already presented. However, the record below establishes that unlike the defense attorney in Rompilla, counsel here did not fail to investigate and prepare to rebut obvious areas of aggravation. Also unlike Rompilla, counsel did not ignore obvious areas of potential mitigation. To the contrary, the record establishes that trial counsel conducted an extensive investigation; explored all possible avenues of defense until it became evident that the insanity defense was the only viable option.

The trial court below, cautioned that the proper focus did not involve whether the additional argument of substance abuse **could** have been made along with the evidence actually presented.

Rather the focus is whether it **should** have been made and whether failure to do so fell below an objective standard of reasonableness. (PCR 718). The trial court concluded that Appellant did not establish that counsel failed to pursue any plausible or reasonable avenue of mitigation. See Miller v. State, 926 So. 2d 1243, 1250 (Fla. 2006)(distinguishing actions for counsel from those in Rompilla because counsel herein was aware of the available mitigation); Davis v. State,. 928 So. 2d 1089, 1107 (Fla. 2005)(same).

In denying relief, the trial court made the following findings; Appellant experimented with drugs and alcohol but he was never controlled by its use; (PCR 712); the conclusions of the postconviction mental health experts are rebutted by the facts of the crime (PCR 713-714); and the chosen defense of insanity was a more credible defense than drug/alcohol use. (PCR 718). When assessing whether counsel made a strategic decision to forego presenting evidence of substance abuse at the penalty phase, the trial court drew two inferences.[12] The court explained:

> First, the totality of the circumstances imply that Owen did not address substance

[12] The trial court drew these inferences because former counsel Carey Haughwout, testified that she could not recall one way or the other whether she knew about Appellant's drug use and whether there was a conscious decision not to present it. (PCT 191-192, 212).

> abuse as a problem with trial counsel.

(PCR 717). The trial court noted that counsel had her investigator spent hundreds of hours with Appellant. Haughwout described Appellant as forthright, and she did not feel that he was withholding any information from her. (PCR 717).

The second inference found by the trial court was as follows:

> Second, the Court infers that trial counsel considered and rejected substance abuse as a mitigator or defense in light of the stronger and more complete defense of insanity.

(PCR 717-718). The court further explained

> While Ms. Haughwout could not attest to making a strategic decision, the experience of counsel, the care with which the insanity evidence was developed and presented, and the relative weakness of the substance abuse mitigation in comparison to the insanity mitigation leads to the conclusion there was a conscious decision to forgo substance abuse as a mitigator.

(PCR 718). The findings of the trial court are supported by the record on appeal as well as the record below.

To establish ineffective assistance of counsel, Owen must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. Strickland v.

Washington, 466 U.S. 688 (1984). This Court discussed the Strickland standard stating:

> We have repeatedly held that to establish a claim of ineffective assistance of trial counsel, a defendant must prove two elements:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
>
> *Vallee v. State*, 778 So.2d 960, 965 (Fla. 2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). In *Valle*, we further explained:
>
> > In evaluating whether an attorney's conduct is deficient, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" and the defendant "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternate courses of action have been considered and rejected. Moreover, "[t]o establish prejudice, [a defendant] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence

in the outcome.'"

*Id.* at 965-66 (citations omitted)(quoting ***Brown v. State***, 775 So.2d 616, 628 (Fla. 2000), and ***Williams v. Taylor***, 529 U.S. 362, 391 (2000)).

Arbelaez, 898 So.2d at 31-32.

In Pietri v. State, 885 So. 2d 245, 255-252 (Fla. 2004), this Court explained:

> There is a strong presumption that trial counsel's performance was not ineffective. As Strickland provides: "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," 466 U.S. at 689, and further: "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690. The defendant alone carries the burden to overcome the presumption of effective assistance: "The defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689. The United States Supreme Court explained that
>
> > a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the

> identified acts or omissions were outside the wide range of professionally competent assistance.
>
> Id. at 690; see also Asay v. State, 769 So. 2d 974, 984 (Fla. 2000) ("The defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy."). Finally, "Judicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 689

Pietri, 885 So. 2d at 255-252. See Gamble v. State, 877 So.2d 706, 711 (Fla. 2004); Davis v. State, 875 So.2d 359, 365 (Fla. 2003); Valle v. State, 778 So. 2d 906 (Fla. 2001); Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989); Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla.), cert. denied, 479 U.S. 972 (1986). Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(concluding standard is not how current counsel would have proceeded in hindsight); Rose, 675 So. 2d at 571.

Moreover, from Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on **what** efforts were undertaken and **why** a specific strategy was chosen over another. Additionally, “Strategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.” Strickland, 466 U.S. at 690-91. See Wiggins v.

Smith, 539 U.S. 510, 533 (2003) (discussing the investigation necessary to meet professional norms and the appropriateness of strategy decisions arising from such investigation).

In Wiggins the Court cautioned

> In finding that Schlaich and Nethercott's investigation did not meet *Strickland*'s performance standards, **we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case**. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*. 466 U.S., at 689, 80 L Ed 2d 674, 104 S Ct 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id.*, at 690-691, 80 L Ed 2d 674, 104 S Ct 2052. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.*, at 691, 80 L Ed 2d 674, 104 S Ct 2052.

Wiggins, 539 U.S. at 533 (emphasis supplied).

With regard to any factual findings made below, this Court cannot disturb those findings if they are supported by the record. See Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999)(reaffirming that appellate court defers to the circuit court's factual findings); Blanco v. State, 702 So. 2d 1250,

1252 (Fla. 1997)(reasoning standard of review following Rule 3.850 evidentiary hearing is that if factual findings are supported by substantial evidence, appellate court will not substitute its judgment for trial judge's on questions of fact, credibility, or weight).

As noted above, Appellant was granted an evidentiary hearing on this claim. However, Appellant's evidentiary presentation failed to establish that his drug/alcohol use was not considered by counsel; failed to establish that his prior drug/alcohol use was significant; failed to establish that he was intoxicated at the time of the crime; and failed to establish that presentation of this substance abuse evidence would have resulted in a life sentence.

Six lay witnesses testified regarding Appellant's prior consumption of alcohol and drugs. Two of the witnesses had no personal knowledge regarding Appellant's drug/alcohol use. (PCR 709-710). The remaining four recounted instances of drug/alcohol use. The trial court found the testimony to be largely insignificant. At best, the testimony established that Appellant had experimented with drugs and alcohol. (PCR 712). The record supports that finding.

At the hearing, Owen presented several witnesses who testified about Owen's experiences as a teenager and young

adult. Fred Morlock knew Owen in 1981/1982 when he resided at the VFW orphanage. (PCT 136) Morlock recalled counseling Owen on substance abuse and assumed he was on some substance because at times his eyes were not clear, other residents/staff reported Owen took drugs, and Owen self-reported substance abuse. (PCT 138-140, 145). However, Morlock never saw Owen take any drugs, nor did he smell alcohol on Owen's breath. (PCT 140-141, 145-147). Morlock had to admit that some young men experiment with drugs/alcohol, and that Owen just may have been experimenting. (PCT 147). Morlock did recall Owen assaulted a female, choking her, when they resided at the VFW. (PCT 139-140). Also, Morlock recalled Owen had been placed in a psychiatric hospital for a few days for an aspirin overdose. (PCT 140, 146-147, 149-150). It was Morlock's recollection that he last saw Owen in 1982. (PCT 143, 148-150).

Kenneth Richards knew Owen since the late 1960's. (PCT 152, 154). He was contacted by and spoke to Haughwout's investigator, Sheehan,[13] regarding Owen's case and substance abuse. When asked by Sheehan, Richards agreed he would testify for Owen, but was never contacted again. (PCT 153-154, 165). Richards recalled that Owen's parents were always intoxicated and were very permissive with their children, but Richards would

[13] Richards' mother, Ruth Richards, also was contacted by a defense investigator at that time. (PCT 167).

leave whenever Owen would be beaten. (PCT 154, 157-158, 166-167). It was Richards' recollection that Owens parents were overly permissive with there children, Owen and Mitch, but there was some discipline. However, when it came to Owen's half-brother, Monty, Owen's parents were "downright brutal." (PCT 158). According to Richards, Owen drank beer and vodka from the age of eight or nine years. Owen was seen smoking marijuana in his garage. (PCT 155-160, 166).

Keith Croucher testified that Owen at the age of eleven or twelve years of age had experimented with marijuana, Valium, alcohol, and acid. There was free access to alcohol in the Owen home. (PCT 169). While Richards reports seeing Owen take drug/alcohol, this was characterized as experimentation.

Wilma Bailey, an employee at the VFW home from 1973 to 1997, knew Owen. (PCT 173). Bailey admittedly did not have a lot of contact with Owen, but recalled he ran in the "loser group", not with the good students. (PCT 175-176). She claimed Owen smoked tobacco and marijuana, but admitted that she has no personal knowledge of any drug use by Owen. She also admitted no personal knowledge of the family dynamics Owen experienced with the VFW foster family with whom he was placed. (PCT 180-182).

Kelly Bragg reported knowing Owen since the early 1970's.

(PCT 253-254). She knew of his alcohol and marijuana use, but denied that Owen used speed or acid. (PCT 255-256). Bragg never saw Owen's parents; the Owen children were left with no food in the house and to fend for themselves. (PCT 257). Her friendship with Owen ended after his father died. (PCT 258).

Timothy Cervantes, a convicted felon[14] met Owen in 1974/1975 when Own moved to the VFW home in Eaton Rapids, Michigan. (PCT 263, 269). Cervantes admitted that he had been contacted in 1987 or 1988 by a defense investigator and reported Owen's background as well as his own. (PCT 263-264, 274). He admitted that he and Owen used alcohol and drugs - beer, any hard liquor, marijuana, speed, hash, mushrooms, and LSD, with Owen. (PCT 265-266, 269). For the most part, this was done on the weekends during parties Cervantes would host for a five dollar fee. (PCT 267, 269). At one point Cervantes noted there was violence perpetrated against girls at the party, and that Owen watched one rape, but then Cervantes noted that it was only rumor that there were "rapes" at his parties. (PCT 267-269, 274). Cervantes, two to three years Owen's senior, admitted that he held sway over the younger children and delivered drugs to friends for a profit. (PCT 272-273).

[14] Cervantes spent 27 months in prison for second-degree murder. He claimed he sentence was mitigated because he was under the influence of drugs at the time of his crime. (PCT 271-272).

The trial court's characterization of this testimony as fairly insignificant was accurate. (PCR 709-712). None of these witnesses could offer any evidence to support Appellant's use of drugs at the time of the crime. And to the extent that the witnesses claimed personal knowledge, it would appear that Owen experimented with drugs/alcohol in Michigan and Indiana while growing up. See Branker v. State, 650 So.2d 195 (Fla. 4th DCA 1995) (explaining that when witness had no personal knowledge about missing property, witness's testimony was hearsay and could not be as evidence); Nationwide Mut. Fire Ins. Co., 480 So.2d at 144 (agreeing that testimony of witness with no personal knowledge of the facts, only those derived from information from others, is incompetent to testify and such testimony is inadmissible).

The testimony of Appellant's mental health experts was equally insignificant. (PCR 712-714). Licensed mental health counselor/psychotherapist, Heidi Guerra explained that in 2005, she met with Owen to conduct a substance abuse evaluation. (PCR 137-38, 142). In addition to his self-reporting, she reviewed collateral sources.[15] (PCR 142-43, 154-55). She concluded that

[15] These sources included the deposition/testimony/reports/notes of prior defense experts, Drs. Berlin, Sultan, Crown, Cheshire, Waddell, and Peterson as well as prior guilt and penalty phase transcripts from both trials for Karen Slattery's murder and the trial for Georgianna Worden murder, the 1986 and 1999 PSI

Owen used drugs and alcohol from the age of nine, and that in addition to alcohol, the drugs used included mescaline/purple barrels, LSD, downers, methamphetamine, sedatives, cocaine, mushrooms, marijuana, and huffing hair spray and airplane glue. However, she readily admitted that Owen was able to control his usage in college - smoked marijuana during the week and drank and used methamphetamine/cocaine on the weekends. (PCT 232-233). He also controlled himself during his stint in the military where he did not use drugs and remained sober. (PCT 233). Guerra gave no opinion on what effect the drugs or alcohol had on Owen's conduct at the time of the crime. (PCT 239). Guerra spent approximately two and half hours with Appellant. (PCT 229).

Appellant also presented the testimony of Dr. Henry Dee, a neuropsychologist. It was Dr. Dee's opinion after talking to Owen for approximately 20 hours, reviewing the documents/reports of Drs. Berlin, Sultan, and Crown, and giving Owen a battery of

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reports, GED report, some "raw data", military records, school records, police reports, VFW notes/reports, and notes of David Fisher and Hillary Sheehan. No witnesses were contacted or interviewed by Guerra (PCT 230, 240). It is important to note here that much of this evidence was gathered by Carey Haughwout's defense team and was available when the defense was developing its trial and penalty phases strategies or was presented in the defense case.

tests,[16] (PCT 99-100) that Owen had cerebral damage in the form of memory damage and impulsivity. However, Appellant's memory damage did not impair his ability to relate his history or facts of the crime to his defense counsel, mental health doctors, or the police. (PCT 102, 108-110, 120, 123, 132). The balance of Owen's psychological tests was normal. Dr. Dee thought that the effect of drugs and alcohol use would intensify Owen's mental illness and delusions. (PCT 107-112). Dr. Dee acknowledged that Owen self-reported his substance abuse, and that such was uncorroborated by independent sources. Also, Dr. Dee agreed that there was nothing noticeable in Owen's actions on the night of the murder to indicate impairment by substance abuse. (PCT 122-123, 127-131). Dr. Dee did not take issue with the findings of Dr. Berlin who reported Owen formulated and carried out his plan to have sex with an unconscious or dying woman. Even Dr. Dee, having reviewed the videotaped confession and with knowledge of the crime facts, had to agree impulsivity was not present in Owen's actions given Owen's confession and the facts of the crime. (PCT 127-131). Dee admitted that Owen's "memory impairment" was not so severe as to preclude him from discussing his history/case with his attorney and doctors; he could tell the police about his motive and intent to commit the instant

[16] Owen's full scale IQ score was 104, thus, removing any claim of mental retardation. (PCT 102, 117).

crimes. (PCT 120-123).

The trial court gave little weight to this testimony because Appellant's expert Heidi Guerra admitted that Appellant could and did control his usage of drugs. (PCR 712). Guerra did not view Appellant's confession. She expressly stated that she offered no opinion about Appellant's drug use at the time of the crime. (PCT 239).

Likewise, Dr. Dee, a neuropsychologist, admitted that the facts of this crime rebutted his diagnosis of impulsivity and memory loss. (PCR 713). He also admitted that he did not look at Appellant's impulsivity as it applied to the crime. (PCT 218). The trial court's rejection of this testimony was proper. See Asay v. State, 769 So. 2d 974 (Fla. 2000) (upholding trial court's rejection of expert opinion as speculative given that experts were unfamiliar with significant facts of the crime); Bryant v. State, 785 So. 2d 422 (Fla. 2001)(upholding trial court's rejection of mental health expert's opinion as defendant's own actions during the robbery/murder belie testimony of expert); Walls v. State, 641 So. 2d 381, 390-391 (Fla. 1994)(recognizing that credibility of expert testimony increases when supported by facts of case and diminishes when facts contradict same); Foster v. State, 679 So. 2d 747, 755 (Fla. 1996)(same); Wournous v. State, 644 So. 2d

1000, 1010 (Fla. 1994)(upholding rejection of uncontroverted expert testimony when it cannot be reconciled with facts of crime); Sweet, 810 So. 2d at 866(upholding determination that new mental health experts' opinions that defendant did not possess requisite intent to satisfy "CCP" aggravating because such testimony did not conform to facts of the case).

Appellant also presented the testimony of former defense counsel Carey Haughwout and Ms. Haughwouts's investigator, Gail Sheehan. Haughwout was admitted to the Bar in 1983, and began her career in the Public Defender's Office, where she stayed for four to five years before going into private practice. (PCt 183-184). She had about 16 years of criminal defense experience at the time of Owen's trial and had been involved in numerous capital cases, 15 of which went to trial, with only Owen receiving the death penalty. Haughwout is Board Certified and had attended capital seminars. She teaches trial practice and procedure, as well as client interviewing, and has been called as an expert to testify in cases where claims of ineffective assistance of counsel were made. (PCT 183-184, 207-211).

As noted above, both witnesses incredibly had no memory, one way or the other, whether drug/alcohol use was ever discussed, investigated or considered as possible mitigating

evidence.[17] (PCT 247, 195, 196, 224). However, irrespective of their inability to recall whether substance abuse was ever considered, the remainder of their testimony, in conjunction with the completeness of the presentation admitted at the penalty phase, clearly established that the defense team conducted and very thorough and thoughtful investigation which lead to presentation of the defense of insanity. (PCR 717-718). The record more than supports the trial court's rejection of Appellant's claim that counsel was deficient in failing to "investigate" substance abuse as a mitigating factor.

As preparation for the retrial of Appellant, Haughwout hired Sheehan to investigate the case, and she obtained the services of three mental health experts, Drs. Berlin, Sultan, and Crown. (PCT 184-186, 215-216). Haughwout spent a significant time with Owen and pursued certain avenues based on what he reported. She found Owen an important source of information and cooperative. It was Haughwout's impression that Owen was

[17] Sheehan admitted a recollection of drug use at the orphanage. (PCT 247). Haughwout also admitted that the record she possessed contained some references to drug use. (PCT 192-194). For instance, she reviewed Dr. Peterson's notes from the 1988 case which indicated Owen used drugs, and she would have had the PSI report from the 1999 trial, which also mentioned drug use. (PCT 192-192).

forthright with her and was not hiding any history.[18] (PCT 186-187, 212). Owen was also active with his mental health experts - there was give and take in their sessions. She did admit that she probably would have given any information on substance abuse to the defense experts. Yet, again, Haughwout claimed no memory one way or the other that Owen had a drug issue.[19] (PCT 191-192, 194-195).

Haughwout admitted knowing that Owen's videotaped confession, which was long and detailed, would be admitted and that she needed a good faith defense that did not refute the confession. She also testified that she knows of strategic reasons why drug/alcohol use would not be presented, but would not say she recalled a strategic reason in the instant case. However, she admitted that drug use can diminish mental health testimony. (PCT 191-196). Haughwout testified that the insanity defense was chosen because it was the truth. (PCT 185, 213-215, 217-218). Also, she explained that generally, she is "not a big

[18] Dee found Owen's memory impairment was not to the degree that it precluded Owen from discussing matters with the counsel, doctors, or police. (PCT 120, 123).

[19] It seems astonishing that this well experienced defense counsel, who gathered all of the information she did through direct contact with her "forthright" client, the assistance of an investigator, and evaluations by three mental health experts, cannot recall whether intoxication was discussed and whether the intoxication defense/substance abuse mitigator were considered.

fan" of intoxication defenses because they do not work, and admitted that in this case, the facts went against an intoxication defense. (PCT 218). Further, a voluntary intoxication defense merely would reduce the crime to second-degree murder, while the chosen defense, insanity, would be a complete defense. (PCT 218-220). According to Haughwout, she was trying to show Owen as a victim.

Hillary Sheehan has been a private investigator since 1972. Haughwout hired her to investigate Owen's case. (PCT 245-246). In fact, Haughwout currently, the elected Public Defender, employed Sheehan as her Chief Investigator for the Public Defender's office. According to Sheehan, she put in approximately 200 hours on the case. She traveled to Michigan and Indiana and spoke to Owen's family, friends, neighbors, and teachers, with the exception of the VFW orphanage staff. Although she tried to gain the cooperation of the VFW staff of the home where Owen resided after the death of his parent, she was unsuccessful. (PCT 246, 248-250). The investigation of Owen's life at the VFW home was stymied by the facility administrator, who even refused to forward letters from Sheehan to those who knew Owen. (PCT 249-250) Sheehan does not recall being asked to do a drug history. However, she may have discussed general drug use at the VFW home. (PCT 247). She does

remember trying to find all possible mitigation, both statutory and non-statutory; she did not intentionally avoid any area of investigation nor was she instructed to avoid any particular area. (PCT 248, 250-251). Sheehan spoke to Owen, but does not recall whether he said anything about substance abuse. (PCT 251). It was Sheehan's recollection that she testified at trial and was permitted to summarize the results of her conversations with Owen's family/friends.

In addition to this evidence, the trial court also reviewed the entire record on appeal. A portion of the penalty phase presentation included three mental health experts. Dr. Berlin, is a forensic psychiatrist, who specializes in sexual disorders; Dr. Faye Sultan, is a clinical psychologist, who also specializes in sexual disorders, and Dr. Barry Crown, a diplomat in neuropsychology, also practices forensic neuropsychology. (ROA 5322-5344, 5482-5512, 6486-6487). Between the doctors, they spent over twenty-four hours with Appellant. Appellant discussed details of the crime as well as his background with Drs. Berlin and Sultan. The experts reviewed extensive records from the VFW orphanage; affidavits from neighbors during Appellant's childhood, police reports, military records, psychological reports from two state doctors, a psychological report conducted of Appellant when he was in the seventh grade.

(ROA 5322-5344, 5482-5512). Not one of those experts ever mentioned Appellant's prior drug/alcohol use when discussing their respective diagnoses.[20]

Only one clear inference can be drawn from a review of the record on appeal and the record below. And that is that Haughwout, an experienced and well respected criminal defense attorney, conducted a complete and thorough investigation into Appellant's background. She had extensive discussions with Owen throughout the years that she represented him; she hired Sheehan, a well seasoned investigator to uncover information about Owen's background,[21]; and she hired three well qualified mental health experts who likewise delved into Owen's background and mental health issues all in an effort to explain how he came to murder Karen Slattery.[22]

The inescapable conclusion is that the record on appeal is devoid of any real discussions about substance abuse because Appellant did not report being intoxicated on the night of the crime and did not stress a history of substance abuse. Haughwout

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[20] As noted elsewhere, their opinions formed the basis for the trial court to find both statutory mitigators and sixteen non-statutory mitigators. Owen v. State, 862 So. 2d 687, 703 (Fla. 2003).

[21] Sheehan went to Michigan and Indiana, Appellant's former places of residence to talk to family, friends, neighbors, and the facility who took him in as an orphan.

[22] Appellant did not present any evidence that would call into question the accuracy/validity of the experts' conclusions.

chose to pursue a defense for which she had much more evidence, i.e., insanity. Haughwout without hesitation stated that insanity was presented because it was true. Haughwout and Sheehan spent an extensive amount of time with Owen and devoted hundreds of hours to investigating this case. Appellant's drug and alcohol use never surfaced as a result of that investigation. Yet, Appellant's new experts, after spending a mere fraction of the time spent by Haughwout's defense team, curiously "uncovered" Appellant's substance abuse problems. Appellant's assumption that Haughwout just ignored an avenue of potential mitigation is illogical in view of this record. The trial court's conclusion that substance abuse had been considered and rejected is amply supported by the record. Cf. Schofied v. State, 914 So. 2d 990 (Fla. 4th DCA 2005)(explaining that reviewing court was unable to apply deference to trial court's ruling because lower court did not identify upon which one of two *inferences* the lower court based its decision); Sochor v. State, 883 So.2d 766, 785 (Fla. 2004) (recognizing that the trial court must resolve conflicting testimony presented at the evidentiary hearing by assigning weight to each witness's testimony).

In any event regardless of whether Haughwout's investigation was deficient in failing to uncover and then

present Appellant's alcohol and drug use, its use at the penalty phase would not have resulted in a different sentence. First, the evidence was exceptionally weak. There was no evidence to suggest that Appellant was addicted to drugs. In fact the evidence was to the contrary. Moreover, Appellant's postconviction witnesses were not able to make a connection between his drug use and his actions on the night of the crime. Second, as noted by the trial court, had the intoxication defense/evidence been offered as mitigation, it would have been inconsistent with Owen's confession, and it would have conflicted with the "true" defense offered, i.e., insanity.

Third, the substance abuse evidence pales in comparison to the evidence presented in aggravation and mitigation. The sentencing court found four aggravating factors and gave each great weight. This Court identified the aggravators as: (1) prior violent felony conviction; (2) felony murder (burglary); (3) especially heinous, atrocious, or cruel ("HAC"); and (4) cold and calculated and premeditated ("CCP"). Owen, 862 So.2d at 690 (ROA 4053-55). The prior violent felony, HAC, and CCP aggravating factors have been recognized as weighty aggravators. See Rivera v. State, 859 So.2d 495, 505 (Fla. 2003) (finding HAC and prior violent felony aggravators are weighty factors); Porter v. State, 788 So.2d 917, 925 (Fla. 2001) (announcing that

prior violent felony and CCP aggravators are weighty).

In mitigation, the sentencing judge found three statutory mitigating circumstances: (1) under the influence of extreme mental or emotional disturbance (considerable weight); (2) Owen's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired (some weight); and (3) Owen's age (little weight). (ROA 4055-57) Another sixteen non-statutory mitigators[23] were found ranging from minimal to some weight and

[23] Owen's non-statutory mitigation entailed:

> The sixteen nonstatutory mitigating factors were: (1) the defendant was raised by alcoholic parents (some weight); (2) the defendant was raised in an environment of sexual and physical violence (some weight); (3) the defendant was a victim of physical and sexual violence (some weight); (4) the defendant was abandoned by the deaths of his parents and abandoned by other family members (some weight); (5) the defendant has a mental disturbance and his ability to conform his conduct to the requirements of law was impaired (some weight); (6) the defendant was cooperative in court and not disruptive during court proceedings (little weight); (7) the defendant has made a good adjustment to incarceration and will be a good prisoner (little weight); (8) the offense for which the defendant was to be sentenced happened fifteen years ago (little weight); (9) the defendant will never be released from prison if given life sentences without parole (minimal weight); (10) the defendant cooperated with law enforcement (little weight); (11) the defendant obtained a high school equivalency diploma (little weight); (12) the defendant received a general discharge under honorable conditions from the United States Army (little weight); (13) the defendant saved a life in his youth

then some weight was given the additional factor, that Owen did not kill the children being watched by Karen Slattery (instant victim) or Georgianna Worden (prior violent felony victim). (ROA 4057-60). Further, the sentencing judge spent some three pages in his order discussing Owen's upbringing (ROA 4049-51), noting:

> The fact that the Defendant, Duane Owen, had one of the more horrific childhoods that this Court has seen or heard of is uncontested in the evidence. It is truely a shame that anyone should be put on this earth to endure a childhood like Duane Owen's. Although the Court will address the aggravating circumstances and mitigating circumstances arguably applicable to this case, what this case really comes down to at this point is whether Duane Owen's background has made him mean calculating, cruel and evil or whether it has made him too mentally ill to be able to become mean, calculating and evil.

(ROA 4051). Ultimately, the Court concluded during the weighing of the aggravation and mitigation:

> ...the Court finds the aggravating circumstances in this case outweigh the mitigating circumstances. In essence, the Defendant, Duane Owen, suffered extreme and

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> (little weight); (14) the defendant suffered from organic brain damage (some weight); (15) the defendant lived in an abusive orphanage (some weight); and (16) any other circumstances of the offense (some weight). As to this final nonstatutory mitigating factor, the trial court considered the fact that Owen did not harm the two young children that Karen Slattery was babysitting at the time of her murder, nor did he harm Georgianna Worden's two young children who were present in her home at the time of her murder.

Owen, 862 So.2d at 691, n.3

> inhuman indignities and abuse as a child and teenager. He was without any reasonable support system and was molded into a sick and conscienceless individual. Nevertheless, he was not so sick that he was unable to become mean, calculating, cruel and evil - a wicked person who now deserved to die.

(ROA 4060). It is against this aggravation, mitigation, and judicial comments that Owen suggests that adding the non-statutory factor of substance abuse would alter his sentence of death to life.[24] The meager evidence of substance abuse would add little if anything to the balance of sentencing factors. The trial court's finding that Appellant could not establish prejudice was correct. Appellant admitted to brutally stabbing to death a fourteen year old babysitter. His crime was deliberate and premeditated. Moreover his prior violent felonies include another similar murder and sexual battery as well as an attempted murder of another young woman. Relief was denied properly. Fotopoulos v. State, 608 So. 2d 784, 792-793 (Fla. 1992(recognizing that crime was committed in a cold, calculated and premeditated manner Cf. Rutherford v. State, 727 So. 2d 216 (Fla. 1998)(rejecting claim of ineffective assistance of counsel for failure to object to hearsay testimony since testimony was only marginally relevant to the bulk of the aggravating factors); Holland v. State, 773 So. 2d 1065 (Fla.

[24] The jury recommendation was ten to two for death.

2005)(recognizing the maxim that there can be no finding of deficient performance for failing to investigate or present mitigation evidence unless the defendant establishes that mitigation exists.); Gilliam v. State, 817 So. 2d 768 (Fla. 2002) (upholding trial court's denial of relief where court found expert's testimony to be deserving of little weight).

## ISSUE IV

**THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT A VOLUNTARY INTOXICATION DEFENSE AT THE GUILT PHASE**

Here, Owen complains that he received ineffective assistance of counsel through trial counsel, Carey Haughwout's failure to present evidence of Owen's history of drug/alcohol abuse as well as evidence of his alleged drunkenness at the time of the offense in furtherance of an intoxication defense. Counsel's representation fell below the constitutional standards of Strickland v. Washington, 466 U.S. 668 (1984). The main focus of Owen's criticism is that Ms. Haughwout's failed to uncover evidence that Owen ingested drugs and alcohol at the time of the crime. Owen was granted an evidentiary hearing on this claim. The trial court denied all relief finding: "Defendant has failed to present any evidence supported by the record or at the evidentiary hearing demonstrating that he was intoxicated at the time of the offense." (PCR at 707). The trial court's factual and legal conclusions are supported by the record on appeal as well as the record below.

With regards to the applicable law regarding ineffective assistance of counsel, Owen must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in

representation, there is a reasonable probability the result of the proceeding would have been different. Strickland, supra.

In Pietri v. State, 885 So. 2d 245, 255-252 (Fla. 2004), this Court explained:

> There is a strong presumption that trial counsel's performance was not ineffective. As Strickland provides: "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," 466 U.S. at 689, and further: "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690. The defendant alone carries the burden to overcome the presumption of effective assistance: "The defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689. The United States Supreme Court explained that
>
> > a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

> Id. at 690; see also Asay v. State, 769 So. 2d 974, 984 (Fla. 2000) ("The defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy."). Finally, "Judicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 689.

Pietri, 885 So. 2d at 255-252. See Gamble v. State, 877 So.2d 706, 711 (Fla. 2004); Davis v. State, 875 So.2d 359, 365 (Fla. 2003); Valle v. State, 778 So. 2d 906 (Fla. 2001); Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989); Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla.), cert. denied, 479 U.S. 972 (1986). The ability to create a more favorable strategy years later, does not prove deficiency. See Patton v. State, 784 So. 2d 380 (Fla. 2000); Cherry v. State, 659 So. 2d 1069 (Fla. 1995); Rose, 675 So. 2d at 571.

The focus is on what efforts were undertaken in the way of an investigation of the defendant's background and why a specific course of strategy was ultimately chosen over a different course of action. The inquiry into a trial attorney's performance is not a analysis between what one attorney could have done in comparison with what was actually done. Any assertion to the contrary is completely inaccurate. The Eleventh Circuit Court of Appeals recounts the state of law regarding this issue as follows:

> I. The standard for counsel's performance is

"reasonableness under prevailing professional norms." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); accord Williams v. Taylor, --- U.S. ----, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000) (most recent decision reaffirming that merits of ineffective assistance claim are squarely governed by Strickland). The purpose of ineffectiveness review is not to grade counsel's performance. See Strickland, 104 S.Ct. at 2065; see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir.1992) ("We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."). We recognize that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled."[12] Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)(emphasis added).

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[12] the best criminal defense attorneys might have done more. Instead the test is ... whether what they did was within the 'wide range of reasonable professional assistance"The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether.' " Waters, 46 F.3d at 1518 (en banc) (citations omitted)(emphasis added).

Chandler v. United States, 218 F.3d 1305, 1313 n. 12 (11th Cir. 2000). It is always possible to suggest further avenues of defense especially in hindsight. Rather the focus is on what strategies were employed and was that course of action reasonable in light of what was known at the time. With these principles in mind, it is clear that counsel Carey Haughwout provided constitutionally adequate representation.

As noted above, the trial court properly rejected Appellant's claim because he failed to offer any factual support for his assertion that a voluntary intoxication defense was viable. The evidence presented at trial from both Appellant and the state unquestionably established that the murder of Karen Slatterly was premeditated. The testimony of Owen's mental health expert, Dr. Berlin, completely refutes any suggestion that Owen was intoxicated at the time of the murder. Dr. Berlin conceded that Owen planned the attack, he intended to burglarize the home, he intended to have sex with Karen Slattery with or without her consent, and he knew stabbing her would result in her physical death. Owen formulated and carried out his plan to have sex with an unconscious or dying woman. Berlin also told the jury that over time, Owen's actions became more deliberate. (ROA 5427-5434, 5384, 6553, 6576-6577).

Owen admitted to stalking the victim. He entered the home,

saw Karen with the children, left, and he came back two hours later. He removed his clothes and wore a pair of socks over his hands. He did not steal any property after the murder because he did not want to get caught with any evidence. He concocted an alibi by turning back the clock at his brother's apartment. (ROA 4055).

The evidence recounted above overwhelming supported the aggravating factor that the murder was "cold, calculated, and premeditated. This Court upheld that finding as follows:

> the murder of Karen Slattery satisfies the requirements of CCP. The fact that Owen stalked Slattery by entering the house, observing her, leaving, and then returning after the children were asleep demonstrates that this murder was the "product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." Evans, 800 So. 2d at 192 (quoting Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994)). Further, Owen unquestionably had "a careful plan or prearranged design to commit murder," id., as evidenced by the fact that he removed his clothing prior to entering the house, wore socks and then gloves on his hands, confronted the fourteen-year-old girl with a hammer in one hand and a knife in the other, and, by his own admission, did not hesitate before stabbing Slattery eighteen times.
>
> The third element of CCP, heightened premeditation, is also supported by competent and substantial evidence. We have previously found the heightened premeditation required to sustain this aggravator to exist where a defendant has the opportunity to leave the crime scene and

not commit the murder but, instead, commits the murder. See Alston v. State, 723 So. 2d 148, 162 (Fla. 1998); Jackson v. State, 704 So. 2d 500, 505 (Fla. 1997). When Owen first entered the home and saw the fourteen-year-old babysitter styling the hair of one of her charges, he had the opportunity to leave the home and not commit the murder. While he did exit the home at that time, he did not decide against killing Slattery. Instead, he returned a short time later, armed himself, confronted the young girl, and stabbed her eighteen times. Owen clearly entered the home the second time having already planned to commit murder. Heightened premeditation is supported under these facts.

Finally, the appellant unquestionably had no pretense of moral or legal justification. Notably, Owen never even suggested to the officers who questioned him, and to whom he confessed, in 1984 that a mental illness caused him to kill. He did not attempt to justify his actions, as he does in the after-the-fact manner he advances today, by explaining to the officers that he needed a woman's bodily fluids to assist in his transformation from a male to a female. He did not explain or disclose in any way that the more frightened the woman, the more bodily fluids she would secrete, and the more satisfying it would be for him. In fact, during his interrogation, Owen in no way attempted to justify his actions. Also, there is no indication in either of Owen's previous direct appeals to this Court, first for the Slattery murder and then for the Worden murder, that he has ever raised this justification in the past. Although the trial court determined that the statutory mental health mitigators were proven, the court also held that Owen had no pretense of legal or moral justification to rebut the finding of CCP. The trial court's ruling is supported by competent and substantial evidence.

> Owen's claim that his mental illness must negate the CCP aggravator is unpersuasive. We have held: "A defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation." Evans, 800 So. 2d at 193. Further, Owen's reliance on Barwick v. State, 660 So. 2d 685 (Fla. 1995), is misplaced. In Barwick, we concluded that the trial court had improperly found CCP to exist because the evidence there did not support the conclusion that the appellant had entered the home of the victim with a "careful plan or prearranged design to kill." 660 So. 2d at 696. Instead, the evidence suggested that he intended to rape, rob, and burglarize, and the murder only occurred as an afterthought because the victim was able to remove the appellant's mask and therefore could have identified him. See id. Here, the evidence clearly demonstrates that Owen entered the home where Slattery was babysitting with a definite plan to murder the victim and then sexually abuse the body. CCP was properly applied to the Slattery murder.

Owen v. State, 862 So. 2d 687, 701 (Fla. 2003). Appellant fails to even address the impact of this overwhelming evidentiary obstacle to his claim.

Likewise, the evidentiary hearing testimony offered nothing in support of the claim.[25] Owen presented several lay witnesses

[25] The state will not again recount the substance of the testimony presented at the evidentiary hearing in support of

who testified about Owen's alleged history of substance abuse; Dr. Dee, who opined about the effects of intoxication on the brain; Hillary Sheehan, an investigator in the case, offered no information regarding Owen's alleged drug use at the time of the crime; and Carey Haughwout, the trial attorney who also could not offer any specific information regarding the viability *vel non* of an intoxication defense. As explained in Claim III, Ms. Haughwout, claimed to have no memory one way or the other that Owen had a drug issue.[26]

Based on the above, the trial court correctly concluded that Carey Haughwout was not deficient in failing to present an intoxication defense in conjunction with an insanity defense because it was not supported by the record. (PCR 706). See White v. State, 559 So. 2d 1097 (Fla. 19900(finding counsel's performance not deficient for failing to present voluntary intoxication defense since no support existed for its presentation); Van Poyck v. State, 696 So. 2d 686, 697 (Fla. 1997)(affirming counsel's strategic decision not to pursue

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this claim. However not one witness could offer any direct evidence that Appellant was intoxicated at the time of the crime.

[26] Haughwout admitted that in this case, the facts went against an intoxication defense. (PCT 218). Further, a voluntary intoxication defense merely would reduce the crime to second-degree murder, while the chosen defense, insanity, would be a complete defense. (PCT 218-220).

voluntary intoxication defense since investigation of same proved futile); Johnson v. State, 583 So. 2d 657, 661 (Fla. 1991)(affirming denial of claim of ineffective assistance of counsel since new defense presented in collateral proceeding was contradicted by evidence as trial); Rivera v. State, 717 So. 2d 477, 486 (Fla. 1998)(upholding counsel's decision jot to pursue voluntary intoxication defense when there existed no evidence to support the claim that defendant was intoxicated at the time of th murder); Breedlove v.State, 595 So. 2d 8, 10 (Fla. 1992)(affirming summary denial of claim of ineffective assistance of counsel for failing to pursue voluntary intoxication defense as record demonstrates a total lack of available facts to establish defense); Pietri, supra.(same).

Appellant next claims that counsel was ineffective during cross-examination of state witness Captain McCoy. Through trial counsel's impermissible questioning, the officer revealed that Appellant had sex with another unconscious victim, Marilee Manley. Owen claims that although the jury was well aware of the fact that Appellant was convicted of the attempted murder of Ms. Manley, because he was never charged with sexual battery, they were unaware that he had sex with her. Other examples of counlse's ineffectiveness were counsel's failure to object to several impermissible comments made by the state during the

penalty phase. Those include alleged impermissible comments on right to counsel; improperly diminishing role of the jury; improper comments on the facts of Appellant's other convictions; improper comment that Appellant was a "cunning rapist".

The state conceded an evidentiary hearing on all of these claims. (PCR 128). However, Appellant did not present any testimony from any his witnesses on these sub-claims, therefore he failed to establish his burden. The claim must be denied. See Marquard v. State, 850 So. 2d 417, 429 (Fla. 2002)(rejecting claim, as no evidence was presented in support of allegations in postconviciton motion); Rutherford v. State, 727 So. 2d 216, 200 (Fla. 1998)(upholding rejection of claim noting that defendant failed to even present witness on the specific claim and other witness contradicted allegation).

## ISSUE V

### APPELLANT'S CLAIM THAT HE IS ENTITELD TO RELIEF BASED ON THE CUMULATIVE EFFECT OF ERRORS IS WITHOUT MERIT

In his final claim, Appellant alleges that the cumulative effect of any and all the errors entitles him to a new trial/evidentiary hearing. Appellant is incorrect. The claims rejected summarily on the grounds they were legally insufficient, procedurally barred, or refuted from the record do not establish error to be considered under this analysis.

Moreover, given the analysis of the evidentiary hearing claims discussed above, neither deficient performance nor prejudice have been shown. As such, cumulative error has not been established. Relief must be denied. Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) (opining "[i]n spite of Zeigler's novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not have been seen until after the trial, we hold that all but two of the points raised either were or could have been, presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850."), sentence vacated on other grounds, 524 So.2d 419 (Fla. 1988); Downs v. State, 740 So. 2d 506, 509 (Fla.1999) (finding that where allegations of individual error are found to be without merit, a cumulative error argument based on the asserted errors must likewise fall); Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998) (reasoning that each claim is either meritless or procedurally barred, there cannot be an cumulative error to consider); See Morris v. State, 931 So.2d 821, 837 (Fla. 2006)(denying claim based on cumulative error where the individual claims making up the cumulative claim were either procedurally barred or without merit); Dufour v. State, 905 So.2d 42, (Fla. 2005)(finding that claims failed cumulatively where individual claims presented in habeas petition and in

motion for postconviction relief provided no basis for relief); Wike v. State, 813 So. 2d 12, 22 (Fla 2002)(same); Rose v. State, 774 So. 2d 629, 635 n. 10 (Fla. 2000)(same); Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994)(same); Rivera v. State, 717 So.2d at 480 n.1 (Fla. 1998)(same).

## CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: James L. Driscoll, Jr., Esq., and David Bass Esq., Capital Collateral Regional Counsel - Middle, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619 this 16th day of July, 2007.

## 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,

BILL McCOLLUM
ATTORNEY GENERAL

__/S/ CELIA TERENZIO_____

CELIA A. TERENZIO
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0656879
Office of the Attorney General
1515 N. Flagler Dr.; Ste. 900
West Palm Beach, FL 33417
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

COUNSEL FOR APPELLEE