IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-162

LOYD DUEST

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CAPITAL APPEALS DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Lloyd Duest, Defendant below, will be referred to as Appellant or Duest and Appellee, State of Florida, will be referred to as “State”. Reference to the original appellate record will be by “ROA”, reference to the resentencing record will be by the symbol “RROA”; reference to the postconviction record will be “PCR”, and supplemental materials will be designated by the symbol “SRO” preceding the type of record referenced by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On September 7, 1987, the defendant, Lloyd Duest (“Duest”), was convicted of the first-degree murder of John Pope(RROA 21). An appeal followed and in Duest v. State, 462 So.2d 446 (Fla. 1985), this Court found the following facts surrounding the conviction:

> On February 15, 1982, defendant was seen by witnesses carrying a knife in the waistband of his pants. Subsequently, he told a witness that he was going to a gay bar to "roll a fag." Defendant was later seen at a predominantly gay bar with John Pope, the victim. The two of them then left the bar in Pope's gold Camaro. Several hours later, Pope's roommate returned home and found the house unlocked, the lights on, the stereo on loud, and blood on the bed. The sheriff was contacted. Upon arrival, the deputy sheriff found Pope on the bathroom floor in a pool of blood with multiple stab wounds. Defendant was found and arrested on April

> 18, 1982. Defendant was tried and found guilty of first-degree murder.

Duest, 462 So.2d at 449.

The conviction was upheld in Duest v. Singletary, 967 F. 2d 472 (11th Cir. 1992) *rev'd on other grounds* Duest v. Singletary, 997 F. 2d 1336 (11th Cir. 1993). In Duest, 997 F. 2d at 1340, the Eleventh Circuit Court of Appeals reversed the district court's denial of habeas corpus, vacated the death sentence and remanded the case for a new sentencing hearing.

A new penalty phase proceeding was held. The jury recommended death by a ten-to-two vote. The trial court found three of the four aggravating factors submitted to the jury, but rejected CCP. The court found no statutory mitigating circumstances and twelve nonstatutory mitigating circumstances.[1] The court sentenced Duest to death.

[1] The trial court found the following: (1) physically and emotionally abusive childhood (great weight), (2) childhood traumatization and deprivation of love (great weight), (3) history of drug and alcohol abuse (some weight), (4) defendant was under influence of drugs or alcohol at time of crime (some weight), (5) institutional abuse and corruption in the Massachusetts prison system, which Duest entered at age 17 (some weight), (6) influence by peer group, particularly a cousin, to commit crimes (some weight), (7) defendant's diagnosis with lymphoma (some weight), (8) mutual care and love with friends and family (little weight), (9) willingness and ability to rehabilitate (little weight), (10) artistic ability (little weight), (11) lack of intent to kill victim, who was alive when defendant left residence and could have called for help (very little weight),(12) defendant treated unfavorably by others and had troubled childhood (very little weight).

On direct appeal of this new penalty phase proceeding, Duest presented eleven issues: (1) The testimony of the medical examiner in the resentencing constitutes undisclosed evidence which calls into doubt the reliability of the verdict at trial; (2) the denial of a defense motion to have the State disclose criminal records of out-of-state witnesses deprived him of due process; (3) the trial court's exclusion of evidence regarding Duest's alibi deprived him of his rights to confrontation and to present a defense; (4) the trial court erroneously excluded evidence and denied an instruction on residual doubt of guilt; (5) the trial court erroneously instructed the jury on the cold, calculated and premeditated aggravator and erroneously denied instructions on two mental mitigating circumstances; (6) the trial court erroneously precluded a defense mental health expert from testifying that mental mitigating factors were present; (7) the trial court erred in permitting the State to elicit testimony identifying Duest's prior convictions from the defense mental health expert; (8) the trial court erred in giving the jury recommendation great weight; (9) the trial court erroneously found that the killing was especially heinous, atrocious, or cruel, and erroneously refused to find two mental health mitigators; (10) the death sentence is unconstitutionally disproportionate; and (11) the death sentence violates the Sixth Amendment right to a trial by jury.. The State filed an Answer

Brief, arguing Duest's contentions lacked merit and his sentence be affirmed. (Exhibit-1) Furthermore, on or about May 9, 2001, Duest filed a Motion for Relinquishment and/or Stay and, on or about May 24, 2001, the State filed its response. (Exhibits 2 and 3, respectively). On June 18, Duest's Motion for Relinquishment was denied.(Exhibit - 4)

On June 26, 2003, the Florida Supreme Court affirmed Duest's sentence of death. Duest v. State, 855 So.2d 33 (Fla. 2003). (Exhibit 5).

STATEMENT OF FACTS ADDUCED AT THE NEW PENALTY PHASE HEARING

Dr. Ronald Wright, the medical examiner, testified that he conducted the autopsy on Mr. Pope, visited Mr. Pope's home, where the murder took place and reviewed the photos taken at the crime scene (RROA 335-338). Mr. Pope sustained multiple stab wounds, some superficial injuries to his arms, a head wound to the temple, multiple stab wounds to his right shoulder, a double wound to his armpit, a wound right through his right rib, and three stab wounds to his back, one of which penetrated the right lung (RROA 357-364). The wounds to Mr. Pope's arms were consistent with defensive wounds (RROA 367). Dr. Wright opined that Mr. Pope was stabbed in his bed, but died in the bathroom (RROA 368). Mr. Pope was alive when the wounds were inflicted, and was conscious for a matter of minutes after being stabbed in the heart (RROA 365). Mr. Pope passed out from the loss of

blood and when he passed out he no longer had a blood pressure (RROA 364-366). Dr. Wright testified that the amount of blood found on the victims bed equated to approximately 1/5 of Mr. Pope's blood volume (RROA 343). In the bathroom, there was pooling of blood at the base of the commode which was consistent with Mr. Pope sitting on the commode while bleeding (RROA 347). Mr. Pope also stood at the sink bleeding and most of the blood came from the wound to his temple (RROA 347). There was a blood smear on the side of the tub which happened when Mr. Pope collapsed in the bathroom (RROA 347-348).

On cross examination, Dr. Wright testified that none of the wounds would have killed anyone quickly (RROA 386). Dr. Wright testified that even if Mr. Pope had only the wound to the temple, it could have been fatal (RROA 387). Dr. Wright opined that it was difficult to determine how long a person could have survived, but said he could have lived if he had called for help within the first five minutes after the attack (RROA 406). Defense counsel was able to impeach Dr. Wright with his 1983 deposition. In the deposition, Dr. Wright testified that Mr. Pope died within five minutes after the attack, now his opinion is that it may have taken between 15 and 20 minutes for Mr. Pope to die (RROA 401-405).

David William Shiflett testified that in 1981 he lived with Mr. Pope (RROA 412). On the day of the murder, Shiflett

returned home from work and noticed that Mr. Pope's Camaro was not in the driveway and assumed that he had gone out to dinner (RROA 413-414). Shiflett testified that when he got into the home, the stereo was blasting, the lights were on, the sliding glass door was open, and this was all unusual (RROA 414). Shiflett's friend Vickie Greene arrived at the house later in the evening. Shiflett went into Mr. Pope's room to borrow some money where he and Green saw that the sheets on Mr. Pope's bed were covered with blood (RROA 420). They did not go into the bathroom, they ran to a neighbor, to call the police, and the police discovered the body (RROA 418-419).

Neil O'Donnell's testimony from the first trial was read into the record as he had died. O'Donnell was a bar manager at Lefty's, a neighborhood gay bar (RROA 444). O'Donnell was shown a picture of Mr. Pope by the police and while he did not know his name he recognized him as a patron (RROA 446-447). O'Donnell saw Mr. Pope in the bar on February 15, 1982 with Duest (RROA 449-463). Joanne Avery testified that Duest came to her home on February 15, 1982 with Mr. Pope, and they were driving gold Camaro (RROA 483-486). About an hour and a half later, she saw Duest alone, driving the Camaro, he showed her some jewelry and said he was going to get it appraised (RROA 487-490). Tammy Dugan was unavailable to testify so her testimony from the prior trial was read into the record. Dugan

testified that on February 15, 1984 Duest said that he was "going out to roll a fag" because he needed money (RROA 503-504). Dugan said that Duest told her he was going to go to a gay bar, pretend to be gay, pick up a man, bring him home, then steal his money (RROA 504). Michael Demizio owned a knife and it was missing. Duest said he had the knife (RROA 507).

Michael Demizio testified that on February 11, 1982, he met Duest on a Bus which was going from Albany to Fort Lauderdale (RROA 522-523). Duest told Demizio that "he used to beat up fags, roll fags, take them back to their houses and rob them" (RROA 524). Demizio and Duest arrived in Fort Lauderdale on February 13, 1982, and while looking for a place to stay met a man named John who offered them a place to stay at the Alpha Apartments (RROA 525-527). On Monday, February 15, 1982, Demizio saw Duest at the apartment between 3:30 and 4:00 P.M.; he had pulled up in a brown Camaro (RROA 5290). Duest was driving the car with a towel on the steering wheel and a towel on the stick shift (RROA 529). Duest was wearing a jogging suit , and Demizio saw that there was blood on the sleeve and collar, Duest had scratches on his face, that Demizio had not seen before (RROA 529-531). The State presented victim impact testimony through Robert Harris a friend of Mr. Pope (RROA 568-585). David Pope, Mr. Pope's son testified that he was a good father, a loving husband, and the community loved him (RROA 647-

654). Lillian Pope, Mr. Pope's daughter testified that he was a special person and he guided her to become a Human Resources Director (RROA 660). Not a day goes by that Lillian does not feel her father's loss (RROA 661).

The defendant called John Boone as his first witness. Boone was the Commissioner of Corrections for Massachusetts, in charge of the entire Massachusetts prison system from 1971-1993 (RROA 591). Boone met Duest when he was an eighteen year old inmate at Concord. Duest spoke of a problem and Boone referred him to a staff person (RROA 593). Boone later learned the Duest had been an inmate at Walpold. This was Duest's first incarceration and he had been placed in Walpold, which is reserved for the most hardened of criminals. This was due to a poor classification system (RROA 593-597). Boone testified that prison riots were common in Massachusetts prisons, and in 1972, a massive riot at Concord caused Duest to be transferred to Walpold (RROA 598). There was stress and tension at every level of the prisons (RROA 599). Young inmates were abused by gangs, drug runners and money collectors, and such a dehumanizing situation was especially damaging to the young inmates like Duest (RROA 600) Drug abuse was rampant in the prisons and the medical staff was routinely threatened by inmates who wanted prescriptions (RROA 601). Boone testified that he only met Duest once and that he reviewed his file but can't recall much

because it was in 1973 (RROA 66).John Gelosi, a Deputy Sheriff testified that Duest once helped him by translating sign language for another inmate (RROA 625). The State presented evidence that Duest was convicted of an escape during which he used a homemade knife to back a deputy into the corner of a holding cell and then left the courthouse (RROA 644). Robert Huber, who works at the Wodden Rogers Education center, testified that Duest was a student while he was in jail and one of Duest's paintings is hung in the lobby (RROA 666-667). Deputy Michael Lynch testified that Duest saved his life because he told Lynch that another inmate was planning to kill him and the facts turned out to be true (RROA 667-668). Clair Guzzetti, Duest's cousin testified that she grew up with him and his father was abusive and everybody was afraid of Duest's father (RROA 671). Guzzetti has written to Duest for many years now and he has come to know the lord (RROA 676-677).

Dr. Patricia Fleming testified that she evaluated Duest in 1989 (RROA 693). Dr. Fleming found that Duest was a shy child with low self esteem, little self confidence, who learned from his father (RROA 694). Duest survived in the world by being tough, the family was dysfunctional and alcohol and drugs had a strong influence on him since he was a teenager (RROA 695). Duest was a neglected child and had a brain dysfunction but she only knew about that from his mother (RROA 695). Duest's father

was raised by alcoholic parents, was in the marines and was determined to teach his kids to grow up tough (RROA 697). Duest was the focus of his father's attention. Duest's father was a hard worker, but became an invalid when he was injured on the job (RROA 699). Duest's cousin Ritchie also had a negative influence on Duest (RROA 700). Dr. Fleming testified that Duest never told her about his incarceration at Walpold (RROA 702). In forming her opinion, Dr. Fleming relied on Duest' prior criminal history. (RROA 713-715). The State was able to ask Dr. Fleming what crimes Duest had been convicted of (RROA 715-720).

Duest's father testified that he was an alcoholic and he abused Duest (RROA 731-737). Duest was addicted to heroin when he was released from Walpold but he does not use heroin anymore (RROA 734-736). Duest's mother testified that he was abused and that his father gave him no respect (RROA 737-741). Duest's sister, Nancy Kerrigan testified that Duest has a daughter. Kerrigan testified that their father was abusive and beat the children (RROA 754-757). Joseph Deauveau testified that he has known Duest since they were 12 years old and Duest was physically abused by his father (RROA 777). Maria Craig testified that she writes to Duest in prison, considers him her father and his death would be a big loss to her and her mother (RROA 783).

At the Spencer Hearing, videotaped depositions of Duest's family members were played for the trial judge (RROA 940-984). All of the family members said that Duest should not get the death penalty.

SUMMARY OF THE ARGUMENT

Issue I – The trial court correctly found, after an evidentiary hearing, that the changed testimony of the medical examiner at resentencing had no effect under any legal theory presented, on either phase of Duest's trial. The trial court denied properly, without an evidentiary hearing, Duest's remaining Brady claims.

Issue-II- The trial court denied properly without an evidentiary hearing, Duest's claims that counsel was ineffective at the penalty phase.

ARGUMENT

ISSUE I

THE TRIAL COURT DENIED PROPERLY APPELLANT'S CLAIMS THAT THE FAILURE TO PRESENT CERTAIN INFORMATION TO THE JURY AT BOTH PHASES OF TRIAL WAS A VIOLATION OF BRADY v. MARYLAND; STRICKLAND v. WASHINGTON; OR JONES v. STATE

Appellant alleges that he was unconstitutionally denied access to three pieces of information which entitled him to a new trial or at the very least a new sentencing proceeding. The information to which he claims he was constitutionally deprived

is as follows: 1. medical examiner, Dr. Ronald Wright, testifying in 1998, at Duest's re-sentencing hearing, altered his testimony regarding the length of time the victim remained conscious and alive, and offered an opinion that had the victim sought medical assistance within the first five minutes he would have survived; 2. polygraph testing data for state witness Dave Shifflett; and 3. a work product memo written by prosecutor Garfield to an investigator. The trial court granted an evidentiary hearing solely on the issue of Dr. Wright's changed testimony, and summarily denied the other two sub-claims. Ultimately the trial court also denied relief on the "Dr. Wright" claim as well. Duest challenges all those rulings.

A. Dr. Wright's testimony.

Appellant alleged that Dr. Wright's testimony at the 1998 re-sentencing proceedings was materially different than the testimony and deposition statements he provided in 1983. He contends that Wright's changed testimony supports his entitlement to either a new trial or a new penalty phase based under three different legal theories which are as follows: Wright's changed testimony was improperly withheld in violation of Brady v. Maryland, 373 U.S. 83 (1963) and therefore the conviction must be reversed; the changed testimony constitutes newly discovered evidence that should have been presented at the guilt phase in 1983 pursuant to Jones v. State 591 So. 2d 911

(Fla. 1991) and/or resentencing counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984) for failing to preserve a Brady claim at resentencing and/or by failing to request a Richardson[1] hearing at that time. Under all three legal theories, Duest contends that this changed/new testimony negates the intent to kill as the perpetrator left the victim alive and the victim's own failure to seek help contributed to his death. Following the evidentiary hearing, the trial court denied relief finding that the "changed" testimony of Dr. Wright was not material under Brady; counsel's failure to challenge the admissibility of the "changed" testimony was nether deficient performance nor prejudicial under Strickland; the "changed" testimony did not undermine confidence in either phase under Jones and in any event it was not newly discovered evidence at resentencing. (PCR 390-396).

In addition to appealing the propriety of those rulings, Duest also asserts that the trial court improperly limited the scope of the evidentiary hearing to only a portion of the issue involving Dr. Wright's testimony. As noted above, Duest presented three separate legal challenges based on Wright's changed testimony. He claims that the trial court limited the hearing solely to a portion of one the legal claims, i.e., counsel was ineffective at resentencing for failing to raise a

[1] Richardson v. State, 246 So.2d 771 2d (Fla. 1971)

Richardson violation during the testimony of Dr. Wright. He also alleges that the trial court never ruled upon his claim of newly discovered evidence that Dr. Wright's changed testimony would have had an effect at the guilt phase of his trial in 1983. The record refutes all of Duests's legal and factual challenges.

The change in Wright's testimony centered solely on the amount of time the victim was conscious and the amount of time it took the victim to die. Dr. Wright also stated that had Pope sought medical treatment instead of trying to render first aid to himself, he could have saved himself. The state acknowledges that the Dr. Wright did revise his opinion regarding the amount of time Mr. Pope remained conscious and alive. However as will be discussed in detail below, the trial court's rejection of this claim was proper as Wright's 1998 testimony in no way negates a finding that the multiple stabbing murder was premeditated.

The **factual** premise for all of Appellant's legal arguments is as follows. Dr. Ronald Wright was the Broward County medical examiner who performed the autopsy on the sixty-four year old victim Mr. John Pope. Wright was deposed on January 13, 1983 (SR 1-17) and testified at trial on March 10, 1983. (ROA 901-919). Subsequent to the reversal of Duest's death sentence in 1993, a resentencing proceeding was conducted in 1998. Wright testified at that proceeding on October 7, 1998. (ROA II 335).

The substance of all three of his statements is recounted below.

In his 1983 deposition, Wright was asked to explain what he observed at the crime scene. He testified as follows:

> QUESTION: It is my understanding that the deceased was found in the bathroom?
>
> ANSWER: That's correct.
>
> QUESTION: Did you attach any relevance to that, as far as the investigation is concerned?
>
> ANSWER: Yes. It is speculative, but the basic feeling I got and it is speculative and that is that the deceased went to the bathroom to clean himself up.

(SR. 3-4)(emphasis added). Dr. Wright was then asked to offer an opinion regarding why there was blood found on the bed in the bedroom and in the bathroom but no blood was found from the bed leading into the bathroom. (SR 4). Wright stated that there were several possible explanations for that including the following:

> So, the other is that he was ---the deceased was stabbed or hurt in the bed and managed to, by putting his hand over the wounds or whatever, stop the flow of the blood for a few seconds that it took him to get to the bathroom, which could well be the case or there may be some other explanation.

(SR.5). Later in the deposition the following exchange took place:

> QUESTION: I understand also, you indicate in your report that it appeared that he was trying to use the toilet paper to stop the

bleeding?

ANSWER: Yes. I guess I did write that down. It sure looks that way. I supposed that is part of that reason why I think that he was behaving somewhat differently than say, ordinary or the common response to being hurt as badly as he was, which also raises some speculative possibilities as well.

QUESTION: Such as?

ANSWER: Well, every indication seems to have been the deceased was a homosexual or at least bisexual, I guess. I don't know how you even differentiate those sorts of things, but had sex with males. At least, there seemed to be sort of a reputation which he had and then his behavior is not as unusual. When one is doing things which are quasi or perhaps, potentially illegal and or considered taboo in the social sense, you don't necessarily do things like immediately call rescue and the police because it engenders—either one of those engenders some kind of investigation which may be embarrassing and at least, from what I read and what I have seen, that it is not as outrageous behavior that he was going to try and out himself in sort of repair and then if required treatment, to get himself to the emergency department where one might speculate that he would come up with a somewhat different kind of story than perhaps, what actually happened.

(SR. 6)(emphasis added). Dr. Wright further opined that due to the loss of blood, Mr. Pope's blood pressure was also diminishing which actually caused him to fall backward and hit his head. This head wound was received during the dying process. (SR. 9). Wright also explained that none of the

wounds were instantaneously incapacitating. Wright opined that the range of time that Pope could have stayed on his feet was anywhere from ten seconds to five minutes. (SR. 12). Initially, Wright thought that Mr. Pope was intoxicated based on the victim's post-stabbing behavior which indicated that he did not appreciate the severity of his injuries. (SR. 15-16).

Dr. Wright testified at trial three months later. Wright was never asked and therefore obviously he never testified regarding the amount of time the victim lived following the multiple stab wounds. The focus of the guilt phase testimony was on the number and positioning of the multiple stab wounds. (ROA 905-911). During cross-examination, the following exchange took place:

QUESTION: And you were at the scene; correct?

ANSEWR: Yes, sir.

QUESTION: And what you observed was a quantity of blood on the bed, correct?

ANSWER: Yes, sir

QUESTION: And a large amount of blood in the bathroom?

ANSEWR: Yes sir. A much larger amount of blood in the bed.

QUESTION: And, really, no bloody trail in between?

ANSWER: None that I could see whatsoever.

QUESTION: And it would be your opinion to a reasonable degree of medical certainty that the majority of the wounds that were inflicted were, in fact, inflicted in the bathroom; correct?

ANSWER: No, sir.

QUESTION: What would you opinion be then?

ANSWER: I don't know. I couldn't say. Based upon my observation, I couldn't tell one way or the other.

QUESTION: Let me ask you this. Would the bleeding in the bathroom be more consistent with the wounds that you observed and the blood you found on the bed?
And I'm talking about the amount of blood that was in the bathroom.

ANSWER: No, not necessarily. He could have received- obviously, the presence of blood on the bed at least suggests that he was injured there.

On the other hand, all of the injuries could have been received while he was on the bed. And an explanation for how the blood did not appear in the intervening course was when he stood up to go the bathroom that either it ran, what bleeding was done externally ran down his body and did not fall on the floor, or he could, which probably bled the worst, he would have put his hand over.

(ROA (ROA. 915-916).

Dr. Wright testified that he conducted the autopsy on Mr. Pope, visited Mr. Pope's home, where the murder took place, and reviewed the photos taken at the crime scene (RROA 335-338).

Mr. Pope sustained multiple stab wounds, some superficial injuries to his arms, a head wound to the temple, multiple stab wounds to his right shoulder, a double wound to his armpit, a wound right through his right rib, and three stab wounds to his back, one of which penetrated the right lung (RROA 357-364). The wounds to Mr. Pope's arms were consistent with defensive wounds (RROA 367). Dr. Wright opined that Mr. Pope was stabbed in his bed, but died in the bathroom (RROA 368). Mr. Pope was alive when the wounds were inflicted, and was conscious for a matter of minutes after being stabbed in the heart (RROA 365). Mr. Pope passed out from the loss of blood and when he passed out he no longer had a blood pressure (RROA 364-366). Dr. Wright testified that the amount of blood found on the victim's bed equated to approximately 1/5 of Mr. Pope's blood volume (RROA 343). In the bathroom, there was a pooling of blood at the base of the commode which was consistent with Mr. Pope sitting on the commode while bleeding (RROA 347). Mr. Pope also stood at the sink bleeding and most of the blood came from the wound to his temple (RROA 347). There was a blood smear on the side of the tub which happened when Mr. Pope collapsed in the bathroom (RROA 347-348).

On cross examination, Dr. Wright testified that none of the wounds would have killed anyone quickly (RROA 386). Dr. Wright testified that even if Mr. Pope had only the wound to the

temple, it could have been fatal (RROA 387). Dr. Wright opined that it was difficult to determine how long a person could have survived, but said he could have lived if he had called for help within the first five minutes after the attack (RROA 406). Wright further testified that death may have taken between 15 and 20 and maybe even thirty minutes. (RROA 401-405).

Duest immediately impeached Dr. Wright with his deposition from 1983, during which he testified that it took between two and five minutes for Mr. Pope to die. Turning to the testimony in question, defense counsel impeached Dr. Wright during the following colloquy;

Question: Now, with respect to the amount of time that the victim may have lived, today you indicated that it could have been between fifteen to twenty minutes, is that correct?

Answer: Yes.

Question: Did you ever make a different statement?

Answer: Yes.

Question: In fact during your deposition you testified –
Cavanaugh: Objection.

The Court: Sustained.

Question: What did you testify , what was the different statement?

Cavanaugh: Objection.

The Court: That's all right?

Answer: I don't remember exactly, it's been awhile since I read the deposition, about a week, but it was much shorter than that.

Question: Well, wasn't it five to fifteen seconds?

Answer: Well, that was the minimum time that would be if he lost all his blood pressure from his– I doubt if I said five seconds, I would like to see that.

Question: Would you like to see your deposition to see if that would refresh your recollection?

Answer: That would help. If I said five I was wrong, then it would be ten to fifteen, it's my usual.

Question: I agree, ten to fifteen, ten to fifteen seconds?

Answer: Right, that's how long you have if you have a wound to your heart and immediately drop your blood pressure.

Question: So he could have lived, according to your opinion within a reasonable degree of scientific certainty, could have lived ten to fifteen seconds?

Cavanaugh: Woe, objection to the form of the question, misleading.

The Court: No, you can continue.

Question: Is that your opinion?

Answer: No, not now, I don't think it was then. I think I was giving you, whoever was asking the questions at that time of the absolute, absolute lowest possibility under any circumstances that would be loss of blood pressure immediately from the heart.

Question: It would have been ten to fifteen?

Answer: Right.

Question: Then you also said, but no more than five minutes, is that correct?

Answer: That is what I testified to back then.

Question: That was January 13th, 1993, correct?

Answer: Approximately, I don't remember the exact date, I forgot that.

Question: Well, no more than five minutes, that was 1-13-93?

Answer: Right.

Question: Excuse me, ‘83, correct?

Answer: Yes.

Question: Today, which is 10-12-98, we are talking fifteen to twenty minutes, correct?

Answer: Yeah, even more. I mean part of that he's unconscious. I mean, we were talking about conscious behavior, I could probably go up to half an hour, if that, he would still have at least the threat pulse or E.K.G. of being alive.

Question: Okay, that had he lived that long is your conclusion that had he picked up the phone and telephoned rescue or police that he certainly would have received treatment and that would have saved his life, is that correct?

Answer: Sure, if he had done that during the first five minutes. There is really just no, he would have done fine and then his–as you go further down the line, ten, fifteen minutes it raises the possibility that he could not be resuscitated but he's not going to cross over to 50/50 until pretty late, that in that time period, that is a 50/50 chance of being successfully resuscitated.

(R-ROA 404-405)

During closing argument, counsel relied on Wright's new testimony to negate the aggravating factor of "heinous, atrocious and cruel"[2] and to support the mitigating factor that because the victim was alive and could have recovered had he sought medical attention, appellant never intended to kill his victim. (RROA 881, 884-885).

In the collateral proceedings below, Duest argued that Wright's "changed" testimony regarding the victim's ability to save himself signified that the perpetrator left the victim alive which should have negated a finding of premeditated murder. This changed testimony was either newly discovered evidence or exculpatory evidence improperly withheld by the state in violation of Brady. (PCR 6-14, 28-29). He then argued in the alternative that,

> To the extent that the State will raise as a defense to the Brady claim that resentencing counsel failed to object or raise a Richardson objection, Mr. Duest submits that counsel was prejudicially deficient See Strickland v. Washington, 466 U.S. 668 (1984). The failure by counsel to adequately object, request a Richardson hearing, and preserve such a claim for appeal is a cognizable claim under Rule 3.851 requiring evidentiary development.

(PCR 15).

Although Duest claims that the trial court limited the

[2] Fla. Stat. 921.141 (5) (h).

scope of the evidentiary hearing to preclude testimony on the Brady, the record completely belies that assertion. First, the trial court explicitly rejected the state's argument that the Brady issue was procedurally barred, instead relying on this Court's affirmance after resentencing in Duest v. State, 885 So. 2d 33, 39-40 (Fla. 2003) wherein this Court noted that because Duest attempted to raise the Brady issue on direct appeal, the issue could be properly raised in a collateral proceeding. (PCR 325). Next, the trial court, noting that the record supported Duest's argument that counsel had not objected to the changed testimony or requested a Richardson hearing, granted an evidentiary hearing on the ineffective assistance of counsel claim. Moreover, the trial court's order included the exact language pled in Duest's motion alleging ineffective assistance of counsel[3] based on the failure to present the Brady and Richardson claims recounted above. (PCR 325).[4] Finally, after recounting each of the specific legal claims raised regarding Wright's testimony, the court determined that an evidentiary hearing was required, "solely on these sub-issues relating to

[3] When granting the hearing, the trial court explained, "As this Court has granted an evidentiary hearing solely on the sub-issue involving Dr. Wright's alleged change in testimony, the newly discovered evidence claim is subsumed by the necessity for evidentiary development." (PCR 326.)

[4] The trial court explicitly rejected Duest's claim that he was precluded from presenting evidence on the Brady aspects of his claim of ineffective assistance of counsel. (PCR 392 n.4).

Dr. Wright's alleged change in testimony." (PCR 325). Consequently Duest's request for further evidentiary development must be denied. There was absolutely no impediment to Duest's ability to develop fully any aspect of the issue involving Dr. Wright's testimony.[5]

The sole witness called by Duest at the hearing was former resentencing counsel Carlos Llorente. He was an experienced trial attorney appointed by the court in 1994 to represent Duest in his second penalty phase trial. He received and read the complete original trial file including all the transcripts, motions, and hearings. (PCR 95) While he had no distinct memory of reading the transcript of Wright's deposition, he did review it since he reviewed everything contained in the file. (PCR 96). He was aware of the differences between Wright's testimony during the second penalty phase and his original deposition and trial testimonies because the differences were obvious, although he could not pinpoint the exact moment he noticed the discrepancy. (PCR 96-98) Llorente knew both of the nature of a Richardson hearing as well as the remedies it afforded. He knew

[5] However, even assuming for purposes of this argument that the trial court limited the scope of the evidentiary hearing to the ineffective assistance of counsel claim only, the substance of the Brady claim was an obvious component of the Strickland claim given that Appellant was claiming that counsel was ineffective for failing to preserve both a Brady claim and a Richardson claim.

that although the court could technically strike a witness's testimony if it found a Brady violation, he never saw that remedy employed. (PCR 98-99) Upon review of Wright's 1983 trial testimony and his deposition, Wright only mentioned the survival time during his deposition. He said nothing during the original trial. (PCR 102-103) During the 1998 trial, Wright did not specify the number of minutes Pope may have survived; he only said that he may have survived a "matter of minutes." (PCR 107-110) It was only upon cross examination that Wright mentioned that a person can survive 15-20 minutes after such an attack. (PCR 111). After that, Llorente went ahead and impeached Wright with his previous testimony. Wright conceded the differences and said he was wrong in his 1983 statement. Llorente brought out the inconsistencies 5 separate times during his examination of Wright in the 1998 trial. Llorente succeeded in establishing, through cross-examination of Wright, that Pope might have survived if he had called 911 and sought help. He did affirmatively use this testimony to Duest's advantage although it might have been even more helpful if used during a guilt phase trial. (PCR 111-116).

Llorente also testified that he sought the assistance of Martin McClain during the trial. McClain was a CCRC attorney who represented Duest in the lengthy post-conviction proceedings which culminated in the granting of a new penalty phase trial.

McClain had extensive experience and was considered an "eminent scholar." (PCR 117-118). Altogether, McClain spent 43.5 hours assisting Llorente on the trial. McCLain was in court when Wright changed his testimony, although he was not present during the direct examination. (PCR 120, 123). It was Llorente who elicited differing time estimates of survival and even got the doctor to say that a person might live as long as 30 minutes after such a stab wound. Llorente said that he had not expected Wright to change his testimony but when he did, he was prepared. He elicited favorable information and effectively impeached the State's witness with his prior statements and testimony. (PCR 118-121). Llorente indicated that he believed that the new testimony would have been most helpful in attacking the issue of premeditation and intent to kill issues of the guilt phase but he could only use it to assist in the second penalty phase trial given the status of the case. (PCR 123-124). As noted above, Duest did not a call any other witnesses.

Following the evidentiary hearing, the trial court denied all relief. The trial court rejected Duest's claim that counsel was ineffective for failing to present a Brady claim or for failing to allege a discovery violation under Richardson. The trial court made the following findings:

> At the evidentiary hearing, Mr. Llorente, stated that he did not receive any discovery notice, memorandum or communication from the

> prosecutor that Dr. Wright's testimony would differ from his 1983 testimony. (RROA 16-17). The first time Dr. Wright testified inconsistently with his 1983 deposition testimony regarding the length of time it took Mr. Pope to die was during cross examination. (RROA 28). Mr. Llorente was well acquainted with the record when confronted with the unexpected change in testimony. (RROA 28). Although Mr. Llorente could not recall why he did not object or request a *Richardson* hearing, he testified that he knew what a *Richardson* violation was and that he used the discrepancies in Dr. Wright's testimony to impeach Dr. Wright's credibility before the jury. (RROA 15, 17.) Mr. Llorente further testified that based upon his experience it was unlikely that the trial court would have granted any sanctions for the alleged Brady violation. (RROA 16).

(PCR 393). After identifying the correct standard under Strickland the trial court made the following findings:

> The Defendant's counsel thoroughly investigated the case and was well acquainted with the record when he was confronted with the unexpected change in testimony. While Mr. Llorente could not recall why he did not seek a *Richardson* hearing, it is clear based upon his knowledge of the available remedy, that he made a strategic and reasonable decision to use the change in testimony to impeach Dr. Wright. Mr. Llorente used the inconsistencies in Dr. Wright's testimony several times to attack Dr. Wright's credibility and elicited multiple admissions from Dr. Wright that he made some mistakes.

(PCR 394). Based on the above, the trial court determined that counsel's decision to impeach Dr. Wright rather than request a

Richardson hearing,[6] was a reasonable strategic decision and not deficient performance under Strickland. Duest's disagreement with the strategy employed be Llorente is insufficient to establish his claim. The trial court's legal conclusion was correct. See Stewart v. State, 801 So.2d 59, 65 (Fla. 2001) (finding "[c]laims expressing mere disagreement with trial counsel's strategy are insufficient"); Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) (opining "[c]ounsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct"); Rose v. State, 787 So.2d 7867 (Fla. 1996) (holding disagreement with defense counsel's strategy was not ineffectiveness); Cherry v. State, 659 So.2d 1069 (Fla. 1995) (concluding standard is not how current counsel would have proceeded in hindsight).

The court further found that counsel's failure to request a Richardson hearing, did not undermine confidence in the outcome

[6] Clearly a claim under Brady v. Maryland 373 U.S. 83 (1963) would not have been warranted at resentencing given the fact that resentencing counsel was able to use this information at trial to impeach Dr. Wright. Snelgrove v. State, 921 So. 2d 560, 568 (Fla. 2005) (explaining that if the information was never presented before the jury, Brady is the more appropriate standard for analysis than Richardson).

of the resentencing proceedings. The court concluded that the revised opinions of Dr. Wright did not,

> alter or cast any reasonable doubt about the facts and evidence that Mr. Pope was alive and conscious when he received the multiple stab wounds and that he lived at least several minutes before he died from these wounds of that the aggravators would not have been established or the mitigators would not have outweighed the aggravators in this case.

(PCR 393). The propriety of the trial court's conclusion is underscored by this Court's rejection of Duest's related claim on appeal of the resentencing. Therein, Duest argued that Wright's changed testimony negated the existence of the "heinous atrocious and cruel aggravating factor. This Court rejected that claim as follows:

> Duest asserts that Dr. Wright's testimony that Pope remained conscious for at least fifteen minutes after the attack, and could have survived his wounds had he sought treatment, rendered the evidence insufficient to prove intent to kill. Therefore, according to Duest, the killing could not have been especially heinous, atrocious, or cruel. The State responds that HAC focuses on the circumstances surrounding the death, rather than the defendant's mental state. The State also maintains that Dr. Wright's testimony that Pope suffered twelve stab wounds, including blows to his temple and lungs, that some of the wounds were defensive, and that Pope was conscious for some minutes after the attack provides competent, substantial evidence supporting the finding of HAC.
>
> This Court's role in considering challenges to findings on aggravating circumstances "is

to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997); see also Alston v. State, 723 So. 2d 148, 160 (Fla. 1998).

In several cases, this Court has affirmed findings of HAC as to murders committed by infliction of multiple stab wounds. In Guzman, we stated:

> The HAC aggravator applies only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. Kearse v. State, 662 So. 2d 677 (Fla.1995); Cheshire v. State, 568 So. 2d 908 (Fla.1990). The crime must be conscienceless or pitiless and unnecessarily torturous to the victim. Richardson v. State, 604 So. 2d 1107 (Fla.1992); Hartley v. State, 686 So. 2d 1316 (Fla.1996). The HAC aggravating circumstance has been consistently upheld where the victim was repeatedly stabbed. See, e.g., Finney v. State, 660 So. 2d 674 (Fla.1995); Pittman v. State, 646 So. 2d 167 (Fla.1994); Atwater v. State, 626 So. 2d 1325 (Fla.1993).

721 So. 2d at 1159. Guzman stabbed the victim numerous times with a samurai sword in the course of a robbery. See id. This Court upheld the trial court's finding of HAC, concluding that the wounds were "exemplified by an utter indifference to the suffering of another and the desire to inflict a high degree of pain. The victim was alive and conscious and experienced fear, terror, pain, and foreknowledge of death." Id. at 1160. In Brown, in which the

victim suffered seventeen stab wounds, this Court upheld the HAC aggravator, concluding that the trial court reasonably found that the victim was conscious at the time of the attack and was aware of what was happening. See 721 So. 2d at 278. See also Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987) (HAC upheld where victim was stabbed seventeen times, had several defensive wounds, and remained conscious during the attack).

In this case, Dr. Wright testified that Pope suffered twelve stab wounds, including blows to the back, temple, armpit, and upper right chest. Pope was stabbed in the lung and in the right side of the heart by a blow with a knife sturdy enough to penetrate his ribs. Wright characterized the wounds to Pope's arm and armpit as defensive, and testified that the penetration of the knife into Pope's body would have been painful. After infliction of the stab wounds, Pope remained alive and conscious for as long as fifteen to twenty minutes. The evidence showed that he aspirated blood from the stab wound to his lung. Pope remained on the bed for some minutes after he was stabbed, then walked into his bathroom, where he collapsed and died. 11 The trial court found that Pope "was most certainly in tremendous fear and pain as he struggled against his attacker and thereafter stumbled into the bathroom, where ultimately, he died by drowning in his own blood."

FOOTNOTES

11 Because of Dr. Wright's revised conclusions, this evidence differs in several respects from the evidence on which this Court affirmed the HAC finding in Duest's direct appeal from his judgment and sentence: "The evidence presented at trial shows that the victim received eleven stab wounds, some of which were inflicted in the bedroom and

> some inflicted in the bathroom. The medical examiner's testimony revealed that the victim lived some few minutes before dying." Duest, 462 So. 2d at 449.
>
> As to Duest's claim of absence of an intent to kill, there is little or no basis to conclude that after inflicting the multiple wounds, Duest knowingly left Pope alive and with some prospect for survival. Moreover, unlike CCP, "the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." Brown, 721 So. 2d at 277. Also, HAC connotes an utter indifference to the victim's suffering, see Guzman, 721 So. 2d at 1159, which we find supported by the record.
>
> Duest also asserts that the trial court erred in finding HAC because the evidence suggests that Pope did not seek medical care because he did not consider his wounds life-threatening, rather than because he did not want his homosexual lifestyle discovered, as Dr. Wright speculated. However, the number and severity of the wounds belie the view that the victim, while he remained conscious, would not have appreciated the gravity of his condition. Moreover, regardless of speculation as to why Pope did not call for medical help, the evidence of prolonged suffering is sufficient to support the HAC finding. Accordingly, we conclude that the trial court's finding that the killing was especially heinous, atrocious, or cruel is supported by competent, substantial evidence.

Duest, 855 So. 2d 33 at 45-46 (Fla. 2003). Regardless of how trial counsel decided to attack or impeach Dr. Wright’s altered testimony, which he did do, the fact remains that the evidence

overwhelmingly established the aggravating factor of "heinous, atrocious, and cruel." Nothing presented by Duest at the evidentiary hearing warranted a reversal of this finding. Cf. Rose v. State, 787 So. 2d 786, 797 (Fla. 2001)(upholding a finding that newly turned over evidence was not material under Brady as it did not negate HAC, and that a Richardson claim would also fail as counsel explained that he would not have used the newly turned over evidence anyway); Johnson v. State, 904 So. 2d 400, 404 (Fla. 2005) (upholding summary denial of "newly discovered evidence" claim as defendant could not establish how this evidence would have produced an acquittal at re-trial).

In rejecting the substance of the Brady, claim as it related to the resentencing proceedings, the court determined that counsel was able to thoroughly impeach Dr. Wright regardless of whether counsel was aware of the change in testimony prior to the hearing. (PCR 392). The court noted that the outcome of the proceedings would not have been different, as counsel did not lose any opportunity to impeach Wright or attack his credibility.[7] (Id.)

Second, the court noted,

> Dr. Wright's revised opinions regarding where in the house the stab wounds occurred and the length of time it took the victim to

[7] The trial court did not find that the state knew and withheld evidence that Wright was going to alter his testimony at resentencing in 1998.

> die did not alter or affect the crucial fact that Mr. Pope was alive and conscious when he received the multiple stab wounds and that he lived at least several minutes before he died from these wounds. The State's argument was not inconsistent regarding its theory that the defendant intended to inflict wounds which caused M[sic]r. Pope's death.

(PCR 392). The trial court's ruling was correct.[8] Rose v. State, 787 So. 2d 786, 796 (Fla. 2001)(rejecting Brady claim as recently discovered pictures would have neither negated or confirmed the medical examiner's opinion regarding the length of time it took for the victim to die).

And finally, the trial court determined that the claim of newly discovered evidence must also fall. The trial court found the claim to be untimely and therefore procedurally barred as it was discovered in 1998 and Duest did not present it until 2005. (PCR 395). Alternatively, on the merits, the trial court determined as follows,

> In the instant case, Mr. Llorente, the Defendant's counsel, impeached Dr. Wright during the penalty phase proceeding regarding his revised opinions during cross examination. The evidence of Dr. Wright's revised opinions was known by all of the parties during that proceeding. Therefore, this Court finds that Dr. Wright's revised opinions are not "newly discovered evidence." *See Miller v. State*, 926 So. 2d 1243, 1258 (Fla. 2006).

[8] The trial court also rejected Appellant's claim that the alleged withholding of Wright's testimony entitled him to a new guilt phase proceeding as well. (PCR 391 n. 3.)

> Furthermore, "newly discovered evidence" must be of such a nature that it would probably produce an acquittal on retrial. *McLin v.State*, 827 So. 2d 948 (Fla. 2002) (quoting *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991)). In this case, the Defendant has not established that Dr. Wright's change testimony would have produced an acquittal on retrial. This Court finds that the material elements of Dr. Wright's testimony would have had no impact on the Defendant's intent to kill or the heinous, Atrocious and Cruel (HAC) aggravator in this case. The Florida Supreme Court has already found that there was sufficient circumstantial evidence to support premeditation. *Duest v. State* , 462 So. 2d 446 (Fla. 1985). Therefore, this Court finds that as to remainder of Claim III for which this evidentiary hearing was held, Mr. Llorente was not ineffective and the Defendant is not entitled to a new trial or a new penalty phase proceeding.

(PCR 395-396). The trial court's findings were correct. Obviously Wright's testimony cannot be considered newly discovered evidence for purposes of sentencing because the jury considered it See Rodriguez v.State 919 So. 2d 1252, 1269 (Fla. 2005) (upholding summary denial of Brady claim as evidence allegedly with held was referenced in closing argument of trial).

With regards to the effect that Wright's altered testimony would have had on the guilt phase, Duest cannot explain away the overwhelming evidence in support of premeditated murder. As this Court noted at resentencing:

> In this case, Duest discussed plans to pick up a homosexual man in a bar, accompany the man to his residence and then rob him. There was evidence from which the jury could have concluded that after being picked up in a bar by Pope, Duest returned to an apartment where he was staying and obtained a knife, then went with Pope to Pope's residence. The evidence introduced during the new penalty phase showed that Pope was stabbed twelve times while on his bed, and that some of the wounds were inflicted in his back and some were defensive in nature. After the stabbing, Duest took Pope's jewelry and car.

Duest, 855 So. 2d at 44-45. The severity and the number of stab wounds also refute any notion that the killer did not have the requisite intent to murder the victim. This Court stated:

> In this case, Dr. Wright testified that Pope suffered twelve stab wounds, including blows to the back, temple, armpit, and upper right chest. Pope was stabbed in the lung and in the right side of the heart by a blow with a knife sturdy enough to penetrate his ribs. Wright characterized the wounds to Pope's arm and armpit as defensive, and testified that the penetration of the knife into Pope's body would have been painful. After infliction of the stab wounds, Pope remained alive and conscious for as long as fifteen to twenty minutes. The evidence showed that he aspirated blood from the stab wound to his lung. Pope remained on the bed for some minutes after he was stabbed, then walked into his bathroom, where he collapsed and died. 11 The trial court found that Pope "was most certainly in tremendous fear and pain as he struggled against his attacker and thereafter stumbled into the bathroom, where ultimately, he died by drowning in his own blood."

Duest, supra 855 So. 2d at 46. This Court further explained:

> As to Duest's claim of absence of an intent to kill, there is little or no basis to conclude that after inflicting the multiple wounds, Duest knowingly left Pope alive and with some prospect for survival.

Id,at 47. The fact that Mr. Pope may have lived had sought medical attention does negate all the purposeful action of Duest, including Duest's admission that he planned to rob a gay man after picking him up in a bar, he procured a knife before driving home with the victim, he stabbed the victim eleven times, some of the stab wounds were in vital organs and the wounds were inflicted with tremendous force, and Duest was later seen with blood on his sleeve carrying the victim's jewelry and driving the victim's car. See Perry v. State, 801 So. 2d 78, 85-86 (Fla. 2001) (upholding finding of premeditation as multiple stab wounds to vital organs is evidence of premeditation); Floyd v. State 850 So. 2d. 383 396 (Fla. 2002) (explaining that predetermined choice of weapon is relevant in determining premeditation).[9]

[9] Apelles asserts that Wright's changed testimony cannot be considered **newly** discovered evidence for purposes of the guilt phase because Dr. Wright testified in his deposition that Mr. Pope could have and should have called for help rather than attempt to render first aid to himself. Wright also speculated that all of the wounds were inflicted in the bedroom and Pope went into the bathroom afterwards. As such, guilt phase trial

Moreover, Duest never challenged the sufficiency of the evidence of premeditation at the guilt phase. His sole defense, presented through the testimony of eleven witnesses, was that he did not commit the murder because he was in Massachusetts at the time of the crime. In fact the closing arguments of both the state and the defense focused on the credibility of the alibi defense. (ROA 1394-1508). Consequently, this evidence would have been irrelevant to the defense presented. Cf. Melton v. State, 949 So. 2d 994, 1012-1013 (Fla. 2006) (rejecting claim of newly discovered evidence as it contradicts defendant's earlier version); Scott v. Dugger, 634 So. 2d 1062, 1065 (Fla.1994) (same).

In summary the trial court's rejection of every challenge related to Dr. Wright's changed testimony was proper. Wright's altered opinion regarding the amount of time that Pope lived and was conscious, in no way refutes the overwhelming evidence of premeditation. Duest procured a weapon before going to the victim's house and stabbed him twelve times. Simply because Duest did not stick around to watch Mr. Pope try and save himself and then bleed to death, does not negate premeditation. Perry; Floyd. More, because premeditation was not even a

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counsel could have presented this information at trial. Instead, counsel relied solely on an alibi defense. There was no claim presented in these proceedings that guilt phase counsel was ineffective for failing to present this claim at trial. (SROA 1-17).

contested issue at the guilt phase, the jury was never told how long it took Mr. Pope to die or how long he remained conscious. Consequently, Wright's changed testimony is irrelevant to the guilt phase. Melton; Scott

Second, with respect to the resentencing jury, they obviously were able to consider Wright's testimony in arriving at the recommendation of death. Counsel impeached Wright; he used it to negate a finding of "heinous, atrocious, and cruel" and he offered it as mitigation in an attempt to show that Duest did not intend to kill the victim. Duest has not alleged or presented at the evidentiary hearing what other alternatives were available to Mr. Llorente. Nor has he established that trial counsel's decision to impeach Wright rather than pursue a different strategy was deficient under Strickland. Cf. Rose.

Third, Wright's did state in his deposition testimony that Pope was ambulatory, he tried to offer first aid to himself and it was unusual in Wright's opinion that Mr. Pope he did not seek help. He speculated that because Mr. Pope was a homosexual, he was reticent in calling authorities. Consequently, Wright's opinion in 1998 was not new. Rodriguez, supra.

B. The Garfield Memorandum

Duest maintains his allegations that the state withheld evidence following his discovery of a previously undisclosed memorandum written by ASA Richard Garfield, the original

prosecutor in Appellant's 1983 trial and sentencing, following public records disclosures pursuant to Fla. R. Crim. P. 3.852. Appellant argues that it was error for the trial court to summarily deny this claim. The State disagrees, as the trial court correctly summarily denied this claim as it legal untenable and refuted from the record.

Generally, a defendant is entitled to an evidentiary hearing unless the post-conviction motion or any particular claim in the motion is legally insufficient or the allegations in the motion are conclusively refuted by the record. Nixon v. State, 932 So. 2d 1009, 1018 (Fla. 2006); See Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000). In order to support summary denial, the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claims. See Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993). The burden is on the defendant to establish a legally sufficient claim. See Freeman, 761 So. 2d at 1061.

In his initial motion, Duest argued that within this memorandum, Assistant State Attorney Richard Garfield made the following "critical statement" concerning the case: "The case is borderline on sufficiency of evidence, which is totally circumstantial." Because this memorandum had not been previously disclosed, the State had violated Brady.

In relying on the state's reasoning presented in its response to the postconviction motion, the court found the claim to be without merit stating:

> The Defendant argued that the memorandum written by former Assistant State Attorney Richard Garfield is *Brady* material. The Defendant claimed that since the document was not disclosed previously, a *Brady* violation occurred. The statement at issue in the memorandum was: "[t]he case is borderline on sufficiency of evidence, which is totally circumstantial." (Defendant's Motion p.19)
>
> The State counter-argued, and this Court agrees, that the Defendant has not satisfied the elements of *Brady*. The statement at issue was the opinion of an attorney, and therefore not discoverable. It was privileged and therefore not *Brady* material. *See, Williamson v. Dugger,* 651 So. 2d 84 (Fla. 1994); Fla. R. Crim. P. 3220(g). Further, the State argued that "at no point in the memo did Garfield cast doubt on Duest's guilt or participation in the crime." (State's Response p. 39). This Court agrees with the State that this "Garfield" sub-claim lacks merit and does not require an evidentiary hearing.

(PCR. 326). That ruling should be affirmed as it is supported by the record.

On appeal, Appellant still fails to make any showing that this document is, in fact, Brady material.[10] Initially, the

[10] Recently, this Court discussed the standard of review applied to Brady claims. "To establish a Brady violation, the defendant must show the following: (1) that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the

prosecutor's **impressions** of the strength of his case are not subject to discovery, and therefore, not subject to Brady.[11] Contrary to Appellant's argument, the trial court correctly relied upon Williamson v. Dugger, 651 So. 2d 84 (Fla. 1994) and did not run-afoul of Young v. State, 739 So. 2d 553 (Fla. 1999), and it's progeny.

In Young, this Court reiterated that Brady material is subject to disclosure, whether it is classified as attorney work product Young, at 385. The state does not disagree with that legal premise. What distinguishes this case from Young and Rogers v. State, 782 So.373 (Fla.2001 2d 373 (Fla. 2001) is that the information in those cases was either descriptions/references to statements made by critical witnesses regarding facts in dispute, or information garnered from investigations implicating other suspects.

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suppression resulted in prejudice. Rogers v. State, 782 So.2d 373, 378 (Fla.2001) (citing Strickler v. Greene, 527 U.S. 263, 280-82, 119 S.CRROA 1936, 144 L.Ed.2d 286 (1999)). Brady claims are mixed questions of law and fact. Rogers, 782 So.2d at 376-77. When reviewing Brady claims, this Court applies a mixed standard of review, "defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law." Lightbourne v. State, 841 So.2d 431, 437-38 (Fla.2003) (citing Stephens v. State, 748 So.2d 1028, 1031-32 (Fla.1999)).” Johnson v. State, 30 Fla. L. Weekly S215 (Fla. Mar. 31, 2005). See Jones v. State, 709 So.2d 512, 519 (Fla. 1998); Hegwood v. State, 575 So.2d 170, 172 (Fla. 1991); Strickler v. Greene, 527 U.S. 263, 280-82 (1999); High v. Head, 209 F.3d 1257, 1265 (11th Cir. 2000); U.S. v. Starrett, 55 F.3d 1525, 1555 (11th Cir. 1995).

[11] Florida R. Crim. Pro. 3220(g)

In Young the prosecutor's notes referenced **testimony** about the sequence of gun shots heard which was critical to Young's self defense theory. Id. 739 So. 2d at 560-561. Similarly in Rogers, the information in question was a second **confession** by a co-defendant McDermid, a main witness against Rogers; a cassette tape of McDermid wherein it appears that he give inconsistent statements; and a police report regarding another robbery which implicated other potential suspects in this case. Rogers 782 So. 2d at 381-382. Herein there is no tangible information that can be considered exculpatory or likely to lead to exculpatory evidence. It is the **mental impression** of the prosecuting attorney, having no evidentiary value and thus, outside the purview of Brady. As such, the trial court correctly relied on Williamson, in ruling that the memorandum is not subject to disclosure. However, even if this Court were to find that Young is controlling, the trial court still conducted a merits analysis; agreeing with the State in finding the document to have no Brady material.

Placing this statement in its proper context, it is clear that Garfield was offering an observation on the posture of the case prior to trial and attempting to focus his investigator to

the task of locating a witness, Joann Wioncek, who had proven to be rather difficult to find.[12]

The trial court agreed that Garfield's observation was an opinion about the status of the case. The court further recognized that the prosecutor did not cast doubt on Duest's guilt or participation in the crime. (PCR 325-326).

Appellant's claim that if counsel had known of this memorandum "it would have provided counsel with ammunition with which to not only cross-examine witnesses but also to question the good faith of the State's prosecution of Appellant for first-degree capital murder and provide counsel with strong support of his motion for judgment of acquittal" (IB. 34-35) is patently absurd, completely unsubstantiated and has no basis in law. Garfield's comments are neither material nor exculpatory and the document is not subject to Brady. The summary denial of this claim should be affirmed.

C. The Polygraph Examination Notes

Next, Appellant argues that the State did not comply with Brady in failing to disclose certain polygraph information, including David Shifflett's polygraph examination, and further contending that the state has other witnesses who have been polygraphed which have not been disclosed. Appellant argued

[12] In fact, Joann Wioncek was located and testified at trial to the substance of which Garfield referred.

below that the State violated Brady in not disclosing David Shifflett's polygraph examination. Appellant further complained that if the State administered a polygraph to Shifflett, they probably also administered polygraphs to others as well, therefore those results must turned over as well. In its order, the trial court summarily denied this claim on the merits:[13]

> The Defendant claimed that the State failed to comply with its ongoing obligation to disclose information pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and the State should therefore be ordered to disclose any and all information in its possession relating to witness polygraphs. The Defendant also argued that the State's failure to disclose the polygraph of Mr. David Shifflett, and the note indicating the administration of such an examination, violated Brady. The Defendant noted that one of the witnesses was Mr. Shifflett, who was the victim's roommate. (Defendant's Motion pp.6-7, ¶ 3-4)
>
> The State counter-argued that the claim regarding Shifflett's polygraph examination must be denied as it is refuted by the record, no Brady violation existed and the claim is without merit. The State also counter-argued that the Defendant's allegation of other witnesses being polygraphed is a "bald allegation and as such is insufficiently plead." After a review of the Defendant's argument, the State's Response and the record, this Court finds that the Defendant has not satisfied the requirements set forth by the United States Supreme Court in Brady and its progeny…

[13] The trial court combined claims II and a sub-claim in claim III as they were essentially the same issue. The trial court addressed the merits of the claim under issue II in its order.

> This Court further finds that the Defendant has not shown that (1) the evidence at issue is favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence has been suppressed by the State, either willfully or inadvertently; and (3) the Defendant has been prejudiced by the alleged suppression of this evidence… Therefore, this court finds that Claim II is without merit, does not require an evidentiary hearing and is denied.

(PCR 399-400). The trial court's ruling should be affirmed as it is supported by the record.

Appellant claimed that pursuant to public records demand he discovered police notes and a police report indicating that witness David Shifflett had been administered a polygraph examination. He alleged that this information was impermissibly withheld from him since 1983. He further alleged that other "witnesses" were also polygraphed by law enforcement and impermissibly withheld. In further support of this allegation, Apellant continues to make the assertion that the Broward County State Attorney's Office "[u]nfortunately... has a track record of failing to disclose the fact that prosecution witnesses were polygraphed and the reports generated from the polygraph examinations. " (IB. 39). The state asserts that summary denial was proper for several reasons.

First, the records relied upon in support of this claim also indicated that Shifflett **passed** the polygraph and the

questions asked of Shifflett were as follows, "At the conclusion of the test [polygraph], this writer was advised by Deputy Vincel that there was no indication in the polygraph administered including the **key questions whether or not Shifflett participated in, set up, or actually murdered the deceased, John Pope."** (PCR 41-45). Duest has not established how this evidence is anyway exculpatory.

Second, this Court has rejected the identical claim, noting, the results would not have been admissible at trial without the consent of both parties. Sochor v. State, 883 So. 2d 766, 787 (Fla. 2004), citing Walsh v. State, 418 So. 2d 1000, 1002 (Fla. 1982). Third, Appellant's claim that the state has and continues to withhold evidence of other polygraph examinations was insufficiently pled and did not warrant an evidentiary hearing. Wright v. State, 857 So.2d 861, 869-870 (Fla. 2003) (rejecting as speculative a Brady allegation that the possibility that undisclosed information may be helpful warrants an evidentiary hearing); Gore v. State, 846 So. 2d 461, 466 (Fla. 2003) (same).

In so far as Appellant relies on Jacobs v. Singletary, 952 F. 2d 1282 (11th Cir. 1992) for support, such reliance is misplaced. First, there is absolutely no finding by the Eleventh Circuit that the State Attorney's Office has a history of violating Brady by not providing polygraph examinations to

defendants. Second, the facts and holding of Jacobs are distinguishable from the case at bar. While in Jacobs the State conceded that it failed to provide a copy of the examiner's report to the defense, the polygraph submitted in Jacobs and it's results were vastly different than the submission and results in this case.

In Jacobs, the polygraphed witness was the only eyewitness to testify that the defendant had fired the first shot resulting in the death of a police officer. The Eleventh Circuit found that the polygraph testimony differed significantly in several areas with that of the witnesses' trial testimony, particularly whether Jacobs had fired at the officer. Furthermore, in concluding Jacobs was entitled to a new trial, the court held:

> We find that Rhodes' polygraph testimony significantly clashes with his statements at trial, and was more damning than other equivocal statements made by Rhodes and available to the defense. Under Florida rules of evidence, the defense could have entered this report both to impeach the witness and to establish the truth of the matter asserted. See Fla. Stat. Ann. §90.801(2) (West 1979). The examiner's report, if accepted as the truth, impeaches Rhodes' inculpatory trial testimony on several issues which centrally concern Jacob's guilt or innocence.

Id. at 1289.

In the instant case, a polygraph administered to David Shifflett, the roommate of the victim who was not an eyewitness

to the crime. His only relevant testimony was that he arrived at the scene and notified the police something was amiss at the victim's house. Thereafter, the body was discovered by the police. (ROA 482-517). Shifflett's materiality as a witness is virtually insignificant compared to the witness in Jacobs. Even if Appellant wanted the jury to consider Shifflet a suspect, the fact is, he passed the examination, and there is no evidence linking him to the crime whatsoever.[14]

Appellant's unsubstantiated claim that the State is "hiding something" of a relevant and exculpatory nature and therefore an evidentiary hearing was warranted, was properly denied. Sochor this particular claim. This court must affirm. Wright, supra Gore supra.

ISSUE II

APPELLANT'S CLAIM THAT HE RECEIVED INEFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE DUE TO THE PRESENTATION OF A MENTAL HEALTH EXPERT AT SENTENCING AND COUNSEL'S FAILURE TO PRESENT

[14] Duest further argues that defense counsel was affirmatively misled by Detective Lauria while being deposed. He claims he discussed his contact with David Shifflett but never mentioned he had a polygraph administered. Appellant was unable to show, nor has he shown here, how this claim prejudiced his penalty phase proceeding and therefore, lacks merit. Moreover, the claim is refuted from the record and meritless. During his entire deposition, Lauria was never asked about polygraph examinations of anyone under investigation, including David Shifflett Lauria did not hide the fact he had contact with Shifflett and when asked is there anything further that you did on this case, he responded "Not that I can think of." Defense counsel never followed up with any further inquiry.

ADDIITONAL FAMILY MEMEBERS AT SENTENING WAS PROPERLY DENIED WITHOUT A HEARING.

Here, Appellant raises two specific claims alleging that resentencing counsel Carlos Llorente, was ineffective in two respects. First, counsel failed to present all of his witnesses at the penalty phase. Counsel presented eleven witnesses at the penalty phase and an additional seven witnesses at the Spencer hearing. Duest argues that all eighteen should have been presented at resentencing and his failure to do so was deficient performance under Strickland v. Washington, 466 U.S. 688 (1984). Second, counsel should not have presented Dr. Patricia Fleming as a mental health expert witness at resentencing. Duest contends that "given the lack of significant testimony" presented by Dr. Patricia Fleming as an expert witness for Duest, counsel's decision to call her as a witness was "patently unreasonable" in that her testimony opened the door to some of Duest's prior criminal history. The court summarily denied the Spencer issue agreeing with the state that the Spencer hearing evidence was cumulative to the evidence presented at resentencing, consequently, appellant had not established prejudice. (PCR 326-327). The trial court found the allegation involving Dr. Fleming procedurally barred as the substance of it was raised and rejected on direct appeal. (PCR 327). The trial court's rulings were correct.

For a defendant to prevail on an ineffective assistance of counsel claim, he must establish (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 assessing an ineffectiveness claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89.

At all times, the petitioner bears the burden of proving not only that his counsel's representation fell below an objective standard of reasonableness, but also that he suffered actual and substantial prejudice as a result of the deficient performance. In order to demonstrate prejudice, the petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" Id. at 694. Thus, the petitioner must show not only that his counsel's performance was below constitutional standards, but also that he suffered prejudice as a result of this deficient performance. The burden of proof for showing ineffective assistance is, and remains, on the defendant. Roberts v. Wainwright, 666 F.2d 517, 519 n.3 (11th Cir. 1982). See also Johnston v. Singletary, 162 F.3d 630, 635 (11th Cir. 1998).

Spencer Hearing Witnesses

Duest maintains he was prejudiced by counsel's omission to present the subsequent Spencer hearing witnesses in that the jury was deprived of significant mitigating evidence. Appellant speculates that due to counsel's failure to prepare, these witnesses were not presented at resentencing. The record completely rebuts Appellant's allegations.

As noted above, the trial court found that appellant could not establish prejudice as the evidence presented at the Spencer hearing was merely cumulative as to what was presented at resentencing. The record supports that assessment. The witnesses who testified on behalf of Duest at the Spencer hearing added nothing further to mitigation would have had any impact on the jury's recommendation.

The gist of testimony of family and friends before the jury at resentencing was follows:

Maria Craig testified that Duest was "there to talk [to her] about family troubles" and if she did something bad "[he] would get on her like a father would" (RROA. 787); Joseph Deavea testified he knew Duest had problems with drugs and knew of the abuse he had grown up with (RROA 776-781); Nancy Kerrigan testified as to Duest's abuse at the hands of their father, Duest's drug abuse and the fact that he was a good uncle to her children (RROA 750-775); Nancy Duest testified to Duest's

abusive upbringing, and Clare Guzzetti testified to Duest's abusive upbringing and that Duest kept in contact with her through his writings. Finally, Richard Duest testified and acknowledged he had been abusive to his son (RROA 734).

At the Spencer hearing, Duest's counsel presented the videotaped depositions of seven witnesses. He had traveled to Boston for prepare their depositions. The record supports the finding that the evidence was cumulative at best Deborah Levanche, Duest's younger sister, testified that Duest had suffered abuse growing up, had been in prison, abused heroin, was an artist and a "beautiful person". (RROA 941-49) Paul Duest, Jr., Duest's brother, testified that his family loves Duest, that Duest is good to his children, and Duest is a fantastic artist. (RROA 957-58, 959) Edward Lavanche, friend of Duest, testified Duest was a good worker and a talented artist Lillian Duest, sister-in-law to Duest, testified that Duest communicates with her family in a "positive way" and that he did "beautiful" paintings. Jennifer Duest, Duest's niece, testified that Duest gives her good advice about school. Another niece, Darlene Duest, testified that the last time she had seen Duest was ten years prior to 1998 but that he has communicated with her since and given her advice. Leighanne Duest, Duest's fourteen-year old nieces, testified that she had met Duest nine years prior to her testimony and that they would correspond back

and forth and talk on the phone every once in awhile. (RROA 982-84)

If one were to amalgamate this Spencer hearing mitigation testimony, the essence of it would be: Duest was abused as a child; had an ongoing substance abuse problem; is a gifted artist; and, keeps in contact with family members, offering advice from time to time. Accordingly, from the foregoing, even if this court were to find counsel's performance deficient in not presenting these witnesses to the jury, there is absolutely no prejudice inuring to Duest Their testimony is cumulative to the testimony presented by family members and **expert witnesses** at the penalty phase.[15] Marquard v. State, 850 So. 2d 417, 429-430 (Fla. 2002)(explaining, "[a]lthough other witnesses could have provided more details relative to Marquard's early life, counsel is not required to present cumulative evidence."); Rhodes v. State, 33 Fla. L. Weekly S190 (Fla. March 13, 2008)(same).

With regards to Appellant's baseless assertion that counsel's lack of preparation was responsible for the failure to

[15] Furthermore, all of these witnesses indicated to the court that they desired the court to spare his life, testimony which would not have been permitted before the jury. See Card v. State, 803 So.2d 613 (Fla. 2001) (victim's granddaughter improperly gave opinion as to appropriate punishment for defendant at Spencer hearing; Floyd v. State, 569 So.2d 1225 (Fla. 1990) (victim's daughter precluded from giving opinion defendant should not be given death penalty).

present all the witnesses at resentencing, the record completely refutes that allegation. As early as September 15, 1997, counsel was prepared to present eighteen witnesses for the resentencing hearing. (RROA 60). Counsel advised this court of his intention to present these witnesses throughout preparation for the hearing. (RROA 67, 134, 136). In June of 1998, the trial court set the resentencing trial date for September 28, 1998. (RROA 134). Due to a hurricane and the illness of the prosecutor, the hearing did not proceed as scheduled. (RROA 206-207). Shortly thereafter, Mr. Lorente, filed a motion for an emergency continuance based on several reasons.[16] Due to the postponement of the hearing, many of appellant's family members refused to alter their schedules to come and testify. (RROA 208-210) 213-214). Based on the trail court's extensive inquiry, Appellant detailed for the court the identity of witnesses who were willing to come and what their testimony would be in comparison to those who would not come. (Id.). The court noted that it had authorized $18,000.00 in travel expenses for these individuals. (RROA 208). She then instructed Appellant as follows:

[16] One of the reasons was based on counsel's desire to further explore mitigation evidence related to Duest's long time incarceration. (RROA 252, 165, 172). Although the continuance was denied, Dues did in fact present expert testimony on that area of mitigation through John Boone. (RROA 591-605).

> COURT: Let me just tell you this. You're coming back here this afternoon at 3:00. You will have contacted all of these folks and tell them that at this point it looks like they're going to need their reservations. You're the one buying the ticket. The county is buying the ticket. That's not an expense to them. If they're that close to this man, I'm sure they'll make arrangements. I can't help a natural disaster. They probably knew that. They have televisions. They knew we were under the hurricane situation. I'll see you back at 3:00.

(RROA 215). Following the recess, the court inquired further, seeking more details regarding the identity of the witnesses and nature of the testimony to be presented. (RROA 151-156). It is clear from the record that the witnesses were all family and friends and they would all testify about the appellant's background. (Id.) The court denied the motion for continuance and ruled as follows:

> COURT: Motion for continuance is denied. Any defense witnesses who are unable to make their arrangements to be here to testify, certainly, if there is a death recommendation there will be a Spencer hearing and they'll have an opportunity to appear at that time and give their full testimony to this Court.

(RROA 176). The resentencing commenced three days later.

This record demonstrates that Mr. Llorente was prepared to present eighteen witnesses at resentencing and had secured the necessary funds for that purpose; several of those witnesses,

refused to change their plans following the week postponement; the trial court denied counsel's request for a continuance; the hearing commenced three days later. Failure to present these witnesses was not the result of deficient performance from Mr. Llorente. Cf. Bush v. Wainwright, 505 So. 2d 409, 411 (Fla. 1987 (explaining simply because a strategy is unsuccessful, does not support a finding that counsel was deficient).

In any event, he trial court properly determined the record refutes this claim in its entirety as the Spencer hearing witnesses only offered were cumulative evidence.

Dr. Patricia Fleming's Testimony

Appellant's claim that counsel was ineffective for presenting Dr. Patricia Fleming as an expert at resentencing. Specifically he alleges that that her direct testimony opened the door to some of Duest's prior criminal history, and because her testimony was "insignificant" counsel should have never allowed her to testify. The trial court correctly found this claim to be procedurally barred.

The State contends that this claim is procedurally barred as it has been fully and finally litigated on appeal. Duest may not recast an appellate issue as one of ineffective assistance and obtain a second review. Although an ineffectiveness claim is cognizable in postconviction, presentation of the claim is not valid when used to re-litigate an issue previously raised and

rejected on appeal. Valle v. State, 705 So. 2d at 1331, 1336 n. 6 (Fla. 1997)(upholding procedural bar on a claim of ineffective assistance of counsel regarding counsel's failure to preclude admission of non statutory aggravating factors as admissibility of that evidence was reviewed on direct appeal); Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995)(finding ineffective of counsel claim for failing to properly challenge the admissibility of Harvey's prior escape procedurally barred as the admissibility of that evidence was upheld on direct appeal); Rivera, 717 So. 2d 477, 480 n.2 (Fla. 1996) (finding it impermissible to recast claim which could have or was raised on appeal as one of ineffectiveness to overcome procedural bar or re-litigate appellate issue); Rollings v. State, 825 So. 2d 293, 296 (Fla. 2002)(same); Cherry, 659 So.2d at 1072 (Fla. 1995)(same).

The procedural posture of this case is directly on point with Valle and Harvey. At resentencing and on appeal, Duest challenge the propriety of Dr. Fleming's cross-examination testimony. Therein appellant alleged that his due process rights were violated because the state was allowed to present improper nonstatutory aggravating factors. This Court addressed Duest's arguments on this issue as follows:

> We reject the remaining issues raised by Duest as without merit Specifically we hold that the trial court did not err...(3) in

> allowing the State to elicit testimony from Dr. Fleming identifying Duest's prior offenses after the witness stated that she considered the convictions in formulating her opinions (issue 7), see Johnson v. State, 608 So.2d 4, 10-11 (Fla.1992); Sec. 90.705(1), Fla. Stat.

Duest, 855 So.2d 33, 49 (Fla. 2003). Consequently, because the propriety of appellant's prior non violent convictions has previously been upheld by this Court, review under the guise of ineffective assistance of counsel is barred. [17]

Irrespective of the procedural bar, Appellee would make the following argument regarding the merits. In this case, there is no reasonable possibility that any error affected the jury's recommendation. Duest's assertion that Fleming's testimony was **the** reason why his prior record was admissible is incorrect. Dr. Fleming was not permitted to discuss the details of the prior crimes, she only listed them. Moreover, the State was asking for the prior violent felony conviction aggravating circumstance, therefore, the jury already knew that Duest had a

[17] Actually, on appeal, Duest made two additional challenges regarding the substance of Dr. Fleming's testimony. Appellant challenged the trial court's sustaining of an objection to a question asked of Dr. Fleming as to whether she found any mitigating circumstances and appellant challenged the trial court's refusal to instruct the jury on the two statutory mental health mitigators. 921.141 (5) () & (). Duest v. State, 855 So. 2d 33, 39 n. 4 (Fla. 2003).

prior criminal history (R. Vol. 3 pp. 391-400).[12] And the record demonstrates that regardless of whether Fleming testified, the jury was well aware that Duest had a prior history. Duest introduced in mitigation the testimony of John Boone. Mr. Boone, who was the Commissioner of Corrections for Massachusetts, during Duest's incarceration, testified as an expert in the field of corrections. (RROA 592-604)). His testimony centered on the deplorable described the conditions at the maximum security unit of Walpold. Boone gave extensive testimony regarding the conditions at Walpold and its effect on a young person. This jury was well aware that Duest had been previously incarcerated at Walpold at the age of nineteen. In fact when referring to Boone's testimony this Court stated:

> The man's testifying, obvious, that this man has been in prison before. I mean, it doesn't take a rocket scientist to find that out, you know, to figure out that he wasn't there visiting.

(RROA 619). Because the jury knew that Duest had a prior record, through the state's case in aggravation as well as his

[12] While the state understands that the felonies relied upon for the aggravator were not addressed during the cross-examination of Dr. Fleming, the fact remains that the jury already knew that Duest had a criminal history.

own case in mitigation, Duest cannot establish the decision to call Fleming was prejudicial under Strickland.[18]

And finally, Duest's characterization of Fleming's testimony as being insignificant is patently incorrect. Dr. Fleming's testimony corroborated the testimony of appellant's other witnesses. Fleming, an **expert** witness in the mental health field, conducted an evaluation of Duest in 1989. She confirmed what everyone else had testified to; that, Duest had been the victim of abuse within his family and later developed a substance abuse problem. Dr. Fleming was the only mental health expert presented by Duest in mitigation. Dr. Fleming testified fully about her psychological findings regarding Duest's mental health and his traumatic upbringing. Those findings bolstered the testimony of appellant's other expert Mr. Boone.[19] Specifically, Dr. Fleming testified that Duest was a shy child, had low self esteem, and little self confidence. She found that Duest's father was an alcoholic, and he severely beat Duest.

[18] Moreover, the fact that the jury knew about additional crimes for larceny and breaking and entering, did not cause Duest to receive a death sentence. Cf. Rivera v.State, 717 So. 2 477, 486 (Fla. 1998) (upholding death sentence in spite of the fact that two prior convictions had since been vacated.).

[19] Dr. Fleming was classified as an expert in psychology and testified that she relied on his criminal history to understand him, and to understand the impact of incarceration on his drug addiction. She reviewed all of the information and all of the convictions both in Massachusetts and Florida (RROA Vol. 6 pp. 719-720, 722).

Dr. Fleming opined that Duest was the product of an abusive/dysfunctional family, was neglected as a child, had a brain dysfunction, and drugs and alcohol had a strong influence in his life. Duest suffered because he was the focus of his father's attention and could never please his father. Duest was influenced by his cousin Ritchie, and the two sampled drugs, including marijuana and heroin. Duest did not detail for her his incarceration at Walpold. Dr. Fleming testified that Duest was a heroin addict when he left Walpold, but he is not an addict now.

Her confirmation of Duest's background, in and of itself, from Duest's *only* mental health expert was vitally significant for the jury to hear. Counsel was keenly aware of this, highlighted when reading his entire closing argument in context: "Read the mitigators, listen to the Judge when she tells you what the mitigators are, that's what they're there for. You have an expert's opinion from Dr. Patricia Fleming who interviewed him. She thought he was rehabilitatible[sic]. She confirmed the background. She confirmed what Mr. Boone told you, that's an expert. The Judge will instruct you on how you should take expert's testimony the same way as Dr. Wright testified, Doctor Patricia Fleming is also an expert Mr. Boone was an expert." (RROA 892)(Emphasis added)

Dr. Fleming's testimony gave credibility to other lay witnesses testimony[20] and helped established the basis for mitigators, amplified by the courts sentencing order wherein the court found the following relevant non-statutory mitigators: alcohol and drug abuse (some weight); physical and emotional abuse as a child (great weight); and, willingness and ability to rehabilitate (little weight). She also testified that he suffered from some type of brain dysfunction as an infant but could not determine how this impaired Duest. Presentation of Dr. Fleming was not deficient under Strickland. See Cave v. State, 899 So. 2d 1042, 1058 (Fla. 2005)(finding counsel's decision to pursue statutory mitigator that opened door to prior criminal history not unreasonable where finding of that mitigator was crucial to overall mitigation strategy).

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court AFFIRM the trial court's denial of Appellant's postconviction challenge to his conviction and sentence of

[20] It is noteworthy that the jury was instructed as to following non-statutory mitigators (among others): that Duest had grown up in an abusive household; that he was an artist; that he was under the influence of drugs at the time of the offense; and, that he demonstrated concern for the well-being of others. (RROA 900). The evidentiary foundation for these non-statutory mitigating instructions came from testimony presented by Duest's witnesses at the penalty phase.

death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Todd G. Scher, 5600 Collins Ave #15-B, Esq., Miami Beach, Fl. FL 33140 this 21st day of April, 2008.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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