IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-648

FRED ANDERSON, JR.

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

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

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STATEMENT OF THE CASE

The Statement of the Case set out on pages 1-3 of Anderson's brief is argumentative and is denied. The State relies on the following statement of the case and the underlying facts, which is taken from this Court's direct appeal decision affirming Anderson's convictions and sentence:

> We have for review a judgment of conviction of first-degree murder and sentence of the trial court imposing the death penalty upon Fred Anderson, Jr. We have jurisdiction pursuant to article V, section 3(b)(1), of the *Florida Constitution*. For the reasons expressed below, we affirm Anderson's convictions and sentences for grand theft of a firearm, robbery with a firearm, attempted first-degree murder, and first-degree murder.
>
> On March 20, 1999, appellant Fred Anderson, Jr. robbed the United Southern Bank (USB) in Mount Dora, Florida, and shot two tellers, Marisha Scott and Heather Young. Young was killed, but Scott survived.
>
> At trial it was revealed that Anderson was on community control for a conviction of grand theft. He was ordered to pay restitution in excess of $ 4,000, but he paid less than $ 100. On March 15, 1999, Anderson was found to have violated his community control and was ordered to spend one year at a probation center beginning March 19. To obtain the funds to pay the restitution, Anderson decided to rob the Mount Dora USB, and, on March 18, 1999, he visited a member of his church at the USB where she worked as a part-time teller. Anderson also stole a loaded .22 caliber six-shot revolver from a neighbor's storage building. The gun fired heavier ammunition than a normal .22 caliber revolver and was a single action revolver, which meant that the hammer had to be pulled back and cocked each time the gun was fired.
>
> On the morning of March 19, Anderson went to the USB under the pretense that he was a student writing a paper on banking and finance. He spoke with Scott and

met with the bank manager, Allen Seabrook. Anderson took particular note of the bank's security VCR, which was kept in Seabrook's office. His plan was to deposit the robbery money into a new bank account at a second bank. After visiting the second bank, Anderson telephoned his supervisor and told her he had the money to pay off the restitution.

On March 20, a Saturday, Anderson obtained a second .22 caliber revolver from his mother's house, and then went to the USB with orange juice and doughnuts under the ruse that he wanted to thank the employees for their help. USB was scheduled to close at noon and Young and Scott were the only people working. Shortly before noon when no customers were present, Anderson told Young and Scott that he was going to his car to get his business card. Anderson returned with the two revolvers and ordered Young and Scott into the bank vault where he ordered them to fill a trash liner with money. Anderson then shot the two tellers. Scott was left paralyzed but was able to testify at trial. She testified that Anderson asked which one of them wanted to die first. Scott said she begged not to be shot. [FN1]

> [FN1] Anderson fired ten shots, hitting the victims nine times. The single action revolver was fired six times, and the other revolver four times.

During the robbery, Sherry Howard entered the bank with her children and saw Anderson near the vault. She also heard Scott saying, "Please don't" or "please no." Howard heard two or three gunshots and ran outside to call the police. The first police officer to arrive saw Anderson ripping an electrical cord and VCR equipment from the wall. Anderson was holding a trash can, which contained the smaller revolver and cash in excess of $ 70,000. The officer told Anderson to "drop the stuff." Anderson complied and was handcuffed. [FN2] Paramedics arrived and began working on the two victims. Young died in transit to the hospital.

> [FN2] At trial, a second officer testified that he heard Anderson say, "I did it. I did

it by myself. I'm by myself" shortly after the police arrived on the scene.

In addition to being caught while the crime was in progress, Anderson's hands tested positive for gunshot residue, and blood recovered from Anderson's clothing was consistent with Scott's DNA. Additionally, a Florida Department of Law Enforcement (FDLE) firearms analyst examined the guns seized at the scene. [FN3] She compared bullets test fired from the guns with seven bullets fired during the crime, some of which were found in the vault and others of which were recovered from Young's body during an autopsy. She concluded that four larger bullets displayed the same poor rifling characteristics as the test fires from the long caliber revolver, but she was not able to positively match them with that gun. However, she did positively match three smaller bullets with the second revolver.

[FN3] The long caliber revolver was found under the desk in the manager's office.

The forensic pathologist who performed the autopsy on Heather Young testified that Young had a total of seven gunshot wounds. She said that all of Young's wounds could have been fatal, with the possible exception of a wound that had entered Young's chin and exited near her eye. One of the wounds had a pattern of gunpowder "tattooing" around it, which indicated that it had been fired at close range. She also testified that there were two injuries on Young's head that were consistent with blunt force trauma caused by some sort of flat surface. At trial, the pathologist examined a picture of Scott and noted that Scott had the same type of blunt trauma injury on her forehead. [FN4]

[FN4] At trial, the State offered the theory that after shooting the two victims, Anderson went to retrieve the VCR, and while he was doing so he heard noises coming from the vault. According to the State's theory, upon returning to the vault and discovering that the victims were still alive, Anderson hit the victims in the head with the VCR or some other blunt object. In addition to the

> pathologist's testimony regarding blunt force trauma, Scott testified that she remembered a "black object" coming at her forehead after being shot. The State speculated that this object was the VCR. There was testimony that the VCR was dented, but it was not clear at trial how this damage occurred. Anderson testified he returned to the vault with the VCR, was surprised to see blood coming from Scott's neck, and dropped the VCR.

During the defense's case-in-chief, Anderson took the stand. Anderson admitted the robbery and testified to his bleak financial condition. Anderson also testified that he lived with his mother, who was disabled, retired, and a cancer survivor. Anderson admitted taking both guns and shooting the tellers, although he stated that he could only remember firing three shots. He also denied that he asked the tellers which one of them wanted to die first.

The jury convicted Anderson of grand theft for stealing the revolver, armed robbery, attempted first-degree murder, and first-degree murder. During the penalty phase, the State introduced the testimony of Young's brother and of her long time boyfriend. The defense offered the testimony of a number of people, including Anderson's mother, friends, members of Anderson's church, and former employers, all of whom testified that they had known him as a person of good character. The jury unanimously voted in favor of a death sentence recommendation and the trial court sentenced Anderson to death. The trial court found four aggravating factors [FN5] and ten nonstatutory mitigating factors. [FN6]

> [FN5] The four aggravating factors were: (1) the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP) (great weight); (2) the homicide was committed for pecuniary gain (moderate weight); (3) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control

or on felony probation (little weight); (4) the defendant was convicted of a previous violent felony (great weight). The previous violent felony aggravator was based on Anderson's contemporaneous conviction for the attempted murder of Scott.

[FN6] The court considered seventeen mitigating factors: (1) remorse for conduct (moderate weight); (2) cooperation with law enforcement (some weight); (3) strong religious faith (consolidated); (4) past achievements and constructive involvement (consolidated); (5) contributions to community and society through exemplary work (consolidated); (6) loving relationship with family (little weight); (7) employment history (little weight); (8) care for family and community (consolidated); (9) potential for rehabilitation (consolidated); (10) skills to be productive in prison (consolidated); (11) no prior history of violence (substantial weight); (12) well liked in his community (consolidated); (13) sympathetic and thoughtful of people (consolidated); (14) active in his church (consolidated); (15) active in community churches (consolidated); (16) appropriate courtroom demeanor (little weight); (17) willingness to plead (little weight). Because of the interrelated nature of (3), (14), and (15), the trial court considered them as a single mitigating factor which was given substantial weight. Likewise, (4), (5), (8), (12), and (13) were also combined into a single mitigating factor that was given moderate weight. Finally, (9) and (10) were consolidated into a single mitigating factor that was given little weight.

Anderson v. State, 863 So. 2d 169, 176 (Fla. 2003).

The Post-Conviction Proceedings.

On March 18, 2005, Anderson filed a motion for post-conviction relief pursuant to *Florida Rule of Criminal Procedure*

3.851. (V2, R206-262). That motion was subsequently amended on December 19, 2005. (V2, R378-401). The Circuit Court of Lake County held a case management conference on August 2, 2005. (V8, r1358-1421). An evidentiary hearing was conducted on certain claims on January 23-27, 2006. (V9,10,11,12 R1487-2103). On January 29, 2007, the Circuit Court entered an order denying all relief. (V5, R836-869). Anderson gave notice of appeal on March 29, 2007. (V5, R881-82).

The Evidentiary Hearing Facts.

Dr. Jorge Villalba, forensic psychiatrist, is the medical director for the Florida Institute for Neurologic Rehabilitation in Wachula, Florida. (V9, R1494; 1495). Dr. Villalba has been involved in numerous civil and criminal cases. The criminal cases involved matters that included impulse control disorders like substance abuse, sexual predator crimes and assault cases. (V9, R1495).

Dr. Villalba evaluated Anderson on November 1, 2005. (V9, R1510). This was Dr. Villalba's first death penalty case. (V9, R1517). Anderson exhibited elements of post-traumatic stress disorder due to an eight-year history of sexual abuse. He has elements of a borderline personality disorder as a result of a long-standing history of abuse. (V9, R1517).[1] Anderson self-

[1] In diagnosing Anderson, Dr. Villalba utilized the out-of-date American Psychiatric Association: *Diagnostic and*

reported a history of being sexually assaulted by his 14-year old cousin,[2] starting at six years old.[3] Anderson "admitted to me of having a lot of issues dealing with those abuse issues, avoiding stimuli that reminded him of this past abuse." (V9, R1497-98). In addition to a clinical interview and various tests that dealt with Anderson's academic and cognitive level, Dr. Villalba administered a Personality Assessment Inventory test ("PAI").[4] (V9, R1501). This test showed Anderson had "elements of trauma, elements of a borderline personality disorder, elements of alcohol dependency." Further, "antisocial traits were not elevated in this test." (V9, R1502). Children who have a history of abuse tend to "fragment the development of personality or

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Statistical Manual of Mental Disorders, Fourth Edition. The current version is American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition. Text Revision. Washington, DC, American Psychiatric Association, 2000. (V9, R1513).

[2] Anderson's cousin, Michael Green, reportedly abused other family members in Anderson's presence. (V9, R1498). Dr. Villalba did not interview any of people who might have been abused by Michael Green. (V9, R1518). Green is now deceased. (V9, R1579).

[3] Anderson told his other expert that the abuse began at age eight. See p.12, *infra*.

[4] The Minnesota Multiphasic Personality Inventory test had previously been administered to Anderson by Drs. Berland and McMahon. (V9, R1501; 1502). Dr. Villalba did not score the PAI himself. His colleague, Dr. Walden, scored the test the day after it was administered to Anderson. (V9, R1539).

ego." (V9, R1502). "These individuals tend to develop chronic, maladaptive types of behavior, which very much correlate with the post-traumatic stress disorder in terms of poor impulse control, poor judgment, problems with sense of identity, sense of self and problems with interpersonal relationships." (V9, R1503). Anderson had a "pervasive fear of losing his mother" at the time of the robbery. He was experiencing heterosexual/homosexual conflicts[5] and exhibited impulsivities in "self-damaging" areas, such alcohol and drug abuse. He had difficulty in controlling his anger and has "severe disassociated symptoms as evidenced by his inability to recall parts of the events that took place during the felony murder." (V9, R1504). Anderson does not remember the sequence of events that took place inside the bank and what happened as a result of all the shots that he fired. (V9, R1504). Anderson self-reported that he experienced the events in a "dream-like" state. (V9, R1505; 1520). He only recalled firing three shots.[6] This "dream-

[5] Anderson self-reported being involved in 20 superficial sexual relationships that involved homosexual relationships, heterosexual relationships, and a combination of the two. (V9, R1515).

[6] Anderson fired ten shots, hitting the two victims nine times. Heather Young was killed and Marisha Scott was left paralyzed. *Anderson v. State*, 863 So. 2d 169, 174 (Fla. 2003). Anderson did not think he had killed Heather Young. (V9, R1532).

like" state (or "disassociative" state) is very common in individuals with an intense history of trauma. An intense level of stress during the actual robbery would be a contributing factor to the disassociative state. "It was his intent and it was premeditated to rob the bank." (V9, R1506). Although Anderson had a plan, it does not undermine a diagnosis of post-traumatic stress disorder or the borderline personality disorder. Individuals with borderline personality disorder tend to have maladaptive functioning, very poor judgment and impulse control issues. (V9, R1506).

Anderson understood the consequences of his actions. He knew the difference between right and wrong when he committed the robbery. "Things got out of hand for him." Anderson did not intend to kill either of the two victims. (V9, R1507). (see footnote 7)

Anderson was not wearing any type of disguise when he robbed the bank. When someone has a form of maladaptive behavior associated with a borderline type of psychopathology, "reasoning is not always logical." (V9, R1508). Dr. Villalba believes Anderson committed these crimes while he was under the influence of an extreme mental and emotional disturbance. (V9, R1509; 1521). In addition, in the "type of family Anderson came from," sexual abuse is not reported. (V9, R1510).

Dr. Villalba’s opinion was based on Anderson’s self-reports and the results of the PAI. (V9, R1510). Dr. Villalba could have administered the MMPI but chose not to. There is no “practice effect” that attaches to the MMPI if it is administered more than once within five years. (V9, R1512). Dr. Villalba carefully considered malingering with regard to post-traumatic stress disorder, but ruled it out. (V9, R1513). Dr. Villalba did not do any independent testing with specifically designed instruments to assess whether Anderson was malingering or not. (V9, R1541). If Anderson self-reported different information to Dr. McMahon, it could suggest manipulation or a desire to look favorable for Dr. McMahon. Anderson is not psychotic or brain damaged. Dr. Villalba did not conduct a neurological examination. (V9, R1516). Anderson is not mentally retarded. (V9, R1626).

Poor judgment is a characteristic of borderline personality disorder as well as antisocial personality disorder. (V9, R1524). Anderson understood that shooting his victims could result in their deaths. (V9, R1525). Dr. Villalba did not know if Anderson told anyone else that he had been sexually abused. (V9, R1526).

The WAIS-R, an intelligence test, had previously been administered to Anderson. Dr. Villalba believed there was an 18-point difference between the verbal and performance scores for Anderson. (V9, R1527). An 18-point difference is significant.

(V9, R1528). Dr. Villalba did not rely on the WAIS score in diagnosing Anderson. Dr. Villalba did not know the outcome of the opinions of other experts that evaluated Anderson. (V9, R1537).

Dr. Robert Berland, a forensic psychologist, has evaluated capital cases since 1986. (V9, R1543). Dr. Berland began working on evaluating Anderson in February 2005. (V9, R1544). Dr. Berland does not like to rely solely on the defendant for information because "the assumption is that the defendants will lie both about mental health issues and about their involvement in the crime." (V9, R1545). Dr. Berland reviewed court documents, including trial transcripts and police reports, the sentencing order and Florida Supreme Court opinion, Department of Corrections documents, and investigative reports of witnesses in evaluating Anderson. He reviewed psychological testing administered by Dr. McMahon and met with Anderson for four hours at the prison. (V9, R1546-47). Dr. Berland believes that Anderson was under the influence of an extreme mental or emotional disturbance at the time of the crime. (V9, R1554). In reviewing tests administered by Dr. McMahon, there was no evidence of malingering. To the contrary, Anderson was trying to "hide or minimize his mental illness, to not report it if he could avoid doing so." (V9, R1555). There was a clear showing of "significant delusional paranoid thinking." (V9, R1555). Dr.

Berland also reviewed an MMPI administered by Dr. McClaren.[7] This profile did not indicate an attempt to fake or exaggerate mental illness. The results underestimated "the severity of his problems because of his efforts to hide." (V9, R1557). Anderson also experienced auditory hallucinations. He thought people were calling his name either when he was alone and it was quiet or when he was around other people with background noise. These hallucinations would occur with or without the use of alcohol or marijuana. (V9, R1559-60). Anderson did not recall using both guns to shoot the victims. (EH74). Anderson was under an extreme mental or emotional disturbance. (V9, R1563).

Anderson had sustained a severe head injury due to a head-on car crash.[8] (V9, R1564). Subsequent to the accident, he was very controlling of people he was close to and exhibited paranoid jealousy. Witnesses said Anderson stared into space for long periods of time. (V9, R1564; 1565). Anderson's psychotic disturbance substantially impairs his capacity to conform his conduct to the requirements of the law. (V9, R1569). Anderson functions at slightly above average in some areas and "he's within shooting distance of retardation" in other areas. (V9,

[7] Dr. Berland did not administer the MMPI to Anderson. (V9, R1592).

[8] The car accident occurred in 1991, and the crimes in this case occurred in 1999. (V9, R1613).

R1571). Anderson's WAIS results reflect impairment from brain injury. (V9, R1572).

Anderson's mother told Dr. Berland that, after the car accident, Anderson became angry very easily over things that normally did not bother him. (V9, R1576). Anderson developed a hand tremor that he did not have before. The head trauma suffered by Anderson had a significant effect on brain function. (V9, R1577). Other witnesses interviewed by Dr. Berland (Mr. Banks and Ms. Harrison) said Anderson was more easily angered over unimportant things after he had been in college than before. He started exhibiting depressive episodes. (V9, R1578).

Anderson told Dr. Berland that his cousin, Mike Green, started sexually abusing him at 8 years old. Green also abused another cousin, Ray Green, who was 7 years old at the time. Mike Green abused Anderson until he was 13 years old. (V9, R1579-80). Anderson told Henry Banks about the abuse he suffered from Green. (V9, R1580). Ray Green corroborated the abuse he suffered by Mike Green, as well. On occasion, Ray Green and Anderson were victimized at the same time. (V9, R1581). This abuse has long-term emotional consequences for the victims. (V9, R1582). Anderson and Ray Green did not talk about these attacks "because of the shame of it," except for very briefly, with each other. (V9, R1583).

Anderson self-reported alcohol and marijuana abuse. He and some friends would meet in the morning before they went to work and drink beer and smoke marijuana at Kerry Cunningham's house. Anderson referred to this group as "The Breakfast Club." Henry Banks and Latasha Harrison confirmed "The Breakfast Club." (V9, R1584-85). Kerry Cunningham denied the existence of "The Breakfast Club." Cunningham said the group only met occasionally and they were just friends. He denied the alcohol and marijuana use. (V9, R1587-88). Anderson's interpretation of events in his life was distorted by the effects of his mental illness on his judgment and perception. (V9, R1590). Dr. Berland did not investigate if Anderson suffered from post-traumatic stress disorder. (V9, R1591).

The MMPI test can detect mental illness which can be verified through other sources. (V9, R1595). Anderson's "L score" of five on the MMPI fell below the score of six which indicates delusional paranoid thinking. (V9, R1597). Anderson had an elevated score of six in 2000 despite "his efforts to hide." (V9, R1597). On intelligence testing, Anderson scored a verbal IQ of 93 and performance IQ of 89. His full scale IQ was 91. A four point difference is not significant. (V9, R1600).

Henry Banks told Dr. Berland that Anderson had been an angry person for as long as he could remember, even prior to the auto accident. (V9, R1600). Latasha Henderson only noticed

Anderson's anger after he started attending college. (V9, R1601). Anderson told Dr. Berland he kept himself isolated from other people. (V9, R1603). Anderson is not on the low end of borderline intelligence; he is "not even close" to being mentally retarded. (V9, R1607). There was no evidence of alcohol and marijuana use being involved in these crimes. (V9, R1607). Anderson is "ambulatory psychotic"; he is well-organized in his thinking and behavior so that he doesn't outwardly appear bizarre or disturbed. There is evidence of brain impairment. (V9, R1608). Brain damage is a common finding in death row inmates. (V9, R1609-10). Anderson only recently was forthcoming about his sexual abuse. (V9, R1613). Anderson does not have borderline personality disorder. (V9, R1614). Anderson had planned the bank robbery, although it was not "effective" planning. (V9, R1618). Anderson has a substantial history of deceiving and misleading people over the course of his life. (EH133).

Dr. Elizabeth McMahon, a clinical psychologist, evaluated Anderson prior to trial to determine competency, his mental status at the time of the offense, and to find any possible mitigating factors.[9] (V9, R1621-22). Dr. McMahon relied on

[9] Dr. McMahon has evaluated over one hundred defendants in capital cases. (V9, R1652). She did not testify at Anderson's trial.

defense counsel to tell her about any potential witnesses that could assist her with mitigation. (V9, R1624). Dr. McMahon read all of the documents sent to her, met with Anderson four times, conducted a full neuropsychological screening and full interview, and conducted a hypnotic session. (V9, R1625; 1617). Anderson did not tell Dr. McMahon that he had difficulty remembering the events of his crimes. He did not specifically remember how many shots he fired. (V9, R1628). Anderson's psychological tests indicate he is an "anxious" person although his outward behavior does not indicate this. (V9, R1629). All of his validity scales were within normal limits. (V9, R1630). Anderson was only suspicious about his community control officer. (V9, R1635). Anderson may have subconsciously resented his mother because she needed him to take care of her. He has never been in a long-term relationship. (V9, R1637).

The day of the robbery/murder, Anderson knew his behavior at the bank was wrong, and "he was having difficulty getting up the nerve to do it." (V9, R1638). His high level of anxiety did not interfere with his perception of reality. (V9, R1638-39).

Anderson did not tell Dr. McMahon about any sexual abuse he suffered as a child. (V9, R1640). However, it is more likely for a male who suffered abuse to tell a female about it rather than a male. (V9, R1641). Without any treatment for the abuse suffered, there could be long-term effects. Areas that could be

affected include sexual relationships and being able to trust other people. (V9, R1642). In order for Dr. McMahon to have diagnosed Anderson with post traumatic stress disorder, he would have to show how the traumatic sexual episodes affected him while he was in the bank vault. In order for it to be "pertinent and relevant to this issue ... I've got to have some connection there some place." (V9, R1644).

Anderson was "fine" when Dr. McMahon visited him subsequent to the guilty verdict. (V9, R1646). Ultimately, she met with Anderson on four separate occasions but did not testify in his case. (V9, R1648). She received sufficient materials in rendering her opinion in her trial report regarding Anderson. (V9, R1651). Dr. Berland only requested results of two of the ten tests she administered to Anderson, the WAIS-R and the MMPI-2.[10] Anderson does not suffer from any defect of the mind. (V9, R1654-55). All of his scores were average or above-average. (V9, R1656). He was close with both his parents and came from a loving, supportive home. (V9, R1659). Anderson told Dr. McMahon he had not suffered any abuse in his childhood. He may have assumed she meant abuse suffered by his parents. (V9, R1660). It is "atypical" for a young child to keep sexual abuse a secret.

[10] Dr. McMahon corrected her testimony that Dr. Berland did receive all of the neuropsychological testing data. (V9, R1676).

(V9, R1662). Dr. McMahon did not see any connection between the PTSD (which involved the sexual assault by his cousin) and the shooting of two female tellers in the bank vault. (V9, R1664). He does not suffer from any brain damage. (V9, R1668). Anderson does not have borderline personality disorder. (V9, R1670).

Anderson told Dr. McMahon he had sexual relationships with both men and women. (V9, R1672). Anderson did not tell Dr. McMahon if his cousin ever threatened him not to say anything about the sexual abuse. (V9, R1684). Anderson does not show any disassociative symptoms. (V9, R1674). Dr. McMahon would have rendered her opinion of Anderson prior to the trial and told defense counsel. (V9, R1678). She would have kept defense counsel informed during the evaluation process. (V9, R1685).

Raymond Green, Pastor of a Pentecostal church, is Anderson's cousin. (V10, R1692-93). Green was living with his family in Eustis at the time of Anderson's arrest. (V10, R1693-94). Green and Anderson, who are one year apart in age, grew up together. (V10, R1694). Michael Green,[11] eight years older than Raymond, was Raymond's paternal uncle. On occasion, Michael Green babysat for Raymond, his two sisters, cousin Ursula, and Fred Anderson. (V10, R1697-98). Green started sexually abusing Raymond at five years old. He abused others that he babysat for,

[11] Michael Green is deceased. (V10, R1717).

as well. (V10, R1698). Raymond saw Anderson being sexually abused by Green. (V10, R1699). Anderson was abused by Green since age six. (V10, R1700). At times, Green assaulted Anderson and Raymond at the same time. (V10, R1700-01). Green sexually assaulted the boys frequently. (V10, R1702). At one point, Green violently assaulted Anderson. (V10, R1707). Raymond and Anderson did not discuss the assaults, "We just dealt with it ..." (V10, R1708). Anderson told Raymond that the assaults were painful and that he bled on several occasions. (V10, R1710). As an adult, Raymond never confronted Green about the assaults. (V10, R1711). Raymond told other family members that Anderson had been assaulted by Green. (V10, R1714). As a child, Raymond did not reveal that Green repeatedly assaulted him. "I didn't know how to tell it or to talk about it. I liked him as a person." (V10, R1715). The defense team did not talk to Raymond prior to trial in 2000. He would have testified at trial had he been asked. (V10, R1716).

Fred Anderson was very close with his parents. (V10, R1719). They lived across the street from Raymond's grandmother (Bernice) where the sexual assaults took place. (V10, R1718-19). Michael Green and his sister, Gail Green Inmon, lived with their mother, Bernice. (V10, R1719). Despite the abuse he suffered, Raymond still liked Michael Green, and lives a law-abiding life. (V10, R1720). Michael never threatened Anderson or Raymond, to

his knowledge. Green never threatened Raymond or Anderson with any kind of weapon, or retaliation in any way, if they told about the abuse. (V10, R1721). Had Green told his grandmother, Bernice, "She wouldn't have believed it." (V10, R1722). In addition, "It wasn't totally looking out for my uncle. It was kind of like looking out for us and our reputation as males and what people would think of us for allowing ourselves to participate in an act like that." (V10, R1723).

William Stone, an assistant public defender for 16 years, was Anderson's trial counsel. (V10, R1726-27). Stone's investigator, J.T. Williams, had Anderson fill out a forensic questionnaire after Anderson's arrest. (V10, R1729-30). Part of the questionnaire says, "List recent stressful situations and events." Stone added, "this pertains to time period immediately preceding 3-20-99."[12] (V10, R1731). In addition, Mr. McDermott, another lawyer involved in the early preparation of the case, had Anderson fill out a different forensic questionnaire. (V10, R1735). There were no significant differences between the two questionnaires. (V10, R1736). The entire forensic assessment form is given to the defendant to be completed and it is reviewed with them. (V10, R1744).

[12] March 20, 1999, was the date of the robbery/murder. *Anderson v. State*, 863 So. 2d 169 (Fla. 2003).

Anderson was on suicide watch for six months after his arrest. That is not unusual for arrestees charged with first degree murder. (V10, R1737). Stone and Anderson did not discuss the complaints Anderson listed on the questionnaire. (V10, R1738). Information on the questionnaires is used to assist mental health experts in evaluating the defendant. (V10, R1741). Stone did not recall discussing Michael Green with Anderson, but may have with Anderson's mother. Anderson never mentioned that any person had sexually assaulted him. (V10, R1742).

Mr. Stone did not initially discuss the events of the robbery/murder with Anderson as "It was pretty well established what had happened." Normally, he would get background information and briefly discussed what happened. However, on several occasions, he and Anderson did discuss what happened. (V10, R1745). Anderson did not have difficulty in discussing the events of the robbery. His explanations were spontaneous and consistent. (V10, R1746). Stone did not try to prove Anderson was innocent. His ultimate objective was to avoid the death penalty. (V10, R1748-49). Although it would have been Anderson's choice to plead guilty and only have a penalty phase, that was "a tactical decision that Mr. Doud and I could make and suggest it to him. I don't advise it." (V10, R1750). It was Mr. Stone's strategy to have "two opportunities, the guilt phase and the penalty phase, to at least in some detail try to suggest

humanizing aspects of Fred's behavior and his background that might make some mitigating difference." Stone did not want to abandon any prospects of prejudicial error that might have occurred during the State's case in the guilt phase. (V10, R1751).

Mr. Stone never believed Anderson was incompetent or insane. (V10, R1752). Anderson was evaluated by a mental health expert a few months before his trial started. (V10, R1753). J.T. Williams, investigator, was responsible for locating mitigation witnesses. (V10, R1755). Stone tried to anticipate the aggravators that the State would raise. "We tried to do what we could as far as cross-examination and evidence presentation that might warrant the same, and research the applicability of them." (V10, R1756).

Although this robbery was "amateurish" in some respects, Stone believed Anderson came close "to possibly getting away with it." (V10, R1774). This was a planned robbery, "naïve in some respects, unsophisticated in some respects, but more sophisticated than a lot of them." (V10, R1775).

During a proffered examination, Stone said the defense team hired a hypnotist to assist Dr. McMahon in interviewing Anderson under hypnosis to determine what led up to the shooting in the bank vault. (V10, R1770). Mr. Stone had hired Dr. McMahon on

several occasions and was satisfied with her competence to evaluate and prepare for a penalty phase defense. (V10, R1771).

Mr. Stone enjoys working with Dr. McMahon. “I appreciate her objectivity, and I respect her opinion.” Stone did not hire any other confidential expert for Anderson’s case, nor did he seek a second opinion on mitigation. (V10, R1778; 1789). Stone gave Dr. McMahon the forensic questionnaires and the results of interviews with witnesses regarding Anderson’s upbringing and background. Dr. McMahon also spoke with several mitigation witnesses. (V10, R1779).

Stone said Dr. McMahon is an extremely through, extremely reliable evaluator. (V10, R1831). “She does a lot of testing, does a lot of interviewing, and very patient interviewing.” (V10, R1831-32).

Dr. McMahon was present during Anderson’s hypnosis session (prior to trial) and conducted most of the questioning. Mr. Stone was not present but Investigator Williams was and reported to Mr. Stone what transpired. (v10, R1786). Stone did not recall Dr. McMahon telling him that Anderson had a memory problem. (V10, R1737). Stone was not aware that Anderson had been repeatedly sexually assaulted when he was a young child. (V10, R1789; 1823). He would have presented evidence to the jury had he known. (V10, R1804). Dr. McMahon indicated that “she couldn’t observe the presence of any statutory mental mitigation or non-

statutory mental mitigation that she thought ... could be developed." (V10, R1832). The defense tried to present positive aspects of Anderson's life. (V10, R1833). Some potential mitigation witnesses refused to testify. "They were adamant ... under no circumstances, [they] were not going to testify ... and would not have anything positive to say." (V10, R1834). Mr. Stone was not given the names Raymond Green or Henry Banks as potential mitigation witnesses. (V10, R1834-35).

Mr. Stone did not recall any specific tactical or strategic reason for not objecting to comments made by the prosecutor, evidence presented at trial, or the jury instructions. (V10, R1802-03; 1804; 1807; 1808; 1810). He did not recall why he did not ask for a curative instruction or a mistrial after objecting to other prosecutorial comments. (V10, R1805). Mr. Stone did not think to assert that the robbing of the bank, because Anderson needed money, constituted a legal or moral justification to do so. (V10, R1811).[13]

Mr. Stone was lead counsel from the inception of this case. He has defended many capital cases and attended numerous "Life Over Death" seminars. (V10, R1814). Anderson made several statements to police confessing to these crimes. (V10, R1818).

[13] No expert testimony supports this notion, either.

It was Stone's goal to save Anderson's life. (V10, R1820). Anderson never told Stone that either bank teller had slammed his fingers in the vault's door or had called him a "stupid 'N'." (V10, R1821). Anderson was very cooperative in completing the forensic assessment forms. (V10, R1822). He did not list any complaints about being sexually abused as a child on the forms. (V10, R1823-24; 1825-26). It said, "I believe I had a normal childhood." (V10, R1824). There was no indication that Anderson had a mental disturbance or psychosis. (V10, R1827; 1847).

On the forensic assessment questionnaire, Anderson did **not** check the statements: 1) hears things not present; 2) feel very spacey; 3) acts without thinking; 4) sees things not present; 5) memory disturbances; 6) suffers from blackouts, flashbacks, or other adverse effects; 7) frequent mental disturbances; 8) treatment for recognizable problems - no recognizable problems. Anderson did not list alcohol or drugs as problems, only that he had consumed them, "in the past."[14] (V10, R1835-36). Anderson was not under the influence of drugs or alcohol at the time of the robbery/murder. (V10, R1836). Anderson prepared most of the handwritten entries on the forensic questionnaire and even attached an addendum containing additional comments. (V10, R1731-32,1822). Mr. Stone commented that he had never had a

[14] Anderson listed "marijuana, occasionally." (V10, R1836).

client who was more thorough than Anderson was in filling out the questionnaire -- he described Anderson as "extremely cooperative." (V10, R1822).

Ultimately it was the defense's strategy to "maintain our credibility, and to try and present Fred in a positive context that would give the jury some reason to think that he is a beneficial human being and worthy of preserving his life, rather than wanting to kill him." (V10, R1840-41).

Clinton Doud was second chair on Anderson's case. (V10, R1855; 1857; 1859). Doud recalled telling Anderson that the facts of this case were bad, "in light of the fact that he was found inside of the bank with the trash can ... blood all over him, the VCR pulled out ... and explained to him we would be happy to make the State prove the truth of the charges." (V10, R1860). It was important to gain credibility and try to humanize their client. (V10, R1861). Doud advised Anderson that he could plead guilty, avoid the guilt phase, and possibly minimize presentation of prejudicial evidence. (V10, R1864). Dr. McMahon dealt directly with Mr. Stone. Doud did not speak to her at all about this case. (V10, R1867). The mental health mitigation started quite a bit before Dr. McMahon was hired. (V10, R1867). Doud asked Anderson about any sexual abuse and any types of problems with his childhood. The attorneys followed this up with interviews with Anderson's mother and other witnesses. (V10,

R1868). Had Doud been aware of the sexual abuse, he would have presented it to the jury. (V10, R1869).

Doud and Stone both conducted jury selection - - "We pretty much split it 50/50." (V10, R1871). Doud did not recall strategic reasons for making specific objections to the prosecutor's statements, arguments, or questions during the trial. (V10, R1874-75; 1877; 1878). He did not recall any tactical or strategic reason for not objecting to jury instructions in the penalty phase. (V10, R1879). The defense team met with mitigation witnesses up to, and throughout the trial. (V10, R1883). Many people did not want to testify on Anderson's behalf. (V10, R1884). However, reluctant witnesses would have been subpoenaed to testify if they had relevant mitigation evidence. (V11, R1891). Some witnesses indicated their testimony "would end up hurting Mr. Anderson more than helping him." (V11, R1894).

James Williams has been an investigator for the Pubic Defender's office for twenty years. (V11, R1896). Williams first met with Anderson within a week after his arrest. (V11, R1897). Williams met with Anderson several times. He was "trying to find people, just doing a lot of different things, serving subpoenas for depositions and stuff, collecting evidence." (V11, R1898). Williams gave Anderson the forensic assessment questionnaire to complete within the first month after his arrest. Williams

explained the form and told Anderson to complete it. He told Anderson he would explain anything that was not clear to him. (V11, R1899-1900). Since Anderson had attended college, he would have understood the questionnaire. Anderson never told Williams he had memory problems. Williams returned the following day to retrieve the completed forensic questionnaire. (V11, R1902). Williams had Anderson fill in any questions that had not yet been answered. (V11, R1904-05). Anderson replied "no" to questions that asked about sexual abuse. (V11, R1905-06). Some clients do withhold information about being abused, although, "If I'm there to try to help you, I don't see why they should hold that from me." (V11, R1909-10). Williams did not talk to Anderson about his answers, "I'm not going to put words in his mouth ... he should know better than I." (V11, R1906). Williams told Anderson the questionnaire would be utilized for mitigation purposes. (V11, R1908).

Jackie Handy, a potential mitigation witness, refused to testify on Anderson's behalf as she claimed her probation officer harassed her.[15] (V11, R1918). Various other witnesses that Anderson listed on the questionnaire did not want to testify. (V11, R1923-24; 1925). Other than Anderson himself, or

[15] Kathy Carver, probation officer, was also Anderson's Probation officer. (V11, R1918-19).

his mother, Williams did not ask any witnesses about Anderson's mental health or sexual abuse. (V11, R1929; 1999-2000). Anderson did not have any medical problems of any sort that went untreated. (V11, R2000-01).

Williams followed the instructions of defense counsel. (V11, R1935). He assisted them in locating witnesses and was present when Mr. Stone or Mr. Doud interviewed them. (V11, R1933; 1935). Although Williams found numerous witnesses, he did not know who actually testified at the trial. (V11, R1940).

Allan Seabrook is the branch manager at United Southern Bank. (V11, R1945). Seabrook first met Anderson when, posing as a student, he came into the bank the day prior to the robbery/murder. (V11, R1946). Anderson told Seabrook he was writing a paper for school and needed to ask a bank manager questions about banking procedures. "He seemed to ask intelligent banking questions." (V11, R1946-47). Anderson was writing on a note pad as he spoke with Seabrook. (V11, R1947). Seabrook noticed, "As my eyes would leave his and I would look out into the lobby ... when I came back he was normally looking at some surveillance equipment that sat on my desk to my left-hand side." (V11, R1948). This was the only unusual thing Anderson did in Seabrook's presence. Anderson did not exhibit any signs of mental illness or unbalanced behavior. (V11, R1948).

Karen Nelson, a Court Deputy for 17 years in Lake County, was assigned to Judge Singeltary's courtroom during Anderson's trial.[16] She has been assigned to Judge Singeltary's courtroom for over 14 years. (V11, R1953-54). Anderson was not wearing handcuffs at the defense table during his trial. (V11, R1957). Anderson's case was "very high profile" in 2000, with television crews present and a number of people in the courtroom. (V11, R1959; 1962-63). Courtroom conditions that existed during the trial in September 2000 could not be duplicated now. (V11, R1960). Deputy Nelson did not recall using microphones in courtroom six. (V11, R1962). Nelson only recalled one case where she heard a defendant's restraints make noise when the jury was present. (V11, R1965). Anderson was shackled by his legs only, to the front side of the desk during jury selection. He was not handcuffed. (V11, R1971). Defendants are never brought into the courtroom with the jury present. (V11, R1977). In addition, Deputy Nelson stood near the defendant's table when the jury came in to create a "diversion. I always do that. I turn my back to the defendant and kind of smile to the jurors as they come out." (V11, R1976; 1980). Further, "If a juror wanted to get down on their hands and knees and get behind my legs, certainly

[16] The trial was held in courtroom six, which is significantly larger than courtroom three, where the evidentiary hearing was conducted. (V11, R1954; 1959).

they could see. But the way it was, commonsense tells you they couldn't have seen. I don't recall any time where any of them stopped and looked around me." This was her procedure during the guilt and penalty phase. (V11, R1978; 1981). Deputy Nelson blocked any view that the jury could have had of Anderson's feet or the shackles attached at his ankles as they came and went from the courtroom. (V11, R1980). It is Judge Singeltary's policy that jurors never hear or see an in-custody defendant shackled at the feet. (V11, R1982-83). Deputy Nelson never heard the shackles on Anderson at any time when the jury was present. (V11, R1983). **The jury never had an opportunity to see the shackles**. (V11, R1985).

Sergeant Linda Green, deputy sheriff, formerly worked in road patrol in Umatilla, Florida. (V11, R2001-02). She knew Anderson's mother, Geneva, from driving through the neighborhood where the Andersons lived. Geneva Anderson "was the eyes and ears of the neighborhood." (V11, R2003). Fred Anderson worked at a local gas station where Deputy Green often stopped and spoke with him. Anderson never showed any signs of mental disturbance. (V11, R2004). On the night Anderson was being booked, he saw Deputy Green and motioned to her to speak with her. Green told Anderson, "I'm shocked to see you're the person sitting here and he just shook his head and he asked me would I check on his mom." Green said she would, and told Anderson he could talk to

her if he needed someone to talk to. (V11, R2006). At Anderson's request, Green spoke with him three times during the next few days. (V11, R2006-07). Anderson did not exhibit any signs that he was confused about who he was or where he was. (V11, R2007). Anderson told Deputy Green details of the robbery. (V11, R2008). In addition, Anderson recalled a bank customer entering the bank after Anderson had escorted the two tellers back to the vault. He tried to remember what that customer was wearing. Deputy Green was interested in trying to locate this potential witness. (V11, R2009). Anderson told Green he had planned to go into the bank manager's office to remove the security video and take it with him when he left the bank. (V11, R2010).

Dr. Harry McClaren, Ph.D., forensic psychologist, has conducted several hundred psychological evaluations on death penalty cases. (V11, R2011; 2013). McClaren evaluated Anderson on December 27-28, 2005. (V11, R2014). McClaren administered various tests which included the MMPI-2nd Edition and the WAIS-3rd Edition. He reviewed background information,[17] and also interviewed several people who knew Anderson.[18] (V11, R2014-15).

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[17] Dr. McClaren reviewed the records of Dr. McMahon and Dr. Berland, school records up to and including college, prison records, medical records, police reports and attorneys' notes, transcripts of interviews subsequent to the crimes as well as video interviews with various law enforcement personnel and Anderson. In addition, he reviewed the trial court sentencing

The results of the MMPI indicated Anderson suffered from anxiety, depression, and social isolation. The profile did not suggest a psychotic condition. (V11, R2015). His depression is not a major depression. (V11, R2031). Dr. McClaren's results were similar to Dr. McMahon's in some ways and not in others. (V11, R2015). Some of the responses given by Anderson could have been situationally affected. (V11, R2017). Anderson's IQ score, according to results of the WAIS, indicated average intelligence, with a score of just under 100. (V11, R2018). None of the test results indicated that Anderson was psychotic or suffers from delusional thinking. (V11, R2021; 2027; 2031). There was no evidence that Anderson suffers from brain damage. (V11, R2028; 2032). There is some possibility that Anderson suffers from post traumatic stress disorder due to the sexual abuse he later revealed. (V11, R2028).

Anderson did not reveal if he suffers from re-experiencing the sexual assaults. (V11, R2029). Anderson does not suffer from

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order and Florida Supreme Court opinion on direct appeal. (V11, R2022-23).

[18] Dr. McClaren interviewed three correctional officers at UCI, three Mount Dora Police officers, Anderson's mother (via telephone), Kerry and Frieda Cunningham, William Stone, Anderson's trial attorney, J.T. Williams, investigator, Dr. McMahon, Deputy Green and FBI Agent Piersanti. (V11, R2022-23).

borderline personality disorder. (V11, R2030). Dr. McClaren concluded that Anderson is non-psychotic, suffers from traumatic experiences he had as a child, and has an anxiety disorder not specified. (V11, R2033).

Anderson's actions showed purposeful, goal-oriented behavior in the time leading up to, and including, the robbery/murder. (V11, R2038). Anderson's lack of recall as to the number of shots he fired is indicative of information that "would be very damaging to his case and would be very hard for most people to accept the death themselves if they actually executed someone in that manner." (V11, R2039). Anderson was not suffering from extreme mental or emotional disturbance at the time of the offense. He does not have a severe mental illness. He was not intoxicated and is not mentally retarded. (V11, R2041-42). Anderson was able to appreciate the criminality of his conduct and conform his conduct to the requirements of the law. (V11, R2043).

Anderson told Dr. McClaren he did not reveal the child sexual abuse because "he didn't want anyone to know." (V11, R2043). McClaren is not sure that Anderson was actually under hypnosis during his session prior to trial. (V11, R2045). Although Anderson had told Dr. McClaren that his college grades

dropped after the death of his father, school records indicate[19] that his grades dropped dramatically two years prior to his father's death. (V11, R2045-46).

Anderson did not report any drug use to the Department of Corrections upon his intake into the system. He reported himself as a social drinker. (V11, R2046). He never reported or received any mental health treatment. (V11, R2047-48). Anderson has selective memory and a history of manipulative and deceptive behavior. (V11, R2048-49).

Anderson was an inept bank robber. (V11, R2052). However, "he came in [the bank] with two loaded weapons, so there is going to be no reloading." (V11, R2054). Although he was not wearing gloves at the time of the crime, he had been at the bank the previous day and left fingerprints at that time. (V11, R2055-56).

The sexual abuse suffered by Anderson as a child could "possibly" have interfered with Anderson's development. (V11, R2063). Anderson may not have been deceptive when he did not tell anyone about the abuse - - it might be just that he did not want anyone to know about it. (V11, R2064). Post-Traumatic Stress Disorder can be a nonstatutory mitigating circumstance. (V11, R2068). However, Dr. McClaren did not diagnose it for

[19] Anderson was majoring in Psychology. (V11, R2051).

Anderson. (V11, R2070). Anderson admitted to his criminality in this case. (V11, R2076-77). Anderson did not admit to nightmares about being sexually abused. He did not want to talk about it with Dr. McClaren. (V12, R2091).

On January 29, 2007, the Circuit Court denied all relief.

SUMMARY OF THE ARGUMENT

The collateral proceeding trial court properly denied relief on Anderson's multiple specifications of ineffectiveness of penalty phase counsel. Anderson can establish neither deficient performance nor prejudice, and is not entitled to any relief. The claim of ineffectiveness for not objecting to certain statements during *voir dire* was properly rejected, and, moreover, is procedurally barred and without merit. The "anti-doubling" jury instruction claim is procedurally barred and, alternatively, meritless. The multiple guilt phase ineffectiveness of counsel claims are procedurally barred and, alternatively, meritless. The "juror interview" claim is procedurally barred, and, alternatively, without merit. The "shackling" claim is procedurally barred and meritless. The "ineffective psychologist" claim is meritless, in addition to presenting only a due process claim, which fails on the facts. The "cumulative error" claim fails because there is no error to "cumulate" in the first place.

ARGUMENT

I. THE PENALTY PHASE INEFFECTIVENESS CLAIM

On pages 31-60 of his *Initial Brief*, Anderson sets out a lengthy argument in which he raises three discrete claims of ineffectiveness of counsel at the penalty phase of his capital trial. Whether counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is reviewed *de novo. Stephens v. State,* 748 So. 2d 1028 (Fla. 1999) *(*requiring *de novo* review of ineffective assistance of counsel claims)*; Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the *Strickland* test. *i.e.,* deficient performance and prejudice, present mixed questions of law and fact which are reviewed *de novo* on appeal. *Cade v. Haley*, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a District Court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, citing *Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998)*; Strickland,* 466 U.S. at 698, 104 S.Ct. 2052 (observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact).

Anderson's first specification of ineffectiveness is trial counsels' "failure" to discover that Anderson had been sexually

abused as a child. In denying relief on this claim, the Circuit Court held:[20]

> Although Defendant now refers to Ray Green, Geneva Anderson, Jacqueline H. Handy, Thelma Williams, Kimberly Royal, Rhonda Bays, Hope Banks, Henry Banks, Tracy Branch, Raymond Green, and social acquaintances of Defendant as witnesses who could have offered mitigation evidence at trial, only Raymond Green testified at the evidentiary hearing. Mr. Green testified as to the repeated sexual abuse he and Defendant had suffered as children. (EH 212-221). Mr. Green had discussed the circumstances of the abuse with Dr. Berland, Defendant's post conviction mental health expert, only the night before the evidentiary hearing. (EH 95). Mr. Green was reluctant to speak of the abuse. (EH 95). At the evidentiary hearing, he indicated the abuse, perpetrated by Defendant's older cousin, Michael Green, was kept secret at the time out of fear they "would get in trouble." (EH 23 6-237). Mr. Green also felt no one would believe them if they told anyone of the abuse. (EH 236-237).
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> At the Rule 3.851 hearing, Mr. Stone, Mr. Doud, Dr. McMahon, and Mr. Williams all testified that at the time of trial there were no indications that Defendant was ever sexually abused. (EH 151, 154-155, 174-175, 256, 303, 327, 337-340, 382-383, 419, 513). In fact, Defendant denied ever being abused and none of the witnesses provided by Defendant, or discovered through investigation, indicated any abuse occurred. (EH 151, 155, 174-175, *256,* 303, 337-340, 382-383, 419, *513).* Importantly, Defendant concealed any alleged abuse in the forensic questionnaire Mr. Williams left with him to complete, although Defendant was exceptionally thorough in filling out the questionnaire. (EFI 336-340).
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> In the forensic questionnaire, Defendant was asked

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20 Anderson listed numerous persons who "could have testified" as mitigation witnesses. **Only one of those individuals, Raymond Green, was called at the evidentiary hearing.** As to all of the other witnesses, there is a failure of proof.

several questions which could have prompted Defendant's disclosure of the abuse. He was asked whether he thought "he was abused. . . or neglected as a child." (EH 338). His answer was "No." (EH 338). When asked to "[d]escribe sexual behavior among family members," he responded "None." (EH 337-338). He also denied that any allegations of abuse or neglect were made against the family. (EH 338).

When asked to summarize his feelings about his family life as a child, he stated "my parents did everything to raise me correctly" and "I wasn't an abused child." (EH 338). He indicated that he had a "normal childhood." (EH 338). He further declined to endorse the portions of the questionnaire that would have indicated he had an unhappy childhood or that he was sexually molested as a child. (EH 339-340). In addition, Defendant's mother, at trial, denied Defendant was ever abused and testified he was raised in a loving environment. (U 2524). At the evidentiary hearing, Mr. Stone testified he did not remember hearing the names Michael Green or Raymond Green at all. (EH 256, 349).

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Davis v. State,* 928 So. 2d 1089 (Fla. 2005). Counsel should not be expected to investigate potential incidents of sexual abuse when Defendant did not suggest any abuse had occurred and actually concealed the abuse from Counsel and the mental health expert involved in the case. *Rodriguez v. State,* 919 So. 2d 1252 (Fla. 2005) ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements of actions.") (quoting *Strickland v. Washington,* 466 US 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); *Stewart v. State,* 801 So. 2d 59, 67 (Fla. 2001) ("[B]y failing to communicate to defense counsel (or the defense psychiatrist) regarding any instances of childhood abuse, Stewart may not now complain that trial counsel's failure to pursue such mitigation was unreasonable.").

In *Cherry v. State,* 781 So. 2d 1040, 1050 (Fla. 2000),

the Florida Supreme Court stated:

> Cherry failed to provide defense counsel with the names of any witnesses who would testify on Cherry's behalf. During the evidentiary hearing, trial counsel testified that Cherry did not provide him with names of any witnesses who could have provided mitigating evidence. . . . As the Supreme Court noted in *Strickland,* "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland,* 466 U.S. at 691. By failing to provide trial counsel with the names of witnesses who could assist in presenting mitigating evidence, Cherry may not now complain that trial counsel's failure to pursue such mitigation was unreasonable. *See id.* Accordingly, it appears the trial court correctly found that counsel was not deficient in failing to investigate and present mitigating evidence because Cherry refused to communicate with trial counsel or provide him with names of witnesses to call for mitigation purposes.

> Counsel's performance will not be deemed ineffective for failing to discover Defendant had been sexually abused as a child when Defendant failed to disclose and concealed any abuse in his past. (EH 151, 155, 174-175, *256,* 303, 382-383, 337-340, 382-383, 419, 513, 540). Defendant chose to disclose the sexual abuse to post conviction counsel and to the doctors involved at the post conviction stage, but concealed this information at the trial stage. Counsel should not be expected to pursue avenues of inquiry that Defendant has indicated would be fruitless. Further, Dr. McMahon should not be faulted for failing to recognize or pursue any alleged symptoms of post-traumatic stress disorder when Defendant concealed the alleged trauma required for the disorder.

(V5, R854-56).

The underlying facts, as found by the Circuit Court, are not clearly erroneous, and fully support that Court's denial of relief on this claim.

If counsel cannot be ineffective for "failing" to discover witnesses that the defendant would not tell him about, and that is the law, then counsel cannot have been ineffective for not learning that Anderson had been sexually abused as a child when any such abuse was explicitly denied. A contrary result is contrary to the express holding in *Strickland* quoted by this Court in its *Cherry* decision. Despite the hyperbole of Anderson's brief, his claim fails -- counsel is not ineffective when the "undiscovered fact" was concealed by the defendant himself.

Likewise, in *Marquard v. State*, Court rejected a similar claim, stating:

> Contrary to the allegations in the Motion, Roger Marquard, the Defendant's father, testified that the Defendant's mother was not an alcoholic when the defendant was born and that family life was relatively normal until the Defendant was approximately five years of age. At that time the Defendant's mother became an alcoholic and the parties divorced. The Defendant's sister testified that the mother was abusive to her, but never to the Defendant. The Defendant's second sister, Amy, is deceased at this time and trial counsel cannot be faulted for failing to call her during the sentencing phase. The evidence is clear that if Amy had been called as a witness, she would have had to testify concerning the Defendant's conviction for molesting her child. No evidence was presented of any information which would have presented mitigating circumstances in the penalty phase.

> Contrary to the allegations in the Motion for Post Conviction Relief, no evidence was presented to show that John Marquard was ever sexually molested as a child either at home or by neighbors. There was no evidence presented at the evidentiary hearing that the Defendant's mother ever abused him, either physically or mentally. The Defendant never provided trial counsel with the names of any witnesses in mitigation. Trial counsel cannot be faulted for failing to call witnesses whose names are not disclosed by the Defendant.
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> Marquard challenges the trial court's findings and conclusions. We disagree and find that the trial court's findings and conclusions are supported by competent, substantial evidence, and accordingly we "will not substitute [our] judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court." *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001).

Marquard v. State, 850 So. 2d 417, 429 (Fla. 2002). Finally, in *Henyard v. State*, the Florida Supreme Court affirmed the denial of post-conviction relief when there was conflicting evidence about whether the defendant had revealed alleged sexual abuse to defense counsel. The Court held:

> Several witnesses at the evidentiary hearing testified that Henyard told them he was molested. However, none of these individuals said they informed defense counsel of Henyard's allegations. Additionally, there is **some question** about the extent to which Henyard relayed this information to his defense team. J.T. Williams, an investigator for the Public Defender's Office, testified that he asked Henyard in a questionnaire soon after the arrest if he had ever been sexually abused and **Henyard wrote that he did not remember ever being sexually abused**. According to lead counsel T. Michael Johnson's notes, Henyard also denied ever being sexually abused to a jail psychiatrist. However, although Johnson could not recall what effort he made in investigating the

alleged sexual abuse, the notes also indicated that Henyard had told him that he had been fondled by an older man when he was eight or nine, roughly a decade before the murders.

Initially, we would note that the evidence of abuse introduced at the evidentiary hearing came from witnesses who were repeating what Henyard had told them and there was no indication that these witnesses shared this information with Henyard's trial counsel. **Moreover, defense counsel was aware of at least two instances where Henyard had specifically said that he was not sexually abused.** As noted above, according to *Strickland*, the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. 466 U.S. at 691. *Strickland* further states, "When a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.* When determining reasonableness, there is a "heavy measure of deference to counsel's judgments." *Id.* **Although we recognize the difficulty individuals may have in reporting such abuse, in this situation where Henyard had specifically denied on at least two occasions that he had been sexually abused, it is not clear that trial counsel's failure to investigate the conflicting evidence that Henyard may have been molested amounts to ineffective assistance of counsel.**

Of course, Henyard was able to introduce evidence that at least one member of his defense team was aware that Henyard claimed he had been abused. Nevertheless, even if we were to determine that trial counsel should have conducted further investigations into the allegations of molestation, the evidence that Henyard introduced at the evidentiary hearing does not demonstrate that he was prejudiced in this case. The only information introduced at the hearing consisted of brief, second-hand accounts by witnesses of what Henyard had told them. There was no additional evidence that the alleged molestation had in fact occurred. Likewise, there was no testimony from mental health experts as to how the alleged molestation, which occurred a decade before the crime, had affected Henyard.

> Therefore, the trial court did not err in finding that Henyard has not demonstrated prejudice on this claim.

Henyard v. State, 883 So. 2d 753, 761-762 (Fla. 2004) (emphasis added); *Henyard v. McDonough*, 19 Fla. L. Weekly Fed. C956 (11th Cir. Aug. 11, 2006); *See also, Hannon v. State/McDonough*, 31 Fla. L. Weekly S539 (Fla. Aug. 31, 2006) (no ineffectiveness when defendant does not reveal potential mitigation). While there are subtle differences between the facts of *Henyard* and the facts of this case, the controlling fact is that Anderson specifically and repeatedly **denied** having been the victim of sexual abuse, while at least one of Henyard's defense team was aware of the abuse claim. If there was no basis for relief in *Henyard*, then there is no basis for relief in this case, either. The performance of Anderson's attorneys was not deficient, and, because he cannot meet that prong of the *Strickland* standard, Anderson cannot carry his burden of proving ineffectiveness of counsel.

Moreover, the significance of the childhood sexual abuse (assuming *arguendo* that those reports are accurate) is minimal in the face of Anderson's crimes, and in no way mitigates the propriety of the death sentence that Anderson received. None of the testimony about Anderson's prior sexual abuse does anything to "help the jury understand" why Anderson played out an elaborate scheme to survey the bank in advance, and to distract

his victims with donuts and juice (as a "thank you" gesture) before robbing the bank and putting the two victims in the vault where he proceeded to fire 10 shots from two handguns into them. There is no connection between Anderson's childhood and the murder he committed years later -- while unfortunate (assuming the truth of Anderson's claims), the sexual abuse explains nothing about this crime. Because that is so, its value as a mitigator is minimal, at best.[21] In Anderson's case, there is substantial aggravation, and the sexual abuse evidence, while evoking some measure of sympathy for Anderson, is far too remote in time, and far too removed factually from the crime, to be of more than minimal weight in mitigation. Even if trial counsel were deficient in not somehow discovering this evidence (which, given Anderson's concealment of the fact is difficult to accept), there is no reasonable probability of a different result. That is what Anderson must show to prevail under *Strickland*, and he

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[21] In *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988), the Eleventh Circuit recognized the importance of a causal connection "between mental illness and homicidal behavior." And, "to prove prejudice by failure to investigate and failure to produce a certain kind of expert witness, a habeas petitioner must demonstrate a reasonable likelihood that an ordinarily competent attorney conducting a reasonable investigation **would have found an expert similar to the one eventually produced**." *Horsley v. Alabama*, 45 F.3d 1486, 1495 (11th Cir. 1995). (emphasis added). Anderson has not done that.

has not done that. He is not entitled to relief of any sort because he cannot establish either prong of *Strickland.*

The second component of Anderson's ineffectiveness claim is that his trial level mental state expert did not have the necessary time and information to conduct an "adequate" evaluation. In the Circuit Court, this claim took the form of a claim that trial counsel did not present "available" mitigation evidence. In denying relief on this claim, the trial court stated:

> At the evidentiary hearing, Defendant called two mental health experts, Dr. Villalba and Dr. Berland. Dr. Villalba opined Defendant displayed elements of post-traumatic stress disorder and elements of borderline personality disorder. (EH 10-12). Dr. Villalba also concluded Defendant was not psychotic. (ER 30). In contrast to Dr. Villalba's conclusions, Dr. Berland diagnosed Defendant as an ambulatory psychotic and concluded Defendant had a brain injury resulting from an automobile accident that occurred seven or eight years before the crime at issue in this case. (EH 122, 127). Dr. Berland did not diagnose Defendant with post-traumatic stress disorder and did not observe any indications of borderline personality disorder. (EH 105, 128).
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> The mental health expert retained at the trial stage, Dr. McMahon, concluded Defendant was not suffering from any disease or defect of the mind. (EH 168). Dr. McMahon found no evidence of any statutory or non-statutory mitigating factors either. (EH 169). She did not have any indication that Defendant had been the victim of childhood abuse. (EH 154-155, 174-175). She saw no "red flags" indicating Defendant suffered from post-traumatic stress disorder. (EH 177). She did not observe any indications of brain damage or of borderline personality disorder. (EH 182, 184). In addition, she did not observe any signs suggesting Defendant was psychotic at the time of the offense or

at the time of evaluation. (ER 181). The fact that Defendant has now found other experts who may disagree with Dr. McMahon's findings does not negate Dr. McMahon's conclusions. *See Asay v. State,* 769 So. 2d 974, 985-86 (Fla. 2000) ("[F]irst evaluation is not rendered less than competent 'simply because the appellant has been able to provide testimony to conflict' with the first evaluation.") (quoting *Jones v. State,* 732 So. 2d 313, 320 (Fla. 1999)).

Dr. Harry McClaren, the State's post trial psychological expert, also testified at the evidentiary hearing. Dr. McClaren, an expert in the field of forensic psychology, examined Defendant, conducted psychological tests, and reviewed various documents and videos. (ER 526, 528-529*).* Dr. McClaren agreed with Dr. McMahon that Defendant was not under extreme mental or emotional disturbance at the time of the crime. (EH 555*).* As stated by Dr. McClaren, Defendant obviously had the capacity to appreciate the criminality of his conduct, he was caught while attempting to remove the videotape from the bank's security VCR. (EH 557*).* Dr. McClaren found Defendant to be non-psychotic and also found he did not suffer from borderline personality disorder. (ER 544-545).

Defendant has consistently provided differing accounts of his background, his mental health symptoms, arid the crime. Defendant did not inform Dr. McMahon, or Counsel, of his abusive background. (EH 154-155, 174-175, 256, 303, 327, 338-339, 382-383, 419). He revealed the information about the abuse after the trial. stage of the proceedings, and that abuse is the basis for any post-traumatic stress disorder diagnosis. (ER 11-12, 127, 542). He did not describe the symptoms of post-traumatic stress disorder to Dr. McClaren, but apparently communicated these symptoms to Dr. Villalba. (ER *543).* Additionally, in the forensic questionnaire Defendant completed, he was asked to endorse which symptoms applied to him from a list of possibilities. (341-342). Although he endorsed some symptoms, Defendant did not endorse the following: hearing things not present, seeing things not present, feeling spacey, acting without thinking, or having memory disturbances. (EH 342). Defendant also denied having ever suffered from hallucinations, blackouts, flashbacks, or other adverse effects. (EH

> 342).
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> Further, in contrast to his previous descriptions, Defendant now indicates one of the victims may have provoked him during the robbery by yelling out "[T]ake the money and leave, you stupid --," using the derogatory "N" word. (EH 46, 335). Defendant also now claims one of the victims closed the glass door of the vault on his hand during the robbery. (ER 45). Defendant did not indicate any of this at the time of trial. (U 2096-2104; ER 335*).* Moreover, this alleged resistance and provocation on the part of the victims contradicts the surviving victim's description at trial. (TT 1996-2015*).*
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> Defense Counsel hired Dr. McMahon to evaluate Defendant for the purposes of trial. (ER 136). Mr. Stone was familiar with Dr. McMahon's work, having worked with her on a number of capital cases, and he respected her judgment. (ER 166, 292). She. had been performing work of this nature for about thirty years and had dealt with over one hundred cases that involved preparing for the penalty phase of a capital case. (EH 166). In this case, Dr. McMahon performed several tests, conducted interviews, and reviewed pertinent materials in order to evaluate Defendant. (EH 139, 160-165, 167, 293-296). Defendant has failed to show the Counsel's performance regarding these issues was deficient or that they were in some way at fault considering the information available to them at the time of trial.

(V5, R858-860). Those findings are supported by competent substantial evidence, and should not be disturbed.

In any event, Anderson's claim that trial counsel "waited until less than a month" before trial to have a mental state expert appointed overreads the actual testimony. Defense counsel testified that:

> "There isn't any, you know, established protocol as to when I hire a mental health expert. I've got some right now that I'm pretty sure are crazy, and I got a

> mental health expert involved immediately. The ones where I don't personally have any real suspicion that there is a question of sanity or competency, I'm not as concerned about it, and in this particular situation I was trying to develop mitigation that I thought she might be interested in looking at as far as witnesses were concerned, because we were primarily concerned with the mitigation aspect of it, whether or not there were any mental mitigators." (V10, R1779).

Likewise, Anderson attempts to distort the testimony by asserting that the "state's expert" testified that six months is the "minimum time necessary" to conduct a mitigation evaluation. Dr. McClaren actually said:[22]

> Q. And would you agree that such preparation for a penalty phase takes a substantial amount of time?
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> A. Nowadays you usually get a lot of time.
>
> Q. Nowadays you usually get a lot of time, what do you mean by that statement, sir?
>
> A. I think that having been doing this for a long time, over 20 years, that over the period of time that I've worked as a forensic psychologist, more time is often given now than may have been 6, 10, even 20 years ago.
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> Q. And by more time could you give us some parameters of when usually the forensic psychologist would be brought in to the case prior to the person actually going to trial and the penalty phase occurring?

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[22] The closing describes Anderson as "a choirboy who lived with his mother." (V4, R629). While Anderson lived with his mother, he was certainly no choirboy, given his history of drug and alcohol use, his frequent lying and deception, and his various prior criminal behavior.

A. I've been called in the last three years --

Q. I'm talking about --

A. I meant like today of the -- would I go to see somebody right away.

Q. These are cases where you're the sole forensic psychologist preparing for the penalty phase in those cases?

A. Yes, they have been.

Q. And you've gone in one day and then gone on and testified?

A. I can't recall doing that.

Q. Well, how much time is the normal course of things in a case that you would be appointed prior to testifying? And I'm talking about where you actually are the lead forensic psychologist and you work up the case, you do the mitigation and you're involved in the decisions as to what to present to the jury with the attorneys, how much time in advance of the trial is it normal in your estimation for you to be retained for such purposes for you to be able to complete your job?

A. Nowadays, six months to a year.

Q. And that's because it does take a substantial amount of time to evaluate the defendant and to talk to the lay witnesses that you're talking about, read the voluminous records involved in one of these cases, correct?

A. Yes. I think that over time capital defense attorneys start earlier in their work for the penalty phase or phase two, whatever you want to call it, in capital murder cases.

(V11, R2072-73).

Raymond Green described the sexual abuse he and Anderson "suffered" at the hands of Michael Green.[23] While Green said he would have disclosed the sexual abuse at the time of trial if he had been asked, that testimony is speculative, at best. Anderson's attorneys had no reason to **ask** Raymond Green whether Anderson had been sexually abused as a child, and there is no way to know if Green would have actually disclosed the abuse. And, while Anderson makes much of the fact that Green lived and worked in Lake County at the time of trial and was "easily available" to counsel, the converse of that fact is also true -- Green must have known about Anderson's trial, and could easily have contacted counsel with this "vital" information, especially knowing, as he did, that Anderson was very reluctant to discuss the sexual abuse. The Circuit Court properly denied relief on this claim.

Anderson's third specification of ineffectiveness is that counsel "failed" to present evidence of mental health mitigation. This claim is, to large degree, essentially a variant of the other penalty phase ineffectiveness claims, and was properly denied for the same reasons.

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[23] Anderson suggests that trial counsel should have inquired into why Michael Green was not discussed along with other "family deaths" That is too many steps removed from the concealed sex abuse to even be relevant to counsel's performance.

To the extent that further discussion is necessary, Anderson devotes a substantial energy to discussing the various diagnoses. Dr. Villalba diagnosed Anderson with post-traumatic stress disorder[24] and with borderline personality disorder, and rejected any notion that Anderson is psychotic. (V9, R1497, 1516). Anderson's other expert, Dr. Berland, **rejected** these two diagnoses in favor of calling Anderson an "ambulatory psychotic." (V9, R1559, 1591, 1608, 1614). At the outset, Anderson's own evidence is inconsistent and mutually exclusive. Little analysis is necessary to determine that Villalba and Berland cannot both be correct -- this conflicting and irreconcilable testimony cancels itself out.

Further, Anderson does not explain how (or for that matter why) conflicting and mutually exclusive mental health testimony should have been presented by trial counsel. With each of Anderson's two mental state experts rejecting the conclusions of the other, the net result is a presentation that appears desperate, at best, and false and contrived, at worst. In any event, Anderson suffered no *Strickland* prejudice when this conflicting testimony was not presented, even assuming that it

[24] When asked why he diagnosed Anderson with post-traumatic stress disorder, Dr. Villalba misleadingly read the entire list of diagnostic criteria from the DSM-IV-TR. (V9, R1499-1501). On cross-examination, he testified that Anderson does not have every one of those criteria, only the ones contained in his report. (V9, R1514).

was deficient performance not to present that sort of conflicting and inconsistent expert testimony.

With respect to the testimony of Dr. McClaren, that witness explained in detail why Anderson does not satisfy the diagnostic criteria for post-traumatic stress disorder. (V11, R2029-30). Likewise, Dr. McClaren testified that, in his opinion, Anderson did not fall under either of the statutory mental state mitigators. (V11, R2041, 2043). While the application of the mitigators is a legal issue, Dr. McClaren's testimony concerning the non-applicability of the mental state mitigators is persuasive (V11, R2041-2043), and should be credited by this Court. Regardless of the information that has come to light since Anderson apparently decided to finally disclose his sexual abuse history, there is nothing that outweighs the heavy aggravation present in this case.

To the extent that Anderson claims a background of drug and alcohol abuse, the evidence is conflicting on that point, as well. While Anderson's experts apparently credited Anderson's self-report (V9, R1510, 1559-60, 1584-85), Dr. McClaren interviewed various persons who were supposed to have been indulging in drug and alcohol use with Anderson -- these individuals denied that the level of substance use came anywhere close to the quantities accepted as fact by Anderson's experts. Anderson's experts based their testimony on self-serving reports

from the defendant which are contradicted by the civilian witnesses. The testimony of Drs. Villalba and Berland is not credible on this point, either. While it is apparently true that Anderson was involved in a car crash in which he hit his head, there is no evidence of any lingering effects from that injury which were manifesting themselves at the time of the offenses giving rise to this proceeding.

To the extent that Anderson claims that he suffered from “a debilitating phobia,” that is an apparent reference to Anderson’s fear of the siren on the fire apparatus housed at the fire station near his home. How that is mitigating is unexplained -- under the facts of this case, it makes no sense to suggest that this bit of information would have made any difference in the outcome. Finally, to the extent that Anderson claims that counsel failed to present “other undeveloped background information,” it is Anderson’s responsibility to identify the “mitigation” that was “unpresented.” He has not done that, and it makes no sense to criticize trial counsel for not presenting evidence that is only identified as “other.” There is no basis for relief because Anderson has not carried his burden of proof under *Strickland.*

Finally, in order to find that trial counsel were constitutionally ineffective, this Court would be required to ignore the fact that Anderson’s new experts based their opinions

(mutually exclusive though they are) on information that Anderson affirmatively concealed from his attorneys and the trial level expert. There has been no showing at all that the new experts would reach the same conclusions in the absence of the sexual abuse evidence that has only recently been disclosed by the defendant. Because that is so, the mental state testimony presented at the evidentiary hearing was simply not available at the time of trial -- counsel cannot be ineffective for not presenting evidence that could not have been presented at trial, especially when the defendant hid it himself. *See, Horsley v. Jones, infra.*

II. INEFFECTIVENESS FOR FAILURE TO OBJECT TO "MISLEADING" STATEMENTS ABOUT AGGRAVATION AND MITIGATION DURING *VOIR DIRE.*

On pages 60-65 of his brief, Anderson argues that trial counsel were ineffective for not objection to "misstatements of the law" during *voir dire*.[25] The collateral proceeding trial court properly denied relief, stating:

> Defendant argues the State Attorney's statements during jury selection and the penalty phase misrepresented Florida law regarding the weighing of aggravating and mitigating circumstances in the penalty phase. Defendant claims the jury was led to believe that a conviction for premeditated murder justified imposing the death penalty, and that a life sentence could be justified only by extenuating circumstances. Defendant maintains Defense Counsel's

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25 The standard of review for this ineffectiveness claim is the same as for the preceding claim. *See*, page 37, above.

failure to object to these statements Constituted ineffective assistance of counsel.

Defendant also argues Defense Counsel, during voir dire, compounded the State's misstatements by not explaining the jury's initial burden to determine whether sufficient aggravating circumstances existed to justify a sentence of death, and by not disputing that a death recommendation was required if aggravating circumstances outweighed mitigating Circumstances. Defendant claims the statements of the State Attorney and Defense Counsel suggested the jury did not have to make a threshold determination before engaging in the weighing process. Defendant further argues that Counsel's statements suggested the jury would be required to recommend a death sentence if the aggravating circumstances outweighed the mitigating Circumstances.

Although the statements in question may have been less than a full explanation regarding the sentencing process, the jury was not told it must return a recommendation of death if the aggravating circumstances outweighed the mitigating circumstances. Further, even assuming Counsel should have objected to the comments or should have further clarified the jury's role in the process, Defendant has failed to establish prejudice. The jury was properly instructed regarding its role in the process by the Court, and juries are presumed to follow those instructions. *Sutton v. State,* 718 So. 2d 215, 216 (Fla. 1st DCA 1998) (TI 2597, 2657-2664). [FN1] The Court's instructions would have eliminated any misapprehension that may have occurred based on the complained-of comments. Moreover, during the penalty phase closing argument, Mr. Doud explained:

[FN1] "TT" refers to the trial transcript.

[T]he law says that the death penalty is not automatic upon Conviction of First Degree Murder. In fact, the death penalty is only appropriate after you go through what I submit is a four step process. And the first step in that is to determine are there aggravating circumstances and do they exist beyond a reasonable doubt.

> Remember what the Judge told you before, beyond a reasonable doubt is a very strict standard. If none of these aggravating circumstances are proved beyond a reasonable doubt, there is only one argument you can have, one outcome, and that is life in prison without parole. You can't make a vote for death, that's the only thing you are allowed to determine.
>
> However, if you find that there are aggravating circumstances, then we move on to the next step. But before we can move on to the next step, once again, there is another consideration that you have to ask, are these aggravating circumstances in and of itself sufficient to vote for death?
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> You weigh it and if you find once again these aggravating circumstances are not sufficient, once again there is only one verdict you can come to and that is life without parole.
>
> If you find that the aggravating circumstances by themselves are sufficient, then we go on to the next step. You weigh the mitigation circumstances, or examine the mitigation circumstances and you determine whether or not each and every one of you are reasonably satisfied that mitigation circumstances exist.
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> (TT 2627-2628).
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> As previously stated, the jury was never instructed that it must recommend death if the aggravating circumstances outweighed the mitigating circumstances in the case. Further, it is undisputed that the Court properly instructed the jury regarding the matter. In addition, Mr. Doud explained the process to the jury in the penalty phase closing argument. Under these circumstances, Defendant has failed to establish prejudice under the *Strickland* standard, even assuming some deficiency in Counsel's performance.

(V5, R841-43).

To the extent that further discussion is necessary, while Anderson claims that the jury was "misinformed" (by the State)

about the mechanics of the process of weighing of aggravation and mitigation, his true claim is based on his belief that the State somehow argued to the jury that a death sentence was **required** if the aggravation outweighed the mitigation. However, the true facts are that the State never made such a statement -- the lack of factual support in the record for this claim likely explains the absence of record citation to support the real claim Anderson is raising. Despite the harsh criticism directed at Anderson's trial attorneys, the true facts are that Anderson is attempting to fit a square peg in a round hole. The State never argued that the jury was required to return a death recommendation if the aggravation outweighed the mitigation, and, because that is so, defense counsel never had any basis to object to anything. Counsel cannot be ineffective for not objecting to a correct statement of law, and Anderson has failed to carry his burden of proof under *Strickland* with respect to this claim. The jury was properly instructed, and there is no basis for relief. *Miller v. State/McDonough*, 926 So. 2d 1243, 1257 (Fla. 2006); *Rodriguez v. State/Crosby,* 919 So. 2d 1252, 1280 (Fla. 2005); *Griffin v. State*, 866 So. 2d 1, 14-15 (Fla. 2003).

Further, even if Anderson's strained reading of the record can be construed as somewhat accurate, there is no basis for relief for the following independently adequate reasons. First,

despite the protestations of Anderson's brief, this claim is no more than a substantive claim for relief that is pleaded in terms of ineffective assistance of counsel in an attempt to avoid the preclusive effect of the procedural bar to review of this claim. *See, e.g., Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1323 (Fla. 1994); *Johnson v. State*, 593 So. 2d 206 (Fla.) cert. denied, 506 U.S. 839 (1992); *Kight v. Dugger*, 574 So. 2d 1066 (Fla. 1990); *Medina v. State*, 573 So. 2d 293 (Fla. 1990); *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990); *Adkins v. Dugger*, 541 So. 2d 1165 (Fla. 1989); *Clark v. State*, 460 So. 2d 886 (Fla. 1984). Attempts to relitigate issues that were decided on direct appeal by pleading such claims in the guise of a claim of ineffective assistance of counsel are improper. *See, Medina, supra; Kight, supra; Clark, supra.* Attempts to relitigate previously-decided claims using a different argument are improper. *Quince v. State*, 477 So. 2d 535, 536 (Fla. 1985). Florida law is well settled that a defendant cannot avoid application of the procedural bar rule by pleading a substantive claim in the guise of an ineffectiveness claim. That is what Anderson has done, and this claim is not a basis for relief.

Second, despite the constitutional pretensions of this claim, Anderson has identified no Florida case law holding that counsel was ineffective for not objecting to the statements

identified in the motion. In the absence of any decisional support for this claim, it is not a basis for relief.

Third, assuming *arguendo* that the complained-of statements were improper, Anderson cannot avoid the fact (which he does not mention) that the jury was properly instructed on their role in the sentencing process. (TT2362, 2657-64). The law is well-settled that juries are presumed to follow their instructions, and, because that is so, there is no harmful error, and no basis for relief. *Sutton v. State*, 718 So. 2d 215, 216 (Fla. 1st DCA 1998) ("The law presumes that the jury followed the trial judge's instructions in the absence of evidence to the contrary."); *Collier v. State*, 259 So. 2d 765, 766 (Fla. 1st DCA 1972); *Cox v. State*, 819 So. 2d 705, 717 (Fla. 2002) (misstatements of law deemed harmless error where trial court gave correct instructions to jury.)[26] Even if counsel's performance was somehow deficient (and given the difficulty of

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[26] In *Cox*, the State had explicitly argued that the jury was required to return a death sentence if the aggravation outweighed the mitigation. The Florida Supreme Court found that the incorrect statements of law were not fundamental error and were not a basis for reversal because the jury was properly instructed. If there was no basis for reversal in *Cox*, and that is the law, there is no ineffectiveness in this case, when the complained-of comments were not the absolute statements found in *Cox* (and in *Henyard v. State*, 689 So. 2d 239 (Fla. 1986)).

creating Anderson's claim out of the record, that requires a stretch), there was no prejudice, and, consequently, no basis for relief under *Strickland.*

III. THE "ANTI-DOUBLING" JURY INSTRUCTION CLAIM

On pages 65-69 of his brief, Anderson argues that trial counsel were ineffective for not requesting the anti-doubling jury instruction with respect to the cold, calculated and premeditated aggravator and the pecuniary gain aggravator. This claim is not only procedurally barred, but also meritless, as the trial court found:

> Defendant argues the jury was permitted to use common aspects of his offense justifying both the cold, calculated and premeditated aggravator and the pecuniary gain aggravator. He maintains Counsel was ineffective in failing to seek a jury instruction regarding merging aggravating factors, and had the jury been instructed properly, one or both of the aggravators in question might have been eliminated.
>
> However, the Florida Supreme Court affirmed the finding of both the cold, calculated and premeditated aggravator and the pecuniary gain aggravator. The Supreme Court stated as follows:
>
>> In order to establish the CCP aggravating factor:
>>
>> [T] he jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotion frenzy, panic, or a fit of rage (cold); and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and that the defendant exhibited heightened premeditation (premeditated); and that the defendant has

> no pretense of moral or legal justification. *Jackson v. State,* 648 So. 2d 85, 89 (Fla. 1994) (citations omitted).
>
> Anderson argued in his brief and at oral argument that, although he had carefully planned the robbery of the USB, the shootings were the result of him panicking during the ‘robbery. It is true that a: plan to kill cannot be inferred solely from a plan to commit another felony such as robbery. *See Farina v. State,* 801 So. 2d 44, *54* (Fla. 2001); *Geralds v. State,* 601 So. 2d 1157, 1163 (Fla. 1992). However, a prearranged plan to kill in order to prove CCP can be indicated by facts such as procurement of a weapon, lack of resistance or provocation, and the appearance of carrying out the murder as a matter of course. *See Farina,* 801 So. 2d at *54; Bell v, State,* 699 So. 2d 674, 677 (Fla. 1997); *Swafford v. State,* 533 So.2d 270, 277(Fla. 1988).

Anderson, 863 So. 2d at 176-77

The Supreme Court found the CCP finding was supported by substantial, competent evidence. *Id* at 177. As to the pecuniary gain aggravator, the Court stated, "[i]n order to establish that a murder was committed for the purpose of pecuniary gain, the State must prove beyond a reasonable doubt that the, murder was motivated, at least in part by a. desire to obtain money, property, or other financial gain." *Id.* at 178. Addressing Defendant's case, the Supreme Court found that "[t]he fact that the murder occurred during the robbery of the bank intuitively indicates that it was motivated, at least in part, by Anderson's desire to obtain money, and, therefore, this aggravating circumstance is supported by competent, substantial evidence." *Id.*

To the extent Defendant's claim disputes the existence of both aggravating factors in this case, that issue had been decided on appeal and Defendant is procedurally barred from raising it in the instant motion. Further, as to the improper doubling argument,

> the facts of a case may support multiple aggravating factors, "provided the aggravating factors are themselves separate and distinct and not merely restatements of each other as in a murder committed during a robbery and murder for pecuniary gain, or murder committed to eliminate a witness and murder committed to hinder law enforcement." *Fotopoulos v. State,* 608 So. 2d 784, 793 (Fla. 1992) (quoting *Echols v. State,* 484 So. 2d 568 (Fla. 1985)).

(V5, R863).

And, to the extent that further discussion is necessary, this claim is foreclosed by binding precedent, even though Anderson fails to recognize that fact. Despite the hyperbole of Anderson's brief, the law in Florida is settled that these two aggravating factors **do not double,** and are not subject to being merged. *Fotopoulos v. State* 608 So. 2d 784 (Fla. 1992); *Cooper v. State,* 492 So. 2d 1059 (Fla. 1986); *Echols v. State,* 484 So. 2d 568 (Fla. 1985). Counsel cannot have been ineffective for not raising a claim that has no merit and is clearly contrary to settled law. Likewise, counsel cannot have been ineffective for not arguing a legally invalid point to the jury. Anderson's claim has no legal basis, and he is not entitled to relief on this claim.

To the extent that further discussion of this claim is necessary, Anderson ignores that the direct appeal decision of this Court affirmed the finding of both the coldness aggravator and the pecuniary gain aggravator. *Anderson v. State*, 863 So. 2d at 177-178. In an effort to explain away that decision, Anderson

asserted below that this Court “apparently unconsciously establish[ed]” this claim when it set out the 13 facts supporting the coldness aggravator. The true facts are that the facts set out in support of the coldness factor do not “only support the pecuniary gain/bank robbery aggravator” as Anderson claims -- those facts demonstrate the cold, calculated and premeditated nature of the murder of Heather Young. Those findings do **not** merge with the pecuniary gain aggravator. As this Court held, “The fact that the murder occurred during the robbery of the bank intuitively indicates that it was motivated, at least in part, by Anderson's desire to obtain money, and, therefore, this aggravating circumstance is supported by competent, substantial evidence.” *Anderson v. State*, 863 So. 2d at 178. This claim is legally and factually invalid, and, for those reasons, counsel was not ineffective for not raising the issue raised by Anderson in his post-conviction motion.

IV. THE GUILT PHASE INEFFECTIVENESS CLAIMS

On pages 69-78 of his brief, Anderson raises four identifiable claims of guilt stage ineffective assistance of counsel.[27]

Anderson’s first claim is that counsel was ineffective for not seeking a mistrial based on an allegedly “improper and

27 The standard of review for these claims is the same as for the other ineffectiveness claims.

prejudicial” closing argument. Anderson raised this claim on direct appeal, where this Court held:

> Anderson's second claim of error is based on a statement made by the prosecutor during closing arguments:
>
> > I've come to the conclusion that if I had to put this defense into a category that it doesn't fit in any of the standard categories, what I would call this defense is "the National Enquire [sic] Defense." Inquiring minds want to know. Ladies and gentlemen, my job is not to satisfy the defendant's curiosity, or his attorneys' curiosity, or the Judge's curiosity, or even your curiosity about these details. I've got one job, one job here today. If you folks have questions that you just have to know the answer to, after this trial is over, my office is up on the fourth floor, you are welcome to come up there and ask me about any of these little details—
>
> Anderson objected to the State's closing argument as an improper comment on Anderson's right to counsel, on the validity of his defense, and on matters that were not in evidence. The court overruled the objection but warned the State, "I don't think you need to tell them to come up to your office and talk to you afterwards. I think that is improper." [FN22]
>
> > [FN22] The State did not repeat the argument and defense counsel did not object further, ask for a curative instruction, or move for mistrial.
>
> We agree that the prosecutor's comment that Anderson's counsel was employing "the National Enquire[r] Defense" followed by the suggestion that the jurors come to his office after the trial if they had any questions was improper. *See, e.g., Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999) (stating that prosecutor "may not suggest that evidence which was not presented at trial provides additional grounds for finding defendant guilty"); *Henry v. State*, 743 So. 2d 52, 53

> (Fla. 5th DCA 1999) (holding that it was improper to refer to defendant's version of events as the "most ridiculous defense" the prosecutor has ever heard); *Izquierdo v. State*, 724 So. 2d 124, 125 (Fla. 3d DCA 1998) (improper to refer to defense as a "pathetic fantasy"); *Waters v. State*, 486 So. 2d 614, 616 (Fla. 5th DCA 1986) (improper to refer to defense counsel's closing arguments as "misleading and as a smoke screen").
>
> However, although we agree that the comment was improper, Anderson is not entitled to relief. In order to require a new trial based on improper prosecutorial comments, the prosecutor's comments must
>
>> either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.
>
> *Spencer v. State*, 645 So. 2d 377, 383 (Fla. 1994). The improper comment in this case does not approach the level of improper comments in cases where we have granted relief. *See, e.g., Brooks v. State*, 762 So. 2d 879, 905 (Fla. 2000); *Ruiz*, 743 So. 2d at 5. Therefore, Anderson is not entitled to relief on this claim.

Anderson v. State, 863 So. 2d at 187.

When Anderson re-raised this same claim in his postconviction motion as a claim of ineffective assistance of counsel, the trial court denied relief, finding the claim procedurally barred and, alternatively, meritless:

> Defendant maintains Defense Counsel failed to properly object to and to preserve prosecutor's comment that Defense Counsel was using "the National Enquire[r] Defense" during closing arguments. He maintains the cumulative effect of this error renders

> Counsel's performance ineffective, although it is not sufficient to constitute ineffective assistance if considered in isolation.
>
> This issue was discussed in the Florida Supreme Court's opinion affirming Defendant's conviction. *Anderson,* 863 So. 2d at 187. At trial, Counsel objected to the State's comment "as an improper comment on Anderson's right to counsel, on the validity of his defense, and on matters that were not in evidence." *Id.* The objection was overruled, but the Court cautioned the prosecutor against inviting jurors to speak with him in his office after the trial. *id.* On appeal, the Supreme Court agreed the State's comment was improper. *Id.* However, the improper comment was found not to "approach the level of improper comments in cases where we have granted relief." *Id.*
>
> Even assuming this issue is not procedurally barred as having been raised on appeal, Defendant fails to satisfy the requirements of *Strickland.* Defendant does not demonstrate that Counsel's performance was deficient. Trial Counsel objected to the comment in question, but the objection was overruled by the Court. As to establishing prejudice, the Supreme Court found Defendant was not entitled to relief based on the State's improper comments. Even considering the cumulative effect of the alleged errors, Defendant has failed to show a reasonable probability the outcome of the proceedings would have differed in the absence of Counsel's alleged deficient performance.

(V5, R844).

To the extent that this claim deserves further discussion, Florida law is well-settled that re-pleading a substantive claim as one of ineffectiveness of counsel does not re-open a claim that has already been decided on direct appeal. *Israel v. State/McNeil*, 33 Fla. L. Weekly S211, 214 (Fla. Mar. 20, 2008); *Rose v. State*, 33 Fla. L. Weekly S195, 196, (Fla. Mar. 13,

2008); *Stephens v. State/McDonough*, 975 So. 2d 405, 419 (Fla. 2007); *Zack v. State*, 911 So. 2d 1190 (Fla. 2005); *Brown v. State*, 755 So. 2d 616 (Fla. 2000). Anderson is not entitled to a second bite at the apple -- this claim was decided on direct appeal, and that is the end of the story. Assuming *arguendo* that counsel should have moved for a mistrial[28] or sought a curative instruction of some sort, Anderson cannot carry his burden of proving prejudice, especially since the Florida Supreme Court found that the error did not require reversal. The evidence against Anderson was, to say the least, overwhelming, and even if a curative instruction had been given, there is no probability at all (much less a reasonable one) of a different result. Anderson is not entitled to relief on this claim because Anderson has proven neither deficient performance nor prejudice.

Finally, Anderson does not explain how the trial court's alternative merits ruling is incorrect. (*Initial Brief*, at 71-2). And, in the face of this Court's explicit holding that Anderson was not entitled to relief, he cannot make that showing.

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28 In light of this Court's finding that the State's comments did not rise to the level of the comments in cases in which relief had been granted, a motion for a mistrial would not have been well-taken under Florida law. This claim is nothing more than Anderson's continuing quarrel with this Court's decision.

Anderson’s second ineffectiveness claim is that counsel was ineffective for not objecting to the testimony of the blood spatter expert as “speculative, highly inflammatory, and of dubious probative value.” *Initial Brief,* at 72. This claim was raised on direct appeal, and rejected by this Court:

> Anderson argues that the trial court erred in admitting the testimony of Farley "Jake" Caudill, a blood stain pattern analyst. Caudill testified as to blood stain patterns inside the vault. [FN11] Anderson's primary argument is that Caudill was not qualified to express an expert opinion; however, he also argues that the testimony was of dubious probative value, completely speculative, and highly inflammatory. Although Caudill's qualifications and opinion are subject to question, we nevertheless believe that the trial court did not abuse its discretion in allowing this expert testimony.
>
>> [FN11] Over Anderson's objection, Caudill testified that some of the blood stains found in the vault were made by blood traveling at "medium velocity," which was consistent with the victims having been struck with blunt force. On cross-examination, Caudill admitted that the medium velocity spatters could have been created in a number of other ways as well, such as the activities of the emergency personnel or from arterial spurting. Caudill also testified that he could not associate the blood spatters he tested with a specific victim.
>
> It is well settled that the determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error. [FN12] *See Provenzano v. State,* 750 So. 2d 597, 602 (Fla. 1999); *Brennan v. State*, 754 So. 2d 1, 4 (Fla. 1999); *Geralds v. State*, 674 So. 2d 96, 100 (Fla. 1996); *Terry v. State,* 668

So. 2d 954, 960 (Fla. 1996); *Ramirez v. State*, 542 So. 2d 352, 355 (Fla. 1989).

> [FN12] An expert is permitted to express an opinion on matters in which the witness has expertise when the opinion is in response to facts disclosed to the expert at or before the trial. § 90.704, *Fla. Stat*. (1999). Section 90.702, *Florida Statutes* (1999), requires that before an expert may testify in the form of an opinion, two preliminary factual determinations must be made by the court under section 90.105, *Florida Statutes* (1999). See Charles W. Ehrhardt, *Florida Evidence* § 702.1 (2001 ed.). First, the court must determine whether the subject matter will assist the trier of fact in understanding the evidence or in determining a fact in issue. *See id*. Second, the court must determine whether the witness is adequately qualified to express an opinion on the matter. *See id.*

Caudill's qualifications were similar to those of the blood spatter expert in *Cheshire v. State,* 568 So. 2d 908, 913 (Fla. 1990). [FN13] In *Cheshire*, we stated:

> Cheshire alleges that the trial court improperly qualified a man named Allen Miller as an expert in blood-spatter evidence. It appears Miller's qualifications consisted of a single forty-hour course, three prior qualifications as an expert and his own field experience. While we agree that these qualifications are open to reasonable question, we nevertheless believe that the trial court did not abuse its discretion in allowing this expert testimony. Any deficiencies in an expert's qualifications, experience and testimony may be aired on cross-examination, provided there is some reasonable basis to qualify the expert. We believe such a basis existed on this record.

Id. In the instant case, although we would note that Caudill's qualifications are also "open to reasonable

question," we conclude that the trial court did not abuse its discretion in allowing Caudill to testify.

> [FN13] Caudill had taken a forty-hour class in blood stain pattern taught by an instructor from FDLE. Although Caudill had not testified as an expert previously, he had conducted blood stain pattern analysis in other cases that had not gone to trial.

To the extent Anderson argues that Caudill's testimony was of **dubious probative value, completely speculative, and highly inflammatory**, he relies on the four evidentiary requirements described in *Glendening v. State*, 536 So. 2d 212, 220 (Fla. 1988), for admitting an expert opinion: "(1) the opinion evidence must help the trier of fact; (2) the witness must be qualified as an expert; (3) the opinion must be capable of being applied to evidence at trial; and (4) the probative value of the opinion must not be substantially outweighed by the danger of unfair prejudice." Anderson argues that Caudill's testimony fails each of these requirements.

Notably, Anderson's objection at trial went primarily to Caudill's qualifications. After the trial court rejected Anderson's arguments regarding Caudill's qualifications, Anderson moved to strike Caudill's testimony on the following grounds:

> [I]t is [Caudill's] opinion that is based on an assumption rather than a factual predicate, that being that his opinion is based upon the assumption that the blood stains originated from the same source, which has not been factually established. And he is also basing his opinion upon the assumption that the substance on the counter is of a cosmetic nature and that also has not been established as a factual matter. [FN14]

> [FN14] Caudill testified that there was a substance on the countertop located inside that vault that appeared to be cosmetics, possibly where a victim's face struck the counter. However, he admitted that he had

> not tested the substance to confirm whether or not it was cosmetics. Furthermore, Caudill also admitted that he had not tested the blood stains to see if they had come from the same victim, or if there had been a commingling of the victims' blood. In Anderson's motion for a new trial, Anderson again raised the claim that the court improperly allowed Caudill to be qualified as an expert and that the court improperly allowed Caudill to render an opinion without having the necessary factual predicate information to support such an opinion. However, Anderson never raised the claim that Caudill's testimony was so highly speculative that it would confuse the jury or that the prejudicial impact of his testimony outweighed its relevance.

Unlike Anderson's current argument, which claims that Caudill's testimony "was of dubious probative value, completely speculative, and highly inflammatory," Anderson's objection at trial appears to have been based on whether the predicate facts had been established to allow Caudill to form his opinion, *i.e.,* whether he had tested the blood to see if it came from the same individual or whether he had tested the chemical nature of a material found on one of the vault's counter tops that appeared to be cosmetics. Therefore, Anderson's current argument is not preserved for review. *See Occhicone v. State*, 570 So. 2d 902, 905-06 (Fla. 1990) (stating that claim was not preserved for review where defense failed to object on specific grounds advanced on appeal); *Farinas v. State,* 569 So. 2d 425, 429 (Fla. 1990) (stating that "[a]bsent fundamental error, an issue will not be considered for the first time on appeal"); *Bertolotti v. Dugger*, 514 So. 2d 1095, 1096 (Fla. 1987) (stating that "[i]n order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court").

Even if Anderson's argument had been preserved, we would conclude that the trial court did not abuse its discretion in allowing Caudill to testify. Caudill's testimony was relevant with regard to the State's

theory on blunt force trauma. [FN15] Moreover, Anderson's counsel rigorously cross-examined Caudill, and this cross-examination would have let the trier of fact assess the weight and credibility that should be attached to Caudill's opinion.

> [FN15] Caudill's testimony provided support for the State's theory that Anderson may have struck the victims with a blunt object after they had been shot. Additionally, the testimony of the medical examiner that both victims had injuries consistent with blunt force trauma and Scott's testimony that she remembered a "black object" coming at her forehead provided evidence that the victims may have suffered some sort of blunt force trauma in addition to being shot.

Anderson v. State, 863 So. 2d at 181. (emphasis added). This Court's holding is dispositive of the issue, and Anderson's attempt to cast this claim as one of ineffectiveness of counsel does not allow him to re-litigate a claim that this Court has already decided. *See, Zack, supra.*

> In denying relief on this claim, the trial court held:
> Defendant claims the failure to properly object to the admission of blood spatter witness testimony contributed to the cumulative error rendering Counsel's performance ineffective. Defendant argues the evidence regarding head injuries to the victims after they received multiple gunshot wounds was irrelevant and cumulative.
>
> On appeal, Defendant argued the Court :erred in admitting the testimony of the blood spatter witness. *Anderson,* 863 So. 2d at 179. Defendant argued the witness was not qualified and the "testimony was of dubious probative value, completely speculative, and highly inflammatory." *Id.* Although the Supreme Court determined Defense Counsel's argument that the testimony "was of dubious probative value, completely speculative, and highly inflammatory" was not preserved for review, the argument was considered

> anyway. *Id.* at 180-181.
>
> The Supreme Court stated that "[e]ven if Anderson's argument had been preserved, we would conclude that the trial court did not abuse its discretion in allowing Caudill to testify." *Id.* at 181. The testimony was relevant regarding the blunt force trauma theory advanced by the State at trial. *Id.* The Court also noted Trial Counsel "rigorously cross-examined Caudill, and this cross-examination would have let the trier of fact assess the weight and credibility that should be attached to Caudill's opinion." *Id.* As Defendant's claims were addressed on appeal, he should not raise the claims couched in terms of ineffective assistance of counsel in the instant Motion. *See Zack v. State,* 911 So. 2d 1190 (Fla. 2005); *Brown v. State,* 755 So. 2d 616 (Fla. 2000). Further, as the Court did not abuse its discretion in allowing the testimony, Defendant cannot establish any prejudice for Counsel's failure to properly preserve the objection.

(V5, R845-846).

The trial court properly denied relief, and, to the extent that Anderson complains that the trial court did not consider the "cumulative effect of the error," that argument overlooks the fact that this Court held that there was no error at all. If there is no error, and this Court has already made that finding, there is nothing to "cumulate" in the first place. Anderson's argument has no factual basis, and does not supply a basis for relief.

Anderson's third claim is that counsel were ineffective with respect to the photographs that were admitted into evidence at trial. Anderson's claim is unclear as to whether his complaint is about the photographs of the deceased victim, or

about the photographs of the victim who survived Anderson's assault. In the trial court, Anderson complained about the introduction of photographs of the **surviving** victim, which was the claim pressed on direct appeal and decided by this Court.[29] After the evidentiary hearing below was concluded, the claim became that the lack of an objection to photographs of the deceased victim supported an ineffectiveness claim as to the photographs of the survivor because this Court mentioned, in a footnote, that there was no objection to the photos of the deceased. With respect to the photographs of the surviving victim, this Court resolved that claim against Anderson:

> Next, Anderson argues that the trial court erred in allowing the introduction of three photographs of Scott because they were not relevant to any issue in the case and, alternatively, that any relevance was outweighed by the prejudicial impact of the photographs. During the testimony of Gene Cushing, a crime scene technician, the State sought to introduce three photographs of Scott that Cushing had taken at the hospital where Scott was being treated. Cushing took the photographs to document Marisha Scott's injuries as they appeared on March 23, 1999, three days after the robbery. When the State attempted to introduce the three photographs, Anderson's counsel, Mr. Doud and Mr. Stone, requested to approach the bench and the following proceedings took place outside the presence of the jury:
>
>> MR. DOUD: Judge, we would object to the introduction of the photographs, I believe it's [State's exhibit] PP. They show the injuries on March 23rd, they don't show the

29 The collateral proceeding trial court denied relief on the claim that was before it. (V5, R846-57).

> injuries as inflicted or as alleged to have been inflicted by the defendant on the date of the robbery, which would have been March 20th. These show stitching and other repairs, other rescue efforts had been performed on that victim.
>
> THE COURT: Anything else?
>
> MR. DOUD: That's it
>
> MR. STONE: And cumulative and unduly prejudicial.
>
> MR. GROSS: They're not cumulative, there's no other picture of Marisha is evidence, your Honor. And the argument that he makes to the time delay are medical and only goes to the weight not the admissibility.
>
> THE COURT: Objection is overruled.

Initially, there is a question of whether Anderson's objection to the introduction of the photographs at trial was sufficient to preserve his claim for review. *See Pagan v. State*, 830 So. 2d 792, 812 (Fla. 2002) (holding that defendant's claim that inflammatory pictures were improperly introduced was not preserved because defense counsel failed to object to their introduction). Anderson's primary objection at trial was that Scott's wounds had been repaired and stitched and thus the pictures were not reflective of how they looked on March 20, 1999. When asked if there was any other reason for the objection, Anderson's counsel responded, "And cumulative and unduly prejudicial." The State responded that the photographs were not cumulative because no pictures of Scott had been introduced, but did not respond to defense counsel's "unduly prejudicial" remark, and the trial court overruled Anderson's objection. It is difficult to find that Anderson's counsel's simple comment that the pictures were unduly prejudicial, without any elaboration or explanation, preserves his current claim, *i.e.*, that the pictures were irrelevant to any contested issue or alternatively, that their inflammatory effect outweighed any relevance.

Nevertheless, presuming that this bare objection is sufficient to preserve Anderson's claim for review, we hold Anderson's claim to be without merit.

We recently explained how trial courts should go about determining the admissibility of photographs of victims and how this Court will treat the determination of admissibility on appeal: This Court has held that "the test for admissibility of photographic evidence is relevancy rather than necessity." Where photographs are relevant, the trial court must determine whether the "gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and [distract] them from a fair and unimpassioned consideration of the evidence." Admission of photographic evidence of a murder victim is within the trial court's sound discretion and is subject to an abuse of discretion standard of review. Nonetheless, this Court has "cautioned trial judges to scrutinize such evidence carefully for prejudicial effect, particularly when less graphic photos are available to illustrate the same point." . . .

> During the guilt phase, this Court has "upheld the admission of photographs to explain a medical examiner's testimony, to show the manner of death, the location of wounds, and the identity of the victim." Moreover, this Court has considered the trial court's preliminary screening as a factor weighing in favor of admissibility.

Philmore v. State, 820 So. 2d 919, 930-31 (Fla. 2002) (citations omitted). [FN20] At the point the photographs were introduced in this case, no pictures of Scott had been introduced and she had not yet testified, and, therefore, the pictures were relevant to show Scott's identity. *See Larkins v. State*, 655 So. 2d 95, 98 (Fla. 1995). Furthermore, they were relevant to show the location of Scott's wounds. *See id.* [FN21] Therefore, the trial court did not abuse its discretion in allowing the three photographs of the living victim to be introduced.

> [FN20] Although *Philmore*, and the cases cited therein, dealt with the photographs of murder victims, the same type of analysis is applicable to photographs of a living victim's injuries. *See, e.g., Waggoner v. State*, 800 So. 2d 684, 685-86 (Fla. 5th DCA 2001) (holding that pictures of the living victim's injuries were relevant to issues in the trial and were admissible).
>
> [FN21] Anderson also argues that the photographs were improperly introduced because the only issue was whether the shooting was intentional. However, this argument is inaccurate. When the pictures were introduced, Anderson had not yet stipulated or testified that he shot Scott. Furthermore, the State had already introduced five pictures of the deceased victim, Young, that were taken at the medical examiner's office. Anderson did not object to the introduction of these photographs and he did not argue, either at trial or on appeal, that these pictures were introduced in error. If the issue at trial had been only whether or not the shootings were intentional, Anderson would have also objected to the pictures of the deceased victim.

Anderson v. State, 863 So. 2d at 184-186 (emphasis added).[30] Any claim relating to the photographs of Ms. Scott is procedurally barred because it was raised and addressed on direct appeal. Anderson cannot relitigate that claim in this proceeding.

Insofar as this claim relates to the introduction of photographs of the deceased victim, Anderson has done no more than raise a bare complaint that those photographs were

30 In her testimony, the Medical Examiner used the photographs to describe the victim’s wounds. (TT1572-77).

introduced. Anderson has done nothing to explain why the photographs of the deceased victim should or could have been excluded because he cannot do so. Those photographs were relevant (at the very least) to the testimony of the medical examiner -- because that is so, Anderson has failed to carry his burden of proof as to his ineffectiveness claim. As this Court has repeatedly acknowledged:

> We have consistently upheld the admission of allegedly gruesome photographs where they were independently relevant or corroborative of other evidence." *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990). As we stated in *Henderson v. State*, 463 So. 2d 196 (1985), "Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." *Id.* at 200. All ten photographs were deemed relevant either to the crime scene technician's explanation of the location of the victim's body, to the medical examiner's explanation of the findings of the autopsy, or as proof that the victim was strangled and did not die by accidental drowning as Arbelaez claimed. Each of these is clearly a legitimate basis for admitting photographs of a murder victim. *See Hertz v. State*, 803 So. 2d 629, 641-43 (Fla. 2001) (finding no abuse of discretion where the photos were "relevant to show the position and location of the bodies when they were found" and to "assist[] the crime scene technician in describing the crime scene" and were "probative of the medical examiner's determination as to the manner of the victims' deaths").

Arbelaez v. State, 898 So. 2d 25, 44 (Fla. 2005). Even if the admissibility of the photographs of Anderson's victim had been objected to at trial, that objection would not have been well-

taken because the photographs were relevant to the issues before the jury. Anderson's complaint is, in reality, that the jury was shown the results of his handiwork. That is not a basis for complaint, and this claim is not a basis for relief.

To the extent that Anderson's claim in his brief is a claim that the photographs of the deceased victim should not have been admitted into evidence, that claim was not raised below and is procedurally barred. To the extent that Anderson is attempting to claim ineffectiveness of counsel with respect to these photographs, that claim was not raised below, either, and is barred for the same reasons. In any event, without waiving the procedural bar, Anderson has demonstrated no theory under which the photographs could have been excluded. Under these facts, his claim fails because he can demonstrate neither deficient performance nor prejudice.

Anderson's fourth complaint is that counsel was ineffective for not objecting or seeking to exclude testimony about the resuscitative efforts utilized with the victims by emergency medical personnel. The trial court denied relief on this claim, stating:

> Defendant argues the Defense was ineffective for failing to object or to move *in limine* regarding the introduction of the testimony of police and medical workers who attended to the victims at the scene of the crime. He maintains the evidence was cumulative, largely irrelevant, and unfairly prejudicial.

Specifically, Defendant refers to the cross-examination of Deputy Michael Thomas where the Deputy was asked if he knew Ms. Scott and he responded with a description of Ms. Scott's condition at the scene of the crime. Defendant argues Counsel was ineffective to the extent the testimony, which indicated Ms. Scott was choking on her own blood and asking for help, was elicited by Counsel. To the extent the answer was unresponsive, Defendant claims Counsel was ineffective for failing to object, for failing to seek an instruction for the witness to answer responsively, for failing to move to strike the testimony, for failing to seek a curative instruction, and for failing to seek a mistrial.

Defendant also asserts Counsel was ineffective for failing to object or to limit the "gruesome and detailed" testimony of Deputy Michael Thomas, Kirk Lewis, Lieutenant Mark O'Keefe, Dr. Susan Rendon, Marisha Scott, and Detective James Jicha. Defendant claims Counsel was ineffective for not eliminating or limiting testimony as to the "death throes of Ms. Young and the agonies of Ms. Scott at the scene and on her rescue flight to {t]he hospital." Defendant maintains the testimony regarding the medical rescue was irrelevant, and the testimony should have been limited to that of the medical examiner and Ms. Scott.

Defendant concedes that the testimony of Ms. Scott and Dr. Rendon, the medical examiner, was proper, and this Court will not address the obvious need for that testimony. As to Deputy Michael Thomas, the first officer to arrive at the bank, Counsel did not err in questioning him whether he knew Ms. Scott. (TI 1356, 380). Although the response exceeded the scope of the question, it was relevant to the extent of the victims' injuries and Defendant's intent to murder the victims. (TT 1380). Further, the record shows Deputy Thomas' testimony also concerned the way in which the victims were moved after he entered the bank vault. (TI 1380-1382). This testimony was relevant to the effect of the movement of the victims on the blood spatter and the DNA evidence. The testimony was not improper or worthy of objection. Counsel's performance regarding this testimony was not deficient.

As to the testimony of Kirk Lewis, an Emergency

> Medical Technician; and Lieutenant Mark O'Keefe, a Paramedic, their testimony was relevant at trial as well. The testimony was relevant to show the condition of the victims and the degree of their injuries. (TI 1406-1423, 1431-1452). The testimony was also relevant to show Defendant's premeditated intent to murder both victims, as evidenced by the multiple gunshot wounds and the extent of the trauma to the bodies of the victims.
>
> Regarding the testimony of Detective Jicha, he testified regarding Ms. Scott's identification of Defendant. (IT 2031-2032). Detective Jicha, the officer in charge of the investigation, met with Ms. Scott while she was in her hospital bed at the Orlando Regional Medical Center. (TT 2025, 2029, 2033). Ms. Scott was able to identify Defendant from the photo line-up shown to her by Detective Jicha, (TT 2029, 2031-2032). Ms Scott's identification of Defendant was obviously relevant, even if Ms. Scott was unable to speak due to the extent of her injuries. (TT 2030). Further, when the sound on the video depicting Miss Scott's identification of Defendant malfunctioned, a recess was taken to correct the malfunction. (TI 2030). Counsel's performance regarding these witnesses was not deficient. Further, considering the overwhelming evidence of guilt, there is no reasonable probability the outcome of the proceedings would have differed in the absence of any alleged deficiencies regarding this matter.

(V5, R849-51). The trial court properly denied relief, and that holding should be affirmed.

To the extent that further discussion is necessary, while Anderson complains loudly about this testimony, he cites no authority for the proposition that it was not properly admitted. The true facts are that only a limited number of Anderson's complaints are actually at issue, and that, as to those matters, there was no error. Specifically, Anderson

claimed below that the testimony of Deputy Thomas, Kirk Lewis, Mark O'Keefe, Susan Rendon, Marisha Scott and James Jicha could have been limited, by competent counsel, to the testimony of Marisha Scott and Susan Rendon. That is a concession that there was no error in the testimony by Miss Scott and Dr. Rendon, and that component of his claim bears no further discussion. Anderson's complaint about Det. Jicha's testimony is limited to the introduction of the videotape of Miss Scott's identification of Anderson as the assailant, a fact that is clearly relevant.

With respect to the two-page testimony of Deputy Thomas about which Anderson complains, that testimony (on cross-examination) was clearly directed toward how the victims' bodies had been moved once Deputy Thomas entered the bank vault, a matter which was relevant to the effect of those actions on the blood spatter and DNA evidence. While perhaps some of that testimony can arguably be considered less than directly responsive to counsel's questions, none of it is objectionable, and none of it is improper. Counsel was not ineffective.

With respect to the testimony of EMT Kirk Lewis, that testimony was relevant to the *res gestae* of the crime, and was far from being "gruesome and detailed." The condition of the victims was certainly relevant (at the very least) to Anderson's intent, and there is no error in the admission of this testimony. An objection by counsel would not have been well-

taken, and counsel cannot be ineffective for not making an invalid objection.

The testimony of Paramedic Mark O'Keefe was likewise quite limited, and was primarily directed to Miss Scott's condition. As such, that testimony was relevant to the charges against Anderson for shooting Miss Scott. There was no basis for objection, and counsel was not ineffective for not making a baseless objection.

To the extent that Anderson suggests that Det. Jicha testified about a soundless videotape of Miss Scott's identification of Anderson, the true facts are that the sound on the video malfunctioned, Anderson's counsel objected, and a recess was taken until the sound problem was corrected. (TT2030). While it is true that Miss Scott could not speak at that time due to her injuries, that does not affect the validity or relevancy of her identification of Anderson. The video was clearly relevant, and an objection would have been overruled. Anderson's counsel were not ineffective for not making a baseless objection, and there is no basis for relief.

V. THE JUROR INTERVIEW CLAIM

On pages 78-81 of his brief, Anderson argues that the trial court erred when it denied his motion to "interview jurors" regarding his "shackling" claim. This claim is reviewed for an abuse of discretion:

> Florida appellate courts have uniformly held that a court's decision on whether to allow an interview of jurors after trial is subject to review for an abuse of discretion. *See, e.g., Boyd v. State*, 910 So. 2d 167, 178 (Fla. 2005) (concluding that the trial court did not abuse its discretion by refusing to question the jury about allegations made by a friend of the defendant that she had overheard jurors discussing extrajudicial information during the guilt phase of a capital trial); *Baptist Hosp. of Miami, Inc. v. Maler,* 579 So. 2d 97, 101 (Fla. 1991) (holding that a trial court abused its discretion in authorizing an inquiry of jurors based on matters that inhered in the verdict); *Shere v. State*, 579 So. 2d 86, 94-95 (Fla. 1991) (finding that a trial court did not abuse its discretion in refusing to grant a capital defendant's motion to interview the jury, which was based on allegations contained in an anonymously written letter to a newspaper); *Melrose Nursery, Inc. v. Collinsworth, Alter, Nelson, Fowler & Dowling, Inc*., 832 So. 2d 891, 892 (Fla. 3d DCA 2002) (recognizing that trial courts have broad discretion to grant or deny a motion to interview jurors); *Roland v. State*, 584 So. 2d 68, 70 (Fla. 1st DCA 1991) (stating that the appropriate standard of review for a trial court's ruling on a motion to interview jurors is abuse of discretion); *Schofield v. Carnival Cruise Lines, Inc*., 461 So. 2d 152, 155 (Fla. 3d DCA 1984) (explaining that the standard of review for an appellate court is whether the trial court abused its broad discretion to permit or disallow jury interviews).

Marshall v. State, 976 So. 2d 1071, 1076-1077 (Fla. 2007).

Moreover, Florida law is settled that:

> Furthermore, "juror interviews are not permissible unless the moving party has made sworn allegations that, if true, **would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings**." *Johnson*, 804 So. 2d at 1225 (*citing Baptist Hospital of Miami, Inc. v. Maler*, 579 So. 2d 97, 100 (Fla. 1991)).

Green v. State, 975 So. 2d 1090, 1108 (Fla. 2008). (emphasis added). Anderson's claim that he was shackled during some part of his trial does not rise to that level because that claim is procedurally barred from review.

In denying Anderson's motion to interview jurors, the trial court stated:

> However, there has been no indication from any jurors that the shackles were observed and there has been no showing of juror misconduct. *Sweet v. Moore*, 822 So. 2d 1269 (Fla. 2002). Defendant has not established good cause and there are other trial participants who can provide information on this matter without conducting any "fishing expedition" interviews of jurors. *Arbelaez v. State*, 775 So. 2d 909 (Fla. 2000).

(V3, R465). At the evidentiary hearing on this claim, Anderson presented only the testimony of one Court Deputy, thus confirming that other witnesses were available concerning this claim. The trial court ruled as follows:

> Defendant asserts his rights were violated because he was shackled during his trial without a determination by the Court that shackling was necessary. Defendant maintains the jurors must have been aware Defendant wore shackles when he was in the presence of the venire and jury. Defendant refers to the leg irons Defendant was allegedly compelled to wear at all times and handcuffs Defendant was allegedly compelled to wear when he testified on the witness stand. Defendant claims the rattling of the shackles was clearly, audible throughout the courtroom and jurors would have heard the sound. Defendant also argues the jurors must have noticed Defendant was shackled to visible attachment points.
>
> Although Defendant relies on the case of *Deck v. Missouri,* 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005), that case concerned the use of visible

> shackles during the penalty phase of a capital case. In this case, Defendant failed to show the shackles were visible or perceptible to the jury. He did not testify at the evidentiary hearing, and the only testimony presented on this claim was that of Court Deputy Karen Nelson. (EH 467-510). Deputy Nelson was the primary courtroom bailiff during Defendant's trial. (ER 468). Deputy Nelson testified there was no conceivable way the jurors could have seen or been aware of Defendant's shackles at any point in the trial. (EH 498-499). Further, she testified the shackles were never audible during Defendant's trial and she was very conscious of the problem that might arise if the shackles were audible to the jury. (EH 496-497). She also instructed Defendant not to make any movements that might cause the shackles to be audible, in order to avoid alerting the jurors to the shackles. (EU 498). Although Defendant asserted in his Motion that he was handcuffed during his testimony, Defendant presented no evidence on this issue during the evidentiary hearing. Deputy Nelson was not directly asked about that issue when she testified. However, her testimony indicated great care was taken to avoid alerting the jury to the fact that Defendant was shackled, which would preclude the use of visible handcuffs during Defendant's testimony at trial.
>
> Defendant's substantive shackling claim is also procedurally barred from being raised in the instant motion. *See Torres-Arboleda v. Dugger,* 636 So. 2d 1321, 1323 (Fla. 1994). To the extent Defendant raises an ineffective assistance of counsel claim, Defendant cannot establish prejudice even assuming Trial Counsel's performance was deficient in failing to object to the shackles. Defendant has failed to establish he is entitled to post conviction relief on his shackling claim.

(V5, R864-65).

The trial court did not abuse its discretion is denying Anderson's motion to interview jurors, and no further proceedings with respect to that claim are necessary or appropriate.

VI. THE SUBSTANTIVE SHACKLING CLAIM

On pages 81-87 of his brief, Anderson raises a substantive claim that he is entitled to relief because he "was shackled in front of the jury." This claim is, in large part, intertwined with the preceding juror interview claim, which relates to this issue, anyway. In the interest of brevity, the trial court's ruling on this claim, which is set out at pages 86-87 above, is not repeated. It is sufficient here to point out that that ruling is supported by competent substantial evidence and, for that reason, should not be disturbed.

To the extent that further discussion is necessary, as Anderson admits, there was no objection to the alleged "shackling" raised at the time of trial. No claim based on shackling was raised on direct appeal to this Court. *Anderson v. State*, 863 So. 2d 169 (Fla. 2003). Because this claim was not raised at trial or on direct appeal, a double layer of procedural bar precludes litigation of the substantive claim in this (or any other) postconviction motion. The well-settled rules of preclusion contained in *Florida Rule of Criminal Procedure* 3.850 apply with full force to this claim. *See, Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1323 (Fla. 1994). Anderson's substantive shackling claim (which Anderson concedes was never preserved) was properly denied on procedural bar grounds, in keeping with longstanding Florida law.

To the extent that further discussion is necessary, Anderson seems to argue that *Deck v. Missouri*, 544 U.S. 622 (2005), (which was explicitly limited to **penalty phase** shackling) should be extended to include any use of shackles whatsoever, regardless of whether those shackles are even perceptible to the jury. That sub-claim, like the primary claim, is procedurally barred because it could have been but was not raised at trial or on direct appeal. Moreover, that claim has no legal basis because *Deck* cannot rationally be read to include shackles that were not visible to the jury. The *Deck* Court made that clear when it stated:

> We first consider whether, as a general matter, the Constitution permits a State to use visible shackles routinely in the guilt phase of a criminal trial. The answer is clear: **The law has long forbidden routine use of visible shackles during the guilt phase**; it permits a State to shackle a criminal defendant only in the presence of a special need.

Deck v. Missouri, 544 U.S. at, 626. [emphasis added]. The Court went on to describe the ultimate decision as being

> that courts cannot routinely place defendants in shackles or other physical restraints **visible to the jury** during the penalty phase of a capital proceeding.

Deck v. Missouri, 544 U.S. at 633. [emphasis added]. If the *Deck* Court had intended to include concealed restraints within the reach of its decision, it would have said so, and would not have specifically limited its discussion to "visible restraints."

Anderson's contrary argument finds no support in *Deck*, and, in addition to being procedurally barred, is not a basis for relief because it has no basis in the law.

In addition to being procedurally barred, Anderson did not carry his burden of proving that the jury would have been able to observe him wearing restraints of any sort.[31] The only evidence presented on this claim was the testimony of Court Deputy Karen Nelson, who was clear in her testimony that the jurors **never** had the opportunity to observe that Anderson was wearing leg restraints, and that the jurors **never** had the opportunity to hear the "rattling of chains" from the restraints during Anderson's trial.[32] Based upon the evidence presented, there is no evidence that Anderson's restraints were visible (or

[31] The record is clear that Anderson was wearing leg restraints, and that those restraints were secured to a concealed anchor point under the counsel table. There is no evidence that the jury ever saw **or heard** Anderson's leg restraints.

[32] During the hearing, Anderson conducted an experiment in which he deliberately rattled the leg restraint chains against the restraint bracket on the counsel table. That experiment proved nothing beyond the obvious -- vigorous rattling would produce noise that could be heard in the courtroom. **There is no evidence that anything of the sort took place during Anderson's trial**. Deputy Nelson testified that such never happened, and that she instructed Anderson to be careful **not** to cause the restraint to rattle during the course of trial. (V11, R1984). The relevance of Anderson's experiment is minimal, at best.

even perceptible) to the jury.[33] Because that is so, there is no error, and no basis for relief, even if this claim were not procedurally defaulted.

VII. THE INEFFECTIVE PSYCHOLOGIST CLAIM

On pages 87-89 of his brief, Anderson claims that he did not receive a professionally adequate mental state evaluation. The collateral proceeding trial court denied relief on this claim, stating:

> Defendant claims he did not receive a professionally adequate mental health evaluation. Defendant argues Dr. McMahon was retained late in the litigation and her evaluation failed to reveal the Defendant suffers from organic brain damage, mental illness, psychosis, emotional instability, and high impulsivity. Defendant claims he was mentally disturbed and unable to conform his conduct to the requirements of the law when he committed the offenses.
>
> As stated previously, Mr. Stone had worked with Dr. McMahon before Defendant's trial and respected her judgment. (EH 166, 292). Dr. McMahon performed several tests, conducted interviews, and reviewed relevant materials in conducting her evaluation of Defendant. (ER 139, 160-165, 167, 293-296). She believed she had sufficient time to perform a competent evaluation of Defendant when she was retained. (ER 198). The fact that Defendant has found other mental health experts who have offered differing opinions does not render Dr. McMahon's evaluation as suspect, especially considering Defendant gave differing accounts to these experts and withheld significant information from Dr.

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33 In the lower court, Anderson claimed that he "remains personally adamant" that he was handcuffed when he testified -- that assertion is not evidence. Anderson had every opportunity to testify, but did not do so -- it is absurd in the extreme to suggest that an averment in a motion is sufficient to place a fact in evidence. Anderson has now abandoned this claim.

McMahon. *See Asay v. State,* 769 So. 2d at 985-86.

(V5, R864-65).

Those findings are supported by competent substantial evidence, and should not be disturbed.

To the extent that further discussion is necessary,[34] Anderson's argument is that his due process rights were violated because the court-appointed mental health expert (Dr. McMahon) did not reach the conclusion that Anderson suffered from "organic brain damage and psychosis." In *Clisby v. Jones*, the Eleventh Circuit Court of Appeals summarized a defendant's due process right to psychiatric assistance:

> In *Ake v. Oklahoma*, the Supreme Court determined that, when a capital defendant has made a preliminary showing to the trial judge that the defendant's mental status is likely to be a significant factor in sentencing, the Constitution requires that a state must assure the defendant access to a competent psychiatrist. 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). [FN7] *Ake* requires "the provision of one competent psychiatrist." 470 U.S. at 79, 105 S. Ct. at 1094. **As the Court noted, this does not mean a defendant is entitled "to choose a psychiatrist of his personal liking or to receive funds to hire his own."** 470 U.S. at 83, 105 S. Ct. at 1092. **We wrote in *Martin v. Wainwright* that *Ake* does not guarantee a defendant the right to a favorable psychiatric opinion.** 770 F.2d

[34] Anderson states, in the caption to this claim, that his "Fifth, Sixth, Eighth and Fourteenth Amendment rights" were violated. The true facts are that *Ake v. Oklahoma*, which is the basis for this claim, was decided solely based on the Due Process Clause. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985). Anderson's assertion that there is any other constitutional basis for this claim is incorrect.

918, 935 (11th Cir. 1985). *See also Silagy v. Peters*, 905 F.2d 986, 1013, n. 22 (7th Cir. 1990); *Kordenbrock v. Scroggy*, 889 F.2d 69, 75 (6th Cir. 1989); *Granviel v. Lynaugh,* 881 F.2d 185, 192 (5th Cir. 1989). **The clear meaning of *Ake* is that the State is required to provide only access to a neutral or independent competent psychiatrist.**

> [FN7] For the purpose of this opinion, we will assume, without deciding, that Clisby made the requisite threshold showing under *Ake*.

We hold that the state meets its *Ake* obligation when it provides a competent psychiatrist. A competent psychiatrist is one who, by education and training, is able to practice psychiatry and who has been licensed or certified to practice psychiatry -- that is, a properly qualified psychiatrist. *See In Re Fichter's Estate*, 155 Misc. 399, 279 N.Y.S. 597, 600 (N.Y. Surrogate's Court 1935) ("competent" "having sufficient ability or authority; possessing the requisite natural and legal qualifications"); *Towers v. Glider & Levin*, 101 Conn. 169, 125 A. 366 (1924) (under Workmen's Compensation Act, "competent physician or surgeon," must have legal competency and competency in particular case, that is, person must be licensed to practice type of healing art he employed, and must be able to treat particular kind of injury in question by means of that art); *Mason v. Moore*, 73 Ohio St. 275, 76 N.E. 932, 935 (1906) (competent bookkeeper is "one who is qualified by education and experience to examine and compare the various books kept by the bank, and trace the bearing of one entry upon another in the different books").

Clisby v. Jones, 907 F.2d 1047, 1049-1050 (11th Cir. 1990) (*en banc*). (emphasis added).[35] The Court emphasized the inherent variability of mental state testimony:

> Because psychiatry deals with the intangibles of the human psyche and human emotions, it is nearly always possible for a defendant to find one psychiatrist who will disagree with the opinion of another psychiatrist, and castigate the other as "incompetent" or as having performed "an incompetent psychiatric examination." [FN8] *See Waye v. Murray* at 767. **This court declines to embark on a course that would lead to "a battle of the experts in a 'competence' review" and compel courts to engage in "a form of 'psychiatric medical malpractice' review" as part of the direct and collateral review of cases in which an *Ake* claim is made**. *See Silagy v. Peters*, 905 F.2d at 1013. As the Court of Appeals for the Seventh Circuit recognized, "The ultimate result would be a never ending battle of psychiatrists appointed as experts for the sole purpose of discrediting a prior psychiatrist's diagnosis." *Id.* at 1013.
>
> > [FN8] Because we hold that there is no constitutional right to non-negligent psychiatric assistance, we do not address the merits of Clisby's challenges to Dr. Callahan's examination and diagnosis. We observe, however, that Clisby tried to support his attack on Dr. Callahan, a psychiatrist, with testimony from a psychologist. We strongly question whether the testimony of a psychologist could prove that the work of a duly licensed psychiatrist fell below the standards of reasonable care for psychiatrists. A psychiatrist is a physician; a psychologist is not. While psychology and psychiatry are related in that they both deal with the

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[35] *Ake* referred **only** to the assistance of a **psychiatrist** -- while often assumed to apply to other sorts of mental health experts, *Ake* has not actually been extended beyond its original scope.

> mind, they represent separate schools of thought and different approaches to mental health. As a matter of law, we might refuse to allow a licensed psychiatrist to be established as negligent or "incompetent" without expert testimony from a psychiatrist to that effect unless the negligence of the psychiatrist's treatment is readily apparent to a layman. *Cf. Cross v. LakeView Center*, 529 So. 2d 307, 310 (Fla. 1st DCA 1988) (psychiatric malpractice case); *McDonnell v. County of Nassau*, 129 Misc.2d 228, 492 N.Y.S.2d 699 (Sup.Ct. 1985) (same).

Clisby v. Jones, 907 F.2d at 1050-1051. (emphasis added).[36] This case presents the classic "battle of the experts" that *Clisby* referred to -- Anderson has now located two new mental state experts who have reached different opinions from the original trial expert, in large part because Anderson withheld significant information from the original expert. Because Anderson refused to tell Dr. McMahon about his history of sexual abuse, Anderson's *Ake v. Oklahoma* claim collapses. Anderson had the assistance of a competent psychologist, and the reason that that expert testified as she did because Anderson withheld significant information from her. Anderson received all the process he was due, and should not be heard to complain that his

[36] Dr. Villalba is a psychiatrist, and Dr. Berland is a psychologist, as are Dr. McMahon and Dr. McClaren. Whether it was proper for Anderson to attempt to challenge Dr. McMahon with the testimony of a psychiatrist is open to question -- the two fields are clearly separate and distinct, and rely on different theories and diagnostic methodology, among other differences.

expert did not know information that he refused to reveal. Anderson has not shown that he was denied any process at all, and this claim is not a basis for relief. *Henyard v. McDonough*, 19 Fla. L. Weekly Fed. C956 (11th Cir. Aug. 11, 2006); *Henyard v. State*, 883 So. 2d 753 (Fla. 2004).

VIII. THE CUMULATIVE ERROR CLAIM

On pages 89-91 of his brief, Anderson argues that he is entitled to relief based on his claim of "cumulative error." In denying relief, the trial court stated:

> Defendant maintains he did not receive a fair trial in accordance with the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. Defendant refers to repeated occurrences of ineffective counsel, flawed jury instructions and an unconstitutional process which tainted the proceedings. Defendant claims the cumulative effect of these errors deprived him of his constitutional rights under the United States Constitution and the Florida Constitution. However, much of the Defendant's claim is generalized and does not refer to specific errors that allegedly deprived him of a fair trial. To the extent Defendant relies on the alleged errors already addressed in this Motion, Defendant has failed to show any errors sufficient to cumulatively cause Defendant prejudice.

Those findings are correct, and should not be disturbed. Nothing contained in Anderson's brief compels a different result, since none of the claims for relief contained in it are error in the first place. *Israel v. State/McNeil,* 33 Fla. L. Weekly S211, 214 (Fla. Mar. 20, 2008).

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that all requested relief be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Maria D. Chamberlin; Marie-Louise Samuels Parmer; and Nathaniel E. Plucker,** CCRC - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619 on this ______ day of June, 2008.

____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

____
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