

IN THE SUPREME COURT OF FLORIDA

RONALD HEATH,

Appellant,

v.

CASE NO. SC07-771

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399

DEPARTMENT OF LEGAL AFFAIRS
PL-01, THE CAPITOL
Tallahassee, Florida 32399-1050
(850) 414-3300, Ext. 3583
(850) 487-0997 (Fax)

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

CASE SNAPSHOT..... 1

PRELIMINARY STATEMENT..... 4

STATEMENT OF THE CASE AND FACTS..... 5

SUMMARY OF THE ARGUMENT..... 21

ARGUMENT..... 26

 ISSUE I..... 26

 WHETHER TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE
 OF HEATH’S CAPITAL TRIAL

 ISSUE II..... 64

 WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT
 PHASE OF HEATH’S CAPITAL TRIAL

 ISSUE III..... 74

 WHETHER NEWLY DISCOVERED EVIDENCE WARRANTS A NEW TRIAL OR
 NEW PENALTY PHASE

 ISSUE IV..... 82

 WHETHER THE CUMULATIVE PICTURE AND EFFECT OF KENNETH
 HEATH’S TESTIMONY CAN BE IGNORED OR OVEREMPHASIZED

 ISSUE V..... 83

 WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO
 REQUEST A SPECIAL VERDICT FORM, DURING THE PENALTY PHASE,
 REGARDING THE SPECIFIC AGGRAVATORS FOUND BY THE JURY

 ISSUE VI..... 85

 WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO
 CHALLENGE THE INDICTMENT ON THE GROUNDS THE STATE FAILED
 TO ALLEGE THE AGGRAVATING CIRCUMSTANCES IT INTENDED TO
 RELY UPON IN SEEKING THE DEATH PENALTY

 ISSUE VII..... 87

 WHETHER FLORIDA’S CAPITAL SENTENCING STATUTE IS
 UNCONSTITUTIONAL

CONCLUSION..... 92

CERTIFICATE OF SERVICE..... 93

CERTIFICATE OF COMPLIANCE..... 93

TABLE OF AUTHORITIES

Cases

<u>Arbelaez v. State,</u> 775 So.2d 909 (Fla. 2000)	54
<u>Asay v. State,</u> 769 So. 2d 974 (Fla. 2000)	63
<u>Ault v. State,</u> 866 So.2d 674 (Fla. 2003)	54
<u>Banks v. State,</u> 842 So.2d 788 (Fla. 2003)	86
<u>Blackwelder v. State,</u> 851 So.2d 650 (Fla. 2003)	86
<u>Craig v. State,</u> 510 So. 2d 857 (Fla. 1987), <i>cert. denied</i> , 484 U.S. 1020, 108 S. Ct. 732, 98 L. Ed. 2d 680 (1988)	77
<u>Darling v. State,</u> 966 So. 2d 366 (Fla. 2007)	87
<u>Davis v. State,</u> 875 So. 2d 359 (Fla. 2003)	63
<u>Downs v. State,</u> 2007 Fla. LEXIS 2388 (Fla. December 13, 2007)	28, 89
<u>Duckett v. State,</u> 918 So.2d 224 (Fla. 2005)	75
<u>Dufour v. State,</u> 905 So.2d 42 (Fla.2005)	69, 74
<u>Evans v. State,</u> 32 Fla. L. Weekly S 719 (Fla. Nov. 15, 2007)	58, 59
<u>Fennie v. State,</u> 855 So.2d 597 (Fla. 2003)	86
<u>Franklin v. State,</u> 965 So.2d 79 (Fla. 2007)	86
<u>Freeman v. State,</u> 852 So. 2d 216 (Fla. 2003)	37
<u>Heath v. State,</u> 648 So.2d 660 (Fla. 1994)	90
<u>Johnson v. State,</u> 921 So.2d 490 (Fla. 2005)	36

<u>Jones v. State,</u> 591 So. 2d 911 (Fla. 1991)	76
<u>Jones v. State,</u> 709 So.2d 512 (Fla. 1998)	75, 76
<u>Jones v. State,</u> 855 So.2d 611 (Fla. 2003)	70
<u>Kimbrough v. State,</u> 886 So.2d 965 (Fla. 2004)	27
<u>Kormondy v. State,</u> 32 Fla. L. Weekly S 627 (Fla. October 11, 2007)	80, 81
<u>Kormondy v. State,</u> 845 So.2d 41 (Fla. 2003)	84
<u>Lawrence v. State,</u> 831 So.2d 121 (Fla. 2002)	69
<u>Linehan v. State,</u> 476 So. 2d 1262 (Fla. 1985)	70
<u>Lovette v. State,</u> 636 So.2d 1304 (Fla. 1996)	79
<u>Maharaj v. State,</u> 778 So. 2d 944 (Fla. 2000)	63
<u>Mills v. State,</u> 476 So.2d 172 (Fla. 1985)	54
<u>Mungin v. State,</u> 932 So.2d 986 (Fla. 2006)	27
<u>Odom v. State,</u> 782 So.2d 510 (Fla. 1st DCA 2001)	70
<u>Owen v. State,</u> 862 So.2d 687 (Fla. 2003)	54
<u>Parker v. State,</u> 904 So.2d 370 (Fla. 2005)	88
<u>Pietri v. State,</u> 885 So.2d 245 (Fla. 2004)	27
<u>Ponticelli v. State,</u> 941 So.2d 1073 (Fla. 2006)	59
<u>Porter v. Crosby,</u> 840 So.2d 981 (Fla. 2003)	87
<u>Reed v. State,</u> 875 So. 2d 415 (Fla. 2004)	36, 37

<u>Ring v. Arizona,</u> 536 U.S. 584 (2002)	84, 85, 86, 88
<u>Robinson v. State,</u> 865 So.2d 1259 (Fla. 2004)	75, 88
<u>Rutherford v. State,</u> 727 So.2d 216 (Fla. 1998)	27, 37
<u>Rutherford v. State,</u> 926 So.2d 1100 (Fla. 2006)	80
<u>Shere v. State,</u> 742 So.2d 215 (Fla. 1999)	83
<u>Sireci v. State,</u> 773 So. 2d 34 (Fla. 2000)	56
<u>Smith v. State,</u> 699 So.2d 629 (Fla. 1997)	79
<u>State v. Bolender,</u> 503 So. 2d 1247 (Fla. 1987)	69
<u>State v. Mitchell,</u> 719 So. 2d 1245 (Fla. 1st DCA 1998) <i>review</i> <i>denied</i> , 729 So. 2d 393 (Fla. 1999)	83
<u>State v. Steele,</u> 921 So.2d 538 (Fla. 2005)	84
<u>State v. Williams,</u> 797 So. 2d 1235 (Fla. 2001)	69
<u>Stephens v. State,</u> 32 Fla. L. Weekly S 735 (Fla. 2007)	28, 89, 90
<u>Stephens v. State,</u> 748 So. 2d 1028 (Fla. 1999)	58
<u>Strickland v. Washington,</u> 466 U.S. 668 (1984)	28, 69
<u>Willacy v. State,</u> 967 So. 2d 131 (Fla. 2007)	37
<u>Winkles v. State,</u> 94 So.2d 842 (Fla. 2005)	85
<u>Woods v. State,</u> 531 So.2d 79 (Fla.1988)	54

Other Authorities

Section 777.011, Florida Statutes.....	76, 77
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CASE SNAPSHOT

This is an appeal from the denial, after an evidentiary hearing, of an amended motion for post-conviction relief. In his motion, Heath made various claims of ineffective assistance of counsel. He also raised a newly discovered evidence claim in the guise of recantation testimony from co-defendant, Kenneth Heath.

The evidence brought forth at trial demonstrated that Ronald Heath, and his brother Kenneth, met Michael Sheridan on the evening of May 24, 1989 at the Purple Porpoise, a bar in Gainesville, Florida. Mr. Sheridan was a traveling salesman who was in Gainesville on business. He had gone to the Purple Porpoise for dinner and drinks.

At the bar, the Heath brothers befriended Mr. Sheridan, induced him to leave the bar with them on a pretense of going to smoke some marijuana, and drove Mr. Sheridan to a remote location selected by Ronald Heath. Once at the murder scene, and at the behest of his brother, Kenneth Heath retrieved a gun from his car and told Mr. Sheridan he was being robbed. Mr. Sheridan did not believe the brothers were serious. They were.

At Ronald Heath's direction, Kenneth Heath shot Michael Sheridan once in the chest. Mr. Sheridan fell to the ground and began to surrender his valuables.

In the meantime, after kicking Michael Sheridan a few times because he was not moving fast enough, Ronald Heath went to the car and retrieved a knife. He returned to where Michael Sheridan sat helpless, but still conscious, on the ground and attempted to cut his throat. When that proved unsuccessful, Ronald Heath exhorted Kenneth to shoot Mr. Sheridan again. Kenneth complied, shooting Michael Sheridan two more times, this time in the head.

The brothers hid Mr. Sheridan's body in the brush. They returned to the city, retrieved Mr. Sheridan's rental car from the parking lot of the Purple Porpoise, stole some items from it, and burned it. The next day, the Heath brothers went on a shopping spree with Mr. Sheridan's stolen credit cards, treating themselves to haircuts, clothes, and shoes.

Kenneth pled guilty to the murder, pursuant to a plea agreement with the State, and testified against his older brother at trial. Ronald Heath defended on a theory that Kenneth was the lone killer and he was not even at the murder scene. The jury rejected this defense and convicted Heath as charged. After the penalty phase, the jury recommended Heath be sentenced to death by a vote of 10-2. The trial court followed the jury's recommendation and sentenced Ronald Heath to death. Heath appealed and this Court affirmed.

Heath filed a motion for post-conviction relief in March 1997 and then subsequently filed an amended motion. The collateral court held an evidentiary hearing on many of Heath's claims. After the hearing, the collateral court denied Heath's motion.

PRELIMINARY STATEMENT

Appellant, RONALD HEATH raises seven (7) claims in this appeal from the denial of his amended motion for post-conviction relief after an evidentiary hearing. References to the appellant will be to "Heath" or "Appellant". References to the appellee will be to the "State" or "Appellee".

The four volume record on appeal in the instant case will be referenced as "PCR" followed by the appropriate volume and page number. The three volume transcript of the evidentiary hearing in this case will be referenced as "PCR-T" followed by the appropriate page number.

These differing citations are necessary because the record volumes are not numbered and paginated sequentially. Instead, the four volumes containing pleadings and orders (Volumes I-4) are numbered and paginated sequentially beginning with page 1 and ending with page 608 and the remaining three volumes which contain the evidentiary hearing transcript (V-VII) are paginated beginning with page 1 and ending at page 520.

References from Heath's direct appeal will be referred to as "TR" followed by the appropriate volume and page number. References to Heath's initial brief will be to "IB" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The relevant facts concerning the May 24, 1989, murder of Michael Sheridan are recited in this Court's opinion on direct appeal:

...The evidence at trial revealed that Heath and his live-in girlfriend, Penny Powell, traveled to the Jacksonville home of Heath's grandmother. After an argument with Heath, Powell returned to Douglas, Georgia, where she and Heath lived. Heath and his younger brother, Kenneth, drove to Gainesville to visit some of Heath's friends.

On May 24, 1989, the brothers went to the Purple Porpoise Lounge in Gainesville where two of Heath's friends worked as waitresses. Sometime during the evening the brothers struck up a conversation with Sheridan, a traveling salesman who had come to the lounge for drinks and dinner. Sheridan bought the brothers a drink and inquired if they ever got high or had any marijuana. Heath suggested to Kenneth that they take Sheridan somewhere and rob him; Kenneth agreed.

The trio left the bar in Kenneth's vehicle, which Heath drove to an isolated area of Alachua County. After parking on a dirt road, all three got out of the car and smoked marijuana. Heath made the hand motion of a pistol and asked Kenneth, "Did you get it?" Kenneth retrieved a small-caliber handgun from under the car seat, pointed it at Sheridan, and told him that he was being robbed. Sheridan balked at giving the brothers anything. Heath told Kenneth to shoot Sheridan. When Sheridan lunged at Kenneth, Kenneth shot him in the chest. Sheridan sat down, saying "it hurt."

As Sheridan began to remove his possessions, Heath kicked him and stabbed him in the neck with a hunting knife. Heath attempted to slit Sheridan's throat, but was unable to complete the task with the dull knife and could only saw at Sheridan's neck. Heath then

instructed Kenneth to kill Sheridan with the gun, and Kenneth shot him twice in the head. The brothers moved the body further into the woods. After returning to the Purple Porpoise, the brothers took Sheridan's rental car to a remote area, removed some items, and burned the car.

The next day the brothers used Sheridan's credit cards to purchase clothes, shoes, and other items at a Gainesville mall. Although Kenneth signed all of the credit card slips, clerks from the various stores testified about the purchases made by the brothers and identified Heath in a photo lineup. The brothers discontinued use of the credit cards when a clerk in an audio store requested biographical information about Sheridan which Kenneth could not answer. The brothers returned to Jacksonville and tossed the handgun into the St. John's River. The handgun was never recovered. Heath eventually returned to the trailer which he shared with Powell in Georgia.

A medical examiner was dispatched to the scene of the murder on May 30, 1989, to examine the body, which was in a moderately advanced state of decomposition. The examiner estimated that death had occurred three to ten days earlier and that death was caused by multiple gunshot wounds and a sharp force injury to the neck.

Several weeks after the murder, Heath was arrested at his trailer for using the stolen credit cards. Powell granted the officers permission to search the trailer and her car. The officers discovered some of the clothes purchased in Gainesville and Sheridan's watch.

Both brothers were indicted for the first-degree murder and armed robbery of Sheridan. That case was later consolidated with another case where the brothers were charged with offenses connected with the forgeries of the credit cards. Kenneth entered into a plea agreement wherein he pled guilty to the charges and agreed to testify about Sheridan's murder. Kenneth was sentenced to life imprisonment without eligibility for parole for twenty-five years for the murder conviction.

Heath v. State, 648 So.2d 660 (Fla. 1994).

At trial, Heath was represented by Special Public Defenders Robert Rush and Steve Scheck. Mr. Rush is an experienced litigator. At the time of the evidentiary hearing, Mr. Rush was board certified in both criminal and civil trial law. (PCR-TR Vol. VII 431).

Heath defended on the theory that Kenneth Heath acted alone in murdering Michael Sheridan and that Heath was not even at the murder scene. Heath called several witnesses in support of this theory. Nonetheless, the jury found Heath guilty of the first-degree murder and armed robbery of Michael Sheridan, as well as conspiracy to commit uttering a forgery, conspiracy to commit forgery, seven counts of forgery, and seven counts of uttering a forgery. (TR. Vol II 313-317).

During the penalty phase, the State put on evidence supporting the prior violent felony aggravator. In addition to the judgment of conviction and sentence, the State called homicide detective Gerald Parker. Detective Parker investigated the murder of Michael Green on December 17, 1977. He testified as to his investigation. (TR Vol. XII 2188-2197). The State also put into evidence a transcript of Heath's sworn statement taken by law enforcement in the course of the Green murder investigation. In the statement, Heath admitted he killed Michael Green. Heath also admitted he burned Green's car. (TR Vol. XII 2204-2243).

Heath presented three witnesses in mitigation - his parents and girlfriend Penny Powell. The first witness to testify was Heath's mother, Vivian Heath. She testified that her relationship with her son was very close. (TR Vol. XII 2249). He was 16 when he was arrested for second degree murder in 1977. He pled guilty and was sentenced to prison. (TR Vol. XII 2249). He got into some trouble when he was 13 or 14. He began stealing small items from their friends, skipping school, and coming in late at night. She and Heath's father would ground him as punishment. (TR Vol. XII 2250). They would take television privileges away and prevent him from going out. (TR Vol. XII 2251). They took Heath to a psychologist or psychiatrist. The doctor recommended Heath's parents make Heath read more and watch less television. He also recommended that Heath get involved in sports.

Heath's parents did not know he had gotten involved with illegal drugs. They became aware of it just weeks before he was arrested in December 1977. Heath passed out on the living room floor and his parents rushed him to the emergency room. (TR Vol. XII 2252).

When Heath was sentenced to 30 years in prison for the second degree murder of Michael Green, his parents visited him one Sunday a month. His brother and grandfather also visited. (TR Vol. XII 2252).

While in prison, Heath got his GED and took college courses. (TR Vol. XII 2253). He got involved with the Jaycees and received an award. (TR Vol. XII 2254). The award was shown to the jury. (TR Vol. XII 2254).

The prison guards, where Heath was incarcerated, seemed to like Heath. He had some problems adjusting initially, but after a short time he seemed to be all right. (TR Vol. XII 2255).

After he was released from prison, Mrs. Heath saw her son pretty frequently. He moved to Georgia and was living with a girl named Penny Powell and her two children. (TR Vol. XII 2256). Heath treated Ms. Powell's children as if they were his own. He took care of their every need.

Heath got a job right after he got out of prison. He was working right up to the day he got arrested. To the best of her knowledge, Heath was not doing any type of drugs at the time of the murder.

Heath also established a relationship with his brother. That surprised Heath's parents as there had always been rivalry between them, especially in sports. Heath seemed happy between the time he got out of prison and the day he was arrested for the murder of Michael Sheridan. (TR Vol. XII 2260). Kenneth Heath was 12 years old when his brother went to prison for murdering Michael Green. (TR Vol. XII 2261).

Heath next called his father, William Heath. Mr. Heath was a manager in a car dealership. He is also a former policeman. He and his son were close. When Heath participated in sports, his parents would go and show support for him. Mr. Heath told the jury that shortly before his arrest for murdering Michael Green, Heath was on his high school swim team and he and his wife had attended a swim meet. (TR Vol. XII 2265).

They started having problems with Heath at age 12. Before that, he had been a perfect kid. His grades went down and he started taking things from friends and neighbors. (TR Vol. XII 2265).

His parents were concerned so they took him to Jacksonville for psychological evaluation. After they evaluated him, the staff sat down with Heath's parents and made some recommendations. They suggested Heath read and get involved in activities. (TR Vol. XII 2265).

Heath's parents became aware that Heath had a drug problem when he passed out in the living room after taking some pills. The doctors told Heath's parents that he had gotten hold of something, maybe Valium. (TR Vol. XII 2266). The staff told Mr. Heath that Heath probably wasn't seriously into drugs but instead was likely experimenting. (TR Vol. XII 2267). Later on, Heath told his parents that he tried to kill himself. He

was depressed and felt he could not do anything right. (TR Vol. XII 2267).

When Heath went to prison for murdering Michael Green, his parents and brother went to visit him at least once a month. While Heath was in prison, Mr. Heath tried to get his son some psychological help. He was unsuccessful. Mr. Heath's attempts to do so caused a rift for a short while between Mr. Heath and his son. Heath was upset about some of the things his father told the prison psychologist. (TR Vol. XII 2269, 2273).

Heath did well in prison. He took a welding course and seemed to get along well with prison staff. The staff talked positively about Mr. Heath's oldest son. (TR Vol. XII 2270).

When Heath got out of prison, he moved to Georgia. He was working at a submarine base in King's Bay. He was doing really well on the job. (TR Vol. XII 2271-2272).

Penny Powell testified that she is a legal secretary. While she and Heath are not legally married, she considers them man and wife. (TR Vol. XII 2314). She first met Heath in February 1988. They exchanged wedding bands on August 14, 1988 and moved in together in November 1988. Powell and Heath lived together in a mobile home in Douglas, Georgia in the seven months before his arrest.

Heath's relationship with Ms. Powell's two sons was very good. They called Heath "Daddy". Heath considered the boys to

be his sons. During the seven months they lived together, Heath's relationship with her sons grew stronger. (TR Vol. XII 2316).

When Heath got out of prison, his first concern was to get a job. He got work with Ms. Powell's brother's construction company. They worked at King's Bay Naval Station. After that job was completed, Heath took a job at Comet Enterprises. Heath never had any problems at work. (TR Vol. XII 2319). After only a short time at Comet, Heath was given more freedom and more responsibility. (TR Vol. XII 2319). He also got several raises. (TR Vol. XII 2319).

When Heath got of prison, there was some tension between Heath and his parents. They reconciled a short time later when Heath went to see them. He had been concerned about their feelings toward him after his release from prison. Heath loved his parents and after his visit with them, they talked often on the phone and exchanged cards and letters. (TR Vol. XII 2321).

Heath never smoked marijuana or drank excessively during the time they lived together. (TR Vol. XII 2324). Heath was very good to her. He treated he like a princess. She thinks he is the kindest, most gentle, caring man that she has ever met. He never raised his hand or his voice to her when they were living together. (TR Vol. XII 2327).

Heath has a good relationship with his grandmother. She adores him. At the time of trial, she was terminally ill with cancer. (TR Vol. XII 2328).

The first fight Ms. Powell and Heath ever had was about Kenneth Heath. Ms. Powell did not want Heath to go out alone with his brother. She was afraid Kenneth would hurt him. (TR Vol. XII 2328). She thought Kenny was trouble and that he intended both she and Heath harm. The defense rested its mitigation case after Ms. Powell testified.

During final instructions, the trial judge gave the Enmund-Tison instruction.¹ (TR Vol. XII 2362). The court instructed the jury on three aggravators: (1) prior violent felony, (2) murder in the course of a robbery, and (3) HAC. (TR Vol. 2363).

The trial court also instructed the jury on each of the statutory mitigators. The court explained that substantial impairment of reasoning abilities, due to use of alcohol and drugs, may constitute commission of a crime under the influence of extreme mental or emotional disturbance. (TR Vol. XII 2364). The court also gave the jury an instruction on the "duress or substantial domination" mitigator. (TR Vol. XII 2364). Finally, the court specifically instructed the jury, at the defendant's

¹ Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982); Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987).

request, that it could consider Kenneth Heath's life sentence as mitigation. (TR Vol. XII 2364).

On November 27, 1990, the jury recommended Heath be sentenced to death by a vote of ten to two (10-2). (TR Vol. III 427). The trial court found two aggravating circumstances: (1) Heath was previously convicted of second-degree murder, a prior violent felony, and (2) the murder was committed during the course of an armed robbery.

The trial court found three mitigating circumstances: (1) Heath was under the influence of extreme mental or emotional disturbance, based upon his consumption of alcohol and marijuana, (2) Heath demonstrated good character in prison, and (3) Heath's co-defendant, Kenneth Heath, received a life sentence. (TR Vol. III 452-470).

The trial court found the aggravating circumstances outweighed the mitigating factors and sentenced Heath to death for the first-degree murder of Michael Sheridan. (TR Vol. III 470). Heath was also sentenced to life in prison, as a habitual felony offender, on the armed robbery conviction.

Heath appealed. Heath raised nine issues on direct appeal: (1) the trial judge erred in overruling his objection to the State's opening statement, (2) the trial judge erred in admitting victim character evidence, (3) the trial judge erred in admitting testimony regarding Heath's desire to escape from

jail, (4) the trial judge erred in excluding evidence of his employment, (5) the trial judge erred in excluding Powell's testimony regarding a statement made by Heath, (6) the trial judge erred by conducting a proportionality review under the guise of considering the brother's life sentence as a mitigating factor, (7) the jury instruction on especially heinous, atrocious, or cruel aggravating factor was unconstitutionally vague, (8) the trial judge erred in sentencing Heath as a habitual offender for the armed robbery conviction, and (9) Florida's habitual offender statute, section 775.084, Florida Statutes (1989), is unconstitutional. Heath v. State, 648 So.2d 660, 663 (Fla. 1994).

On October 20, 1994, the Florida Supreme Court rejected each of Heath's claims. This Court unanimously affirmed Heath's convictions and sentences, including the life sentence imposed as a result of Heath's conviction for armed robbery. Heath v. State, 648 So.2d 660, 666 (Fla. 1994).

Heath filed a Petition for Writ of Certiorari with the United States Supreme Court. On June 26, 1995, in Heath v. Florida, 515 U.S. 1162 (1995), the United States Supreme Court denied review.

On March 24, 1997, Heath filed an initial motion for post-conviction relief. Heath amended the motion on August 2, 2004. On or about April 11, 2005, Heath filed a second amended motion

to vacate his convictions and sentences. He raised twenty (20) claims. The State filed a response on May 10, 2005.

On September 13, 2005, the collateral court held a case management conference/Huff hearing on Heath's second amended motion. On November 3, 2005, the court entered an order denying Claims IX and XIII-XX. The court also denied Claims XI and XII as insufficiently pled but granted the defendant leave to amend these claims. (PCR Vol. II, 202-208).

The collateral court directed that any amendment to Claims XI and XII must comport with Rule 3.851(f)(4), Florida Rules of Criminal Procedure. (PCR Vol. II 202-208). Heath never amended Claims XI or XII.

The collateral court scheduled the evidentiary hearing to commence on March 29, 2006. On March 20, 2006, Heath filed supplemental allegations to Claim X. (PCR Vol. II 214-216).

Heath averred trial counsel was ineffective for failing to present the testimony of Kenneth Heath to establish and argue a non-statutory mitigating factor during the penalty phase of Ronald Heath's capital trial. Heath also alleged trial counsel was ineffective for failing to present the testimony of Heath's parents to establish that Heath did not, and could not, dominate Kenneth Heath. Finally, Heath alleged that testimony of other unnamed witnesses would establish that Ronald Heath did not, and could not, dominate Kenneth Heath. (PCR Vol. II 214-216). The

State did not object to Heath presenting evidence in support of his supplemental allegations to the extent Heath identified, by name, available witnesses he averred that trial counsel should have, but did not, call during the penalty phase of Heath's capital trial. (PCR Vol. II 225-228).

Prior to the evidentiary hearing, the parties exchanged witness lists along with a summary of the substance of each witness's testimony. Heath's witness list contained the names of witnesses who would allegedly testify they overheard Heath's prosecutors discuss Heath's prior murder conviction within earshot of the jury. Heath had never presented a sworn claim of prosecutorial misconduct in his initial or amended motion for post-conviction relief.

Additionally, Heath's witness list contained the name of Mary Cook (Mary Dodd). Ms. Cook was listed in support of Claim XI of Heath's amended motion for post-conviction relief. However, Heath had never amended the previously denied claim regarding Mary Cook.

The State filed a written objection to the presentation of any evidence related to any potential claim of prosecutorial misconduct. The State also posed an objection to Heath offering evidence in support of Claim XI which had been denied as insufficiently pled and not re-pled. The State argued the purpose of an evidentiary hearing is to allow a defendant to

present evidence on sworn claims about which there is a factual dispute and not to conduct an investigation or fishing expedition into potential claims. (PCR Vol. II 228).

An evidentiary hearing was held on March 29-31, 2006. Though the claim was not properly presented in Heath's amended motion for post-conviction relief or even presented at all in any type of motion conforming to Rule 3.851, Florida Rules of Criminal Procedure, the collateral court allowed Heath to proffer testimony on the issue of prosecutorial misconduct. The court reserved ruling on whether the defendant's claim was properly before the court.²

The collateral court sustained the State's objection to any consideration of Claim XI. The court ruled that Heath had not re-pled Claim XI and as such, the defendant never presented a legally sufficient claim.

The court did permit the defendant to proffer the deposition testimony of Mary Cook (Dodd). In response to the proffer, the State was permitted to question trial counsel why he did not call Ms. Dodd to testify. Trial counsel testified that while Ms. Dodd could have testified about the watch, Ms. Dodd also saw some of Mr. Sheridan's jewelry in Ronald Heath's possession. Trial counsel did not want her testimony, that

² Heath does not raise any claim alleging prosecutorial misconduct on appeal.

Heath had more of Michael's jewelry, to get before the jury. (PCR-T Vol. VII 487).³

At the conclusion of the evidentiary hearing, the collateral court ordered a transcript of the record to be prepared and served on both parties. The court granted the parties' request to submit written closing arguments in lieu of oral argument.

On June 7, 2006, the court entered an order denying Heath's motion for post-conviction relief. This order was entered before the parties had an opportunity to submit written closing arguments and did not address all of Heath's claims. At the request of the state, with the concurrence of counsel for Mr. Heath, the collateral court set aside the order, rendering it a nullity. (PCR Vol. II 305-306).

On June 20, 2006 while both parties were preparing their closing arguments, Heath filed a motion to convene a jury trial. (PCR Vol. II 309-313). The State responded in opposition to the motion. (PCR Vol. II 318-321). Subsequently, both counsel for Heath and counsel for the state presented written closing arguments to the collateral court judge.

On March 6, 2007, the collateral court entered an order denying Heath's motion for a jury trial. (PCR Vol. II 314). On

³ Heath does not raise any claim of ineffectiveness regarding Mary Cook (Dodd) on appeal.

March 27, 2007, the collateral court signed an order denying Heath's second amended motion for post-conviction relief. The order addressed each of Heath's claims for which an evidentiary hearing had been granted. (PCR Vol. IV 549-606).

On April 18, 2007, Heath filed a timely appeal from the order denying his second amended motion for post-conviction relief. (PCR Vol. IV 607-608). Heath filed an initial brief on November 28, 2007 and an amended initial brief on December 18, 2007. This is the State's answer brief.

SUMMARY OF THE ARGUMENT

ISSUE I: In his first claim, Heath alleges trial counsel was ineffective for failing to put on certain mitigating evidence during the penalty phase of Heath's capital trial including evidence that Heath has a severe anti-social personality disorder, has a history of substance abuse, was physically and emotionally abused, deprived, and neglected as a child, was a slow learner, acted under the dominion of Kenneth Heath, and was sexually assaulted while in prison for second degree murder. Heath also alleges that trial counsel was ineffective for failing to challenge the cause of Michael Sheridan's death and to object to an unconstitutional aggravating doubler. Finally, Heath faults trial counsel for not pursuing mitigation evidence during the penalty phase but instead relying solely on residual doubt.

In preparation for the penalty phase, trial counsel retained experienced forensic psychologist, Dr. Harry Krop. Dr. Krop evaluated Heath and advised counsel that Heath has an anti-social personality. He also advised his testimony would do more harm than good. This court has recognized that anti-social personality is a trait looked on with disfavor by most jurors. Counsel is not ineffective for failing to present evidence that, after investigation, he considers will do more harm than good.

Counsel is also not ineffective for failing to put on evidence that does not exist. For instance, neither of the experts who testified at the evidentiary hearing could diagnose Heath with a substance abuse problem and neither found that Heath was a slow learner or had been emotionally abused, deprived, or neglected as a child. Likewise, not a single witness established that Kenneth dominated Heath on the night of the murder or at any other time. Heath presented no credible testimony that contradicted the medical examiner's trial testimony that Michael Sheridan died from wounds inflicted by both brothers.

While Heath did present some evidence at the evidentiary hearing that his father used excessive corporal punishment and that Heath was a victim of multiple sexual assaults while in prison, Heath cannot show the failure to present this evidence undermines confidence in the outcome of the penalty phase. Finally, trial counsel also may not be deemed ineffective for doing something he did not do. The record refutes Heath's claim that trial counsel relied solely on residual doubt in his mitigation case. To the contrary, trial counsel presented three witnesses to testify that Heath was a good worker, father, partner, son, and prisoner, who only encountered difficulties when he started experimenting with drugs as a teenager.

ISSUE II: In claim two, Heath alleges that trial counsel was ineffective for failing to present a voluntary intoxication defense. At trial, trial counsel, with Heath's consent, pursued an "I was not there" defense. Trial counsel considered, and investigated, the possibility of both defenses. Trial counsel determined, as a matter of strategy, and after consultation with Heath, that the "I was not there" defense was a stronger defense than voluntary intoxication. It is not ineffective assistance of counsel to chose, after investigation, one strategy over another, even if the chosen strategy is ultimately unsuccessful.

ISSUE III: In claim three, Heath alleges that newly discovered evidence entitles Heath to a new trial, or at the very least, a new penalty phase. The recantation testimony at issue is very narrow. At trial, Kenneth testified that he shot Michael Sheridan once, Heath retrieved a knife and tried to cut Michael's throat, and when that proved unsuccessful, Kenneth shot Michael Sheridan twice more at his brother's behest. At the evidentiary hearing, Kenneth testified that he fired the three gunshots into Mr. Sheridan's chest and head before Heath cut on Michael's throat. Kenneth claimed, contrary to his trial testimony that Michael was already dead at the time Heath inflicted the knife wounds. Even if the collateral court had found this "order of wounds" testimony credible, which it did not, this newly discovered evidence would not result in an

acquittal because Heath would still be guilty, as a principal, of both premeditated murder and armed robbery.

Finally, Kenneth's "new" evidentiary hearing testimony would not entitle Heath to a new penalty phase. Kenneth's testimony at the evidentiary hearing did nothing to diminish Heath's major role in the crimes for which he was convicted. Additionally, Kenneth's evidentiary hearing testimony, that the brothers had planned to rob and kill Michael Sheridan to eliminate him as a witness, provided support for two additional aggravators not previously instructed upon or found by the trial court. Kenneth's "recantation" as to the order of wounds, especially in light of the remainder of his testimony, is not the sort of evidence that, if presented to a new penalty jury, would probably result in a life sentence.

ISSUE IV: In claim four, Heath presents no actual issue and no argument whatsoever. Failure to present any argument renders a claim legally insufficient for appellate review.

ISSUE V: In claim five, Heath alleges trial counsel was ineffective for failing to request a special verdict form setting forth the specific aggravators the jury found to exist beyond a reasonable doubt. This Court has specifically rejected the notion that a special verdict form must be provided to the jury so it may record its vote on each aggravator upon which it

was instructed. Counsel is not ineffective for failing to file a meritless motion.

ISSUE VI: In claim six, Heath alleges trial counsel was ineffective for failing to challenge the indictment when the state failed to allege the aggravating circumstances it intended to rely upon in seeking the death penalty. This court has repeatedly held that there is no requirement for the state to allege aggravating circumstances, in the indictment. Accordingly, trial counsel cannot be deemed ineffective for failing to pose a meritless objection.

ISSUE VII: In this claim, Heath raises two constitutional challenges to his sentence to death, the first based on Ring v. Arizona and the second, alleging the jury's verdict was unfairly skewed because they were permitted to consider that Heath, at least in part, caused Michael Sheridan's death.

As to Heath's Ring claim, he is not entitled to relief, inter alia, because Ring is not retroactive to cases on collateral review. Heath's second claim is equally meritless. The record refutes any notion that the jury was not allowed to consider how Michael Sheridan died. In addition to the evidence demonstrating the Kenneth Heath inflicted three fatal gunshots to Michael Sheridan's chest and head, trial counsel argued vigorously that Kenneth alone killed Michael Sheridan.

ARGUMENT

ISSUE I

WHETHER TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE OF HEATH'S CAPITAL TRIAL

In Heath's first claim, Heath avers that trial counsel was ineffective for failing to present certain mitigating evidence to the jury. Heath alleges trial counsel should have presented evidence that Heath has a severe anti-social personality disorder, had a history of alcohol and substance abuse, was an emotionally deprived, neglected, and abused child, was under the dominion of his brother at the time of the murder, and was sexually assaulted while he was in prison for second degree murder.

Heath also alleges that trial counsel was ineffective during the penalty phase for clinging to a "lingering doubt" theory, for failing to challenge an unconstitutional doubling, and for failing to present testimony that Heath was not the actual killer. (IB 64-68). This Court should reject Heath's claims.

To establish a claim of ineffective assistance of counsel, two elements must be proven. First, the defendant must show that trial counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the

Sixth Amendment. Kimbrough v. State, 886 So.2d 965, 978 (Fla. 2004).

In order to meet this first element, a convicted defendant must first identify, with specificity, the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Pietri v. State, 885 So.2d 245 (Fla. 2004).

In reviewing counsel's performance, the court must indulge a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. It is the defendant's burden to overcome this presumption. Mungin v. State, 932 So.2d 986, 996 (Fla. 2006).

If the defendant successfully demonstrates trial counsel's performance was deficient, the defendant must then show this deficient performance prejudiced the defense. In order to demonstrate prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998). A defendant may not obtain

collateral relief on a claim of ineffective assistance of counsel unless he proves both prongs of Strickland have been met. Stephens v. State, 32 Fla. L. Weekly S 735 (Fla. 2007) (noting that unless a defendant can show both deficient performance and prejudice, it cannot be said that a conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable).

A. Reliance on residual doubt at penalty phase

In this claim, Heath alleges that trial counsel was ineffective for relying on residual doubt at the penalty phase when there is no right to present such a defense. (IB 62). Heath did not raise this as a claim below. (PCR Vol. II 111-127).⁴

This Court may reject this claim for two reasons. First, the claim was not raised below in Heath's amended motion for post-conviction relief. (PCR Vol. II 111-127). This Court has previously ruled that it will not consider post-conviction claims that are not raised, first, in the collateral court. Downs v. State, 2007 Fla. LEXIS 2388 (Fla. December 13, 2007) ("The remainder of the issues raised by Downs [in this appeal]

⁴ Heath does not offer any specific alternative that trial counsel should have pursued. Indeed, Heath does nothing more than cite to case law that stands for the proposition that a defendant is entitled to effective assistance of counsel. (IB 62-63).

were not asserted in the trial court and, hence, may not be asserted here.").

Second, the record of trial refutes any notion that trial counsel relied exclusively on "residual doubt" in order to persuade Heath's jury to recommend a life sentence. The record reflects that trial counsel called three witnesses to the stand during the penalty phase to show that Heath was a good husband and father, had been well-adapted to prison life, had been a good son until he began experimenting with drugs, came from a good family who cared for him and would take measures to assist his rehabilitation, and was a dependable, hard working employee.

In advocating for a life sentence, trial counsel also exploited evidence brought out during the guilt phase of Heath's capital trial. At trial, witnesses testified that Heath had been drinking and smoking marijuana on the night of the murder.

Prior to sentencing, trial counsel argued that Heath's alcohol consumption and marijuana use on the night of the murder justified a finding the murder was committed while Heath was under the influence of an extreme mental or emotional disturbance. (TR Vol. III 430). The trial judge agreed and gave some weight to this statutory mental mitigator. (TR Vol. III 462). The court also found, based on the evidence presented at the penalty phase, that Heath adapted well to prison life. (TR Vol. III 465).

The record refutes any notion that trial counsel relied exclusively on residual doubt in mitigation. This Court should deny this sub-claim.

B. Severe anti-social personality disorder

Counsel next alleges that trial counsel was ineffective for failing to present evidence that Heath suffers from a severe anti-social personality disorder. Heath raised this issue below and the court granted an evidentiary hearing. After the evidentiary hearing, the collateral court denied the claim. The Court found that Heath had proven neither deficient performance nor prejudice. (PCR Vol. IV 583).

At the evidentiary hearing, both the state and the defense put on testimony pertinent to this claim. The State presented the testimony of Dr. Harry Krop.

Dr. Krop testified that he was appointed before trial to evaluate Ronald Heath. He was hired as a confidential expert for the defense. (PCR-T Vol. VI 253), (TR Vol. I 38). He first saw Heath in 1989. Dr. Krop testified that he evaluated Heath for competency to proceed and to determine his mental state at the time of the offense. He also was asked to address factors that might be considered potentially mitigating if Heath were convicted of first degree murder. (PCR-T Vol. VI 252). Dr. Krop has evaluated some 383 death row inmates and is intimately familiar with statutory mitigation. (PCR-T Vol. VI 252).

In the course of his evaluation, Dr. Krop obtained a history from Heath. Heath spoke to him in detail about the murder of Michael Sheridan. (PCR-T Vol. VI 259). Dr. Krop also interviewed both of Heath's parents extensively, particularly, Heath's mother, to obtain background information. (PCR-T Vol. VI 261).

In the course of his evaluation, Dr. Krop reviewed depositions and police reports, records from Heath's previous incarceration for second degree murder, including a PSI, his entire legal file from that murder, his school records, and several psychological evaluations. Dr. Krop saw nothing in Heath's school records that would indicate a learning disability. Heath told Dr. Krop that he did not do well in school because of a lack of interest and motivation. (PCR-T Vol. VI 280). Dr. Krop told the collateral court there were about five or six different evaluations that had previously been done on Heath. (PCR-T Vol. VI 260).

Dr. Krop testified that one evaluation was done by Dr. Miller, a prominent psychiatrist in Jacksonville. Dr. Miller had diagnosed Heath with a sociopathic personality disorder with situational depression. Dr. Miller did an EEG which was within normal limits. (PCR-T Vol. VI 261). Another psychiatrist diagnosed Heath with an adjustment disorder with a depressed mood. Another doctor, David Linguist, diagnosed Heath with an

anti-social personality disorder. (PCR-T Vol. VI 261). At NFETC, Heath was diagnosed with an inadequate personality.

Dr. Krop gave Heath several neuropsychological screening tests. All were within normal limits. Heath's IQ is above average. (PCR-T Vol. VI 262). His medical history is inconsistent with any head injuries. Heath does not have any neuropsychological deficits. (PCR-T Vol. VI 262).

Dr. Krop concluded that Heath has an anti-social personality disorder. This disorder is marked by impulsivity, failing to honor financial obligations, a history of irritability and aggressiveness, failing to conform to social norms, abandonment of several jobs, getting into trouble with the law, reckless disregard of his or others' personal safety, general irresponsibility, and lack of stable relationships. (PCR-T Vol. VI 271-272).

Dr. Krop advised Heath's trial counsel that there was no evidence of major mental illness or neuropsychological deficits. He spoke with Steven Scheck, Heath's penalty phase counsel, about his evaluation. Dr. Krop also wrote a follow-up letter after the conversation, memorializing his and counsel's concerns that calling Dr. Krop during the penalty phase would be more harmful than helpful. (PCR-T Vol. VI 274).

Dr. Krop believed his testimony would not help Heath for at least two reasons. One, Heath's version of events was

inconsistent with other materials he received, which included Heath's denial that he was even present. Second, Dr. Krop believed that anti-social personality disorder is one that is viewed by jurors in a very negative manner. (PCR-T Vol. VI 277). It was Dr. Krop's clinical judgment that there was no way he could present his testimony in a form that would be more beneficial than harmful to Heath's cause. (PCR Vol VI 278). In Dr. Krop's view, Heath did not meet the criteria for either statutory mental mitigator at the time of the murder. (PCR-T Vol. VI 283).

Dr. Darren Rothschild, a psychiatrist, testified for Heath at the evidentiary hearing. Like Dr. Krop, Dr. Rothschild reviewed records and conducted interviews in evaluating Heath. Dr. Rothschild concluded that Heath has an anti-social personality disorder. (PCR-T Vol. V 167).

According to Dr. Rothschild, a person with anti-social personality disorder manifests a pervasive pattern of lacking respect for other people's rights, properties, and a disrespect for law and order to some degree. In order to make a diagnosis of anti-social personality disorder, there has to be a pervasive pattern of disregarding others and law and order. (PCR-T Vol. V 168). The disrespect for others can create harmful situations for other people. (PCR-T Vol. V 169). People with anti-social

personality disorder can control their behavior but they often choose not to. (PCR-T Vol. V 170).

In talking with Heath's parents, Dr. Rothschild discovered that Heath had been physically cruel to people, had used a weapon to cause serious physical harm, had broken into other people's houses more than once and had often lied to cover up his actions. (PCR-T Vol. V 172). He also set fires on several occasions which are hallmark signs of conduct disorder, a precursor to anti-social personality disorder. (PCR-T Vol. V 172).

In Heath, he noticed five criteria that Heath fit into clearly. First, Heath showed a history of failing to conform to social norms by repeatedly performing acts that are grounds for arrest. Additionally, Heath showed a lack of remorse. Dr. Rothschild told the court that "[i]n talking with him about some of the incidents, I did not sense genuine remorse for what happened." (PCR-T Vol. V 173).

Third, Heath has a history of deceitfulness and there is anecdotal evidence to support a conclusion that Heath has conned others for personal profit or pleasure. (PCR-T Vol. V 173). Fourth, Heath is irritable and aggressive. Finally Heath shows signs of impulsivity or a failure to plan ahead. (PCR-T Vol. V 173).

Dr. Rothschild told the collateral court that, in his opinion, Ronald Heath was not under the influence of extreme mental or emotional disturbance at the time of the murder. (PCR-T Vol. VI 218). He did not find any evidence that, at the time of the murder, Heath's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (PCR-T Vol. VI 219).

Finally, trial counsel, Robert Rush testified as to his reasons for not presenting Dr. Krop as a witness during the penalty phase. Mr. Rush testified that the defense team hired Dr. Harry Krop to assist him in preparing for trial. Mr. Rush retained Dr. Krop because he had an excellent reputation within the legal community for doing forensic evaluations. He was also a person who was capable of giving good courtroom testimony. (PCR-T Vol. VII 434).

Dr. Krop's evaluation of Heath revealed that Heath has an anti-social personality disorder. Mr. Rush recalled that Dr. Krop's testimony would have been more hurtful than helpful and that there were too many factors that Dr. Krop believed would be detrimental. (PCR-T Vol. VII 459). Dr. Krop also advised him that some of the information that he obtained from Heath's parents would not have been helpful in presenting mitigation.

Ultimately, the defense decided not to call Dr. Krop. Although co-counsel Stephen Scheck made the final call on

whether to call Dr. Krop, the decision not to present Dr. Krop during the penalty phase was a joint decision, between both trial counsel and Dr. Krop. They were all in agreement. (PCR-T Vol. VII 501). In Mr. Rush's view, it did not make sense to him to present anti-social personality disorder as a mitigator in Heath's case. (PCR-T Vol. VII 504).

This Court should deny this claim for two reasons. First, it was a reasonable tactical decision on the part of the defense team not to call Dr. Krop. Presenting such testimony would have opened the door to discussion of Heath's anti-social traits as well as acts of specific misconduct as a child. Moreover, it would also have ensured the jury was aware that while Heath could have controlled his behavior on the night of the murder, he simply chose not to.

As both Dr. Krop and Mr. Rush correctly observed, such testimony would have been more hurtful than helpful. It is not ineffective assistance of counsel to affirmatively choose, after investigation, not to call a witness that would "open the door to damaging cross-examination and rebuttal evidence that would counter any value that might be gained from the evidence." Johnson v. State, 921 So.2d 490, 501 (Fla. 2005). See also Reed v. State, 875 So. 2d 415, 437 (Fla. 2004).

Even if this Court were to assume that counsel should have called Dr. Krop, Heath cannot prevail because Heath cannot show

presenting such testimony probably would have resulted in a life sentence. This Court has found, on several occasions, that anti-social personality disorder is "a trait most jurors tend to look unfavorably upon." Freeman v. State, 852 So. 2d 216, 224 (Fla. 2003). See also Willacy v. State, 967 So. 2d 131, 144 (Fla. 2007); Reed v. State, 875 So. 2d 415, 437 (Fla. 2004).⁵

Heath failed to demonstrate that trial counsel's failure to call Dr. Krop undermines confidence in the death sentence. Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998). This Court should affirm the collateral court's order denying the claim.

C. Alcohol Abuse:

Heath claims that trial counsel should have presented evidence, in mitigation, that Heath had abused alcohol. (IB 65). Heath points to the testimony of Dr. Rothschild who, Heath alleges, testified that Heath had a history of alcohol abuse. (PCR-T Vol. V 176).

Heath makes no attempt to explain how this evidence likely affected the outcome of his trial. Moreover, Dr. Rothschild did not actually testify that Heath abused alcohol.

⁵ When queried about whether a person with anti-social personality disorder would likely be a good inmate (Skipper inquiry), Dr. Rothschild testified that when Heath was in prison for murdering Michael Green, he had multiple infractions and that while incarcerated for the murder of Michael Sheridan, Heath had multiple rule violations.

Instead, Dr. Rothschild, testified he "suspected" alcohol abuse. (PCR-T Vol. V 176). He could not actually make a diagnosis for two reasons. First, Heath minimized his own alcohol use. Second, because Heath was in prison from the age of 16 or 17 until the age of 27, there was not a window of time to truly assess whether he would meet the criteria for substance abuse. (PCR-T Vol. V 176, PCR-T Vol. VI 216).

While Dr. Rothschild testified that Heath's use of alcohol and marijuana on the night of the murder could have been brought to trial counsel's attention, the record shows it actually was. (PCR-T Vol. V 178). Indeed, the jury did hear, from both Jennifer Berquist and Kenneth Heath that Heath was using marijuana and alcohol on the night of the murder. Moreover, the trial judge found, in statutory mitigation, that Heath was under the influence of extreme mental or emotional disturbance based upon Heath's consumption of alcohol and marijuana on the night of the murder. (TR Vol. III 452-470).

It is not logical to conclude that trial counsel was ineffective for failing to present evidence of a "suspected" history of voluntary alcohol abuse when trial counsel, instead, successfully persuaded the trial court that a statutory mitigator existed because of alcohol and drug use on the night of the murder. This Court should deny this claim.

D. Abused child and sexual assault victim:

In this sub-claim, Heath alleges that trial counsel was ineffective for failing to present evidence that Heath was an abused child and was sexually assaulted while in prison.

(1) *Child abuse*

Heath presented no testimony, and makes no claim, that he was generally abused as a child. Instead, Heath claims only that he was "abused" because his father used excessive corporal punishment to discipline him.

Both Dr. Krop and Dr. Rothschild opined that Heath was physically abused. Their opinion of physical abuse stemmed solely from anecdotal evidence that Heath's father used excessive corporal punishment to discipline Heath.

Dr. Krop did not provide any specific examples of physical discipline upon which he based his opinion. Dr. Rothschild testified that Heath reported that he had lived in fear of his father because he was punished severely for misbehavior. Dr. Rothschild told the collateral court that both Heath and his father reported one incident in which Heath was beaten with a belt to the point where he had bruises and marks on him. (PCR-T Vol. V 178). Heath's parents, however, denied that Heath was abused by corporal punishment. Corporal punishment was used when other methods of discipline, such as loss of television privileges and grounding, failed. (PCR-T Vol. VII 369). Mr.

Heath testified that he would not spank his son when he was angry with him. Instead, he would wait until he calmed down. (PCR-T Vol. VII 391). Mrs. Heath told the collateral court that Heath was clothed while being spanked and that the spankings never resulted in welts or marks on any part of Heath's body other than his buttocks. (PCR-T Vol. VII 369).

Trial counsel told the collateral court that he was aware that Heath's father beat their son with a belt. Mr. Rush told the collateral court he believed that Heath did not want his defense team to raise that during the penalty phase. He also did not feel the jury would find that fact particularly mitigating. (PCR-T Vol. VII 461-462).

Heath did not testify at the evidentiary hearing that he felt abused or provide any evidence that Heath's father's use of excessive corporal punishment was chronic. Nor did Heath offer any testimony to refute Mr. Rush's testimony that Heath did not want to present evidence that his father used excessive corporal punishment.

This Court should deny this claim for at least two reasons. First, other than a conclusory statement that this evidence would have persuaded the jury to recommend a life sentence, Heath offers no argument or explanation how the failure to present this evidence undermines the confidence in the death

sentence. (IB 61, 65). As such, Heath failed to demonstrate any error in the collateral court's rejection of this claim.

Next, the evidence introduced at the evidentiary hearing establishes that trial counsel's strategy was to put a good face on both Heath and his parents. With Heath, it was certainly an uphill battle, as Heath had killed another young man when he was just 16 and had spent almost his entire adult life in prison.

Heath's parents were another thing entirely. Mr. Rush testified that he believed that Heath's parents were going to present strong mitigation to the jury. In his view, Heath's parents would present themselves in a fine manner that would reflect well on his client. (PCR-T Vol. VII 498). It is logical to conclude that a reasonable attorney might choose not to put parents on the witness stand to make a good impression then bring up evidence that would undermine their credibility. In addition, trial counsel testified that it was his recollection that Heath did not want to present evidence of his father's excessive corporal punishment. (PCR-T Vol. VII 461-462). Finally, Heath put on no evidence establishing any nexus between his father's excessive corporal punishment and the murder of Michael Sheridan.⁶

⁶ The state does not contend that any of the factors that Heath alleges should have been presented do not constitute mitigation. Rather it is the state's argument that is it reasonable to conclude both a jury and a trial court might find that

In light of the two aggravators found in this case, Heath has failed to show that trial counsel's failure to put on this evidence undermines confidence in the death sentence. This Court should affirm.

(2) ***Sexual assault while in prison***

Heath also presented, albeit it indirectly, evidence at the evidentiary hearing that while he was in prison he was the victim of multiple rapes. (PCR-T Vol. V 178).⁷ Dr. Rothschild testified that during the course of his evaluation of Heath in preparation for these collateral proceedings, Heath reported he had been a victim of multiple rapes while in prison for second degree murder. (PCR-T Vol. V 178). Dr. Rothschild told the collateral court there was evidence of that in Heath's medical records. Dr. Rothschild testified that evidence of these sexual assaults might have been considered mental health mitigators or issues that could have been brought to the attorney's attention. (PCR Vol. V 178).

Mr. Rush testified that he was aware of that fact before trial. (PCR-T Vol. VII 498). Mr. Rush testified that to the best of his recollection, Heath did not want the defense team to

mitigating factors that have no nexus to the murder to be less weighty than ones that do.

⁷ Heath did not actually introduce any of these medical records that Dr. Rothschild relied upon. Nor did Heath testify about the incidents of sexual assault or their impact on him.

put that evidence before the jury during the penalty phase. (PCR-T Vol. VII 498). Ultimately, penalty phase counsel decided not to present this evidence. (PCR-T Vol. VII 499).

While it is clear this evidence could have been presented to the jury, Heath has failed, in light of the strong aggravation, to demonstrate that trial counsel's failure to present that evidence undermined the confidence in the verdict. This court should deny this claim.

E. Under dominion of brother

In this claim, Heath alleges that trial counsel was ineffective for failing to put on an expert to dispute the State's theory that Heath dominated his younger brother on the night of the murder. Heath raised a variation of this claim below.

In his amended motion for post-conviction relief, Heath alleged that trial counsel was ineffective for failing to call an expert to prove that Heath acted under the dominion of his brother, Kenneth. (PCR Vol. I 119). In his supporting facts, however, Heath altered his claim from an allegation that trial counsel was ineffective for failing to produce evidence of a mitigator (substantial domination of another) to an allegation that trial counsel was ineffective for failing to rebut the State's theory that Heath was the dominating force on the night of the murder. (PCR Vol. I 119). The court granted an

evidentiary hearing on this claim. After the hearing, the court denied the claim in its entirety. The court ruled that:

In this claim, Heath alleges that trial counsel was ineffective for failing to present expert and lay testimony during the penalty phase of the defendant's trial that, at the time of the murder, the defendant acted under the dominion of co-defendant Kenneth Heath. Evidence that the defendant acted under "the substantial domination of another person" is a statutory mitigating circumstance. *Section 921.141(6)(e), Florida Statutes*. It does not appear, however, that the defendant is claiming he acted under the substantial domination of Kenneth Heath so as to rise to the level of a statutory mitigator. Rather, the defendant claims that trial counsel was ineffective for failing to present available evidence that Ronald Heath acted under the domination of Kenneth Heath. According to the defendant, such evidence would have risen to the level of a non-statutory mitigator.

The defendant failed to produce any evidence at the evidentiary hearing that he was, at the time of the murder, acting under the dominion, substantial or otherwise, of his brother. Instead, the testimony at both trial and at the evidentiary hearing established that the defendant was, literally, calling the shots on the night of the murder.

At the evidentiary hearing, some five witnesses testified as to this issue. Trial counsel testified he found no evidence to support a conclusion that Kenneth dominated Heath. Trial counsel testified, in fact, he found to the contrary. Heath was older and physically larger than his brother and was mentally quicker and more secure. Based on his interactions with the defendant and with Kenneth Heath, trial counsel found no evidence to suggest that at the time of the murder, Heath was acting under the dominion and control of Kenneth Heath.

Dr. Darren Rothschild also addressed this issue during the evidentiary hearing. Heath retained Dr. Rothschild for the purpose of evaluating Heath during

post-conviction proceedings and testifying at the evidentiary hearing.

Among the issues Dr. Rothschild was asked to address was whether there was any evidence that Heath acted under the substantial domination of co-defendant Kenneth Heath at the time of the murder. Dr. Rothschild provided no testimony that the defendant acted under the substantial domination of another. To the contrary, Dr. Rothschild testified he did not have an opinion that the defendant was under the substantial influence of another person.

Dr. Rothschild testified he did not have an opinion on whether either brother was dominating the other. Dr. Rothschild testified he did not come to the conclusion that Kenneth Heath was controlling the defendant before the murder. He had no opinion on whether Kenneth Heath was controlling the defendant during the murder. Dr. Rothschild testified that when he spoke with Heath's parents, neither of them led him to believe that Kenneth Heath dominated Heath in any way. He did not come to the conclusion that the defendant was easily led by others.

Sheila Short, a correctional officer, testified for the defense. She testified that she was not in a position to observe whether Ronald Heath dominated Kenneth Heath. She also was not in a position to observe whether Kenneth Heath ever dominated Ronald Heath. She did not see any evidence that one was subservient to the other.

She did overhear Kenneth Heath make a statement while he was in jail. She testified that Kenneth Heath at some point said "I fixed his ass this time didn't I." She asked him who he meant, and Kenneth Heath told her "my brother".

She could not say what Kenneth Heath was referring to. According to Ms. Short, Kenneth Heath could have been talking about anything. She did not perceive he was talking about a game of cards, but she did not know. She never heard Kenneth Heath say he was going to lie against his brother at trial.

The defendant's father, William Heath, never really saw any evidence that the defendant dominated his younger brother. He never saw any evidence that Kenneth Heath dominated the defendant. Heath's mother, Vivian Heath, testified that when her sons were growing up, neither son dominated the other. She never saw them as adults together. Once her sons reached adulthood, she never saw Kenneth Heath dominate Heath nor the defendant dominate his younger brother.

Despite this testimony on direct examination, Mrs. Heath testified during cross-examination she thought Kenneth Heath had the dominating personality of the two brothers. She thought Kenneth Heath was dominating because he had a much stronger personality and the worst temper. Once again, she testified she never saw Kenneth Heath dominate the defendant as an adult. She testified that she could not say to Dr. Rothschild or Dr. Krop that Kenneth Heath dominated Ronald Heath or Ronald Heath dominated Kenneth Heath. (EH Vol. III 378).

Mrs. Heath's demeanor on the witness stand established that Mrs. Heath wished to portray the defendant to this court in the best possible light in order to save her son's life. Accordingly, this Court gives no weight to her testimony that Kenneth Heath has the dominating personality. Mrs. Heath not only has a motive to save her son's life but had no opportunity to observe her sons interact as adults because they both were in prison. Moreover, Mrs. Heath did not see her sons on night of the murder and has no first hand knowledge of the events leading up to the death of Michael Sheridan. Accordingly, Mrs. Heath can provide no credible evidence that at the time the Heath brothers murdered Michael Sheridan, the defendant was acting under the domination of his brother.

The defendant failed to produce any evidence that at the time of the murder, he acted under the domination of Kenneth Heath. Instead the evidence at trial and at the evidentiary hearing, established that Heath was an integral part, if not the leader, of the planning and the execution of the robbery and murder of Michael Sheridan. San Martin v. State, 705 So. 2d

1337, 1348 (Fla. 1997)(affirming the trial court's rejection of the substantial domination mitigator because "the evidence clearly establishes that [San Martin] was an integral part of the planning and execution of these crimes"); Valdes v. State, 626 So. 2d 1316, 1324 (Fla. 1993) (holding the substantial domination mitigator was not established where defendant participated equally in murder, defendant provided the murder weapon, and defendant forced the victim out of the car, where the victim was executed).

Trial counsel cannot be ineffective for failing to produce evidence that did not exist at the time of trial. This claim is **DENIED**.

(PCR Vol. V 593-597).

Before this court, Heath repeats, verbatim, his claim that he presented to the collateral court. (PCR Vol. I 119-120, IB 65-66). Heath avers that trial counsel should have called an expert, such as Dr. Rothschild, who would testify that "it is unlikely Kenneth Heath acted pursuant to the direction of the Defendant". (IB 66). Accordingly, it appears that the gravamen of Heath's claim is not that Kenneth dominated his older brother but that trial counsel was ineffective solely because he did not present evidence to rebut the state's theory that Heath was a dominating force on the night Michael Sheridan died.

Heath's claim should be denied for two reasons. First, Heath cannot demonstrate that counsel's failure to put on this evidence undermines the outcome of this verdict. The trial court did not find in aggravation that Heath dominated his younger brother nor was the jury instructed that Heath's

domination of his younger brother was evidence that it could consider in aggravation. Such a finding or instruction would have been improper because the fact that Heath directed his younger brother during the course of Michael Sheridan is not a statutory aggravator. Accordingly, neither the trial judge nor the jury weighed Heath's domination over his brother in aggravation.⁸

Second, this claim should be denied, because contrary to Heath's allegations, Heath presented no evidence that "it is unlikely that Kenneth Heath acted pursuant to the direction of his brother." (IB 66). Three witnesses' testimony at the evidentiary hearing refute any notion that trial counsel failed to unearth evidence that Ronald Heath was not directing his brother in the robbery and murder of Michael Sheridan.

Kenneth Heath testified at the evidentiary hearing that he and Michael Sheridan started talking at the Purple Porpoise. They talked about baseball. Kenneth told the court that his discussion with Michael Sheridan at the Purple Porpoise was friendly. He had no intention of doing Michael any harm. (PCR-T Vol. V 97).

⁸ In this sentencing order, the trial court did find that Heath was the dominant force in the robbery and murder of Michael Sheridan. He did not, however, weigh this domination as an aggravator.

Kenneth testified that Heath came over to him and suggested they rob Michael Sheridan. (PCR-T Vol. V 97). He went along with what Heath told him to do. (PCR-T Vol. V 97).

Kenneth testified that when he, Michael, and Heath left the Purple Porpoise, Heath told him where to go. Heath decided where they would take Michael to rob him. En route, Heath saw a turn off that goes into the woods a little way. Heath told Kenneth to pull down that road. Heath told Kenneth how far down the road to drive. (PCR-T Vol. V 59,99).

When they all got out the car, Heath made a motion with his hand, like "do [you] have the gun"? Kenneth told him, no. Kenneth told the collateral court that Heath was "like, get the gun, get the gun." Heath was moving his lips and making gestures to indicate what he wanted Kenneth to do. Kenneth understood that Heath wanted him to get the gun from the car. Kenneth got the gun. (PCR-T Vol. V 61). He got the gun because Heath told him to. (PCR-T Vol. V 99).

When he walked back to the rear of the car, Kenneth pointed the pistol at Michael and told him he was being robbed. Mr. Sheridan thought he was kidding and was moving back and forth in front of Kenneth. Heath started telling Kenneth to "shoot him." (PCR-T Vol. V 65). Kenneth told Michael that he did not want to shoot him and directed Michael to take his wallet out and his jewelry and stuff off. Heath told him again to "shoot him."

(PCR-T Vol. V 65). Kenneth testified that Michael Sheridan lunged at him and he shot him. (PCR-T Vol. V 65). Kenneth thought Michael was going to attack him. (PCR-T Vol. V 66). He did not shoot him because his brother told him to but because Michael lunged at him. (PCR-T Vol. V 66).

After he shot Michael once, Michael Sheridan staggered back and sat down. Heath went up to him and told him to remove his jewelry. Michael was trying but was not doing it. He wasn't really functioning. Heath then removed Michael's necklaces, his watch, and his wallet. He could not find the bracelet the brothers wanted, so Heath told Mr. Sheridan to "give us the bracelet, we'll get you to a hospital, we'll get you some help." Heath then started kicking Michael Sheridan. He kicked him a number of times. (PCR-T Vol. V 100).

Heath then told Kenneth to shoot him again, to make sure he was dead. He did. (PCR-T Vol. V 68). Kenneth Heath shot Michael Sheridan twice more at this brother's direction. (PCR-T Vol. V 107).

Kenneth did not want to leave any witnesses. Heath had talked to him before about not leaving any witnesses. Heath had tried to talk Kenneth into robbing a liquor store before they left Georgia to travel to Gainesville. Heath told Kenneth that all he had to do is go in there and shoot the person working in

the liquor store. Heath told Kenneth that he should not leave any witnesses. (PCR-T Vol. V 71).

The brothers talked about shooting Michael Sheridan to eliminate him as a witness before they even left the Purple Porpoise. (PCR-T Vol. V 71). Kenneth followed Heath's directions on the night of the murder. (PCR-T Vol. V 98).

In addition to his testimony about the murder, Kenneth told the collateral court about his life-long relationship with his brother. He has always been afraid of his brother. (PCR-T Vol. V 108-109). Heath physically abused Kenneth as a child. Heath shot him with a bow and arrow and hurt him a lot. (PCR-T Vol. V 109). His brother was the only person Kenneth was ever afraid of. (PCR-T Vol. V 109-110). Heath sexually abused Kenneth when Kenneth was young. (PCR-T Vol. V 110).

In addition to Kenneth Heath's testimony, Mr. Rush was questioned, at the evidentiary hearing, about why he failed to present evidence that Kenneth Heath actually was the dominant party. (PCR-T Vol. VII 466). Mr. Rush testified that he found no evidence to support such a notion.

Mr. Rush told the collateral court that he found the opposite to be true. Heath was older than Kenny, physically larger, and mentally quicker, more secure. (PCR-T Vol. VII 466). Based on his interactions with both brothers, and Kenny's report of abuse at the hands of his brother, there was no

evidence that Kenneth dominated Ronald Heath. (PCR-T Vol. VII 466).

Finally, Dr. Rothschild testified for Heath on this issue. However, Dr. Rothschild provided no support for Heath's claim that it "unlikely" that Heath dominated Kenneth. Certainly, Dr. Rothschild presented no such testimony.⁹

Instead, Dr. Rothschild told the collateral court that he was asked to determine whether Heath was the dominating figure or was he dominated. (PCR-T Vol. V 177). Dr. Rothschild had no opinion on that issue, in part, because of the discrepancies in the brother's accounts. (PCR-T Vol. V 177). He did, however, believe that Heath was not a person who was easily led by others. (PCR Vol. V 214). Neither of Heath's parents led him to believe that Kenneth dominated Heath in any way. (PCR-T Vol. VI 214).

The trial judge's rejection of this claim is supported by competent, substantial evidence. Heath presented no evidence at the evidentiary hearing to support a claim that Kenneth dominated his brother on the night of the murder. Likewise, Heath presented no evidence that trial counsel failed to uncover any evidence that would have refuted the State's theory that Ronald Heath was a dominant force in the planning of both the

⁹ Unlike Mr. Rush, Dr. Rothschild had no personal contact with, and did not interview, Kenneth Heath. (PCR Vol. VI 201).

robbery and murder of Michael Sheridan. Trial counsel cannot be ineffective for failing to present evidence that does not exist. This claim should be denied.

F. Unconstitutional doubler

In this sub-claim, Heath alleges trial counsel was ineffective for failing to challenge the "in the course of a felony" aggravator because the same set of facts that support a felony murder conviction also supports a finding of the aggravating factor.¹⁰ Heath alleges that had trial counsel objected, the jury would not have recommended death and the judge would not have imposed the death penalty. (IB 67).

Heath raised this claim in his amended motion for post-conviction relief. The collateral court denied this claim. The court found the claim was procedurally barred and without merit. (PCR Vol. II 204).

Below, and before this Court, Heath complains the "committed in the course of a felony" aggravator impermissibly acts as an automatic aggravator when a defendant is convicted of both first degree murder and an underlying enumerated felony. Heath fails to point to any Florida case law that supports his position.

¹⁰ Improper doubling actually occurs when two separate aggravating factors are found based on the same aspect of the crime. It does not occur when one aggravator is found to exist based on the same facts as supports a conviction for an underlying enumerated felony.

This Court may reject this claim for two reasons. This claim is procedurally barred. A substantive challenge to the constitutionality of the "in the course of an enumerated felony" aggravator may be, and should be, raised on direct appeal. Because Heath failed to do so, this claim is procedurally barred. Arbelaez v. State, 775 So.2d 909, 919 n. 8 (Fla. 2000). Heath may not resurrect this barred claim as an ineffective assistance of counsel claim. Woods v. State, 531 So.2d 79, 82 (Fla.1988) ("[C]louching a procedurally barred claim in terms of ineffective assistance of counsel will not revive such a claim.").

This Court may also deny this claim on the merits. This Court has repeatedly, both before and after Heath's capital trial, rejected the notion that the "murder in the course of a felony" aggravator is either automatic or unconstitutional. Ault v. State, 866 So.2d 674, 686 (Fla. 2003). See also Owen v. State, 862 So.2d 687, 704 (Fla. 2003) (ruling that the murder in the course of a felony aggravating circumstance is neither unconstitutional nor automatic because the list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony); Mills v. State, 476 So.2d 172, 178 (Fla. 1985)(rejecting argument that murder in the course of a felony

aggravator creates automatic aggravating circumstance for all felony-murder cases because Legislature has reasonably determined that first-degree murder committed in course of another dangerous felony is an aggravated capital felony).

G. Cause of death

Heath claims that counsel was ineffective, at the penalty phase, for failing to challenge the medical examiner's testimony that Michael Sheridan's death was caused by the actions of both brothers. (IB 67). At trial, Dr. William Hamilton testified that Michael Sheridan died as a result of multiple gunshot wounds and a sharp force injury to the neck. (TR Vol. VII 1351). Dr. Hamilton told the jury there were "very definite things you can say about this case: He [Michael Sheridan] was shot three times and he had a sharp force injury to his neck. Somebody put a blade in his neck and someone shot him three times. That's very definite." (TR Vol. VII 1378).

Heath did not present any expert testimony to refute the medical examiner's trial testimony. Instead, Heath points only to the evidentiary hearing testimony of his brother, Kenneth Heath.

Kenneth testified at the evidentiary hearing, that Heath did not attempt to cut Michael's throat until after he shot Mr. Sheridan three times. Kenneth told the collateral court that Michael Sheridan was already dead before Heath used the knife on

Michael's throat. (PCR-T Vol. V 72-73). At trial, however, Kenneth testified that he shot Michael Sheridan once in the chest, Heath attempted to cut Michael's throat, and when his efforts were unsuccessful, Kenneth shot and killed Michael Sheridan by shooting him twice in the head, at Heath's direction.

Heath alleges Kenneth's recantation testimony at the evidentiary hearing establishes that counsel was ineffective for failing to challenge Michael Sheridan's cause of death. (IB 67). This claim can be denied for at least three reasons.

First, and the most obvious, is that Heath attempted, below, to prove his claim of ineffective assistance of counsel by offering "newly discovered evidence" that Michael Sheridan was already dead before Heath started sawing at Michael Sheridan's neck with a knife. (IB 67). By its nature, newly discovered evidence is evidence that was not known to the defendant or trial counsel and could not have been known by the exercise of due diligence. Accordingly, counsel cannot be ineffective for failing to exploit evidence that was not discoverable until some 15 years after Heath's capital trial. Sireci v. State, 773 So. 2d 34, 40-41 (Fla. 2000) (counsel cannot be ineffective for failing to discover newly discovered evidence because newly discovered evidence, by its nature, is

evidence that could not have been discovered by the exercise of due diligence).

This claim may also be denied because the collateral court found Kenneth Heath's recantation testimony, as to the order of wounds inflicted on Michael Sheridan, to be incredible.¹¹ In denying Heath's claim the collateral court ruled that:

This Court finds Kenneth Heath's testimony as to the order of the wounds inflicted on Michael Sheridan not to be credible. This court reaches this conclusion for at least four reasons. First, Kenneth Heath's testimony is inconsistent with the medical examiner's trial testimony that the cause of death was gunshot and a sharp force injury to the neck.

Second, Kenneth Heath's testimony is internally consistent. For instance, while Kenneth Heath claimed at the evidentiary hearing that the victim was dead at the time the defendant cut and stabbed at the victim's throat, Kenneth Heath did not recant his previous testimony that Michael Sheridan was making noises at the time Heath tried to cut this throat. While in his previous testimony at trial, Kenneth Heath described the sounds as "like he was trying to swallow", Kenneth Heath testified at the evidentiary hearing he did not know if the sounds Mr. Sheridan was making were "swallowing sounds, or what." Nevertheless, according to Kenneth Heath, Michael Sheridan was still making sounds at the time the defendant stabbed him in the throat. This testimony directly contradicts his claim that Michael Sheridan was already dead when the defendant stabbed and sawed at his throat with a knife.

Third, Kenneth Heath revealed his motivation for testifying for his brother during the collateral proceedings. When asked whether his mother wanted him

¹¹ Ironically, it came out during the evidentiary hearing that Heath admitted to Dr. Rothschild that he tried to cut Mr. Sheridan's neck after the first shot, and then, after that, Kenneth shot him two more times. (PCR Vol. IV 209).

to try to save Heath's life, he said, yes that "she doesn't want to see Ronnie die". Kenneth Heath had a motive to alter his trial testimony and this court believes it is appropriate to consider that motive as one factor in determining whether Kenneth Heath's "recanted" testimony as to the order of wounds is credible.

Finally, Kenneth Heath's demeanor on the witness stand and explanation for his changed testimony belies any notion that his testimony as to the order of wounds is credible. Kenneth Heath insisted his trial testimony was truthful in every way, including the order in which the fatal wounds were inflicted on Michael Sheridan. He insisted, likewise, that his pre-trial deposition was truthful. Kenneth Heath also insisted his evidentiary hearing testimony was true.

Kenneth Heath denied his evidentiary hearing testimony constituted recanted testimony at all. When offered an opportunity to explain the apparent change in his testimony, he explained he told the truth at trial and was telling the truth at the evidentiary hearing. According to Kenneth Heath, someone must have altered the transcripts of his trial and deposition testimony. Considering the totality of the circumstances, this court finds Kenneth Heath's recanted testimony regarding the order of wounds not to be credible.

(PCR Vol. IV 569-571).

This Court has ruled, consistently, that it gives deference to a trial court's assessment of witness credibility because the trial court is in a superior vantage point in assessing the credibility of witnesses. Evans v. State, 32 Fla. L. Weekly S 719 (Fla. Nov. 15, 2007); Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). As Heath failed to present any credible evidence that Michael was already dead at the time Heath attempted to cut Michael Sheridan's throat, Heath failed to show

counsel was ineffective for failing to challenge Dr. Hamilton's opinion as to the cause of Michael Sheridan's death. Evans v. State, 32 Fla. L. Weekly S 719 (Fla. Nov. 15, 2007)(collateral court's finding that the alleged alibi witness's testimony at the evidentiary hearing was not credible supported the collateral court's conclusion there was no reasonable probability the outcome of the trial would have been different if trial counsel would have called the witness at trial); Ponticelli v. State, 941 So.2d 1073, 1091 n.20 (Fla. 2006) (affirming the denial of Ponticelli's claim because Ponticelli put on no evidence at the evidentiary hearing to support the claim).

Finally, this claim may be denied because, even assuming trial counsel should have uncovered evidence to show that Michael Sheridan was dead at the time that Heath attempted to cut his throat, Heath cannot show there is a reasonable probability of a different outcome.¹² At the evidentiary hearing, Kenneth Heath testified that he and his brother, even before they left the Purple Porpoise, planned to take Michael Sheridan to a remote location, rob him of his valuables, then kill him to ensure there were no witnesses. (PCR-T Vol. V 71, 97). The brothers were well prepared to carry out their plan.

¹² In his sentencing order, the trial court found the state had not proven beyond a reasonable doubt that Ronald Heath's actions in stabbing Michael Sheridan caused his death. (R 467).

In their car, the Heaths had a .22 caliber handgun, a sawed off shot-gun, and a knife. Once at the kill spot, the defendant directed his younger brother to get the gun from the car. According to Kenneth Heath, the defendant told him repeatedly to shoot Michael Sheridan. Kenneth Heath also testified that his brother looked as if he was in ecstasy while he was cutting Michael Sheridan's throat. (PCR-T Vol. V 106). He looked as if he was enjoying it. (PCR-T Vol. V 107).

The evidence introduced both at the evidentiary hearing and at trial established that the brothers, together, executed Michael Sheridan; Kenneth Heath by shooting him and the defendant, at the very least, by urging his younger brother, several times, to "shoot him". Given Kenneth Heath's testimony about the chilling events leading up to Michael Sheridan's murder, coupled with evidence that Heath had previously been convicted of murdering another young man, there is simply no reasonable probability Heath's penalty phase jury would have recommended a life sentence. Nor is there any reasonable probability the trial judge would have sentenced Heath to life in prison without the possibility of parole for 25 years. This Court should deny this claim.

H. Other mitigating evidence

In this catch-all claim, Heath alleges that trial counsel was ineffective for failing to present other available

mitigating evidence. Heath claims that trial counsel was ineffective for failing to present evidence that (1) Heath grew up deprived emotionally (2) Heath was emotionally abused and neglected throughout his childhood, (3) Heath's father abused him with corporal punishment, (4) Heath was a slow learner, (5) Heath had a substance abuse problem, (6) Heath endured multiple rapes and sexual assaults as a juvenile in prison, and (7) at the time of the murder, Heath was suffering from extreme emotional distress due to the recent fight and break-up with his girlfriend. (IB 68). Heath claims that had trial counsel placed this evidence before the jury, these mitigators would have outweighed the aggravators and Heath would probably have received a life sentence. Heath also claims, without elaboration, that trial counsel should have presented a mental health expert at trial. (IB 68-69).

(1) Heath endured multiple rapes and sexual assaults as a juvenile in prison, Heath was physically abused with corporal punishment and trial counsel should have called a mental health expert to testify as to his anti-social personality disorder.

In raising these claims, Heath simply repeats his allegations of ineffective assistance of counsel made in other parts of his first claim. For the reasons set forth in the state's response to those specific claims, Heath is entitled to no relief.

(2) Heath was emotionally neglected, deprived and abused as a child, was a slow learner, and was suffering from extreme emotional distress at the time of the murder because of a recent break-up with his girlfriend.

These claims should be denied because Heath either presented no evidence to support the "mitigators" or the testimony at the evidentiary hearing specifically refutes his claims. Both of Heath's parents testified he was not emotionally deprived, he was not emotionally abused or neglected, and he was not a slow learner. (PCR-T Vol. VII 374-375, 391-393).

Dr. Krop, testified, at the evidentiary hearing, he did not believe that Heath was emotionally deprived, neglected or abused. (PCR-T Vol. VI 283). Dr. Krop also told the collateral court that he did not believe Heath was a slow learner or that Heath was suffering from extreme emotional distress due to a recent fight and breakup with Penny Powell. (PCR-T Vol. VI 283).

Dr. Krop testified that although Heath was upset about the fight with Ms. Powell, he did not believe it was a contributor to Michael Sheridan's murder. (PCR-T Vol. VI 284). Dr. Krop also testified that Heath's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not impaired at the time of the murder. (PCR Vol. VI 282-284). Likewise, Dr. Rothschild, the defendant's evidentiary hearing expert, provided no evidence

that Heath was emotionally, deprived, neglected, or abused as a child, was a slow learner, or was suffering from extreme emotional distress at the time of the murder.

Trial counsel cannot be ineffective for failing to present non-existent evidence. Heath's claim should be denied.

(3) Heath had a substance abuse problem

Heath cannot show that trial counsel was ineffective for failing to present evidence that Heath had a substance abuse problem. This is true for two reasons. First, Heath presented no evidence at the evidentiary hearing to support a substance abuse diagnosis. Dr. Krop found no evidence to support a diagnosis of substance abuse. (PCR-T Vol. VI 283). Dr. Rothschild testified that he suspected, but could not confirm, a substance abuse diagnosis. (PCR-T Vol. V 176).¹³

This claim may also be denied because trial counsel actually presented evidence of substance abuse on the night of

¹³ Even if Dr. Rothschild had been able to confirm such a diagnosis, the fact that Heath was arguably able to find an expert to testify more favorably does not demonstrate trial counsel was ineffective. (PCR Vol. I 176). Davis v. State, 875 So. 2d 359, 371 (Fla. 2003) ("[T]rial counsel was not deficient where the defendant had been examined prior to trial by mental health experts and the defendant was simply able to secure a more favorable diagnosis in postconviction."); Asay v. State, 769 So. 2d 974, 986 (Fla. 2000) (a reasonable investigation into mental health mitigation "is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert") Maharaj v. State, 778 So. 2d 944, 957 (Fla. 2000) ("Failure to present cumulative evidence is not ineffective assistance of counsel.")).

the murder. Though Dr. Rothschild testified that Heath's use of alcohol and marijuana on the night of the murder could have been brought to trial counsel's attention, the record shows it actually was. (PCR Vol. VII 179), (TR Vol. V 784-853). Indeed, the jury did hear that Heath was using marijuana and alcohol on the night of the murder and the trial judge found, in statutory mitigation, that Heath was under the influence of extreme mental or emotional disturbance based upon Heath's consumption of alcohol and marijuana on the night of the murder. Trial counsel cannot be ineffective for failing to present evidence he actually presented. Heath's claim should be denied.

ISSUE II

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE OF HEATH'S CAPITAL TRIAL

Heath raises one claim of ineffective assistance of counsel during the guilt phase. Heath alleges trial counsel was ineffective for failing to present a claim of voluntary intoxication.

Heath presented this claim in his amended motion for post-conviction relief. The collateral court granted an evidentiary hearing on this claim.

At the hearing, trial counsel explained his trial strategy. Mr. Rush testified the defense theory decided upon was that Ronald Heath did not commit the murder, he wasn't there,

Kenneth, alone, committed the murder, and Kenneth was blaming Heath to get the benefit of a plea deal. (PCR-T Vol. VII 436).

Mr. Rush testified that he met with Heath numerous times and had numerous discussions in formulating his defense. (PCR-T Vol. VII 437). Heath never admitted to Mr. Rush that he was actually at the murder scene. (PCR-T Vol. VII 456). Heath never wavered from that during all of their discussions. (PCR-T Vol. VII 457). Instead, Heath told Mr. Rush that he passed out in the car and Kenny came back and woke him up after the murder. (PCR-T Vol. VII 480).

When questioned about the possibility of pursuing a voluntary intoxication defense, Mr. Rush told the collateral court that he did consider the evidence of Heath's alcohol and marijuana use on the night of the murder. He discussed a voluntary intoxication defense with Heath. (PCR-T Vol. VII 440-441).

He did not, however, consider voluntary intoxication to be a viable defense. (PCR-T Vol. VII 438). Mr. Rush testified that voluntary intoxication is a very difficult defense for the jury to accept. It has been his experience that people do not accept someone not taking responsibility due to voluntary intoxication. (PCR-T Vol. VII 438).

Additionally, in his view, the evidence did not rise to the level necessary for an intoxication defense. He noted that

"[w]e had these individuals (Ronald and Kenneth Heath) walking around, talking, making decisions, driving an automobile, none of which reached the standard for an intoxication defense." (PCR-T Vol. VII 439).

Mr. Rush told the court that he also does not believe in presenting incompatible defenses. A "you're not there but if you were, you're intoxicated, diminishes the effectiveness." (PCR-T Vol. VII 439). Mr. Rush testified that incompatible defenses lose credibility with the jury. "You can't take one position and then say, well, if you don't believe that, here's my second argument. It just does not work. You lose credibility. And in my experience, every jury trial is a battle, at least in part, for credibility." (PCR-T Vol. VII 439).

Mr. Rush told the collateral court that based on all the available evidence; he advised Mr. Heath that an "I was not there" defense was the defense that should be pursued. Heath agreed. (PCR-TR Vol. VII 441). Trial counsel testified that the decision to pursue an "I was not there defense" as opposed to a voluntary intoxication defense was a tactical decision on his part. (PCR-T Vol. VII 482). Trial counsel called several witnesses in support of the chosen defense. (TR Vol. X 1875-2000, TR Vol. XI 2001-2031).

This entire claim rests on the notion that trial counsel was ineffective for defending on a theory that Heath was not at the murder scene at all. Heath alleges trial counsel should have, instead, defended on the grounds that Heath was at the scene of the murder but was too intoxicated to form the specific intent to commit the crimes charged. This claim is without merit for two reasons.

First, in light of the evidence and his client's own version of events, the decision to pursue an "I was not there" defense, as opposed to a voluntary intoxication defense, was a reasonable tactical decision and not deficient performance. While Heath alleges that trial counsel did not consider presenting a voluntary intoxication defense, the evidence presented at the evidentiary hearing refutes this claim.

Indeed, the evidence established that trial counsel considered, and then rejected, a possible voluntary intoxication defense because he did not believe there was enough evidence to sustain a defense. In Mr. Rush's view, the voluntary intoxication defense is a difficult defense for a jury to accept and the "I was not there" defense was much stronger. (PCR-T Vol. III 441).

Heath presented no testimony at the evidentiary hearing that trial counsel either failed to discuss the two potential defenses with him or ignored his wishes as to the defense to be

presented. Heath did not take the stand and testify that he did not agree to trial counsel's strategy. Nor did he testify that he told trial counsel he was actually at the murder scene but was so intoxicated that he did not know what he was doing.

Trial counsel's testimony at the evidentiary hearing establishes the decision to pursue an "I was not there" defense over a voluntary intoxication defense, was, in itself, a reasoned tactical decision. Additionally, the evidence adduced at the evidentiary hearing supports a conclusion that trial counsel made a reasoned tactical decision not to pursue incompatible alternative defenses before the jury. As Mr. Rush observed at the evidentiary hearing, a "he was not there at all, but if he was there, he was too drunk to know what he was doing" is unlikely to have a persuasive effect on a jury during the guilt phase of a capital trial.¹⁴

Trial counsel made the decision, with the consent of Ronald Heath, to pursue an "I was not there" defense after considering all of the evidence against Heath, Heath's own version of events, and all other alternatives. Such tactical decisions, even though ultimately unsuccessful, do not constitute ineffective assistance of counsel. Dufour v. State, 905 So.2d

¹⁴ A voluntary intoxication theory, in order to be at all credible, would have required Heath to admit to his presence at the scene and his participation in the murder/robbery. Heath would not even do so, even to trial counsel.

42 (Fla.2005)(rejecting Dufour's claim of ineffective assistance of counsel and noting that pursuing a voluntary intoxication defense would have been totally inconsistent with the defense theory presented that Dufour did not commit the murder); Lawrence v. State, 831 So.2d 121, 129 (Fla. 2002) ("This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected.") State v. Williams, 797 So. 2d 1235 (Fla. 2001)(rejecting claim of ineffective assistance of counsel for failing to present a voluntary intoxication defense at trial and concluding that counsel could not be deemed ineffective for failing to pursue such defense when the defense would have been inconsistent with Williams' theory of the case that he did not commit the crime); State v. Bolender, 503 So. 2d 1247, 1250 (Fla. 1987) ("strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected.").

This Court may also affirm the collateral court's denial of this claim, because the evidence at trial and at the evidentiary hearing demonstrate there was no viable voluntary intoxication defense. Accordingly, Heath cannot satisfy Strickland's prejudice prong because Heath cannot show that, had counsel pursued a voluntary intoxication defense, there is a reasonable

probability he would have been acquitted or convicted of a lesser offense.

In order to successfully assert the voluntary intoxication defense, the defendant must come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged. Jones v. State, 855 So.2d 611 (Fla. 2003); Linehan v. State, 476 So. 2d 1262, 1264 (Fla. 1985). Such a defense is rarely successful. See e.g. Odom v. State, 782 So.2d 510, 512 (Fla. 1st DCA 2001)(Padovano, J., concurring)(noting that "voluntary intoxication rarely offers a realistic chance of success" and observing "[m]ost experienced criminal lawyers and judges would be hard pressed to come up with a single example of a case in which the defense of voluntary intoxication succeeded.").

Neither the evidence introduced before the jury at trial nor the evidence adduced at the evidentiary hearing provides support for the notion that Heath was so intoxicated he was unable to form the intent necessary to murder and rob Michael Sheridan. Though Heath claims that "the evidence at trial was undisputed that the Defendant was intoxicated on the evening of the offense," this assertion is not supported by the record of trial. (IB 69).

At trial, Jennifer Berquist testified she was a zoology student at the University of Florida. She also worked at a place called the Purple Porpoise, a restaurant and bar in Alachua County. Ms. Berquist testified that sometimes she was a waitress and sometimes she was a bartender and she managed both. (TR. Vol. IV 784-785).

At the time of the murder, she had known Heath for 3 ½ to 4 years. On May 22, 1989 (the night before the murder), Heath came into the bar. She was surprised to see him as she had not seen him for about 2½ years. Heath introduced her to his brother. She did not have a lot of time to talk but noticed they were drinking. The brothers got very drunk. When she left work, she found them behind the bar waiting for her. The pair mentioned they were going to drive to Jacksonville. She did not want them to drive drunk so she offered to let them stay at her place. They accepted and followed her home.

The next morning, she woke up, went downstairs and saw them smoking pot on her couch. She was upset with them and asked them to stop and get that stuff out of her house. The guys left about 11:00 a.m. the morning of May 23, 1989. (TR Vol. IV 792).

She saw the Heath brothers again that evening at the Purple Porpoise. They came in about 10:00 p.m. They came up and tried to get behind the bar to talk to her. Customers are not allowed in that area. After she told them they could not come behind

the bar, they asked for, and she gave them, a pitcher of beer. Heath tried to give her a gold bracelet but she refused the gift.

That evening, Jennifer Berquist also saw Michael Sheridan in the bar. He ordered food from her and had two Crown Royals on the rocks, one of which was a double. (TR Vol. V 829). At some point, after the Heath brothers came into the bar, Jennifer saw the Heaths talking with Michael Sheridan. Sometime thereafter, Heath told Jennifer that Sheridan would buy the Heaths' drinks and told her to put them on Sheridan's tab. Sheridan made no objection.

During the time the Heath brothers and Sheridan were talking together, Heath got up several times to go play video games. Eventually, Jennifer saw the Heath brothers and Sheridan get up and go out the back door. They came back a few moments later. They did this two or three times. She suspected they were smoking marijuana.

The trio were there at the bar for about 2 ½ hours. Sheridan paid the tab. Ms. Berquist saw Sheridan leave with both Heath brothers at about 12:30 or 12:45 a.m. She testified Heath was not drunk when he left the bar. (TR Vol. V 853).

At the evidentiary hearing, both expert witnesses agreed that their evaluation of Ronald Heath revealed no evidence to support a conclusion that Heath was so intoxicated on the

morning of May 24, 1989 that he could not form the intent to commit the robbery and murder. Dr. Krop testified that in view of Heath's explicit and detailed memory as to what happened, which included specific directions about which way someone turned, he did not feel Heath was significantly intoxicated. (PCR-T Vol. VI 281). Dr. Rothschild testified that, in his view, given Heath's version of events, alcohol did not preclude Heath from knowing what he was doing. (PCR-T Vol. VI 223).

Finally, Kenneth Heath's testimony at trial, and at the evidentiary hearing, established that while the brothers had ingested alcohol and marijuana on the night of the murder, Heath possessed the capacity to plan Michael's murder, direct Kenneth to the kill site, observe and then recall Michael was wearing jewelry at Purple Porpoise that he was no longer wearing when Kenneth first shot him, rob Michael, hide Michael's body after Kenneth shot him a second and third time, negotiate the route back to the Purple Porpoise, recover Michael Sheridan's car, drive it to another location, loot it, burn it, and then drive to a friend's home to spend the night.

Though granted an evidentiary hearing on this claim, Heath failed to demonstrate there was a viable voluntary intoxication

defense.¹⁵ Trial counsel cannot be deemed ineffective for failing to present a non-viable defense at trial. Dufour v. State, 905 So. 2d 42, 53 (Fla. 2005)(rejecting Dufour's claim counsel was ineffective for not pursuing a voluntary intoxication defense when Dufour failed to show at the evidentiary hearing that a viable voluntary intoxication defense could have been presented).

ISSUE III

WHETHER NEWLY DISCOVERED EVIDENCE WARRANTS A NEW TRIAL OR NEW PENALTY PHASE

Heath alleges that newly discovered evidence warrants a new trial or, alternatively, a new penalty phase. The newly discovered evidence at issue is the evidentiary hearing testimony of Kenneth Heath. Kenneth testified, contrary to his trial testimony, that he fired all three shots into Michael Sheridan before his brother attempted to cut Mr. Sheridan's throat.

Heath avers this testimony would result in an acquittal or at the very least a life recommendation upon re-trial. He does not, however, explain how such evidence probably would result in an acquittal nor does he elaborate on his theory that Kenneth's new testimony would probably result in a life recommendation

¹⁵ Heath did not take the stand at the evidentiary hearing to testify he was impaired by alcohol to the extent he could not form the intent to rob and kill Michael Sheridan.

upon re-trial.¹⁶ While Heath does cite to Jones v. State, 709 So.2d 512, 521 (Fla. 1998) as controlling case law, Heath makes no attempt to apply the Jones test to the evidence presented in this case, either at trial or at the evidentiary hearing. This court has held that conclusory arguments are legally insufficient to present a proper basis for relief. Duckett v. State, 918 So.2d 224, 235 (Fla. 2005).

A. GUILT PHASE

In order to entitle Heath to a new trial on the basis of newly discovered evidence, the defendant must show (1) the evidence was unknown by the trial court, by the party, or by counsel at the time of trial and the defendant or his counsel could not have known of it by the use of diligence and (2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Robinson v. State, 865 So.2d 1259, 1262 (Fla. 2004); Jones v. State, 709 So.2d 512, 521 (Fla. 1998). Newly discovered evidence satisfies the second prong of this test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his

¹⁶ For some reason, Heath bases a large portion of his two page argument on this issue on the collateral court's preliminary order entered, in error, on June 7, 2006. (IB 71-72). The order to which Heath is referring was set aside in its entirety, with the concurrence of counsel for Mr. Heath, and is not before this Court on appeal.(PCR Vol. II 305-306). A final order was signed by the trial court on March 27, 2007 (PCR Vol. IV 605). This latter order is the only order before this court on appeal.

culpability." Id. at 526. In determining whether the evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." Jones v. State, 591 So. 2d 911, 916 (Fla. 1991).¹⁷

This Court may deny this claim for at least two reasons. First, even if the collateral court had found the "recantation evidence" credible, which it did not, Kenneth Heath's new testimony would not have resulted in an acquittal at trial. This is so, because even if believed, Kenneth's testimony at the evidentiary hearing unquestionably establishes Heath's guilt, as a principal, of both first degree premeditated murder and first degree felony murder. *Section 777.011, Florida Statutes.*

At the evidentiary hearing, Kenneth testified he and his brother, even before they left the Purple Porpoise, planned to take Michael Sheridan to a remote location, rob him of his valuables, then kill him to ensure there were no witnesses. (PCR-T Vol. V 71,97). The brothers were armed to the teeth. In their car, the Heaths had a .22 caliber handgun, a sawed off

¹⁷ This determination includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether the evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence. Jones v. State, 709 So. 2d at 521.

shot-gun, and a knife. (PCR-T Vol. V 36). Kenneth's Heath's evidentiary hearing testimony established that the brothers lured Michael Sheridan out of the Purple Porpoise with murder on their mind.

Once at the murder site, Heath directed Kenneth to get the gun from the car. (PCR-T Vol. V, 99). Heath urged Kenneth to shoot Michael at least three times.

Assuming, *arguendo*, that Kenneth's evidentiary hearing testimony was credible, the brothers, together, executed Michael Sheridan. Kenneth by shooting him and Heath, at the very least, urging Kenneth, several times, to "shoot him." (PCR-T Vol. V 70, 108).

Kenneth's "recanted" testimony demonstrated both a pre-arranged plan to kill Sheridan and Heath's active involvement in bringing about Michael Sheridan's death. Kenneth's new testimony, that three gunshot wounds were the sole physical cause of Michael's death, does not in any way detract from Heath's blameworthiness for this aggravated, premeditated murder. *Section 777.011, Florida Statutes; Craig v. State*, 510 So. 2d 857 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S. Ct. 732, 98 L. Ed. 2d 680 (1988). Contrary to Heath's position now, Kenneth's "recanted" testimony, if believed, would not acquit Heath of first degree murder upon re-trial. Rather it, along with all the other evidence presented at trial, would convict

Heath once again, beyond any reasonable doubt, of premeditated first degree murder.

Likewise, Kenneth's "recanted" testimony would not diminish, in any way, Heath's liability for felony murder as a principal in the first degree. Kenneth testified it was Heath's idea to rob Michael Sheridan. (PCR-T Vol. V I 97). Heath selected the location where they took Michael. (PCR-T Vol. V 98). Once at the kill site, Heath directed Kenneth to get the gun from the car. (PCR-T Vol. V, 99).

Kenneth testified at the evidentiary hearing, as he did at trial, that after he shot Michael Sheridan once, Heath went up to Michael and told him to remove his jewelry. (PCR-T Vol. V, 67). Heath kicked Mr. Sheridan a number of times, because Michael did not move fast enough (PCR-T Vol. V 100). Heath removed Michael Sheridan's necklaces, his watch, and his wallet. Heath couldn't find the bracelet Michael had on, so Heath asked Mr. Sheridan where it was. Heath pulled down Michael's shorts looking for the bracelet but couldn't find it. Heath then told his brother to "shoot him again to make sure he was dead". (PCR-T Vol. V 68). Kenneth testified he shot Mr. Sheridan again. Heath told Kenneth to "shoot him again, shoot him again." He did.

In Florida, a person is guilty of felony murder, when the killing occurs during the course of an enumerated felony,

including robbery. Even if Kenneth's act in shooting Michael was the sole physical cause of his death, the evidence of Heath's active participation in the robbery and his exhortations to his brother to "shoot him", prove his guilt, as a principal, of felony murder. Smith v. State, 699 So.2d 629 (Fla. 1997) (noting there was direct evidence supporting Smith's conviction for felony first degree murder when he actively participated in the robbery and kidnapping of the victims, procured the duct tape used to bind the victims, and was present when the victims were thrown into the water); Lovette v. State, 636 So.2d 1304 (Fla. 1996) (evidence supported conviction for first degree felony murder even though Lovette did not fire the shots that killed the victims because he was a willing participant in the underlying armed robbery).

Because Kenneth's "new" testimony, if believed, still establishes that Heath is guilty of both premeditated murder and felony murder, Heath has failed to prove that Kenneth Heath's recanted testimony was of such a nature as to produce an acquittal of first degree murder or even conviction of a lesser included offense.

This court may also deny the claim because the collateral court found Kenneth Heath's testimony, that Michael was already dead when Heath attempted to cut his throat, incredible. This court has noted that recantation evidence, such as the

evidentiary hearing testimony of Kenneth Heath, may be considered newly discovered evidence. This Court has also observed that recanted testimony is exceedingly unreliable. Accordingly, this Court has admonished trial courts that it should deny a defendant's post-conviction motion for a new trial if it is not satisfied that the new testimony is true. Kormondy v. State, 32 Fla. L. Weekly S 627 (Fla. October 11, 2007).

In this case, the collateral court found Kenneth Heath's testimony incredible, based in large part, on the fact his testimony was inconsistent with the medical examiner's testimony that Michael Sheridan died from multiple gunshot wounds and a sharp force injury to the neck. (TR Vol. VII 1351). In accord with this Court's decision in Kormondy v. State, 32 Fla. L. Weekly S 627 (Fla. October 11, 2007), and because the trial court's finding is supported by competent, substantial evidence, Heath's claim must fail.

B. PENALTY PHASE

In order to grant a new penalty phase based on newly discovered evidence, the newly discovered evidence must be of such a nature that it would probably result in a life sentence. Rutherford v. State, 926 So.2d 1100, 1108 (Fla. 2006). Unlike ineffective assistance of counsel claims which look back to the time of trial, newly discovered evidence claims look forward to the possibility of a new trial or a new penalty phase. If Heath

cannot show that Kenneth's "recantation" testimony, when considered with all the other evidence admitted in the original proceedings, would probably result in a life sentence upon retrial, he is not entitled to relief.

This Court may deny this claim for two reasons. First, the collateral court found Kenneth Heath's recanted testimony not credible. Accordingly, the court correctly denied Heath a new penalty phase. Kormondy v. State, 32 Fla. L. Weekly S 627 (Fla. October 11, 2007)(trial courts should deny a defendant's post-conviction motion for a new trial if it is not satisfied the new testimony is true).

More importantly, however, is the fact that Kenneth Heath's "new" testimony, did not eliminate any aggravator but instead provided evidence that would support two additional aggravators not found by the trial court. Accordingly, in looking forward to the possibility of a new penalty phase, Heath has not demonstrated that Kenneth's "recantation" testimony is of such a nature that it would probably produce a life sentence.

At the evidentiary hearing, Kenneth testified that before they left the Purple Porpoise, the brothers discussed and planned taking Michael out to the woods to rob him. (PCR-T Vol. V 97). The brothers also planned to kill Michael so there would not be any witnesses. (PCR-T Vol. V 71) This testimony, alone, would support a finding, at a new trial, the murder was both

cold, calculated, and premeditated and committed for the purpose of witness elimination.

Moreover, even if the jury concluded that Michael Sheridan was already dead at the time, Heath's evidentiary hearing testimony revealed that Heath was "in ecstasy" as he attempted to cut Michael Sheridan's throat. (PCR Vol. V 106). According to Kenneth, he looked as if he was enjoying it. (PCR Vol. V 107).

Presented with evidence that the brothers intended, well in advance to rob and kill Michael Sheridan, that Heath looked as if he was enjoying cutting Michael's throat, that Heath instructed his brother, at least three times, to shoot Michael Sheridan, and that Heath had previously been convicted of second degree murder, there is no reasonable possibility, let alone, a probability, a new penalty phase jury would recommend a life sentence. This Court should deny this claim.

ISSUE IV

WHETHER THE CUMULATIVE PICTURE AND EFFECT OF KENNETH HEATH'S TESTIMONY CAN BE IGNORED OR OVEREMPHASIZED

This is not a claim cognizable on appeal. Indeed, it is not a claim of any kind because Heath makes no claim of error or presents any argument. Instead, Heath simply makes a declarative statement without any context or argument. A claim is not properly presented for appellate review if an appellant

fails to present any argument. Shere v. State, 742 So.2d 215, 218 n.6 (Fla. 1999)(claims are insufficiently presented for review if the appellant fails to present any argument or allege on what grounds the trial court erred in denying a claim). See also State v. Mitchell, 719 So. 2d 1245, 1247 (Fla. 1st DCA 1998) *review denied*, 729 So. 2d 393 (Fla. 1999) (finding that issues raised in appellate brief which contain no argument are deemed abandoned).

Heath has either presented no claim at all or abandoned any potential claim by failing to present any argument. This court should deny relief.¹⁸

ISSUE V

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A SPECIAL VERDICT FORM, DURING THE PENALTY PHASE, REGARDING THE SPECIFIC AGGRAVATORS FOUND BY THE JURY

In this claim, Heath alleges that trial counsel was ineffective for failing to request a special verdict regarding the specific aggravators found by the jury. The collateral court summarily denied this claim. (PCR Vol. II 205).

¹⁸ In citing to a portion of Lightbourne, it may be that Heath is attempting to present a claim that Kenneth Heath's "recanted" testimony warrants a new penalty phase because his testimony likely played a large role in the jury's recommendation that Ronald Heath be sentenced to death. However, Heath has already raised this claim in his third issue on appeal and the state has fully addressed this argument in this brief.

Before this Court, Heath fails to provide, or cite to, any legal basis for his claim. Likewise, Heath fails to cite to any case law of which counsel should have been aware or upon which counsel could have relied to request a special verdict form.

While Heath did not point to any authority upon which he relies in presenting this issue to this Court, defendants typically raise this claim in light of the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). Trial counsel cannot be constitutionally ineffective for failing to request a special jury verdict form when such a verdict form was not then, and is not now, required by law.

This Court has specifically rejected the notion that a special verdict form must be provided to the jury so it may record its vote on each aggravator upon which it was instructed. Kormondy v. State, 845 So.2d 41, 53 (Fla. 2003)(Ring does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury). Indeed, this Court has ruled that a trial court departs from the essential requirements of law in requiring a special verdict form that details the jurors' votes on specific aggravating circumstances. State v. Steele, 921 So.2d 538, 548 (Fla. 2005). In light of this Court's decisions in Kormondy and Steele, the trial court's ruling on this claim should be affirmed.

ISSUE VI

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE INDICTMENT ON THE GROUNDS THE STATE FAILED TO ALLEGE THE AGGRAVATING CIRCUMSTANCES IT INTENDED TO RELY UPON IN SEEKING THE DEATH PENALTY

In claim six, Heath alleges that trial counsel was ineffective for failing to challenge the indictment. Heath claims trial counsel should have challenged the indictment because the state failed to allege the aggravating circumstances it intended to rely upon in seeking the death penalty.

Heath raised this claim in his amended motion for post-conviction relief. The collateral court summarily denied the claim. (PCR Vol. II 206).

Before this Court, Heath cites to the United States Supreme Court decision in Ring v. Arizona, 536 U.S. 584 (2002) as well as several cases from the Eighth and Fifth Circuit Courts of Appeal.¹⁹ (IB 73). Heath fails to point, however, to the law from this Court that is both on all fours as to this claim and contrary to Heath's argument.

Indeed, this Court has made clear that, in Florida, the indictment need not contain at least one statutory aggravator to pass constitutional muster. In Winkles v. State, 894 So.2d 842 (Fla. 2005) this Court noted:

¹⁹ Heath also cites to the United States Supreme Court decision in Blakely v. Washington, 542 U.S. 296 (2004). Blakely has no applicability to Florida's capital sentencing scheme.

...As we have said before, '[t]he aggravating factors to be considered in determining the propriety of a death sentence are limited to those set out in [the statute].' Therefore, there is no reason to require the State to notify defendants of the aggravating factors that it intends to prove. Id. at 846, quoting Vining v. State, 637 So. 2d 921, 927 (Fla. 1994).

Moreover, this Court has repeatedly rejected claims that Ring requires aggravating circumstances to be alleged in the indictment. Franklin v. State, 965 So.2d 79, 102 (Fla. 2007)(noting that this Court has rejected claims that Ring requires aggravating circumstances to be alleged in the indictment). See also Banks v. State, 842 So.2d 788 (Fla. 2003) (rejecting Banks' Ring claim that the aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be charged in the indictment, submitted to a jury during the guilt phase, and proven beyond a reasonable doubt); Fennie v. State, 855 So.2d 597 (Fla. 2003)(rejecting Fennie's claim that Florida's death penalty statute was unconstitutional because it fails to require aggravators to be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt); Blackwelder v. State, 851 So.2d 650 (Fla. 2003) (specifically rejecting Blackwelder's argument that aggravating circumstances must be alleged in the indictment, submitted to the jury, and individually found by a unanimous

jury verdict); Porter v. Crosby, 840 So.2d 981 (Fla. 2003)(same).²⁰

An objection to the indictment on the grounds it failed to allege at least one aggravator would have been meritless. Trial counsel cannot be ineffective for failing to raise a meritless objection. Darling v. State, 966 So. 2d 366, 383 (Fla. 2007) (trial counsel not ineffective for failing to make a meritless objection).²¹

ISSUE VII

WHETHER FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL

In this claim, Heath raises two constitutional challenges to his sentence to death. First, Heath alleges that Florida's sentencing scheme is unconstitutional because Florida does not require the jury's recommendation for death to be unanimous. (IB 73). Second, Heath alleges that the jury was improperly allowed

²⁰ Even if this were not the case, Ring is satisfied in this case because in addition to first degree murder, Heath was convicted of the armed robbery of Michael Sheridan. As the murder in the course of a felony aggravator rests on Heath's separate conviction for armed robbery, a crime for which he was charged in the indictment and convicted by a unanimous jury beyond a reasonable doubt, Heath's reliance on Ring would fail.

²¹ Of course, counsel cannot also be deemed ineffective because Heath bases his claim on cases, including Ring v. Arizona, all of which were decided years after Heath went to trial. Accordingly, even if these cases applied to invalidate the indictment, a proposition the State does not accept, counsel cannot be ineffective for failing to raise these cases which had not been decided at the time of Heath's capital trial. Trial counsel is not required to be clairvoyant to be effective.

to consider, without the benefit of a curative instruction, that Heath killed Michael Sheridan when, as a matter of law, that fact had not been proved beyond a reasonable doubt. (IB 85).

Heath presented the first claim to the collateral court in his amended motion for post-conviction relief. The court summarily denied the claims. (PCR Vol. II 206-207). Heath did not present the second claim before the collateral court.

A. The non-unanimous jury recommendation

In this claim, Heath claims that Florida's failure to require a unanimous jury recommendation of death violates the dictates of Ring v. Arizona, 536 U.S. 584 (2002). This Court has decided on many occasions that Ring does not require a unanimous recommendation of death to pass constitutional muster. Parker v. State, 904 So.2d 370, 383 (Fla. 2005) ("This Court has repeatedly held that it is not unconstitutional for a jury to recommend death on a simple majority vote...").²² Heath's claim should be denied.

²² Ring is satisfied in any event because the jury found the existence of one aggravator unanimously when it convicted Heath of the armed robbery of Michael Sheridan. As such, Ring does not apply to the facts of this case because the "in the course of a felony" rests on a unanimous guilt-phase verdict. Robinson v. State, 865 So. 2d 1259, 1265 (Fla. 2004) ("This Court has held that the aggravator[] of murder committed 'during the course of a felony' . . . [was] already submitted to a jury during trial and, hence, [is] in compliance with Ring.").

B. The curative instruction

In this claim, Heath alleges the jury's death recommendation was constitutionally skewed because the jury was allowed to consider, without the benefit of a curative instruction, that Heath killed Michael Sheridan.²³ Heath avers that, as a matter of law, it had not been proven that Heath killed Michael Sheridan. (IB 85).

This Court should deny this claim for at least three reasons. First, Heath did not present this as a claim to the collateral court in his amended motion for post-conviction relief. (PCR Vol. I 111-128) (PCR Vol. II 214-216). As such, Heath may not properly assert this claim on appeal. Downs v. State, 2007 Fla. LEXIS 2388 (Fla. December 13, 2007) ("The remainder of the issues raised by Downs [in this appeal] were not asserted in the trial court and, hence, may not be asserted here.").

Second, this claim is procedurally barred. Challenges to jury instructions can, and should, be raised on direct appeal. Stephens v. State, 32 Fla. L. Weekly S 735 (Fla. November 15, 2007)(substantive challenges to penalty phase jury instructions barred in post-conviction proceedings because Stephens could have raised these claims on direct appeal).

²³ Trial counsel never requested a curative instruction.

Heath made no claim, on direct appeal, that the trial court's failure to provide a "curative instruction" to the jury unconstitutionally skewed the jury's death recommendation. Pursuant to this Court's ruling in Stephens, this claim is procedurally barred. Id.

Finally, this claim may be denied on the merits because the record refutes Heath's allegation that the jury was not permitted to consider Ronald Heath's role in the murder. The evidence introduced at trial established that, on the night that Kenneth and Ronald Heath murdered Michael Sheridan, Kenneth Heath armed himself with a gun and Ronald Heath wielded a knife. Heath v. State, 648 So.2d 660 (Fla. 1994).

At trial, the medical examiner, Dr. William Hamilton, testified that Michael Sheridan's death was caused by multiple gunshot wounds and a sharp force injury to the neck. (TR Vol. VII 1351). Dr. Hamilton told the jury there were "very definite things you can say about this case: He [Michael Sheridan] was shot three times and he had a sharp force injury to his neck. Somebody put a blade in his neck and someone shot him three times. That's very definite." (TR Vol. VII 1378).

While Heath did not present an expert to contradict Dr. Hamilton's opinion as to the cause of death, trial counsel was permitted, and did, argue that Kenneth Heath, and not Ronald Heath, actually caused Michael Sheridan's death.

During closing arguments, trial counsel argued that Heath should be spared because Michael Sheridan died when Kenneth Heath shot him in the chest. Trial counsel argued that Mr. Sheridan's throat was cut later on. (TR Vol. XII 2351).

Trial counsel told the jury that the medical examiner agreed that Mr. Sheridan probably died from the gunshot wound to the chest. (TR Vol. XII 2355).²⁴ Counsel pointed out that this meant that Mr. Sheridan was actually killed by someone other than Ronald Heath. (TR Vol. XII 2355).

Counsel told the jury that two people cannot kill the same guy and that it was Kenneth Heath who killed Michael Sheridan. (TR Vol. XII 2355). Counsel also told the jury that it should not sentence Ronald Heath to death when Kenneth Heath was sentenced to life in prison. Counsel pointed out that it would be unfair to do so because Kenneth Heath was the guy who fired the gun that killed Mr. Sheridan. (TR Vol. XII 2357-2358).

During final instructions, the trial court instructed the jury that in order to recommend death it must find that Heath killed or attempted to kill Mr. Sheridan, or intended the killing to take place, or that he was a major participant in the armed robbery and that he was, at least, recklessly indifferent

²⁴ In reality, Dr. Hamilton simply agreed that the first gunshot to Michael Sheridan's chest was likely a fatal wound. He also testified that someone could live for some period of time after such a gunshot was inflicted.

to human life. (TR Vol. XII 2362). While the trial judge did not give any sort of curative instruction, because one was neither requested nor proposed, the jury was allowed to consider that the three gunshot wounds inflicted by Kenneth Heath were fatal injuries. This Court should deny this claim.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of Heath's amended motion for post-conviction relief.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399
Department of Legal Affairs
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3583 Phone
(850) 487-0997 Fax
Attorney for the Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert Augustus Harper, Harper and Harper Law Firm, 325 West Park Avenue, Tallahassee, Florida 32301-1413 this 29th day of February 2008.

MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

MEREDITH CHARBULA
Assistant Attorney General