IN THE SUPREME COURT OF FLORIDA

JAMES WINKLES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Case No. SC08-941
L.T. No. CRC 99-05593 CFANO-M
Death Penalty Case

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant James Delano Winkles pleaded guilty to two counts of first degree murder on April 3, 2002 (R 3/514-33).[1] The first count charged Appellant with the murder of Elizabeth Graham, who was abducted in Pinellas County when she arrived at a business appointment on September 9, 1980 (R 1/3-4, 3/523-24). The second count charged Appellant with the murder of Margaret Delimon, who was abducted in Pinellas County from a business appointment on October 3, 1981 (R 1/3-4, 3/526). On April 14, 2003, a death sentence was imposed for each murder count (R 2/325-32).

Appellant raised the following two issues on direct appeal:

I. WHETHER THE FLORIDA DEATH PENALTY STATUTE VIOLATED THE SIXTH AMENDMENT RIGHT TO HAVE AGGRAVATING CIRCUMSTANCES FOUND BY A JURY.

II. WHETHER APPELLANT'S RIGHT TO NOTICE OF THE NATURE AND CAUSE OF THE ACCUSATION WAS VIOLATED BY FAILURE TO ALLEGE THE AGGRAVATING CIRCUMSTANCES IN THE INDICTMENT.

Winkles v. State, Florida Supreme Court Case No. SC03-935.

On direct appeal, this Court affirmed Appellant's convictions and death sentences. Winkles v. State, 894 So. 2d 842 (2005). This Court outlined the facts of the case as follows:

[1] The record on direct appeal will be designated by "R" with citations to the appropriate volumes and page numbers, the postconviction record will be designated by "PCR" with citations to the appropriate volumes and page numbers.

This case originates from two abductions that occurred more than twenty years ago. First, on September 9, 1980, having identified an employee of a dog grooming business as his victim, appellant arranged as a ruse for a groomer to come to a vacant house. When a different groomer arrived, the 19-year-old Elizabeth Graham, appellant decided she was sufficiently sexually exciting for his plan. Abducting her at gunpoint, Winkles handcuffed, gagged, and blindfolded her, and put her in his vehicle. He drove Graham to his grandmother's house, where he instilled fear in her by handcuffing her hands and feet and firing several .25 caliber rounds into the floor. He raped Elizabeth multiple times over several days. Finally, after he realized that she knew her location (from his grandmother's magazines), he decided he had to kill her. He drugged her, and when she fell asleep, opened an umbrella over her head to catch the spatter and shot her three times in the head. Appellant burned her clothes and buried her somewhere in Pinellas County. [FN 1] He returned two weeks later, however, fearing someone would discover and identify the body. He removed her head and took it to the Steinhatchee River (in Lafayette County), where he removed the teeth and the lower mandible. Appellant ran water through the skull to be sure no spent bullets remained inside and threw the skull into the river. The skull was discovered in July 1981, and subsequent DNA testing revealed the skull to be Elizabeth Graham's. For many years, Elizabeth's murder remained unsolved.

About a year later, in October 1981, appellant chose Margo Delimon for abduction when he visited a model home where Delimon was the realtor. He asked her out for a drink, which she refused. The next day, however, he arrived at the model home early and asked Delimon out to breakfast, and she agreed. Afterwards, Margo agreed to see some property with appellant. He instead abducted her, handcuffing her and taking her to a vacant house next door to his grandmother's. As in the earlier case, he raped the victim repeatedly over the next several days. On the morning of the fourth day, he realized he had to kill her because she could identify him and the house. He killed her with an overdose of sleeping pills, burned her clothes, and buried her in Pinellas County. About two weeks later,

he moved the body to Citrus County. A week after that he dug up her head, removed the teeth, and deposited the skull in Hernando County near an area where his family camped.

The murders of Graham and Delimon remained unsolved until 1998 when appellant, a suspect in the cases then serving a prison sentence, contacted authorities claiming to have information. Stating that he was having nightmares about the murders, over the ensuing months he confessed in detail to kidnapping and murdering the two women. He also provided specific information about the women's personal lives and the location and condition of the victims' remains. He took detectives to the exact location where Delimon's body had been found (Delimon's skull previously had been found exactly where appellant said he disposed of it). Winkles also gave several detailed, videotaped interviews about the murders to a local news channel. Finally, on March 25, 1999, appellant was indicted for the premeditated murders of both women.

Appellant filed a pretrial motion contending that Florida's capital sentencing statute was unconstitutional. The court denied the motion. Preserving the issue for appeal, Winkles pled guilty to the murder charges and waived his right to a jury for the penalty phase of the trial. At the plea hearing, the State was prepared to prove appellant committed the crimes through Winkles’s confession and other corroborating evidence, including testimony by Donna Maltby, whom he similarly kidnapped in 1982, but who managed to escape. He was serving a life sentence for this crime [FN 2] when he confessed to the Graham and Delimon murders.

The evidence would have shown that appellant always planned his abductions by identifying a victim, preparing his vehicle by disabling the passenger-side door so that a passenger could not open the door or lower the window, and having handy his "abduction kit" (containing pre-cut lengths of rope, handcuffs, "gags" (fishing bobber corks covered in glass shards or containing razor blades), sleeping pills, bottles of liquor, and Vicks Vaporub to put under his nose to prevent his smelling decaying bodies). He also kept a case containing women's undergarments.

> [FN 1] Her body never was recovered.
>
> [FN 2] Appellant was convicted of kidnapping (life sentence), armed robbery (90 years), and aggravated assault (10 years' probation, consecutive to the life sentence) on May 27, 1982.

Winkles, 894 So. 2d at 843-45.

POSTCONVICTION PROCEEDINGS:

Pursuant to Florida Rule of Criminal Procedure 3.851 Appellant filed his first Motion for Postconviction Relief on September 20, 2006 raising four claims (PCR 1/1-53). Claims I and II alleged ineffective assistance of counsel at the guilt and penalty phases (PCR 1/7-15). Claim III challenged the constitutionality of lethal injection (PCR 3/15-24). Claim IV raised an incompetency to be executed claim (PCR 3/25-27). Appellant conceded a hearing was not required for Claims III and IV (PCR 3/15, 25). The State filed its response on October 18, 2006 (PCR 3/54-65). Appellant later moved to supplement Claim II and filed an Amended and Second Amended Motion for Postconviction Relief in December 2006 and January 2007 (PCR 1/68-73, 89-167, 2/176-255). State responses followed submitting that portions of Claim II concerning failure to present mitigation warranted a hearing (PCR 1/170-75, 2/259-60).

The postconviction court granted an evidentiary hearing on Claims I and II of Appellant’s second amended motion, both

alleging ineffective assistance of trial counsel. Claim I alleged:

> MR. WINKLES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS AND THEIR FLORIDA COUNTERPARTS. TRIAL COUNSEL ADVISED MR. WINKLES THAT IF HE WERE SENTENCED BY THE JUDGE AND NOT BY A JURY, THE SENTENCE WOULD BE UNCONSTITUTIONAL AND THUS WOULD BE INVALID.

(PCR 2/182).

Claim II alleged:

> MR. WINKLES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE, COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT THE DEATH SENTENCE IS UNRELIABLE.

(PCR 2/186).

Claim II alleged in two sub-claims:

> A. Trial counsel was ineffective in failing to have Mr. Winkles evaluated by a mental health professional licensed and qualified in the State of Florida; trial counsel failed to have qualified mental health professionals review the work product submitted or in the alternative, to evaluate Mr. Winkles themselves.
>
> B. Trial counsel was ineffective in failing to obtain the necessary funds from the trial court to properly retain a mitigation expert. Due to trial counsel's inability to do so, mitigation went undiscovered in Mr. Winkles penalty phase.

(PCR 2/188, 189)

Testimony was presented on December 18, 2007, and concluded on February 22, 2008. On December 18, 2007, Appellant presented

the testimony of Dr. Henry Dee, neuropsychologist; Mr. J.C. Winkles, the Appellant's uncle; Dr. Michael Maher, psychiatrist; and the Appellant, James Delano Winkles. On February 22, 2008, Appellant presented the testimony of trial counsel Bjorn Brunvand and Daniel Hernandez; the Appellant, James Delano Winkles also testified.

Dr. Dee was retained by Capital Collateral Regional Counsel to evaluate Appellant for purposes of pursuing postconviction relief (PCR 4/377). Dr. Dee met with Appellant three times, on July 22, July 28, and September 2, 2005 (PCR 4/377, 399). Dr. Dee administered a battery of tests, including the WAIS-III on which Appellant obtained scores of: performance IQ, 102; verbal IQ, 119; full scale IQ, 112 (PCR 4/378-79). According to Dee, the split of 17 points between the verbal and performance scores "is presumed to reflect impairment in right hemisphere functioning" (PCR 4/379). Appellant's score of 88 on the Denman memory test showed impaired memory, which is a common aftereffect of a brain lesion, illness or disease (PCR 4/380). Appellant's performance on the Wisconsin Card Sorting test was also defective, suggesting frontal lobe damage (PCR 4/381). The results for the rest of the test battery were normal (PCR 4/381).

Dr. Dee diagnosed Appellant with chronic brain syndrome with mixed features, meaning Appellant has brain damage (PCR 4/382).

The damage manifests itself most obviously in short-term memory problems, and also in difficulties with executive functions involving Appellant's ability to deal with higher-level intellectual matters such as planning and coordination (PCR 4/382-83, 409). People with frontal lobe damage do not use adequate deliberation or thought, and may say outrageous or shocking things, inappropriate for the social context (PCR 4/383-84). Dee noted that Appellant's high IQ level might mask or overcome his memory and executive functioning problems (PCR 4/383, 408-09).

Dr. Dee related Appellant's childhood and family history as Appellant had described it to Dee (PCR 4/384-393). Appellant was raised in rural Alabama in the 1940s (PCR 4/385). His mother died shortly after he was born; he was raised primarily by his paternal grandmother and a couple of aunts (PCR 4/388). He did not complete the 9th grade but starting getting into trouble for such things as stealing cars around that time (PCR 4/386-87). According to Appellant, his entire family was "oversexed" and he engaged in consensual sexual activity with his grandmother and two aunts from the time Appellant was about nine years old until he was 32 or 33 (PCR 4/386, 392). Appellant also advised that his family had money, but refused to spend it on him; his grandmother and aunts ate steak but gave him hot dogs, and they wore fine clothes but he had only rags (PCR 4/391-92). Appellant did not

feel that his family had any affection for him, as they did not express any love outside the bedroom (PCR 4/391-92). Appellant told Dr. Dee about an incident where his grandmother held his hand over the kitchen sink and used a butcher knife to cut his hand, telling him to never tell anyone outside the family about the things going on in the house; she then took him into the bedroom for sex (PCR 4/393).

Dr. Dee recounted that there had been a lack of discipline in the household, and that Appellant joined the Air Force when he was 15, because his grandmother wanted him out of the house (PCR 4/387, 389). Appellant contracted hepatitis after about six weeks, and the authorities discovered his true age and discharged him (PCR 4/389). Appellant was in prison soon after on theft charges (PCR 4/389). In 1961, Appellant was married for the first of three times (PCR 4/390). He often worked as a mechanic and was in and out of prison (PCR 4/390-91, 412-13).

Dr. Dee also discussed Appellant's medical history (PCR 4/394-97). Appellant had been knocked unconscious five times in high school during athletic activities (PCR 4/394). He had been hospitalized as a teen with a high fever, and had suffered from malaria (PCR 4/395). He also reported no history of drug or alcohol abuse and having been prescribed medications for congestive heart failure, upset stomach, heart disease, and

vascular disease; he suffered mini-stokes going back to 1994 and had episodes of Bell's palsy, as well as disc problems (PCR 4/395-96, 402). Appellant had been severely beaten at least three times in prison and gassed to unconsciousness after being sentenced in this case (PCR 4/401-02).

Dr. Dee noted that it was characteristic of Appellant to say things deliberately designed to shock him [Dee], and Dee could not identify the motivation for such behavior (PCR 4/391). However, Dee felt that Appellant's accounts of the sexual abuse he suffered as a child "rang true" from what Dee heard (PCR 4/411). Dee did not find any evidence to support any statutory mitigating factor and felt the most significant non-statutory factor that could have been presented was Appellant's history of sexual abuse (PCR 4/397-99, 419).

Dr. Dee reviewed documents which had been provided to him, and interviewed Appellant's uncle, J.C., who was not in a position to corroborate Appellant's claim of sexual abuse (PCR 4/384, 411-14). He was aware that J.C. denied having been sexually abused by his mother, an alleged perpetrator of Appellant's abuse (PCR 4/425). The only source of information for the abuse was Appellant himself (PCR 4/411). Dee did not compare the test results he obtained with any of the testing done by Dr. Brittain prior to Appellant's sentencing, so he could not determine whether

post-sentencing events, such as the beatings, gassing, and ministrokes, may have caused or contributed to any frontal lobe or brain dysfunction (PCR 4/401-04). He was aware of Dr. Brittain's lengthy report but did not review it and could not comment on any of Brittain's findings (PCR 4/400). He did not review Appellant's prison records or any medical records regarding the hospitalization for a fever, and he did not administer any test to identify malingering (PCR 4/421-22). Dee acknowledged that the murders Appellant committed involved extensive and detailed planning, and that Appellant was not happy with the living conditions on death row (PCR 4/406, 416).

James "J.C." Winkles is Appellant's uncle, a retired attorney, born in 1920 (PCR 4/426-27). J.C.'s father died when J.C. was nine, and his mother, Lena Wade, married James Hawk a few years later (PCR 4/427-28). J.C. lived with them in Oakman, Alabama, until he left home at 18 (PCR 4/428). Appellant's father, J.C.'s brother, married a young girl and they lived with Lena Wade when Appellant was born, after J.C. had moved away (PCR 4/429). Appellant's mother died shortly after Appellant was born, possibly from childbirth complications (PCR 4/429-30). Appellant's father did not take any interest in or provide for Appellant (PCR 4/429-30). Instead, Appellant was raised by his grandmother, Lena Wade, and an aunt, Orrine (PCR 4/431-33).

Prior to Appellant's birth, Lena and Orrine were convicted of bootlegging and sentenced to federal prison in West Virginia (PCR 4/431). They may have been released early in order to care for Appellant following his mother's death (PCR 4/432). Orrine later married Bob Trusdale and lived a law-abiding, respectable life for many years (PCR 4/433). Orrine died about twenty years ago (PCR 4/428, 433).

Lena Wade raised six children of her own, and raised Appellant and another grandson, Douglas (PCR 4/433, 435). J.C. testified that Wade "loved us all" and "would have done anything for any of her children or grandchildren" (PCR 4/433). However, J.C. could see in hindsight that she was not a good mother; she was promiscuous, there were no sexual morals in the home, there was no discipline, and education was not a priority (PCR 4/433-34). The children were encouraged to break the law, such as stealing coal from the railroads in order to heat the house in the winter (PCR 4/433, 436). According to J.C., Wade was not trying to turn her children into major criminals, but the stealing was a matter of survival (PCR 4/443).

J.C. had no knowledge of any suggestion of any kind of physical or sexual abuse while growing up, and saw no indications that any of the grandchildren had been subjected to any abuse (PCR 4/441-44, 449). J.C. couldn't imagine his mother intentionally

cutting anyone's hand over the sink (PCR 4/446). He recalled an incident where Wade and other relatives were teasing Appellant about his small penis, but they didn't mean any harm by it; Appellant was not the subject of disdain or derision (PCR 4/438, 444). J.C. never saw any signs of violence in the interaction between Appellant, Wade, and Orrine (PCR 4/441).

J.C. testified that his family lived in extreme poverty for about a year after his stepfather died, before his mother began receiving benefits (PCR 4/434). He had never heard anything like Dr. Dee's account of Appellant eating hot dogs while his grandmother ate steak and noted his mother never wore finery in her life (PCR 4/445). J.C. did not believe that life had been any different for Appellant than it had been for J.C. growing up; his mother provided for Appellant, fed and clothed him, and loved and supported him in her own way (PCR 4/444-45, 448). J.C. acknowledged that his testimony was motivated in part by his opposition to capital punishment (PCR 4/438).

Dr. Michael Maher evaluated Appellant in postconviction (PCR 4/455). Dr. Maher met with Appellant on Nov. 2, 2005 (PCR 4/458). Appellant recounted his background to Dr. Maher as he had for Dr. Dee; Appellant described growing up in poverty in rural Alabama, and recalled his grandmother teaching him to perform oral sex on her when he was about seven or nine years old (PCR 4/459-62).

According to Maher, such abuse would be "tremendously disturbing" to a child's normal development and ability to engage in trusting relationships (PCR 4/463). Dr. Maher diagnosed Appellant with sexual perversion disorder (PCR 4/465). Appellant does not have the ability to control his sexual urges, but he can control his behavior in response to his urges (PCR 4/465). Dr. Maher compared Appellant to another serial killer, Bobby Joe Long, noting there was a common pattern of sexualized sadism and extensive planning (PCR 4/464).

Notably, Dr. Maher acknowledged that he would not have reached the same conclusions without having heard J.C.'s descriptions of the family environment; Maher did not have the confidence in Appellant's self-report to have relied on it for diagnostic purposes (PCR 4/468-69). Until he reviewed J.C.'s affidavit, Maher "very seriously questioned and doubted Mr. Appellant's honesty and reliability" as to Appellant's own history (PCR 4/468). Dr. Maher believed that Appellant lies consistently and exaggerates his exploits, but noted that he sometimes told the truth in shocking and remarkable ways (PCR 4/498, 504-05).

Dr. Maher agreed with Dr. Dee that there is no statutory mitigation to be applied in this case (PCR 4/467). Maher reviewed Dr. Brittain's report, as well as testimony, affidavits and school records, but none of the materials he reviewed offered any

indication that Appellant had revealed allegations of sexual abuse (PCR 4/475-76, 493-95, 503-04).

Appellant testified that he has been incarcerated since January 7, 1982 (PCR 4/509). He confessed to the Graham and Delimon murders, which occurred in 1980 and 1981, because they were praying on his mind a lot, giving him nightmares (PCR 4/509). According to Appellant, his attorneys told him that he would get the death penalty if he went before a jury, but if he pled guilty before a judge, the death penalty would be invalidated under Ring v. Arizona, 536 U.S. 584 (2002) (PCR 4/510). Both Brunvand and Hernandez related to Appellant that they had heard the judge comment that Appellant's cooperation with the police should be "worth something," which Appellant took as an indication "that there might be the possibility of a life sentence there" (PCR 4/510-11).

Appellant had told the defense mitigation investigator, Cheryl Pettry, all about the abuse by his grandmother (PCR 4/513). Appellant testified that the abuse started when he was about five, although he did not think of it as abuse (PCR 4/514-15). The women of the house walked around in various stages of undress and gave him baths all of the time (PCR 4/515). He recalled an incident where his grandmother took him into her bed and warmed his hands between her breasts, and how she taught him how to

perform oral sex (PCR 4/516). He testified that he was teased about his small penis and that he enlisted in the Army when he was 15 years old, but discharged shortly thereafter when he contracted hepatitis and they learned his true age (PCR 4/516-18). He returned to live with his grandmother and they moved to Florida in 1967 (PCR 4/519).

According to Appellant, there was a lot of moving around before they settled in Florida (PCR 4/519). They visited Appellant's aunts Orrine and Pearl and their husbands, Bob and Tinker, in Hawaii, Rhode Island, and various military bases (PCR 4/519). Appellant testified that, in each place, Pearl would attach herself to several guards; if her husband was out of town and the guards were not available, Pearl would turn to Appellant for sexual gratification (PCR 4/519). Appellant also discussed having a good friend, Gary, and telling his grandmother that he almost told Gary what was happening at Appellant's house, which prompted his grandmother to call Appellant over to the sink, where she was cutting up a chicken, and to slice the knuckle of his finger, telling him to never tell anyone about what happened at their house (PCR 4/520-21).

Appellant related that he had told Marcia Crawley all about his past in her taped interview, which lasted over five and a half hours, but was heavily redacted when played in court (PCR 4/522-

24). As a result of the redactions, the court never heard about the abuse by Appellant's grandmother and aunts (PCR 4/524). The grandmother and aunts were dead by the time of Appellant's trial for these murders (PCR 4/529). Appellant observed that although the women claimed to love him, they never showed him any warmth, and they would eat steak, pork chops, or whatever they wanted, but only gave him potatoes and vegetables, never the good stuff (PCR 4/524). Appellant stated that the way he was raised shaped his opinions on women, and today he considers all women to be potential targets (PCR 4/525). Appellant testified that, when he told his attorneys about the sexual abuse, Hernandez seemed upset and said, if it was true, they would have to deal with it; Brunvand seemed to think it was common and told Appellant, it didn't matter if it was true, because even if it was, they couldn't prove it because no one else was alive to corroborate Appellant's claims (PCR 4/531-34). At that time, Appellant had no idea that his uncle, J.C., was still alive (PCR 4/534). Appellant claimed that it was not his decision to avoid presenting testimony about the sexual abuse as mitigation (PCR 4/543).

Trial counsel Bjorn Brunvand testified that he had been appointed as conflict counsel in this case, and was responsible primarily for the penalty phase (PCR 5/565, 593). Brunvand is board certified as a criminal trial lawyer and was an experienced

capital defender prior to his appointment (PCR 5/596, 605). He had volunteered with the Office of Capital Collateral Representative when he was in college and wrote articles on the death penalty when he was in law school (PCR 5/595-96, 605). He worked for the public defender's office for several years and has practiced criminal law since leaving that office for private practice in 1992 (PCR 5/605-06).

Brunvand litigated a motion challenging the constitutionality of Florida's death penalty scheme under Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). At the time of the motion, Ring had been accepted for certiorari review, but the decision was not released until June, 2002 (PCR 5/567-72). Brunvand tried to get Appellant's case continued until after Ring was decided, but was unsuccessful (PCR 5/571-72). Brunvand believed that Ring would invalidate Florida's system, and take the death penalty off the table (PCR 5/571-72). His impressions about the case were discussed with Appellant (PCR 5/574). However, an open plea was entered on April 3, 2002, with the Ring issue preserved for appellate review (PCR 5/572, 574).

Brunvand filed a motion to secure funds for mitigation specialist Cheryl Pettry (PCR 5/575-76). He requested $10,000, but was only granted $5,000 (PCR 5/576-77). The court later

authorized a $5,000 payment, although Ms. Pettry's expenses showed she had spent more than that on her investigation (PCR 5/577-79).

Brunvand was aware of Appellant's allegations of sexual abuse by his grandmother and aunts (PCR 5/584-87). Counsel recalled that Appellant may have discussed the allegations in those portions of interviews which he had given which were not played for the court's consideration at sentencing, although other portions of the interviews were played (PCR 5/585-86). Brunvand noted that much of the interviews contained shocking, inflammatory information which would be extremely prejudicial and damaging to the defense, had the tapes been played in their entirety (PCR 5/600-02). Brunvand and Hernandez had discussed their concerns about putting on evidence of Appellant's experiences with his grandmother with Appellant (PCR 5/609). The biggest concern was Appellant's presentation of the allegations; Brunvand explained that Appellant smiled, as if proud, and characterized his experience as a good thing (PCR 5/609-11). There was not anyone else available to testify to the abuse, and when Appellant discussed the abuse in the Crawley interview, "it just didn't come across well," according to Brunvand, and Brunvand did not think it would help convince the court that life was the appropriate sentence (PCR 5/610-11). This opinion was discussed with Hernandez and Appellant, and all agreed; Appellant determined that

the right course was to avoid presenting that evidence as mitigation (PCR 5/611).

Brunvand testified that the strongest mitigation he could offer was Appellant's cooperation with the authorities, which led to resolution for these two old, unsolved cases (PCR 5/583, 599-600). Brunvand felt such mitigation was a legal matter which would carry more weight with attorneys and judges than with a jury (PCR 5/599-600). Brunvand and Hernandez specifically discussed this with Appellant, and Appellant decided to waive a penalty phase jury and have the sentencing before the judge only (PCR 5/600).

Appellant was evaluated by Dr. Brittain and Brunvand reviewed the lengthy report Brittain prepared and spoke with Brittain about his findings (PCR 5/606-07). Brunvand also retained Dr. Sidney Merin, and discussed Brittain's report and findings with Merin (PCR 5/608-09). Merin agreed generally with the defense assessment that Appellant's medical testimony would be more damaging than beneficial (PCR 5/608-09). Brunvand also spoke with a retired psychologist, Dr. McKay Vernon, about Appellant (PCR 5/607, 612, 619). Vernon was not a potential witness, but volunteered to evaluate Appellant because Vernon had an interest in serial killers (PCR 5/612, 619). Brunvand felt Dr. Brittain had done a very thorough job, but the defense decided his

testimony would not be beneficial (PCR 5/620). Brunvand noted that using any doctor will bring risks, opening the door to other difficult issues (PCR 5/620). Ultimately, the defense made a strategic decision against presenting any expert for mental mitigation, as the testimony was not that helpful and was somewhat inconsistent with the primary mitigation, that Appellant wanted to help solve these cases (PCR 5/608).

Brunvand noted that Appellant was strong-willed, and dictated all of the major decisions to be made (PCR 5/588-90). Appellant ignored his attorneys' advice and spoke directly to the police up to the time of his plea (PCR 5/591). Brunvand agreed that Appellant's statement at his sentencing may have been provided to the prosecutor before it was read by Appellant, as the victims' family members were present and the State had the opportunity to review the statement for any objectionable comments (PCR 5/602-04).

Trial counsel Daniel Hernandez testified that he had been appointed to represent Appellant, primarily for the guilt phase, but that he and Brunvand worked on both phases as a team (PCR 5/622-23). They met with Appellant often, and engaged in ongoing discussions about whether to enter a plea or go to trial (PCR 5/623, 625).

Appellant testified that he had discussed testifying about the abuse by his grandmother and aunts on numerous occasions (PCR 5/629). According to Appellant, he volunteered to testify about his experiences, but both Brunvand and Hernandez told him that it would be a pointless exercise, since there was no one to substantiate his claims (PCR 5/629-30). Appellant had provided his attorneys with a list of all family names, not knowing if the individuals were dead or alive (PCR 5/630). As far as he knew, everyone was dead; he had been in prison almost 20 years, and had not had any contact with any family since about 1980 (PCR 5/630).

Closing arguments were submitted by Appellant and the State (PCR 2/279-304, 3/307). An extensive order denying Appellant's Motion for Postconviction Relief was entered on April 18, 2008 (PCR 2/305-46). This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court did not err in denying Appellant's claim of ineffective assistance of counsel during the guilt or penalty phase. Following an evidentiary hearing, the trial court concluded that Appellant had failed to establish either deficient performance or prejudice. The trial court's factual findings are supported by competent, substantial evidence, and the legal principles were properly applied in denying relief.

ARGUMENT

ISSUE I

WHETHER MR. WINKLES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL BASED ON COUNSEL'S ADVICE REGARDING SENTENCING.

Appellant challenges the trial court's rejection of his claim of ineffective assistance of counsel with regard to the guilt phase of his capital trial. As this claim was denied following an evidentiary hearing, the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo*. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

Claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious

that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695; Valle, 705 So. 2d at 1333; Rose, 675 So. 2d at 569.

Proper analysis of this claim requires a court to eliminate the distorting effects of hindsight and evaluate the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment; the burden is on the defendant to show otherwise. Strickland, 466 U.S. at 689. See generally Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000). In addition, this Court has repeatedly recognized that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Henry v. State, 937 So. 2d 563, 573 (Fla. 2006), quoting Stewart v. State, 801 So. 2d

59 (Fla. 2001), and Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000).

Appellant's allegation that trial counsel was ineffective in advising Appellant to enter a guilty plea was conclusively refuted by the testimony presented at the evidentiary hearing. After a hearing on this issue, the trial court held:

> Defendant alleges that he was denied effective assistance of counsel at the guilt and penalty phases as counsel advised him that his death sentence would be invalid if he was sentenced by the judge without a jury. Defendant alleges in his motion that based upon these representations he waived a guilty phase jury, pleaded guilty, waived a penalty phase jury and proceeded to sentencing before a judge. Defendant alleges he was further prejudiced because he was denied a potential Ring/Aprendi claim on appeal because he waived a jury at the guilt and penalty phases.
>
> The Court finds Defendant has failed to establish prejudice. Defendant has not moved to set aside his plea or indicate that he would not have entered a guilty plea but for the advice counsel gave about the validity Florida's death sentencing scheme. From the beginning of the case, it was indicated that Defendant did not intend to go to trial. Counsel Brunvand testified that, after Defendant was advised by himself and Counsel Hernandez, he made the determination that he did not want to go to trial. Testimony also indicates that Defendant is a strong-willed individual who had the final say. Defendant's own actions support this characterization as he continuously spoke to law enforcement about the case even after counsel advised against it and sometimes without counsel's knowledge.
>
> When Defendant entered his guilty plea, counsel stated, "Mr. Winkles wishes to enter this plea because he wishes to accept responsibilities for his actions." *See Exhibit A. Change of Plea Hearing pg. 4.* Defendant indicated that he confessed in order "to salve my conscience and to give some closure to the families." The Court finds that Defendant has not demonstrated that he entered a guilty plea based upon any erroneous advice

from counsel. Testimony adduced at the evidentiary hearing evidences that Defendant entered a guilty plea based on his own perverse need to receive recognition for the horrific acts he committed, acts that in his own words "went off perfect."

Defendant also fails to prove that he waived a penalty phase jury based on counsel's advice about the validity of Florida's death sentencing scheme. At the evidentiary hearing Defendant indicated that he decided to forego a penalty phase jury based upon the representation that his cooperation with authorities would be "worth something" to the judge and there "might be a possibility" of a life sentence from the judge. Counsel stated that the strongest mitigation they had to present was the fact that he cooperated with law enforcement. It was believed that this would hold more weight with a judge than it would with a jury. Counsel also stated that the Defendant decided to waive a jury for penalty phase after discussing it with both of his attorneys and contemplating it. Defendant admitted that a judge would "most probably" give more weight to the fact that he came forward. The judge did give considerable weight to the fact that he cooperated with police. The Defendant's decision to forego a penalty phase jury was a tactical one, and "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). This decision was reasonable given the nature of the mitigation to be presented.

Finally, Defendant has not shown that counsel provided any affirmative misadvice. Counsel expressed an opinion on how a pending United State Supreme Court case could impact capital punishment in Florida. The outcome was by no means certain and counsel demonstrated this knowledge by attempting to continue Defendant's case until the case was decided. When a continuance was not available, he properly preserved the issue for appeal. As Defendant has failed to establish either prong under Strickland, this claim is denied.

(PCR 2/308-09)(emphasis supplied).

Trial counsel Bjorn Brunvand was the attorney primarily responsible for Appellant's penalty phase, and Brunvand was the one to discuss Ring and its potential implications with Appellant (PCR 4/510; 5/623-25). Although Ring was not decided until after Appellant entered his plea, counsel insured that the issue was explored and properly preserved for appellate review (PCR 5/567-74). Winkles, 894 So. 2d at 845-46.

Notably, Appellant did not testify that he would not have pled guilty had he received any different advice. This omission alone supports rejection of this claim. Absent some proof that Appellant would have pled not guilty and gone to trial absent affirmative misadvice from counsel, Appellant did not show prejudice and cannot prevail on this issue. Hill v. Lockhart, 474 U.S. 52, 59 (1984) ("in order to satisfy the 'prejudice' requirement [when claiming ineffective assistance of counsel with regard to entry of a plea], the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"); Ey v. State, 982 So. 2d 618, 623-24 (Fla. 2008); Grosvenor v. State, 874 So. 2d 1176, 1181 (Fla. 2004) (applying Hill). Furthermore, this Court examined the propriety of Appellant's plea and held:

> In this case, our review of the plea colloquy amply satisfies us that the trial court thoroughly informed

> appellant about the rights he was waiving and appellant indicated both verbally and in writing that he understood. Specifically, the court explained that appellant was entitled to a jury in both phases of the trial, that if he elected to waive his right to a jury, the judge alone would determine his sentence, and that the only sentencing options were life or death. Appellant stated that he understood the ramifications of his plea, that he was not being threatened or coerced, and that he was not on any medication that would impair his understanding of his decision. He does not contend otherwise in this appeal. Accordingly, we hold that he knowingly and voluntarily entered his plea, and the trial court properly accepted it.

Winkles, 894 So. 2d at 847. Moreover, Appellant indicated at the time of his plea he entered the plea because he believed it was in his best interest to do so, and that he was satisfied with counsel's advice concerning changing his plea to guilty (R 2/304-05, 3/522).

More importantly, Appellant did not identify any affirmative misadvice from his attorneys. Although Brunvand was hopeful, like many defense attorneys in Florida, that Ring would signal the end of capital punishment in Florida, counsel cannot be deemed ineffective for failing to anticipate the exact holding of that decision or its impact in Florida. Cherry v. State, 781 So. 2d 1040, 1053 (Fla. 2000); Nelms v. State, 596 So. 2d 441, 442 (Fla. 1992). Counsel attempted to continue Appellant's case until Ring was decided, to no avail (PCR 5/571-72). Appellant's testimony that Brunvand told him that a death sentence would not stand up on

appeal if he pled guilty is not credible, since Ring had not yet been decided. Moreover, Brunvand testified that Appellant listened to the advice of his attorneys, but made his own decision to plead guilty, as he did not want a trial (PCR 5/599).

Appellant suggests that Brunvand should have explained that a guilty plea would foreclose any possible relief under Ring, and that counsel did not sufficiently preserve the Ring claim for review. However, this Court considered and rejected the Ring claim as without merit; this Court did not find that review was procedurally barred or waived by the guilty plea. Winkles, 894 So. 2d at 845-46. Rather, as this Court expressly found, Appellant's prior violent felony convictions supported the imposition of the death sentence and precluded any relief under Ring. See Poole v. State, 33 Fla. L. Weekly S957 (Fla. Dec. 11, 2008) (prior violent felony aggravator takes case outside scope of Ring). Appellant's decision to plead guilty had no impact on the way his claim was reviewed and resolved on direct appeal.

Appellant failed to demonstrate that his attorneys performed deficiently with regard to the legal advice they provided prior to Appellant's decision to plead guilty. Appellant, who was strong-willed and made the ultimate decisions in this case, wanted to plead guilty. In addition, Appellant did not adequately allege, and certainly did not establish, any possible prejudice even if

any erroneous advice had been given, since Appellant did not testify that he would not have entered his plea in the absence of the advice. On these facts, the trial court properly denied this claim and its judgment must be affirmed.

ISSUE II

WHETHER MR. WINKLES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL BASED ON AN ALLEGED FAILURE TO INVESTIGATE AND PRESENT MITIGATION EVIDENCE.

Appellant challenges the trial court's rejection of his claim of ineffective assistance of counsel with regard to the penalty phase of his capital trial. As this claim was denied following an evidentiary hearing, the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo*. Stephens, 748 So. 2d at 1033.

As discussed above, claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984).

Appellant's allegations that his attorneys performed deficiently with regard to the investigation and presentation of mitigating evidence were also refuted by the testimony at the evidentiary hearing. The trial court properly denied this claim as the record reflects that counsel did conduct a reasonable investigation for mitigation and made a strategic decision regarding what evidence to present. Moreover, the trial court properly denied this claim as there was no showing of prejudice. Specifically, Appellant claims that his attorneys should have presented his uncle, J.C., as a penalty phase witness, and should

have investigated and presented mitigation obtained through a mental health professional. Once again, no deficient performance or prejudice can be discerned on the facts of this case.

The trial court rejected Appellant's penalty phase claims with the following findings:

> Defendant alleges that counsel was ineffective at the sentencing phase of his trial for failing to have him evaluated by a mental health professional licensed and qualified to testify in the State of Florida. It is further alleged that counsel was ineffective for failing to have a qualified mental health professional review the work product submitted. Defendant asserts that he was prejudiced because the mitigation, which could have been presented, would have been weighed and influenced to obtain a life sentence by the trial court.
>
> Defendant was evaluated by a Dr. Brittain, who prepared a lengthy report and spoke with counsel about his findings. Counsel also retained Dr. Sidney Merin to review Dr. Brittain's findings and discuss them with him. Dr. Merin is qualified to testify in the State of Florida. Counsel also spoke with a Dr. Vernon, who evaluated Defendant for his own purposes and not for trial. After discussing the medical findings, counsel concluded that, from a tactical standpoint, the testimony that would be provided by a mental health professional would not be helpful and would be inconsistent with the plea. Counsel agreed that there is a risk whenever mental health professionals are presented that the door will be opened to many different issues. After ascertaining what evidence mental health professionals would present to the Court, counsel made a decision not to present such evidence, as it would not be beneficial. "The choice by counsel to present or not present evidence in mitigation is a tactical decision properly within counsel's discretion." Brown v. State, 439 So. 2d 872, 875 (Fla. 1983). Counsel clearly chose to not present testimony based on the representations of experts he consulted and the focus of their mitigation that Defendant cooperated with law enforcement to

solve two cold cases. The decision not to present testimony about Defendant's mental health is not deficient "merely because the defendant now secured the testimony of a more favorable mental health expert." Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2002) (quoting Asay v. State, 769 So. 2d 974, 986 (Fla. 2000)).

The testimony of the new experts indicates that neither Dr. Dee nor Dr. Maher found statutory mitigation. Dr. Dee diagnosed Defendant with brain damage, which would have caused a deficit in short-term memory and planning skills, neither of which would have influenced Defendant in the committing of the crime. Dr. Dee further testified that it was not possible to determine when this damage may have occurred. Dr. Maher diagnosed Defendant as having a sexual perversion disorder and stated that, while Defendant may not have the ability to control his sexual urges, he did have control over his behavior in response to his urges. Dr. Maher's testimony would not have been available at the time of sentencing, as he did not feel comfortable relying on Defendant's self-report of abuse. It is his belief that Defendant lies and has lied his entire life. Therefore, Dr. Maher only relied on Defendant's statements of his abuse after Defendant's uncle James "J.C." Winkles verified some of Defendant's reported history, which occurred long after trial.

Counsel was aware of Defendant's claim of sexual abuse as a child by the hands of his grandmother and aunts. Counsel testified that, in order to use Defendant's sexual abuse as a child as a mitigating factor, he believed it would be necessary for Defendant to testify about it. Counsel was not aware of anyone else who could testify to this mitigating factor, and this fact has not changed, as J.C. Winkles was not aware of any sexual abuse. Counsel found Defendant's testifying to be problematic due to his description of what took place and how he presented it as something to be proud of and not a bad thing. He did not believe that Defendant testifying about this would help persuade the Court that a life sentence was appropriate. Counsel further stated that he advised Defendant of this and Defendant agreed that it was the right course not to go into the issue of abuse. Defendant testified that counsel advised him that it

would not be helpful to present this testimony as no one could substantiate it.

The Court finds this to be a reasonable tactical decision made by counsel. The reasonableness of this decision was further supported by the testimony of the Defendant as well as Dr. Dee and Dr. Maher. It was Dr. Dee's belief that at times Defendant made statements to him, which were deliberately designed to shock him. Dr. Maher commented that, although Defendant lies, he has "told the truth in some shocking---and remarkable ways." Defendant's testimony at his evidentiary hearing confirmed the misgivings counsel had about Defendant testifying during the penalty phase. Defendant did seem to be proud of his early introduction to oral sex provided by his grandmother and even stated that this tutelage resulted in him bringing "even a victim to sexual gratification before I did myself." Defendant also made shocking statements and even offered, "I'm 68, and I still masturbate five times a day." Accordingly, this claim is denied.

*****

Defendant alleges that counsel was ineffective for failing to obtain the necessary funds from the Court to properly retain a mitigation expert and, due to counsel's inability to do so, mitigation went undiscovered in the penalty phase. Specifically, Defendant alleges a proper investigation would have led to the discovery of his uncle J.C. Winkles. As to the claim that counsel was ineffective for failing to obtain the necessary funds for a mitigation expert, this Court finds this claim barred as it was available for direct appeal. The record shows that counsel properly moved for $10,000.00 for Cheryl Pettry but was only granted $5,000.00. *See Exhibit B: Defendant's Motion for Costs to Retain the Services of a Mitigation Expert/Investigator* and *See Exhibit C: Orders.*

The Court finds Defendant has failed to establish that counsel was ineffective for failing to investigate and find his uncle J.C. Winkles to testify about his early life. Defendant fails to demonstrate that counsel should have known that this witness was available and would have provided beneficial testimony. Defendant testified that he made a list of

> relatives, both alive and dead, that he knew of. Defendant stated that as far as he knew everyone was deceased, as he had been in prison for almost 20 years and the last time he had contact with them was in 1980. A mitigation expert conducted about 122 hours of work and was unable to locate J.C. Winkles. Counsel testified that his office tried to complete any additional work that the mitigation expert could not complete due to monetary restrictions.
>
> Defendant's uncle J.C. Winkles could not corroborate Defendant's allegation of sexual abuse and, at times, contradicted statements made by Defendant. J.C. Winkles would have provided testimony that Defendant's mother died when he was very young and that he was raised by his grandmother, J.C. Winkles' mother, because the Defendant's father took no interest in him. J.C. Winkles admitted that his mother was not a good mother but loved all of her children and would have done anything for them. He stated that his mother was promiscuous and encouraged petty thievery for survival because they were so extremely poor. J.C. Winkles saw no indication that Defendant was abused either physically or sexually and never saw any signs of violence between Defendant and his mother. J.C. Winkles testimony would have supported mitigation that Defendant was raised by relatives because of the untimely death of his mother.
>
> Defendant has not demonstrated that, but for counsel's errors, he probably would have received a life sentence. Gaskin v. State, 822 So. 2d 1243, 1247 (Fla. 2000). The Court finds that the mitigation that Defendant was raised by relatives due to the untimely death of his mother would not have resulted in a life sentence due to the heavily aggravating factors in this case. The Florida Supreme Court has upheld the sentence of death in cases where substantial mitigation has been presented. Lawrence v. State, 846 So. 2d 440, 454-455 (Fla. 2003); Smithers v. State, 826 So. 2d 916, 931 (Fla. 2002). Accordingly, this claim is denied.

(PCR 2/309-12)(emphasis supplied).

As to Appellant's claim that his attorneys should have presented his uncle, J.C., in mitigation, there has been no

showing that J.C. was reasonably available or discoverable to counsel. As such, his testimony is of little value. See State v. Riechmann, 777 So. 2d 342, 354-55 (Fla. 2000) (claim of ineffective assistance of counsel properly denied where evidence not available at time of trial). Appellant himself testified that he had no idea that J.C. was still alive at the time of his trial (PCR 4/534). His attorneys employed a mitigation specialist to investigate Appellant's background, and she used all of the funds which the court approved (PCR 5/575-80). There was no explanation as to how J.C. was discovered by collateral counsel, and there is no basis to suggest that counsel were deficient in failing to discover J.C. as a witness.

Moreover, any possible deficiency in failing to discover and present J.C. as a penalty phase witness could not have prejudiced Appellant, since J.C. did not have any new or significant mitigation to offer. Importantly, as the trial court found, J.C. could not directly corroborate Appellant's claim of having been sexually abused as a child. At the evidentiary hearing, J.C. rebutted Appellant's claims that Appellant was fed and clothed like a pauper while his grandmother and aunts ate steak and wore finery (PCR 4/444-45). The testimony offered by J.C. at the evidentiary hearing would not have compelled a life sentence in light of the heavy aggravating factors in this case. Appellant's

argument that he was prejudiced by the failure to present testimony regarding sexual abuse that could not be corroborated, testimony regarding his mother's death or testimony that his grandmother was not a good mother is not persuasive. In sentencing Appellant to death the trial court found the following four aggravating factors: 1) prior violent felony convictions; 2) murder committed during the course of a kidnapping; 3) avoid arrest; and 4) cold, calculated and premeditated to each murder (R 379-83). In finding Appellant's death sentences were proportional, this Court held the trial court properly found each aggravator and that Appellant's case was "certainly among the most aggravated". Winkles, 894 So. 2d at 847-48. This Court has recognized that prior violent felony and CCP are among the weightiest aggravators available. See Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999) (noting that CCP is one "of the most serious aggravators set out in the statutory sentencing scheme"); Sireci v. Moore, 825 So. 2d 882, 887 (Fla. 2002) (noting that the prior violent felony conviction aggravator is one "of the most weighty in Florida's sentencing calculus"). Given the strength of the aggravation and the weakness of the mitigation, there is no reasonable probability Appellant would not have been sentenced to death. See

Rutherford v. State, 727 So. 2d 216, 226-27 (Fla. 1998) (postconviction testimony that defendant suffered from an extreme emotional disturbance and had a harsh childhood, with an abusive alcoholic father would not have changed the result of trial where three aggravating factors of HAC, CCP and robbery/pecuniary gain were found); Breedlove v. State, 692 So. 2d 874, 877-78 (Fla. 1997) (three aggravating factors of during a burglary, HAC, and prior violent felony overwhelmed the mitigation testimony of family and friends, including evidence of abuse, offered at the postconviction hearing); Buenoano v. Dugger, 559 So. 2d 1116, 1119 (Fla. 1990) (no prejudice found in failure to present evidence that defendant had impoverished childhood, was psychologically dysfunctional, was young when mother died and was moved between foster homes where there were reports of sexual abuse in light of aggravated nature of crime—prior violent felony, pecuniary gain, HAC and CCP). The element of prejudice cannot be satisfied. As such, the denial of this claim must be affirmed.

Appellant's claim of ineffective assistance for failing to present a mental health expert also fails. At the evidentiary hearing, counsel explained that Appellant had been evaluated by competent mental health professionals, and that a strategic decision was made against presenting their testimony (PCR 5/608-

09). The law is well settled that, when such strategic decisions are made, counsel cannot be deemed to have been ineffective. Darling v. State, 966 So. 2d 366, 377-78 (Fla. 2007) (noting counsel are entitled to rely on trial experts); Burns v. State, 944 So. 2d 234, 243-44 (Fla. 2006) (upholding reasonableness of decision against presenting mental mitigation); Looney v. State, 941 So. 2d 1017, 1029 (Fla. 2006) (same).

The testimony at the evidentiary hearing clearly refuted any suggestion of deficient performance with regard to mental mitigation. Trial counsel consulted with three mental health experts (PCR 5/620-21). Although Appellant presented the opinions of two "new" experts in postconviction, this is no basis for a finding of deficient performance. See Trotter v. State, 932 So. 2d 1045, 1052 (Fla. 2006) (mental health investigation not rendered incompetent because defendant has secured testimony of more favorable expert); Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997) (same). Importantly, neither Dee nor Maher offered any criticisms of Dr. Brittain's pre-trial evaluation or findings (PCR 4/499-04, 475-77, 495-96, 503-04).

In addition, the mental health evidence offered in postconviction was not compelling. Both Dr. Dee and Dr. Maher agreed that there was no statutory mitigation that could have been presented (PCR 4/419, 491). Although Dr. Dee diagnosed Appellant

with brain damage, Dee acknowledged that the damage could have been a result of post-sentencing injuries and/or illnesses (PCR 4/401-02, 404). Significantly, Dee could not identify any manifestations of the brain damage which may have impacted Appellant's actions in these murders; the primary characteristics, a deficit in short-term memory and planning skills, clearly did not influence Appellant in the commission of the Graham and Delimon murders (PCR 4/382-83, 406, 408-09).

Dr. Maher acknowledged that his postconviction testimony would not have been available at the time of trial. As such, it cannot form the basis for relief. See Riechmann, 777 So. 2d at 354-55. Without the added background information from Appellant's uncle, J.C., which was not available at trial, Dr. Maher did not have the confidence to rely on Appellant's self-report of abuse in reaching his conclusions (PCR 4/468-69). And even if Dr. Maher had been able to offer his same conclusions prior to sentencing, his opinion that Appellant is a serial killer with a sexual perversion disorder would not have compelled a life sentence. Dr. Maher testified that Appellant was like another serial killer, Bobby Joe Long, yet Long is still on death row, despite the fact that Long's case involved greater mitigation, since the trial court concluded that both statutory mental mitigating factors

applied in that case (PCR 4/464, 5/621). Long v. State, 610 So. 2d 1268, 1272 (Fla. 1992).

In this case, as the trial court properly found, counsel's decision not to present a mental health expert was a reasonable strategic decision and the postconviction proceedings did not demonstrate any deficiency or resulting prejudice under Strickland. Based on the aggravated nature of Appellant's crimes there is no reasonable probability that had a mental health expert testified, the outcome would have been different. See Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997) ("In light of the substantial, compelling aggravation found by the trial court, there is no reasonable probability that had the mental health expert testified, the outcome would have been different.")

Finally, the strategic decision against presenting Appellant's testimony about his history of sexual abuse was informed and reasonable. Henry v. State, 937 So. 2d 563, 570 (Fla. 2006) (counsel's decision not to present certain mitigation evidence may be a tactical decision properly within counsel's discretion); Valle v. State, 705 So. 2d 1331, 1335 n.4 (Fla. 1997) (same). Appellant was aware of the reasons for and against his testifying about the abuse, and agreed with his attorneys that his evidence would not be helpful. Counsel were certainly reasonable in assessing the danger to the defense case presented by

permitting Appellant to take the stand and testify; the postconviction experts and court both acknowledged Appellant's tendency to make shocking and outrageous statements (PCR 2/311, 4/384, 391, 498). "An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword." Reed v. State, 875 So. 2d 415, 437 (Fla. 2004). Moreover, reasonable fact-finders would agree with Dr. Maher's assessment that Appellant's own testimony about his history was not credible; again, the postconviction testimony would not have resulted in a life sentence, had it been offered in Appellant's penalty phase (PCR 4/468-69). As in Derrick v. State, 983 So. 2d 443 (Fla. 2008), this is not a case where counsel failed to discover mitigation, but rather counsel made a strategic decision to forego presentation of evidence of childhood abuse. As in Derrick, this decision was reasonable. Any other decision would not have changed the outcome in this case.

Nothing presented in postconviction should impair this Court's confidence in the propriety and reliability of the death sentences imposed on Appellant. As no basis for deficient performance or prejudice can be found with regard to the penalty phase representation provided to Appellant, the trial court's resolution of this issue must be affirmed.

CONCLUSION

WHEREFORE, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE has been furnished by U.S. Regular Mail to Richard E. Kiley, Assistant Capital Collateral Regional Counsel, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136; and to James A. Hellickson, Assistant State Attorney, Post Office Box 5028, Clearwater, Florida 33758-5028, this 15th day of January, 2009.

CERTIFICATE OF FONT COMPLIANCE

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

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COUNSEL FOR APPELLEE