IN THE SUPREME COURT OF FLORIDA

RAY LAMAR JOHNSTON,

Appellant,

v.

CASE NO. SC09-496
L.T. No. CR99-11338
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

The record on direct appeal will be cited throughout this brief as "DA" with the appropriate volume and page number (DA V#/page#).

The post-conviction record will be cited as "PCR" with the appropriate volume and page number (PCR V#/page#).

STATEMENT OF THE CASE AND FACTS

Trial and Direct Appeal:

On direct appeal, *Johnston v. State*, 863 So. 2d 271 (Fla. 2003), this Court summarized the facts presented at trial:

> On either February 6 or 7, 1997, Janice Nugent, a forty-seven-year-old divorced woman, was strangled to death in her Tampa home by Ray Lamar Johnston. Nugent's body was discovered by her son-in law, John McCarthy, at about 11 p.m. on Friday, February 7, 1997. When McCarthy arrived at Nugent's house, he noticed the side door to the house was ajar and keys were still in the door lock. Nugent's car was still in the carport. McCarthy entered the house and discovered Nugent's body, wrapped in a bed comforter and submerged in the bathtub. Nugent was wearing only panties and a brassiere.
>
> The medical examiner, Dr. Julia Martin, testified that the time of Nugent's death was between 1 a.m. on Thursday, February 6, and 1 a.m. on Friday, February 7. Dr. Martin determined that the cause of death was manual strangulation, and that Nugent was murdered before she was submerged in the bathtub. T here was extensive bruising to Nugent's neck and shoulder area. Dr. Martin concluded that the strangulation in this case was not by constant, continuous compression, but rather was "more of a manual throttling ... meaning it was more pressure, release, pressure, release. There was some fighting activity." [FN1] Defensive bruising on Nugent's arms and hands and defensive fingernail injuries on her nose indicated that Nugent struggled with her assailant and attempted to pull the assailant's hands off her face.
>
> [FN1] Dr. Martin reached this conclusion based on the multiple deep bruising and fingertip contusions to the neck and the lack of petechial hemorrhages in and around the eyes. Petechial hemorrhages are sometimes seen in cases of strangulation where continuous pressure was applied.

Nugent sustained three to five blunt impact "pattern type injuries" on her buttocks and hips. Dr. Martin testified that within a reasonable medical probability, one or more of the patterned injuries on Nugent's buttocks were made by a belt. The other pattern type injuries could have been made by a belt or some other implement, possibly a vacuum cleaner hose. The belt that caused the injuries was never recovered.

Kelli McCarthy, Nugent's daughter, testified that Nugent retained all of her used answering machine tapes and stored them in a bureau drawer in her bedroom. The answering machine tapes and a portable phone with caller ID were not found. There were no signs of forced entry and no signs of a struggle in any room other than the master bedroom. In the master bedroom a lamp on a bedside table had been broken and partially overturned. Nugent's massage table was open in the living room and jars of cocoa butter and massage oil were found on a nearby piece of furniture. McCarthy testified that Nugent was a massage therapist and would bring the table into the living room to give massages. McCarthy described Nugent as a creature of habit and a "neat freak" and testified that Nugent would mop her kitchen floor every week. It would be very uncharacteristic of her to leave a cup unwashed for three or four weeks. She also testified that Nugent habitually bathed twice a day. There was only one bathtub in the house.

The last person to see Nugent alive, other than Johnston, was Ron Pliego. Pliego arrived at Nugent's house on Wednesday, February 5, 1997, around midnight and left at around 1 a.m. on Thursday morning. Pliego did not eat or drink anything while at Nugent's house and had some form of sexual encounter [FN2] with Nugent. Pliego could not remember whether the massage table was in Nugent's living room when he left. Pliego was eliminated as a suspect in the Nugent murder after he provided police with his fingerprints and DNA.

[FN2] Pliego could not remember whether the encounter involved vaginal or oral intercourse.

Nugent, Johnston, and Frances Aberle, an acquaintance of Nugent who had dated Johnston, were regulars at a bar named "Malio's." A short time before the murder, Aberle told Johnston that she would no

longer go to Malio's with him because she was afraid Nugent would retaliate against her for being with Johnston. Several days after the murder, Aberle and Johnston spoke about the murder and Aberle said, "I just can't understand someone doing that. Why? No matter what somebody did, why somebody would do that." Ray agreed with her and then said, "Well, now there's no reason you can't go to Malio's with me."

Johnston's fingerprints were found on the bottom of a plastic cup under the kitchen table and on the cold water knob of the bathtub, near Nugent's body. Shoe tracks consistent with shoes recovered from a search of Johnston's apartment were found on Nugent's kitchen floor. The State could not prove that the shoe tracks came from the exact shoes owned by Johnston, but did establish that the tracks were consistent with the tracks made by Johnston's shoes. DNA evidence matching Johnston's DNA profile was found on a bed sheet in Nugent's master bedroom. The odds of another person matching Johnston's DNA profile are one in 279 trillion. The mixture stain from which the DNA evidence was found was consistent with blood, saliva, or sweat, but it was not consistent with semen. No evidence of sexual battery was introduced at trial.

Detectives Noblitt and Stanton interviewed Johnston three times before the Nugent trial. In the first interview, Johnston told the detectives that he knew Nugent, and that he met her at Malio's. He had danced with her a few times, and they went out on one dinner date several weeks before Valentine's Day. After the date, they went back to Nugent's house. [FN3] Nugent took him through her kitchen to a locked room at the rear of the house. Nugent began to act strangely and Johnston left the house. Johnston said he never went out with Janice again; he was in the house for no more than half an hour that night; he and Janice did not have sex; and they did not have a fight. Johnston denied killing Nugent.

[FN3] Testimony from other witnesses established that Johnston was in Nugent's house sometime before January 15, 1997.

The second interview took place six days later. By that time, the detectives had received information

that Johnston's fingerprint was found on the shower knob in Nugent's bathroom. Detective Noblitt asked Johnston to go back over the events of his dinner date with Nugent, and Johnston reiterated the story he gave in the first interview. Noblitt then said, "Your fingerprint is in a place very near where Ms. Nugent's body is." Noblitt did not indicate exactly where the fingerprint was found. Johnston said he was only in Nugent's house once and only went in the rooms he had previously mentioned; then Johnston stopped and said "Wait a minute, I may have gone in the computer room." Noblitt countered, "That won't explain the fingerprint," and told Johnston he did not believe he was telling him the truth. Noblitt asked Johnston if he knew where the body was found. At first Johnston said no, then he said, "Oh, I think it was found in the bathroom." Asked how he knew that, Johnston said he had read it in the newspaper. A short time later, Johnston mentioned to the detectives that he has occasional blackouts and seizures. Johnston told the detectives, "Sometimes I get to doing something and doing it and doing it and when it's over I can't remember what I've done." Detective Stanton asked Johnston, "Is that what happened with you and Janice?" and Johnston said, "No, I did not kill Janice."

Detective Noblitt insisted that "[s]omething happened. Your fingerprints are in a place where I know you were there the night she was killed." Johnston stopped for a second and said, "I went to the bathroom." Noblitt took that as meaning that he went in to urinate, and he insisted to Johnston that he did not believe him and the fingerprint did not get there that way. Johnston thought about it for a few minutes and then said, "Okay, I'm going to tell you the truth." He then told the detectives that after he and Nugent returned to her house, they had a conversation about ghosts, which Nugent believed lived in her house. Nugent offered him a massage and Johnston accepted. Johnston took off his clothes and got on the massage table. Nugent heated some massage oil, and when she poured it on him it burned his buttocks and the back of his legs. He jumped up and ran into the shower, washed himself off, and fled Nugent's house in his underwear. Johnston told Noblitt that he was scared and that is why he did not mention these facts during the first interview.

The third interview with Johnston took place on September 2, 1997. By that time, the detectives had received DNA test results indicating that Johnston's bodily fluid was found on a sheet in Nugent's master bedroom. The detectives advised Johnston of his constitutional rights, as they had done in the previous interviews, and told him they wanted to talk more about Nugent's homicide. Noblitt testified:

> I told him that we executed our search warrant; told him we had only taken a few things; that most of his property was still there, and had some small talk about who was going to pick up whatever remaining property he had. And Mr. Johnston sat there and looked at myself and Detective Stanton and said, "I think I have a problem."

Johnston then told the detectives that he had another person named Dwight living inside of him. Johnston said that Dwight was "very mean" and "I got to be cautious." Noblitt testified that Johnston "sat and put his fists together and clinched his fists real tight with his knuckles almost turning white and leaned back in his chair and kind of closed his eyes ... and he said 'You've got to see him man.'" During the same interview Johnston denied that "Dwight" killed Nugent.

The State filed a motion to rely upon *Williams* [FN4] rule evidence of Johnston's prior first-degree murder conviction. After two hearings on the subject, the trial court granted the State's motion to rely upon *Williams* rule evidence and issued a ten-page order detailing the analysis the court conducted in reviewing the motion. The State presented evidence that on March 13, 2000, Johnston was convicted of the first-degree murder of Leanne Coryell. Coryell was murdered on August 19, 1997, six months after the Nugent murder. Johnston confessed to the Coryell murder during the penalty phase of the Coryell trial, after the jury had convicted him of the murder.

[FN4] *Williams v. State*, 110 So.2d 654 (Fla.1959); § 90.404, Fla. Stat. (Supp.1996).

Coryell was a thirty-year-old, physically fit,

blond-haired, attractive woman. She was forcibly abducted from her apartment by Johnston and taken to a nearby park. Her body was found nude and partially submerged in a pond. Coryell's clothing was scattered on the ground in the vicinity of the pond, and her car was found nearby in a church parking lot. The cause of her death was strangulation, most likely manual strangulation. However, the possibility that a ligature was used could not be ruled out by the medical examiner. Coryell was most likely already dead when her body was dragged and placed into the water. There was evidence of a sexual battery.

Johnston and Coryell resided in different buildings of the same apartment complex. Certain property, including an ATM card, was taken from Coryell, and money was later withdrawn from her bank account using that card. There were pattern injuries on Coryell's buttocks that were consistent with Coryell having been beaten with a belt. The pattern injuries matched the pattern of Coryell's belt found at the scene.

During the Nugent trial, the State read into the record parts of Johnston's confession to the Coryell murder. In this confession, Johnston admitted killing Coryell, but said he did not rape or sexually assault her. Johnston said that after she was already dead he attempted to cover himself by making it appear as if Coryell had been assaulted. In furtherance of this objective, he removed Coryell's clothes and scattered them, kicked her in the crotch area, struck her with her belt, and dragged her into the pond. Johnston admitted that he knew chlorinated water, and even water itself, would remove trace evidence, and acknowledged that he took steps to cover up what he had done.

During his confession to the Coryell murder, Johnston referred to "Dwight," the entity which purportedly lived inside him. A psychologist had testified earlier in the Coryell penalty phase that Johnston expressed a fear that another personality within him named "Dwight" had possibly committed the Coryell murder. However, Johnston admitted in his confession that "Dwight" was not responsible for the Coryell murder.

The Penalty Phase:

Johnston's second penalty phase was conducted on April 10-12, 2001. The State began with an overview of the evidence, from Detective Stanton, addressing Johnston's guilt for the murder of Janet Nugent. (DA V18/1929-1934). The medical examiner provided the testimony establishing the heinous, atrocious and cruel (HAC) aggravator. (DA V18/1957-1962; 1973-1979; 1980-1986).

Next, the State called three witnesses to establish Johnston's long history of prior violent felonies. First, Susan Reeder testified that Johnston attacked her in 1974 in Birmingham, Alabama. After exiting her car at an apartment complex, Ms. Reeder was grabbed from behind by Johnston, who put a knife to her throat. Johnston told her not to make a sound or he would cut her throat. (DA V18/1988). Johnston took her to a car and put her in the back seat. (DA V18/1989). Upon arriving at a deserted location, he made her undress and lean over the hood of his car and he beat her on the buttocks with his belt. (DA V18/1991-1992). Johnston sexually assaulted Ms. Reeder; he was prosecuted for kidnapping and rape. (DA V18/1993).

The testimony of Carolyn Sue Peak was read to the jury. Ms. Peak was attacked by Johnston in June, 1988, in Jacksonville, Florida. (DA V18/1999-2000). While exiting her vehicle at her apartment complex, Johnston confronted Ms. Peak and stuck a knife to her throat. Johnston told her that if she screamed, he would

cut her throat. He got in the car and told her to drive. Shortly thereafter, Johnston had her pull over; he tied her up, put her in the back seat and drove off. (DA V18/2000-2001). Fortunately, a police officer stopped the car. A warrant was outstanding for Ms. Peak and Johnston was ultimately apprehended. (DA V18/2002-2003). After Johnston's arrest, a camera, surgical gloves and mask were found in the car. (DA V18/2003).

Next, Detective Willette testified regarding Johnston's confessed murder of Leanne Coryell. (DA V18/2007-2017). Thereafter, the State introduced a judgment of conviction from Georgia pertaining to a count of robbery by intimidation of victim Judy Elkins, and a Florida conviction for burglary with assault in 1988. (DA V18/2019-2020). Lastly, two witnesses, Kelli and John McCarthy, the victim's daughter and son-in-law, testified as to victim impact evidence.

In mitigation, the defense presented clinical psychologist Dr. Harry Krop as an expert in neuropsychology, clinical psychology and forensic psychology. (DA V19/2038). Dr. Krop concluded that Johnston had frontal lobe impairment and the PET scan supported this conclusion. (DA V19/2059, 2075). Dr. Krop found Johnston's ability to conform his behavior to the requirements of the law was impaired as a result of organic brain syndrome. (DA V19/2078). Johnston never admitted killing Ms. Nugent. Thus, Dr. Krop was unable to address Johnston's mental

status at the time of the murder. (DA V19/2085).

The defense also called Johnston's sister, Rebecca Vineyard. Vineyard testified to Johnston's family life and his positive interaction with her children. (DA V19/2112-2130). Max Allen Johnston, the Defendant's brother, also testified. (DA V19/2131-2138). The Defendant caused trouble as a child, but Max Allen could not recall any specifics. (DA V19/2132). He thought the Defendant received electroshock therapy at 14, although he was not aware that the Defendant was given Dilantin which would have caused the same type of lethargic behavior. (DA V19/2133, 2140; 20/2288). Johnston's family sought treatment for him, but their efforts failed. (DA V19/2134-2138).

The State called neurologist Dr. Pollock as a rebuttal witness (out of order). Dr. Pollock treated Johnston in March 1997, prior to the murder of Ms. Nugent. Johnston complained of headaches, vertigo, numbness and passing out. (DA V19/2151). Tests were ordered, including an MRI, an EEG, a CAT scan and a spinal tap; all results were normal (DA V19/2152-2154). Johnston denied having a seizure disorder and Dr. Pollock found no cause for Johnston's complaints. (DA V19/2158).

The defense called Lynn Mundy to testify about her romantic relationship with Johnston. Mundy testified to Johnston's loving behavior toward her. Johnston was incarcerated during the entire course of this relationship, which ended when he dropped her for

Susan Bailey. (DA V19/2181-2190). Johnston never demonstrated any deviant sexual or violent behavior toward Mundy during their six year relationship. (DA V19/2196-2197).

Susan Bailey's previous trial testimony was read into the record. Bailey had been married to Johnston for two years. (DA V19/2199). She also testified to Johnston's positive behavior toward her during their relationship. (DA V19/2200-2206).

Johnston's mother, Sara James, was the last family member to testify on Johnston's behalf. James testified that the Defendant was particularly attached to his father. (DA V20/2226). Johnston was a musical child. He played the viola in the Birmingham Junior Symphony. He taught himself the guitar and piano, and had a gorgeous singing voice. (DA V20/2229). Johnston was an average student. (DA V20/2230). He had some disciplinary problems in school and his parents placed him in various military academies. (DA V20/2233-2236). At thirteen, Johnston was taken to a psychologist. His mother did not think that this helped. Johnston's behavior still became explosive at times. (DA V20/2237). After Johnston stole a neighbor's car, they took him to Hillcrest Hospital. (DA V20/2239). Johnston did not receive shock treatment, but was heavily medicated for four weeks of treatment. (DA V20/2241-2242). Johnston began getting headaches in his teens. He fell from a moving vehicle as a child and hit his head on the curb. (DA V20/2244-2245). Johnston was not

abused by his parents. (DA V20/2249-2250).

The defense concluded its mitigation presentation at the penalty phase with the testimony of forensic psychiatrist, Dr. Michael Maher. (DA V20/2267). Dr. Maher relied upon Johnston's medical records, the tests done by Dr. Krop and 15 – 25 hours spent interviewing the Defendant. (DA V20/2295-2297). Dr. Maher's physical diagnosis for Johnston was seizure disorder of uncertain character. According to Dr. Maher, Johnston has frontal lobe impairment and dissociative symptoms. (DA V20/2299, 2306). Dr. Maher also concluded that Johnston's disorder substantially impairs his ability to conform his conduct to the requirements of law. (DA V20/2303). Johnston is not legally insane, does not have multiple personalities and is not antisocial. (DA V20/2304, 2309-2310, 2311-2312). Johnston does not have structural brain damage. (DA V20/2318).

The State called Dr. Donald Taylor, a forensic psychiatrist. (DA V20/2337). Dr. Taylor reviewed prison records, police reports, medical records, family history, including trial testimony of Johnston's mother and sister, and prior opinions and testimony of Drs. Krop, Maher, Woods and Pollock. (DA V20/2340-2342). Dr. Taylor also interviewed Johnston twice for a total of four hours in the presence of defense counsel. (DA V20/2342). Dr. Taylor concluded that Johnston is both a "sexual sadist" and a sadomasochist. (DA V20/2345). Johnston possibly has conversion

disorder with pseudo-seizures which are the result of stress and anxiety, not resulting from any organic brain problem. (DA V20/2346). Johnston may also have a problem with alcohol and drugs. (DA V20/2347). Johnston also met the criteria for a diagnosis of antisocial personality disorder. (DA V20/2347). Johnston's criminal history demonstrated this increase in severity of sexual sadistic activity. (DA V20/2351). Dr. Taylor also concluded that Johnston has frontal lobe impairment, but it is not related to brain damage. (DA V20/2351). Any impairment Johnston had would not prevent him from planning or taking premeditated action against an individual. (DA V20/2352).

Spencer Hearing:

A *Spencer* hearing was conducted on June 13, 2001. The defense presented a number of witnesses to testify to Johnston's behavior while incarcerated. Probation officer John Walkup supervised Johnston on probation for 14 months in 1987. (DA V22/2519). Johnston never missed an appointment, was gainfully employed and met his financial obligations. (DA V22/2520). Johnston was recommended for unsupervised probation, but he reoffended and was arrested. (DA V22/2520-2521). Gloria Myers, a Department of Corrections educator, worked with Johnston while he was incarcerated. (DA V22/2523). Johnston carried out his responsibilities as a teacher's aide appropriately, and Myers recommended gain time for Johnston because he was a good worker.

(DA V22/2523-2527). Mary Ann Grace, a choir director, worked with Johnston in the prison choir at Hamilton Correctional. (DA V22/2530). They continued to communicate after he was released. (DA V22/2531). He performed his responsibilities and would function appropriately in a prison environment. (DA V22/2531-2532). Johnston was a clerk for Chaplain John Fields when Fields was at Lake Correctional. (DA V22/2533). Johnston was a good worker, musically talented, and could function appropriately in prison. (DA V22/2533-2535). However, Fields fired Johnston from the chapel because of his rude and abrasive behavior to others. (DA V22/2537-2538). Johnston was transferred to another facility; Johnston's disciplinary records included threats toward inmates and jail guards and possession of razor blades/homemade weapons (in September of 1997, June of 1999, June of 2000, and September of 2000). (DA V22/2545; 2547).

Johnston spoke on his own behalf. (DA V22/2567-2582). Johnston explained the circumstances of his disciplinary reports and discussed his accomplishments in prison. (DA V22/2567-2579). Johnston denied killing Ms. Nugent. (DA V22/2579). In imposing the death sentence, the trial court found two aggravators, one statutory mitigating factor, and twenty-six (26) non-statutory mitigating factors. *Johnston*, 863 So. 2d at 274-278.

On October 16, 2003, this Court affirmed Johnston's first-degree murder conviction and death sentence for the murder of

Janice Nugent. *Johnston*, 863 So. 2d at 286. On March 22, 2004, the U. S. Supreme Court denied Johnston's petition for writ of certiorari. *Johnston v. Florida*, 541 U.S. 946 (2004).

Post-Conviction:

Johnston's Rule 3.851 Motion to Vacate, as amended on May 3, 2006, alleged 19 post-conviction claims. On November 22, 2006, the trial court entered a written order granting, in part, an evidentiary hearing on eight post-conviction claims. (PCR V6/1119-1139). Evidentiary hearings were held on December 1, 2006, June 14-15, 2007, and July 12-13, 2007.

Johnston's initial brief focuses, primarily, on his claims of ineffective assistance of counsel at the second penalty phase. Johnston's counsel for the second penalty phase was Harvey Hyman, who was admitted to the Florida Bar in 1993. (PCR V41/1315). Hyman had been a prosecutor in Miami, from 1993–1998, and he was hired by the Hillsborough County Public Defender's Office in 1998. (PCR V41/1315-1316). At the time of Johnston's trial and original penalty phase, Hyman was present in court with trial counsel, Kenneth Littman and Gerod Hooper; Hyman was part of the defense team. (PCR V41/1318-1321). Hyman also sat at counsel table during the first penalty phase. (PCR V41/1321). In addition, Hyman had the files compiled by the Public Defender's Office, which included those of mitigation specialist, Carolyn

Fulgueira.[1] The defense sought documents and records of Johnston's hospitalizations, education, employment and any accidents throughout his life. (PCR V40/1202). "Hundreds and hundreds of hours" were spent looking for history, interviewing witnesses, collecting records and documents, and consulting with Johnston and mental health professionals. (PCR V40/1201). Ms. Fulgueira met with Johnston in order to obtain his social, personal, educational, work, and military history. The Public Defender's office also obtained the assistance of mental health professionals, Dr. Michael Maher, Dr. Krop and Dr. Wood from North Carolina. (PCR V40/1203). The lay witnesses who were interviewed included the defendant's family members, women that Johnston had been involved with (including Lynn Lunde, and his ex-wife, Susan Bailey), and DOC personnel who had prior contact with Johnston, including Chaplain Field and Gloria Myers. (PCR V40/1206; 1210). All of these interviews were memorialized and placed in the case file for all defense counsel. (PCR V40/1210). The records included the treatment of the defendant by neurologist, Dr. Diana Pollock. (PCR V40/1211).

Johnston was indicted, convicted, and sentenced to death on the Coryell murder before he was charged in the Janice Nugent murder case. (PCR V40/1208). A detailed timeline was prepared,

[1] The State will address trial counsel's post-conviction testimony in further detail within the argument section of the

with a chronological summary of potential mitigation, records, and mitigation witnesses. (PCR V40/1208-1209). The timeline and defense mitigation records included educational records from Georgia, psychiatric records from Alabama, hospital, psychiatric and psychological testing records from the Department of Corrections. (PCR V40/1211-1212). Memos of the jail meetings with the defendant included the defendant's opinion that his family didn't care what happened to him, he didn't want anybody to get involved in his life, and his family viewed him as an embarrassment. (PCR V40/1215). Nevertheless, the defense continued with efforts to obtain the family's cooperation in providing mitigation and securing their testimony for the penalty phase. ((PCR V40/1215). During a jail visit in 1998, the defendant spoke about his "other personality," Dwight Towers. (PCR V40/1217). Both Dr. Krop and Dr. Maher were informed of Johnston's claim of other personalities. (PCR V40/1217). On February 18, 1998, defense counsel, Mr. Littman, and Ms. Fulgueira met with Johnston in jail and discussed obtaining the assistance of Dr. Wood and a PET scan for mental health mitigation. (PCR V40/1218).

Although Johnston voiced his concerns about his family members testifying in the penalty phase, Ms. Fulgueira spoke with his mother, his sister, Becky, and his second wife, Susan, and

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instant brief.

they were willing to help Johnston in a penalty phase, if needed. (PCR V40/1219). In Johnston's view, a life sentence was the same as a death sentence. (PCR V40/1219). By May of 1998, the Public Defender's Office had conducted a mock trial, with the assistance of a jury consultant, who furnished the defense with a large report. (PCR V40/1225). At the mock trial, Johnston was subjected to direct and cross examination, and his testimony was videotaped. (PCR V40/1225) During a jail visit on August 10, 2000, in preparation for the Nugent trial, Johnston said that he "didn't want a penalty phase *this time* to be a bunch of people saying what a good cook he was and that he could play the guitar and sing good." (PCR V40/1227-1228). When asked if he wanted his [Nugent] penalty phase to concentrate more on the PET scan, Johnston agreed to think about it. (PCR V40/1228). Discussions with Johnston regarding witnesses and strategy for penalty phase continued throughout the case. (PCR V40/1228). The defense also contacted individuals from the prison system (John Field, William Jordan, and Gloria Myers), as well as Susan Bailey, and secured their attendance. (PCR V40/1229). In August of 2000, there were ongoing discussions among the defense team about the PET scan testimony and how it would be presented. (PCR V40/1229). On August 16, 2000, Ms. Fulgueira sent a memo to defense counsel regarding Dr. Wood's recent opinion. (PCR V40/1234). This memo of August 16, 2000, stated, in part:

> Gerod, Dr. Wood told me, as Kenn has said, that **the impulsive behavior angle in mitigation has weakend because his behavior is now more of a pattern than an impulsive act. It is -- it is sick and more abnormal and juries don't like it. He feels that Ray's judgment is definitely impaired, and when asked what a clinical term would be for Ray, he said obsessive compulsive or a serial killer.**
>
> I will be calling Dr. Krop today and try to get him down here ASAP to test for further deterioration. I will advise.
>
> PCR V40/1234, e.s.)

A memo between attorneys Littman and Hooper also addressed the concern over Dr. Wood's opinion. (PCR V40/1235). Dr. Krop did not give much credence to Johnston's claim of multiple personalities. (PCR V40/1239). Following a contentious meeting with Johnston on August 18, 2000, the defense was concerned that Johnston might act out at trial. (PCR V40/1236-1237).

Following the evidentiary hearing proceedings, the trial court entered a 125-page written order denying Johnston's amended motion to vacate on December 31, 2008. (PCR V8/1544-1600; V9/1601-1668). This post-conviction appeal follows.

SUMMARY OF THE ARGUMENT

The trial court correctly denied Johnston's IAC/guilt and penalty phase claims under *Strickland*.[2] In denying Johnston's IAC claims, the trial court set forth detailed factual findings which are supported by competent, substantial evidence. Inasmuch as no procedural or substantive errors have been shown with regard to the factual findings or the trial court's application of the relevant legal principles, no relief is warranted and this Court must affirm the trial court's order denying post-conviction relief.

Johnston's renewed *Giglio*[3] claim asserts unsupported and nefarious allegations against the M.E., Dr. Julia Martin, and should be stricken. The trial court specifically found, "*Dr. Martin's testimony to be credible and consistent, and that Defendant has failed to present any evidence that Dr. Martin testified falsely at trial.*" (PCR V8/1553-1554).

Finally, the trial court correctly summarily denied the remaining post-conviction claims. The trial court's two comprehensive written orders detailed the trial court's fact-specific rationale and also attached those portions of the record that refute the defendant's claims.

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[2] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

[3] *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972).

ARGUMENT

ISSUE

THE IAC/PENALTY PHASE CLAIM

In this issue, Johnston argues that his successor counsel was ineffective in calling Max Allen Johnston to testify at the penalty phase and allegedly (1) belittling the defendant, (2) making light of mitigation and (3) taking an adversarial role against him. This claim was denied after an evidentiary hearing. For the following reasons, the trial court's order denying this IAC/penalty phase claim should be affirmed.

Standards of Review

In *Pagan v. State*, 2009 WL 3126337, 5-6 (Fla. 2009), this Court recently reiterated the standards applied to claims of ineffective assistance of counsel:

> Following the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court has held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied:
>
>> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component

> of the test when it is clear that the prejudice component is not satisfied.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986) (citations omitted).

Because both prongs of *Strickland* present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the trial court's factual findings that are supported by competent, substantial evidence, but reviewing the trial court's legal conclusions *de novo*. *Pagan*, 2009 WL 3126337, citing *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

The Max Allen Johnston sub-claim

The trial court found that "the decision to call Max Allen Johnston was a strategic decision made after alternate courses had been considered and rejected and, considering that every effort should be made to eliminate the distorting effects of hindsight, . . . counsel's decision was reasonable under the norms of professional conduct." (PCR V8/1594). As the trial court cogently explained:

> **As to the alleged failure of trial counsel to read the case file and note that Allen Johnston would be a "horrible witness," Mr. Hyman testified that the decision to call Allen was made after discussions of the possible options and negatives, he never thought anything about Allen's testimony was going to be inconsistent with his defense theory, he felt Allen's testimony provided an eye witness account to what life was like growing up with Defendant and gave a context to the medical records and "where did this all begin."** (See July 13, 2007, transcript pp. 1118-19). **Mr. Hyman testified he did not think Defendant's mother was a**

good witness because when she testified in the first Nugent penalty phase she distanced herself from the errors in Defendant's development and Hyman felt it was better to get a witness who would present information about Defendant's childhood development that was sympathetic to the defense theory of Defendant showing signs of frontal lobe issues but receiving shock treatments and being over medicated to create a context that it has been frontal lobe since then. (See July 13, 2007, transcript pp. 1119-20). **Mr. Hyman testified there was one incident from Defendant's youth that Allen Johnston could amplify through eyewitness testimony that was the "crux" for Mr. Hyman**. (See July 13, 2007, transcript p. 1121). **Specifically, he testified that Allen described Defendant as an "incorrigible kind of rambunctious guy," who went to Hillcrest and returned a "zombie," and he felt "this was excellent eyewitness testimony to establish that something went on during those treatments that not only didn't solve the situation, but made it worse."** (See July 13, 2007, transcript p. 1121). **As to the March 4, 1998, memorandum, introduced as Defense exhibit #8, documenting a phone interview Ms. Fulgueira had with Allen Johnston, Mr. Hyman testified that he did not feel the information about Defendant's negative behavior was something to "run from" and it "should be no one's surprise" because it correlates with Defendant's history, and he and the defense team felt Allen was the only family member that was presenting that type of compelling testimony.** (See July 13, 2007, transcript pp. 1120-22). **Mr. Hyman remembered talking with Allen prior to the trial, and given the defense theory and desire to present a history and context for Defendant's behavior, nothing they discussed dissuaded Mr. Hyman from calling him as a witness**. (See July 13, 2007, transcript pp. 1122-24). He also testified that "for the most part, [he] relied on other members of the team to do their jobs" and he "relied on Ms. Fulgueira a lot because she was a person with more often than not exclusive interaction with many of the witnesses." (See July 13, 2007, transcript p. 1166).

On cross-examination post conviction counsel asked Mr. Hyman, "when you asked Max Allen Johnston whether

or not his brother should receive life in prison or the death penalty, what were you expecting him to say?" (See July 13, 2007, transcript p. 1194). Mr. Hyman responded:

> I was expecting him to be more narrow in scope than the way he answered it...I do remember in my mind's eye that I was...definitely disappointed with the way he gave the answer. I would have liked to have had something a little more committal and a little more enforcement leaning towards life.

(See July 13, 2007, transcript pp. 1194-95). Hyman further testified that

> **for all those witnesses – I know this for a fact, because this is how I prepared the case. There was going to be no surprises, no shoot from the hip on this one. Every single witness that we had to testify I read them – I told them the exact questions I was going to ask and they told me the exact answers they were going to give.**
>
> **And as a matter of fact, when I did their...prep, I wrote down the questions and I would...have the answers that I would expect to get.**

(See July 13, 2007, transcript p. 1195).

Ms. Fulgueira also testified at the evidentiary hearing regarding the decision to call Max Allen Johnston. She testified that he was not called as a penalty phase witness in the Coryell trial because of the information contained in the March 4, 1998, memorandum, Defense exhibit #8, and because he was reluctant to come testify. (See June 14, 2007, transcript pp. 303-04, Defense exhibit #8). **However, on cross-examination she testified that by the time of Defendant's second penalty phase trial in the Nugent case almost three years later, Allen Johnston had changed his mind mainly because he wanted to express his belief that the reason these homicides occurred is because the system had wronged his brother.** (See June 14, 2007, transcript pp. 32 1-22). **She further**

testified that Allen had told her that he tried to bring to law enforcement's attention that Defendant needed help, but the system and law enforcement had let Defendant down and if law enforcement had heeded Allen's warning, these women would not have been killed. (See June 14, 2007, transcript p. 325). **Ms. Fulgueira also testified that based on her conversations or contacts with Allen immediately prior to the second penalty phase, she did not think he would damage the mitigation case.** (See June 14, 2007, transcript pp. 324-25). **She also testified that her "assumption, [her] feeling was at the time that Max Allen testified that he was there to testify for life for his brother, on behalf of his brother to ask for life," and that she did not think he was going to tell the jury about the uncharged offense involving an assault on a prostitute.** (See June 14, 2007, transcript pp. 33 8-39).

Max Allen Johnston also testified at the evidentiary hearing. He testified that he did not tell anyone from the defense team what he was going to testify to that day during the penalty phase and that no one from the defense went over with him what he was going to testify to that day or at any time. (See December 1, 2006, transcript p. 158). However, on cross-examination, he admitted that he did not really know what information Mr. Hyman had about what information Allen had provided to the Public Defender's Office in the past and what he could testify about. (See December 1, 2006, transcript p. 163). Allen also testified that he had an independent recollection of having had telephone conversations with Ms. Fulgueira during the Public Defender's Office representation of Defendant. (See December 1, 2006, transcript p. 178). **The Court finds the decision to call Max Allen Johnston was a strategic decision made after alternate courses had been considered and rejected and, considering that every effort should be made to eliminate the distorting effects of hindsight, the Court further finds counsel's decision was reasonable under the norms of professional conduct.** See Occhicone, 768 So. 2d at 1048 (citing Strickland, 466 U.S. at 689).

(PCR V8/1591-1594, e.s.)

The trial court’s order is supported by competent substantial evidence. Johnston’s second penalty phase counsel, Harvey Hyman, not only reviewed the Public Defender’s files, which included the discovery materials and work product materials compiled by mitigation specialist, Carolyn Fulgueira, but Hyman was present for strategy discussions with the defense team and Hyman was present at trial, both before and during the first penalty phase. Hyman was also seated at counsel table at the first penalty phase. (PCR V41/1320-1321).

Hyman became involved in the decision-making for the second penalty phase by at least January 10, 2001, although it may have been earlier. (PCR V42/1469). According to Hyman, everything was decided or “done by a committee.” (PCR V41/1325). The penalty phase strategy was discussed with Mr. Littman and Ms. Fulgueira. (PCR V41/1132). In attempting to “tweak” the defense presentation for the second penalty phase, Hyman considered calling additional witnesses, particularly in the area of the PET scan and the defendant’s medical history. (PCR V41/1330-1331).

In deciding whether to call Max Allen Johnston, Hyman knew that he had not been called in the first penalty phase because of “baggage” associated with his testimony. (PCR V41/1341). According to Hyman, the decision to call Max Allen Johnston was a team effort, and it was made after discussion of the possible

options and possible negative information. (PCR V41/1342). Hyman was a proponent of calling Max Allen Johnston because he provided and "eyewitness to what life with [the defendant] was like back then." (PCR V41/1342) In Hyman's assessment, Max Allen Johnston gave a context to the medical records and a context to "where did this all begin." (PCR V41/1343). After observing the defendant's mother testify, Hyman did not believe that she was a productive witness for the defense; she distanced herself from errors in Johnston's development. (PCR V41/1343). Hyman did not view the negative information in Ms. Fulgueira's memo as something that the defense should run from, concluded that it "should be no one's surprise, and considered it as a correlation to the defendant's history. (PCR V41/1344-1345). By calling Max Allen Johnston, Hyman was able to present a better context for the source of the defendant's behavior. (PCR V41/1345).

Hyman found one incident in the defendant's youth that was especially significant, which only Max Allen Johnston could amplify. (PCR V41/1345). Specifically, Max Allen Johnston was an eyewitness who described the defendant as a "zombie" after the defendant's return from Hillcrest. (PCR V41/1345). Max Allen Johnston was the only family member who provided that compelling testimony. (PCR V41/1346). Hyman recalled speaking with Max Allen Johnston before the trial. (PCR V41/1346). Given the defense theory and the desire to present the defendant's

behavior, in context, nothing from Hyman's pre-trial conversations with Max Allen Johnston dissuaded him from calling Max Allen Johnston as a witness. (PCR V41/1347-1348). Hyman felt that Max Allen Johnston was a productive witness because he was able to inform the jury that it wasn't right for the government and institutions who failed Johnston and failed to provide rehabilitation to now turn around and try to execute him. (PCR V41/1351-1352). Indeed, during his penalty phase closing argument, Mr. Hyman emphasized:

> **I think perhaps the most important witness you heard from was Allen, Allen Johnston, Ray's brother.** He expressed to you the complete frustration that has gone on with Ray and Ray's family for Ray's entire life. **They knew that there was a problem with Ray from the beginning**. And remember this chart? I referred to it in my opening statement to you. I used it throughout the proceedings because I felt **it was important for you to see that he wasn't faking it in 1969 when he was in Hillcrest, when they had him so doped up or shocked up, or whatever they did to him that Allen and even mom told you he came home looking like an idiot, like a zombie.**
>
> **I submit to you, <u>it was over for Ray when he was fourteen. The guy didn't have a chance</u>. No, that's not to say he didn't have the same opportunities as Allen and Becky and Butch and Scotty. That's not what it's about. It's not about coming from a deprived childhood. <u>It's about being sick in the head and no one knowing, with 1960's technologies, what to do beside giving him massive, massive, massive doses of these mind altering medications</u>, Dilantin, Dilantin on a 14 year old . . .**

(DA V21/2430, e.s.)

In short, attorney Hyman made a reasonable strategic decision to call Max Allen Johnston at the second penalty phase. The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527 (2003) (quoting *Strickland*, 466 U.S. at 688). Moreover, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689. In this case, Mr. Hyman's decision -- to call Max Allen Johnston at the second penalty phase -- was the epitome of a strategic decision. See, *Chandler v. United States*, 218 F. 3d 1305, at 1314, n. 14 (11th Cir. 2000) (*en banc*) (a decision to call some witnesses and not others as "the epitome of a strategic decision"). Here, the trial court correctly found (1) the "decision to call Max Allen Johnston was a strategic decision made after alternate courses had been considered and rejected," and (2) "counsel's decision was reasonable under the norms of professional conduct." (PCR V8/1594).

<u>Allegedly (1) making light of mitigation, (2) belittling Johnston and (3) taking an adversarial role</u>

Next, CCRC cherry picks excerpts from the penalty phase and

accuses Mr. Hyman of making light of mitigation, belittling Johnston, and taking an adversarial role against the defendant. In rejecting these IAC/penalty phase sub-claims, the trial court found, *inter alia,* (1) Johnston took Mr. Hyman's comments out of context, (2) Johnston mischaracterized some of Mr. Hyman's comments, (3) Mr. Hyman did not take an adversarial role against the defendant, and (4) Mr. Hyman knew that Johnston would not be testifying and he wanted "the jury to witness interactions between [him and Defendant] that would be consistent with what the medical history was which was [Defendant] was someone who was a bit impetuous and a bit impulsive, someone who acted in an unsophisticated and immature fashion." (PCR V8/1598). The trial court's order states, in pertinent part:

> Defendant also argues Mr. Hyman took an adversarial role against Defendant when he allegedly glorified victim impact evidence and belittled Defendant in front of the jury, and that this is similar to the conduct found to constitute ineffective assistance of counsel in State v. Davis, 872 So. 2d 250 (Fla. 2004). **The Court disagrees and finds the conduct in Davis is distinguishable from Mr. Hyman's conduct in the present case. Likewise, the Court finds King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), which Defendant also cites in support of this ineffective assistance of counsel claim, is distinguishable from the present case.**
>
> **The Court also notes that Defendant and Dr. Cunningham both mischaracterize Mr. Hyman's *voir dire* reference to victim impact evidence by asserting that Mr. Hyman informed the venire that "*the evidence will show* how the friends and families lives...have been lessened." (See June 15, 2007, transcript pp. 713-14)**

(emphasis added). A review of the trial transcript reveals that Mr. Hyman did not tell the venire that the evidence would show any particular thing about the victim, her family, or her friends. Rather, Mr. Hyman informed the venire that there is something called victim impact evidence and explained it as follows:

> It is an opportunity for the relatives or friends of the woman who was killed to come to the court and testify to you, the jurors, whichever twelve of you are picked, and read a statement about how their lives have been lessened and how the world is less of a place because this person...has been removed from the planet...However, it comes with a very special instruction and some very special guidelines as to how you are to evaluate that. And what His Honor is going to tell you is that that is not an aggravating factor.

(See April 9, 2001, transcript pp. 1778-79). **The Court does not agree that Mr. Hyman "glorified" victim impact evidence, and does not find that he took an adversarial role against his client.**

* * *

A review of the trial transcript reveals that Defendant's argument takes counsel's comment out of context and places too great significance on counsel's word choice than is warranted. The alleged inappropriate reference was made during a discussion of the mental health mitigation the jury could expect to hear from the mental health experts. Mr. Hyman then stated,

> Now, when you're making this [sentencing] decision, you have to think to yourself, well, is this stuff just being made up two weeks before the trial when someone's life is on the line?
>
> Well, no, no there were actual documented records that go all the way back to the 1960s.

(See April 10, 2001, transcript pp. 1908-09). **For the next eleven pages of the trial transcript, Mr. Hyman went through a timeline of Defendant's life and**

discussed various hospitalizations for physical and psychological problems, incidents of behavioral difficulties, and Defendant's incarceration history. (See April 10, 2001, transcript pp. 1909-20). **Considering the context in which it was made and that it was only used once, the Court finds it is highly unlikely that Mr. Hyman's use of the word "stuff' affected the outcome of the penalty phase trial.**

Defendant argues another instance of belittling occurred at the close of Mr. Hyman's cross-examination of Dr. Pollock, when Hyman informed the Court he had no further questions then stated, "[h]old on. It's something earth shaking I got to find out first." (See April 11, 2001, transcript p. 2171). Dr. Cunningham testified that for counsel to turn to his client and say, "it's something earth shaking I've got to find out first[,] [i]s a sarcastic and demeaning response to do a defendant who is trying to get your attention." (See June 15, 2007, transcript pp. 717-19). . .

* * *

Mr. Hyman testified that he made the alleged sarcastic and or dismissive comments because the defense knew Defendant would not be testifying and he wanted "the jury to witness interactions between [him and Defendant] that would be consistent with what the medical history was which was [Defendant] was someone who was a bit impetuous and a bit impulsive, someone who acted in an unsophisticated and immature fashion." (See July 13, 2007, transcript pp. 1130-32). **Mr. Hyman felt that Defendant's demeanor and behavior in court was consistent with the medical diagnosis and his presentation that Defendant was less morally culpable because he has medical and physical deficits**. (See July 13, 2007, transcript pp. 1136-37). **Mr. Hyman also testified that he attempted to highlight these interactions with Defendant in closing argument because many seminars teach defense attorneys to "be aggressive when defending a death penalty case and encourage the jury...to vote for life because life is appropriate or vote for life for no reason at all and you, the jury, can use anything you want to look at to justify a life recommendation," and Hyman wanted the jury to witness**

> **something they could put into context with the expert medical testimony that was presented.** (See July 13, 2007, transcript pp. 1132-35). When questioned whether Mr. Hyman ever told Defendant he would engage in the above alleged inappropriate interactions and make the alleged improper statement in closing argument, Mr. Hyman testified:
>
>> **I didn't tell him every question I was going to ask and I didn't tell him every argument I was going to make. But I will tell you this much. Every question I did ask and every argument I did make was consistent with the strategy that he agreed would be in his best interest that we counseled him to follow, that I counseled him to follow, that I believed in my heart would be his best chance at getting a life recommendation.**
>
> (See July 13, 2007, transcript pp. 1227-28). **The Court finds that Mr. Hyman's use of the alleged sarcastic, belittling, and dismissive comments was part of his trial strategy, and given the strong presumption that counsel rendered adequate assistance, the Court finds that Defendant has failed to establish the acts identified above "were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. As such, relief is not warranted on this portion of Defendant's Claim VII.**
>
> **Because the Court finds Defendant has not established deficient performance with respect to any of the above allegations, Claim VII is denied.**
>
> (PCR V8/1595-1599, e.s.)

The trial court's fact-specific order is supported by competent substantial evidence. Attorney Hyman testified that the defense knew that Johnston was not going to testify, and therefore, Hyman attempted to "have the jury witness interactions" between Johnston and Hyman that would be consistent

with the medical history and reveal someone who was "a bit impetuous and a bit impulsive, someone who acted in an unsophisticated and immature fashion." (PCR V41/1356). Mr. Hyman considered Johnston's demeanor and behavior in court to be consistent with the medical testimony, the theory that the defendant was a person with a broken brain, rather than an evil person, and the defense presentation that Johnston was less morally culpable because of his medical and physical deficits. (PCR V41/1357; 1359). Mr. Hyman did not make light of mitigation nor take an adversarial role against his client. To the contrary, as the trial court noted, Mr. Hyman went through a detailed timeline of Johnston's life and discussed various hospitalizations for physical and psychological problems, incidents of behavioral difficulties, and Johnston's incarceration history. Furthermore, during closing argument, Mr. Hyman emphasized that Johnston would spend the rest of his life in prison, without parole; that Johnston's family members were straightforward and uniformly confirmed that there is "something wrong with him;" "something wrong in [his] head;" "it was over for [the defendant] when he was fourteen . . . [he] didn't have a chance;" Johnston's medical problems were long-standing and legitimate; Dr. Krop was already suspicious, in the 1980's, that there was "something really, really wrong with [Johnston], not that he chose to be an evil person;" "don't kill someone . . .

for something which they couldn't control, for something which they begged for help for and they couldn't give him, for something that he's sick in the head for;" and, in conclusion, Mr. Hyman implored, "please spare [the defendant's] life." (DA V21/2425-2452). Thus, Mr. Hyman repeatedly portrayed the defendant as someone with long-standing mental health problems.

CCRC also argues that this case was "winnable as evidenced by the 7-5 vote in Nugent I." (*Initial Brief of Appellant at 24*). Thus, both juries recommended the death penalty for the murder of Janice Nugent. Therefore, this "winnable" case resulted in two separate death recommendations and the "winnable" death recommendation each time fails to establish deficient performance *and* resulting prejudice under *Strickland*.

Next, Johnston relies on several quotes from Dr. Cunningham's assessment of trial counsel's performance. (*Initial Brief of Appellant at 26-29*). Johnston's extensive reliance on Dr. Cunningham is misplaced. First, the trial court found that both Johnston and Dr. Cunningham *mischaracterized* Mr. Hyman's *voir dire* reference and Johnston has not overcome this dispositive factual finding. Second, the trial court did not find that Mr. Hyman took an adversarial role against his client. Third, Dr. Cunningham's post-conviction critique of counsel's performance is irrelevant. See, *Provenzano v. Singletary*, 148 F.

3d 1327 (11th Cir. 1998) (stating, “[i]t would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the state courts, by the district court, and by this Court, each in its own turn.”)

Johnston also cites to *State v. Davis*, 872 So. 2d 250 (Fla. 2004) and *King v. Strickland*, 748 F.2d 1462 (11th Cir. 1984). (*Initial Brief of Appellant at 29-31*). The trial court found this case distinguishable from *Davis* and *King.* In *Davis*, trial counsel voiced expressions of racial prejudice against African Americans. In *King,* defense counsel attempted to separate himself from his client in closing argument, emphasized the reprehensible nature of the crime, and indicated he had reluctantly represented the defendant. In this case, Mr. Hyman called numerous witnesses to support the defense mitigation, sought to portray Johnston as mentally damaged and broken and implored the jury to return a life recommendation. “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.” *Howell v. State*, 877 So. 2d 697, 703 (Fla. 2004).

CCRC asserts "there can be no rational, reasonable justification for calling Max Allen Johnston to testify in light of the Fulgueira memorandum." (*Initial Brief of Appellant at 33*). This argument is rank second-guessing. As Mr. Hyman confirmed in post-conviction, Hyman knew that Max Allen Johnston had not been called in the original penalty phase because of "baggage" associated with his testimony. (PCR V41/1341). Mr. Hyman did not view the negative information in Ms. Fulgueira's memo as something the defense should run from, concluded that it "should be no one's surprise, and considered it as a correlation to the defendant's history. (PCR V41/1344-1345). By calling Max Allen Johnston, Hyman was able to present a better context for the source of Johnston's behavior. (PCR V41/1345).

Lastly, Johnston accuses the trial court of placing an unfair burden on the defense and being "unfair" in applying the "presumption that, under the circumstances, Mr. Hyman's failure to object might be considered sound trial strategy." (*Initial Brief of Appellant at 34-36*). This complaint is utterly specious. *Strickland* sets forth this presumption and the defendant bears the burden of pleading and proving his post-conviction claims under *Strickland*. See, *Conde v. State*, 2010 WL 455264, 3 (Fla. 2010); *Chavez v. State*, 12 So. 3d 199, 213 (Fla. 2009) ("The defendant has the burden of affirmatively

establishing each prong of the *Strickland* standard.”). Johnston must show both a deficient performance and “that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different.” *Occhicone v. State*, 768 So. 2d 1037 (Fla. 2000). In this case, the powerful aggravating factors included that (1) defendant was previously convicted of a felony involving the use or threat of violence to the person and (2) the capital felony was especially heinous, atrocious, or cruel (HAC). These were balanced against the statutory mitigating factor (the defendant’s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired) and 26 non-statutory mitigating factors. In post-conviction, Johnston has failed to demonstrate both a deficiency of counsel *and* that, without the alleged errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different. The trial court’s comprehensive fact-specific order should be affirmed.

ISSUE II

THE IAC/PENALTY PHASE CLAIM (Mental Health Mitigation)

This is an IAC/penalty phase claim based on the alleged failure to investigate and present mental health mitigation.

Although Johnston cites to the guilt phase in the title of his second issue, his argument focuses, entirely, on the penalty phase. (*Initial Brief of Appellant* at pages 37-47).

In reviewing this *Strickland* claim, the Court employs a mixed standard of review, deferring to the post-conviction court's factual findings that are supported by competent, substantial evidence, but reviewing legal conclusions *de novo*. See, *Conde v. State*, 2010 WL 455264, 2 (Fla. 2010), citing *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

Johnston spends the bulk of his argument (*Initial Brief of Appellant* at 37-45) repeating Dr. Cunningham's post-conviction critique. In denying this IAC/penalty phase claim, the trial court unraveled Johnston's allegations, addressed Dr. Cunningham's testimony, and ultimately concluded, "even if the alleged additional mitigation had been presented during the penalty phase, there is no reasonable probability that the balancing of the aggravating and mitigating factors would have resulted in a life sentence." (PCR V8/1576). The trial court's order states, in pertinent part:

> . . . **On cross-examination, Dr. Cunningham admitted that there was a potential for harm to the mitigation case had Dr. Woods testified that Defendant was a serial killer and it looked more like a pattern and compulsive rather than impulsive behavior.** (See June 15, 2007, transcript p. 736). **Dr. Cunningham also acknowledged that during Mr. Hyman's questioning of Dr. Maher at trial, Dr. Maher produced a photo of a PET**

scan image and explained it for about two and a half pages of the trial transcript. (See June 15, 2007, transcript pp. 784-85, and April 11, 2001, transcript pp. 2271-74). **He also admitted that Dr. Maher was allowed to tell the jury that he recognized Dr. Woods as an expert in the field of PET scan technology.** (See June 15, 2007, transcript p. 785, and April 11, 2001, transcript pp. 2278-79).

As to the failure to elicit important testimony from medical and mental health experts, Dr. Cunningham testified that Dr. Harry Krop's testimony in the Nugent case was lacking much of the compelling detail that his testimony had in the Coryell case. (See June 15, 2007, transcript p. 579). . . .

* * *

On cross-examination, Dr. Cunningham admitted that Dr. Krop testified at trial that his initial contact with Defendant was on an unrelated case in 1988 at which time he learned Defendant had a very long history of behavioral problems starting at an early age and that Defendant had suffered head injuries at ages six and ten. (See June 15, 2007, transcript pp. 795-96 and April 10, 2001, transcript p. 2040). **Dr. Cunningham admitted that Mr. Hyman elicited the following relevant testimony from Dr. Krop: the information Dr. Krop learned in 1988; that Dr. Krop had performed a battery of neuropsychological tests on Defendant in 1997; that Defendant performed abnormally on two tests and within normal limits on others causing Dr. Krop to have more confidence that Defendant was making a good effort; Dr. Krop's opinion that Defendant had frontal lobe impairment; Dr. Krop's opinion that the PET scan reports were corroborative of frontal lobe impairment; a description of how the frontal lobe works and that frontal lobe impairment is associated with problems with impulse control; Dr. Krop's diagnosis that Defendant suffers from frontal lobe syndrome which is organic brain damage; that Defendant's organic brain damage is likely chronic and has been longstanding at least since childhood; and Dr. Krop's opinion that Defendant's ability to conform his behavior to the requirements of the law is impaired by his organic**

brain syndrome. (See June 15, 2007, transcript pp. 796-800 and April 10, 2001, transcript pp. 2040, 2053-55, 2059, 2071-78).

Moreover, at trial Dr. Krop testified that he conducted tests to assess Defendant's overall intellectual ability and Defendant's IQ was 104, which is in the average range of intellectual ability. (See April 11, 2001, transcript p. 2053). He also testified that he administered tests to measure memory, hand-eye coordination or "perceptual motor," a person's ability to express himself and receive information or an "aphasia screening examination," and two tests that specifically measure frontal lobe functions, the "categories test" and the "card sort test." (See April 11, 2001, transcript pp. 2053-54). As to the three manifestations of frontal lobe impairment, Dr. Krop testified that the frontal lobe is responsible for "getting something started," "stopping something once it starts," and impulse control. (See April 11, 2001, transcript p. 2072).

As to the alleged failure to elicit important testimony from medical and mental health experts, Dr. Cunningham also testified that Dr. Diana Pollock's findings were particularly important because they identified legitimate neurological symptoms that Defendant was experiencing prior to the offenses and provide strong support that Defendant suffers from brain dysfunction. (See June 15, 2007, transcript p. 581). . . .

* * *

On cross-examination, Dr. Cunningham admitted that Dr. Pollock examined Defendant between March 1997 and July 1997, which was after the murder of Ms. Nugent. (See June 15, 2007, transcript p. 780). **Despite his uncertainty as to who elicited such testimony, Dr. Cunningham admitted on cross-examination that Dr. Pollock's testimony that Defendant had a history of passing out at work and in the car assisted in the presentation of mitigating information to the jury.** (See June 15, 2007, transcript pp. 781-82). **Indeed, during Mr. Hyman's cross-examination of Dr. Pollock at trial, he elicited that Defendant had passed out in his**

office and was admitted to Morton Plant Hospital, and after Defendant was discharged from Morton Plant he passed out while driving and ended up in St. Joseph's Hospital. (See April 11, 2001, transcript p. 2160). **Mr. Hyman also asked Dr. Pollock whether she thought Defendant was faking his seizures or making them up, and she responded no.** (See April 11, 2001, transcript p. 2168). **In addition, Mr. Hyman testified at the evidentiary hearing that he remembered Dr. Pollock as being a completely reluctant witness, who had treated Defendant in the past completely unrelated to this case, and "she was not remotely interested in helping either side."** (See July 13, 2007, transcript p. 1126).

As to the alleged failure to elicit important testimony from medical and mental health experts, Dr. Cunningham also testified that Dr. Maher testified about . . . six important findings in the Coryell case but not in the Nugent case . . .

* * *

On cross-examination, Dr. Cunningham admitted that trial counsel elicited from Dr. Maher some good mitigating information and there were "many things that [Dr. Maher] described that are relevant in nature." (See June 15, 2007, transcript p. 788). **Dr. Cunningham admitted that Mr. Hyman elicited from Dr. Maher that Defendant suffered from a seizure disorder of uncertain character, frontal lobe impairment, and organic impairment and Dr. Maher found cognitive dysfunction to be present in Defendant.** (See June 15, 2007, transcript pp. 790-91, and April 11, 2001, transcript pp. 2299-2301). **Moreover, at trial Dr. Maher testified that his finding of the presence of a cognitive dysfunction is "particularly related to the issue of how [Defendant] behaves under circumstances of high emotionality and high stress and specifically that he tends to behave in an impulsive manner under those circumstances."** (See April 11, 2001, transcript pp. 2299-2301). **Mr. Hyman also elicited from Dr. Maher that "the frontal lobe is the part of the brain that sorts through feelings, impulses, desires, ideas and makes decisions about what's a good idea and what is not a good idea,**

particularly with regard to moral and ethical issues and behavior." (See April 11, 2001, transcript p. 2301). **Dr. Maher went on to explain that with the frontal lobe "we're dealing with shades of gray. It's not an either or thing. The frontal lobe doesn't shut things off or allow them to go. It slows things down. It introduces other ideas."** (See April 11, 2001, transcript pp. 2302-03).

Dr. Cunningham testified that he relied on the tests already conducted by Dr. Krop, Dr. Maher, and Dr. Woods in forming his opinions and that he found their work and test results to be reliable, but he thought there were elements that could have been expanded on with additional investigative social history support and with additional records. (See June 15, 2007, transcript pp. 774-76). **When asked whether he objected to any of the conclusions drawn by these three doctors, Dr. Cunningham responded,**

> I accept Dr. Wood's opinion about the PET scan. I'm not in a position to critic that...and I'm not recalling every opinion expressed by the doctors but as I read their testimony there's nothing that comes to me now that was jarring to say that I would actively dispute that.

(See June 15, 2007, transcript pp. 776-77).

As to the defense failure to elicit testimony regarding evidence supportive of the presence of neurological condition and brain functioning impairment, Dr. Cunningham testified that Defendant's medical records "are replete with descriptions of symptoms and of treatment for conditions that have neurological implications," and they should have been put before the jury in testimony because he could "think of nothing more relevant and credible than historic medical records detailing such neurological findings." (See June 15, 2007, transcript pp. 630-31, 634-35). He then summarized Defendant's history of neurological symptoms and seizure disorder as evidenced by medical notes made by personnel and/or physicians at the Hillcrest Hospital, Acute Care Clinic, various Department of Corrections' Correctional Institutions, Morton Plant Hospital, Cigna Health Care, St. Joseph's

Hospital, Morgan Street Jail, Orient Road Jail, and Falkenburg Road Jail. (See June 15, 2007, transcript pp. 630-48).

On cross-examination Dr. Cunningham admitted that he did not find Defendant to be a credible historian; that an aspect of Defendant's history that Dr. Cunningham perceived based on his review of the source materials is that Defendant has lied routinely from childhood; and statements of Defendant's family members support this aspect as well as that Defendant was a manipulator. (See June 15, 2007, transcript pp. 740-41). **Dr. Cunningham also admitted trial counsel elicited from Dr. Maher that, among other things, he relied on the medical history of Defendant including Hillcrest medical records, jail and prison medical records, Dr. Pollock's examination, Dr. Wood's test results, and Saint Joe's and Morton Plant Hospital medical records, conferred with Dr. Krop, and reviewed his findings and tests.** (See June 15, 2007, transcript pp. 783-85, and April 11, 2001, transcript pp. 2268-70). **In addition, at trial Mr. Hyman elicited from Dr. Maher that while at Hillcrest, an EEG was performed on Defendant to look for seizure disorder and the results yielded "some vague indications" and "to some extent [Defendant] fit into the gray area. Sometimes it's described as nonspecific showing."** (See April 11, 2001, transcript pp. 2283-84).

As to the failure of the defense to elicit testimony regarding the nexus of Defendant's brain impairment and his criminal conduct, . . .

* * *

On cross-examination, Dr. Cunningham admitted that due to his limited discussion with Defendant regarding the Nugent murder, he cannot opine as to whether the murder was a result of reactive impulsivity although there were elements of judgment impulsivity. (See June 15, 2007, transcript pp. 738-39). **He further admitted that, "other than [Defendant's] statements that he couldn't remember anything and maybe it was his alter that did this Dwight," he never discussed with Defendant his state of mind at the time of the homicide**

of Janice Nugent. (See June 15, 2007, transcript p. 738). **Dr. Cunningham also agreed that because continued, detailed questioning of the victim from the 1974 kidnapping and assault could be perceived by a jury as further victimizing the victim and inflaming the jury against the defense, that would be a consideration of whether to elicit that information from the victim or from the expert called who has reviewed her prior testimony and could give a context for what happened next.** (See June 15, 2007, transcript pp. 760-62). When Mr. Hyman was asked why he did not spend more time cross-examining this prior victim, he responded:

> [A]t the time, it never occurred to me and I never had any discussion with Mr. Littman that we would get anything productive out of increasing the details and increasing the bad news that came from the. . . prior victims [and] it would have been inconsistent with what I was trying to present which was concentrate on. [Defendant's] physical and medical deficits and not concentrate on his behavior.

(See July 13, 2007, transcript pp. 1129-30).

Dr. Cunningham also admitted that Mr. Hyman elicited Dr. Maher's opinion that Defendant did not suffer from antisocial personality disorder and there were medical explanations for Defendant's antisocial acts. (See June 15, 2007, transcript pp. 791-92, and April 11, 2001, transcript pp. 2311-13). **Indeed, Dr. Maher testified at length as to the differences between antisocial personality disorder and dissociative disorder and explained that the dissociative disorder is a brain functioning diagnosis whereas antisocial personality disorder is a personality disorder.** (See April 11, 2001, transcript p. 2311). **Dr. Cunningham also admitted that Dr. Maher testified Defendant suffered from organic brain impairment and Dr. Maher believed Defendant's negative conduct in life is primarily indicative of this frontal lobe disorder.** (See June 15, 2007, transcript p. 792, and April 11, 2001, transcript pp. 2315-16).

As to the defense failure to offer evidence of Defendant's broader aggressive reactivity, Dr. Cunningham testified that there were "descriptions by his family members of startling levels of aggressive reactivity that he had displayed in the past toward them, that this wasn't simply something that came out in a sexual offense context, but was present more broadly." (See June 15, 2007, transcript pp. 679-80)…

*   *   *

As to the defense's failure to elicit testimony regarding dysfunctional factors in Defendant's family of origin,. . .

*   *   *

. . . on cross-examination, Dr. Cunningham admitted there was no evidence that Defendant was ever physically abused or beaten by his father when his father was drunk. (See June 15, 2007, transcript p. 754).

As to the failure to present testimony regarding ADHD, **Dr. Cunningham testified that there is evidence that Defendant has ADHD but no one prior to Dr. Cunningham had ever diagnosed Defendant with ADHD**. (See June 15, 2007, transcript pp. 589-90). **Dr. Cunningham was not able to identify any specific additional materials than what was available to the mental health experts at trial that he was provided with and reviewed and that might account for him being able to make the ADHD diagnosis while the mental health experts at trial did not.** (See June 15, 2007, transcript pp. 592-93). **Because post conviction counsel conceded that he did not have an expert to testify that despite the absence of an ADHD diagnosis, trial counsel should have known about Defendant's ADHD and should have managed his mental health experts so as to include a diagnosis of ADHD and presentation of such at trial, this Court disallowed Dr. Cunningham's testimony regarding ADHD.** (See June 15, 2007, transcript pp. 588-602, 611). **Trial "counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as**

complete as others may desire." Darling v. State, 966 So. 2d 366, 377 (Fla. 2007). As none of the medical or mental health experts who evaluated Defendant prior to trial reached an ADHD diagnosis, trial counsel cannot be deemed ineffective under Strickland for failing to present testimony regarding ADHD. See id.

As to the defense failure to introduce testimony regarding Defendant's potential for positive and non-violent adjustment to prison, including his pattern of conduct in prison, . . .

* * *

. . . On cross-examination, **Dr. Cunningham admitted that had testimony been elicited regarding Defendant's potential for positive and non-violent adjustment to prison, this would have opened the door to introduction of Defendant's acts of potential violence, misconducts, and infractions, including Defendant's having been disciplined for having a weapon in his jail cell after having been convicted and sentenced to death for the murder of Leanne Coryell, which information Dr. Cunningham acknowledged the jury could react negatively to.** (See June 15, 2007, transcript pp. 725-28). **Moreover, the Court notes that the sentencing court already accepted as non-statutory mitigation that Defendant excelled in a prison environment.** (See August 22, 2001, Sentencing Order, attached).

As to Defendant's assertion about his split personality "Dwight," Dr. Cunningham, also testified that he found Defendant's description of his multiple personalities to be highly improbable and his opinion is that it is unlikely Defendant was suffering from multiple personality disorder. (See June 15, transcript pp. 745-46). **Ms. Fulgueira also testified that in February of 1998, Defendant told her about this other personality and that he had it since childhood, and throughout her work on behalf of Defendant, considerable effort was made to investigate Defendant's claim of having multiple personalities, including informing Dr. Maher and Dr. Krop about these other personalities.** (See July 12, 2007, transcript p. 993,

State's exhibit #4). **She also testified that she and Dr. Krop had a meeting with Defendant on August 29, 2000, during which Defendant claimed to have multiple personalities and Dr. Krop explained to Defendant that he was confusing multiple personality with a behavior that he dislikes in himself so he gives it a name.** (See July 12, 2007, transcript pp. 1015-17, State's exhibit #15).

After reviewing Claim IV, the testimony, evidence, and argument presented at the evidentiary hearing, the written closing arguments, the applicable law, the court file, and the record, **the Court finds Dr. Cunningham's opinion regarding what information the defense should have presented in support of mitigation at the second penalty phase is irrelevant. See Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998).**

In imposing a death sentence, the Court found and weighed two aggravating factors (Defendant was previously convicted of a violent felony and the capital felony was especially heinous, atrocious, or cruel (HAC)), one statutory mitigating factor (the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired), and the following twenty-six nonstatutory mitigating factors:

1) defendant has a long history of mental illness (slight weight);
2) defendant suffers from a dissociative disorder (no weight);
3) defendant suffers from seizure disorder and blackouts (no weight);
4) defendant did not plan to commit the offense in advance (no weight);
5) defendant's acts are closer to that of a man-child than that of a hard-blooded killer (no weight);
6) defendant is haunted by poor impulse control (no weight);
7) defendant is capable of strong, loving

relationships (slight weight);
8) defendant excels in a prison environment (slight weight);
9) defendant could work and contribute while in prison (slight weight);
10) defendant has extraordinary musical skills (no weight);
11) defendant obtained additional education while he was in prison (no weight);
12) defendant served in the U.S. Air Force and was honorably discharged (slight weight);
13) defendant received a certificate of recognition from the Secretary of Defense for services rendered (slight weight);
14) defendant excelled and was recommended for early termination while on parole (slight weight);
15) defendant was a productive member of society after his release from prison (slight weight);
16) defendant turned himself in to the police (slight weight);
17) defendant demonstrated appropriate courtroom behavior during trial (slight weight);
18) defendant has tried to conform his behavior to normal time after time (no weight);
19) defendant has a special bond with children (no weight);
20) defendant has the support of his mother, brother, and sister (slight weight);
21) defendant has been a good son, brother, and uncle (no weight);
22) defendant has a mother, sister, three brothers, three nieces, and two nephews who love him very much (slight weight);
23) defendant maintained a Florida driver's license (no weight);
24) defendant maintained credit cards and a bank account (no weight);
25) defendant can be sentenced to multiple consecutive life sentences and will die in prison (no weight); and
26) the totality of the circumstances does not set this murder apart from the norm of other murders (no weight).

(<u>See</u> August 22, 2001, Sentencing Order, attached).

> **Therefore, the Court finds even if the alleged additional mitigation had been presented during the penalty phase, there is no reasonable probability that the balancing of the aggravating and mitigating factors would have resulted in a life sentence. As such, Claim IV is denied.**

(PCR V8/1558-1576, e.s.)

As the trial court's comprehensive final order demonstrates, the trial court carefully addressed Johnston's IAC/penalty phase (mental health mitigation) claims and the trial court's order is supported by competent substantial evidence. In faulting the trial court's rejection of the Dr. Wood sub-claim, Johnston essentially ignores the defense memos on the harmful aspect -- that a clinical term for Johnston would be obsessive/compulsive or serial killer. Trial counsel cannot be ineffective where the alleged mitigation may be fundamentally damaging to the defense. See, *Chavez v. State*, 12 So. 3d 199, 209 (Fla. 2009).

Next, Johnston complains that the trial court placed "an unnecessary requirement and burden" on the defendant in finding that "[b]ecause post conviction counsel conceded that he did not have an expert to testify that despite the absence of an ADHD diagnosis, trial counsel should have known about Defendant's ADHD. . ." (*Initial Brief of Appellant* at 46). As previously noted, under *Strickland*, the burden belongs to the defendant. *Conde*, *supra*. Furthermore, Dr. Cunningham knew that defense

counsel had called both Dr. Maher, a board-certified forensic psychiatrist, and Dr. Krop, a board certified neuropsychologist. Dr. Cunningham is not a neuropsychologist and did not do any neuropsychological testing. In forming his opinions, Dr. Cunningham relied on the tests already conducted by Dr. Krop, Dr. Maher, and Dr. Wood. (PCR V37/985). Dr. Cunningham did not disagree with the conclusions of Dr. Wood, Dr. Krop, or Dr. Maher.[4] (PCR V37/986-987). Dr. Cunningham was aware that Dr.

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[4]Dr. Cunningham agreed that Johnston's penalty phase counsel, Mr. Hyman, presented testimony from Dr. Maher to establish that Dr. Maher also relied on the Hillcrest medical records, jail and prison medical records, Dr. Pollock's examination, St. Joseph's and Morton Plant hospital records. Dr. Maher also conferred with Dr. Krop and reviewed his findings and test results, and reviewed Dr. Wood's test results. (PCR V37/994-995). Several pages of the penalty phase transcript were devoted to Dr. Maher's description and explanation of the PET scan, CAT scan, and EEG. Dr. Maher also told the jury that he recognized Dr. Wood as an expert in the field of PET scan technology. (PCR V37/995). Dr. Cunningham agreed that Mr. Hyman presented some "good" mitigating information from Dr. Maher, including that Johnston suffered from organic brain injury or brain damage (frontal lobe impairment), Johnston's seizure episodes worsened as he got older; Dr. Maher consulted with Dr. Krop, interviewed Johnston, reviewed his medical history, social history, and Dr. Maher opined that Johnston did not have an anti-social personality disorder. (PCR V37/998-1002). Dr. Cunningham also acknowledged that Dr. Krop told the penalty phase jury that he learned, in 1988, that Johnston had a long history of behavior problems, which started at an early age. The jury knew that Johnston tested abnormally on two neuropsychological tests which pertained to frontal lobe function. (PCR V37/1005-1007). Mr. Hyman elicited testimony from Dr. Krop that Johnston had frontal lobe impairment, organic brain syndrome (frontal lobe damage), and the PET scan reports were indicative or corroborative of that frontal lobe impairment. Mr. Hyman also presented Dr. Krop's opinion – that as a result of the defendant's organic brain disorder, his ability to conform his behavior to the requirements of the law would be impaired. (PCR

Diana Pollock saw Johnston in March of 1997 through July, 1997; and, at the penalty phase, Dr. Pollock testified that there were no abnormalities in the MRI, CAT scan, spinal tap, or EEG. (PCR V37/990-991). Dr. Cunningham was the first, and only expert, to reach a finding of ADHD. (PCR V37/988). "At the time of trial, any alleged "ADHD" theory was unsupported by *any* of the experienced mental health experts. Defense "counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire." *Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007).

Finally, Johnston faults the trial court's conclusion that Dr. Cunningham's opinion on trial counsel's performance is irrelevant. (PCR V8/1575, citing *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998). Johnston argues that Dr. Cunningham's opinion should be deemed relevant in light of *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842 (2007). In *Panetti*, Dr. Cunningham did not seek to offer any impermissible opinion on trial counsel's representation; instead, Dr. Cunningham, a clinical and forensic psychologist, offered an opinion on the issue of Panetti's *competency*. In this case, Dr. Cunningham's opinion was aimed at trial counsel's performance, a

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V37/1008-1010).

matter which Dr. Cunningham was not qualified to address and one which was irrelevant under *Provenzano*. Furthermore, in *Darling v. State*, 966 So. 2d 366, 378 (Fla. 2007), this Court rejected another capital defendant's IAC-penalty phase/mental health mitigation claim which was based, in part, on Dr. Cunningham's post-conviction assessment. Here, as in *Darling*, much of what Dr. Cunningham offered was cumulative to the testimony presented and trial counsel was not ineffective in relying on the evaluations done by well-qualified mental health experts. In this case, as in *Darling*, the defendant's IAC/mental health mitigation claim was correctly denied.

ISSUE III

THE GIGLIO CLAIM
(Based on Dr. Julia Martin)

In this claim, CCRC repeats their nefarious accusations against the medical examiner as an alleged violation of *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S. Ct. 763 (1972). In denying this *Giglio* claim, the trial court specifically found "*Dr. Martin's testimony to be credible and consistent, and that Defendant has failed to present any evidence that Dr. Martin testified falsely at trial*." (PCR V8/1553-1554). Johnston's outrageous claim is unsupported by the evidence and affirmatively contradicted by the record and the trial court's findings.

A *Giglio* violation occurs at trial when (1) the prosecutor

presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. See, *Guzman v. State*, 941 So. 2d 1045, 1050 (Fla. 2006). Because *Giglio* claims present mixed questions of law and fact, this Court defers to those factual findings supported by competent, substantial evidence, but review *de novo* the application of the law to the facts. *Sochor v. State*, 883 So. 2d 766, 785 (Fla. 2004).

This issue was raised below as a hybrid *Brady*/*Giglio* claim and relief was denied after an evidentiary hearing. The trial court's order of December 31, 2008, states, in pertinent part:

> In Claim II, Defendant alleges that his due process and equal protection rights were violated because the State knowingly misrepresented facts to the Court to ensure that certain prejudicial evidence would be admitted at trial under the William's [sic] Rule. **Specifically, Defendant alleges the State committed a Giglio violation by eliciting false testimony from the medical examiner, Dr. Julia Martin, that there was a 51% or greater probability that a belt was used to beat the victim in this case.** Defendant asserts that Dr. Martin's April 3, 2000, and March 15, 2006, deposition testimony, and various entries in her Telephone and Contact Log Report [FN5] (contact log) prove that her "true opinion" was that the bruises were caused by something other than a belt. **Defendant also alleges the State committed a Brady violation by not disclosing this contact log until the post conviction proceedings.**
>
> [FN5] This contact log is apparently the October 2, 2000, Memorandum to which Defendant refers in his Motion.
>
> **The State denies Defendant's assertion that the prosecutor misrepresented to the Court Dr. Martin's**

opinions concerning the cause of the various bruises, and denies Defendant's assertion that the State suborned Dr. Martin's alleged perjury by pressuring her to testify falsely at trial.

Brady Claim

*   *   *

In this case, the information Defendant alleges was suppressed or withheld, namely that Dr. Martin's "true opinion" was that items other than a belt were used to beat the victim, was disclosed and available to the defense prior to and at the time of trial. While it is unclear from the record whether the actual contact log was disclosed prior to trial, the information contained in the September 27, 2000, entry was disclosed roughly one week before trial. On September 28, 2000, the State filed its Additional Notice of Discovery, which disclosed, in pertinent part, the following:

> **On the afternoon of September 27, 2000, associate Medical Examiner, Dr. Julia Martin compared photographs of the patterned injuries to the buttocks of Janice Nugent to the vacuum hose and cord retrieved. . .from the floor of Ms. Nugent's bedroom. In Dr. Martin's opinion, the patterns of several of the injuries to Ms. Nugent's buttocks are consistent with the structure of various parts of the vacuum hose and cord.**

(See Additional Notice of Discovery, attached). **This accurately summarizes Dr. Martin's comments in the contact log. In response, the defense filed Defendant's Motion for Court to Reconsider Williams Rule Order, in which Defendant argued that the disclosure demonstrates that after comparing the vacuum hose and cord to the victim's bruises, Dr. Martin no longer believed the pattern bruises were caused by a belt, but instead believed they were caused by the vacuum cleaner hose and/or cord.** (See Defendant's Motion for Court to Reconsider Williams Rule Order, attached). **As such, not**

only did Defendant possess the alleged suppressed information at the time of trial thereby precluding the finding of a Brady violation, he urged the Court to reconsider its William's Rule Order based on the information. Because Defendant has already raised this argument regarding Dr. Martin's "true opinions," it is procedurally barred during these post conviction proceedings and must be denied.

However, even assuming the procedural bar does not apply, this claim is without merit. Neither the September 27, 2000, entry, nor any other entry in the contact log, indicates that Dr. Martin had formed "true opinions" about the cause of the bruises or what her "true opinions" may have been. Indeed, Dr. Martin's evidentiary hearing testimony refutes Defendant's allegation that the contact log contained her "true opinions." The following exchange took place when Dr. Martin was asked about the September 27, 2000, entry:

Hendry: Did it appear that in these - in this section here, you came to opine the vacuum cleaner hose and attachments were used to strike the victim?

Dr. Martin: don't know that I opined that.

Hendry: How do you mean?

Dr. Martin: Just what I said. I don't know that I opined that.

Hendry: You're saying that you're not opining in this section?

Dr. Martin: I'm merely stating things. These are comments.

Hendry: As you're stating these things. Are these your opinions?

Dr. Martin: I don't know that I opined that. I'm merely making statements of what occurred during the meeting.

(See December 1, 2006, transcript p. 211). Dr. Martin's testimony during the following exchange

further elucidates the purpose of the contact log and what can and cannot be properly gleaned from it:

> Hendry: Okay. So it appears that in this note of 9/27/2000, you did not know what may have caused the injuries [to] the right side, correct?
>
> Dr. Martin: I don't think it says that.
>
> Hendry: Is there any opinion here wherein you say that [a] belt was used to a 51 percent or greater probability?
>
> Dr. Martin: No. And it also doesn't say the curling iron or wire or cord or whatever was also 51 percent or greater. It doesn't say that either.
>
> Hendry: Okay. Was a curling iron used to cause this injury?
>
> Dr. Martin: My opinion in trial testimony was that it was from a belt.
>
> Hendry: Uh-huh.
>
> Dr. Martin: So that would be, no, it wasn't.
>
> Hendry: I'm asking you about the probability that a curling iron was used to cause this injury?
>
> Dr. Martin: Evidently I didn't think so or I would not have testified that it was a belt in court.

(See December 1, 2006, transcript p. 216). **As Defendant has not presented any other evidence this issue, and based on Dr. Martin's evidentiary hearing testimony, Defendant is unable to establish that the contact log represents Dr. Martin's "true opinions" regarding the cause of the victim's bruises or that her "true opinions" differed from her trial testimony. In addition, because the alleged suppressed information was available to trial counsel and Defendant at the time of trial, there is no Brady violation. Thus, Defendant's Brady claim is denied.**

Giglio Claim

*   *   *

In this case, Defendant has failed to demonstrate that Dr. Martin's trial testimony was false and his Giglio claim is therefore without merit. Contrary to Defendant's assertion, Dr. Martin has testified consistently throughout this case [FN6] about the various different bruises on the victim's buttocks and her opinions regarding their possible and likely causes. When Dr. Martin testified at trial that there was a 51% or greater probability that a belt was used, she was referring to a specific injury on the right buttock. Her opinion with regard to this particular injury has remained consistent and nothing in the contact log or her deposition or evidentiary hearing testimony indicates otherwise.

> [**FN6] Beginning with her pre-trial April 3, 2000 deposition and trial testimony, to her post-trial March 15, 2006 deposition and December 1, 2006, evidentiary hearing testimony.**

At the evidentiary hearing, Dr. Martin testified that she had no independent recollection of this case and that she stands by her trial testimony. (See December 1, 2006, transcript p. 213). Defendant asserts that because Dr. Martin was never presented with a belt for comparison, she could not have truthfully opined that a belt caused the bruises and the reason she testified to a 51% or greater probability that it was a belt was because the prosecutor pressured her to do so in an attempt to save his favorable ruling on the William's Rule evidence. However, this assertion is refuted by Dr. Martin's evidentiary hearing testimony, as indicated by the following exchange:

> Hendry: How do you reach that conclusion that a belt was more likely than not used to cause that injury? How do you arrive at that?
>
> Dr. Martin: As a forensic pathologist, I'm trained in pattern injury examination analysis.

> It’s like with a gunshot wound. I don’t have to have a bullet in the body to say this injury is a gunshot wound. This is the classic pattern of a belt.
>
> Hendry: Okay. Classic pattern of a belt?
>
> Dr. Martin: There’s obviously, you know, you can have different appearances of a belt, but this is one of the very typical patterns that a belt will produce.

(See December 1, 2006, transcript p. 199). **This testimony is consistent with her previous deposition testimony, trial testimony, and contact log notes.**

Moreover, Dr. Martin specifically testified that she would not change or tailor her opinion as a forensic pathologist to accommodate law enforcement or in response to pressure from trial counsel. (See December 1, 2006, transcript pp. 226-27). **Dr. Martin testified that she did not recall receiving a telephone call from the prosecutor wherein he allegedly attempted to pressure her to testify falsely to a 51% or greater probability a belt was used to cause the bruises. (See December 1, 2006, transcript p. 231). However, she further testified that even if such a call took place, she would not have been influenced to change her opinion, as evidenced by the following exchange with post conviction counsel:**

> Hendry: Okay. Hypothetically, let’s assume that a phone call was made to you from the prosecutor in this case and he said, I need to know 51 percent or greater probability or more that a belt was used to beat this victim. . .Might such a statement to you, might that influence your testimony with regards to your opinion as to what caused these injuries?
>
> Dr. Martin: No.
>
> Hendry: Why not?
>
> **Dr. Martin: Because I’m an independent person. I’ve been trained in forensic pathology, and I**

> **give—my opinions are my opinions. I'm not influenced or pressured by others, as I think you should know by now.**

(See December 1, 2006, transcript pp. 231-32).

> **The Court finds Dr. Martin's testimony to be credible and consistent, and that Defendant has failed to present any evidence that Dr. Martin testified falsely at trial. As such, Defendant's Giglio claim is denied. Based on this Court's finding that Defendant's Brady and Giglio claims both lack merit, Claim II is hereby denied.**

(PCR V8/1548-1554, e.s.)

Johnston's renewed argument is replete with irresponsible accusations, insinuations and *ad hominem* attacks. (*Initial Brief of Appellant* at 48-56). It should be stricken. There was no testimony which supported CCRC's claim, no showing of any misrepresentation, and no evidence that Dr. Martin changed her opinions, or that she was forced, pressured, coerced, or encouraged to do so.

Moreover, Johnston's *Giglio* claim is affirmatively contradicted, as the trial court found. Dr. Julia Martin unquestionably stood by her original trial testimony and confirmed that nothing in post-conviction caused her to change any opinions or testimony at trial. (PCR V33/55-57; 83; 90-91). Dr. Martin would not change or tailor her forensic opinion either to accommodate law enforcement or in response to pressure from counsel. (PCR V33/85; 89-91). This claim is meritless.

Essentially, CCRC seeks to resurrect a procedurally-barred

Williams' rule claim. Johnston's *Williams'* rule claim was addressed at length on direct appeal and this Court held that the trial court did not abuse its discretion by finding that the Coryell murder was admissible as *Williams'* rule evidence. *Johnston*, 863 So. 2d at 283. In post-conviction, the trial court correctly found that the defendant may not relitigate his *Williams'* rule claim, which was rejected both at trial and on direct appeal. See, *Jones v. State*, 949 So. 2d 1021 (Fla. 2006). Any attempt to relitigate either the *Williams'* rule claim or a sufficiency-of-the-evidence claim in post-conviction is procedurally barred. See, *Howell v. State*, 877 So. 2d 697, n.3 (Fla. 2004).

ISSUE IV

THE IAC/GUILT PHASE CLAIM
(Based on Johnston's testimony at Coryell Penalty Phase)

Although styled as an IAC/Guilt Phase Claim in this case (Nugent), this issue is, instead, based on Johnston's previous testimony at the Coryell penalty phase. In denying post-conviction relief, the trial court found, "[a]s Defendant has not identified or even alleged any specific conduct of trial counsel during the guilt or penalty phase of the Nugent trial constituting deficient performance, . . . [the] Defendant has failed to meet his burden of proof in establishing ineffective assistance of counsel." (PCR V8/1577). Moreover, as Mr.

Registrato (penalty phase counsel in Coryell) confirmed, Johnston's decision to testify at the Coryell penalty phase was against counsel's advice, but Johnston was adamant about testifying and apologizing to the victim's mother because he thought it would help him. (PCR V40/1253-1255).

In denying this post-conviction claim, the trial court's order of December 31, 2008 states, in pertinent part:

> In this claim, Defendant alleges his trial counsel from the Coryell case was ineffective for giving ill-advice regarding Defendant's right to testify. Specifically, Defendant alleges that trial counsel failed to inform him of the dangers in taking the stand and failed to warn him of the possibility that a confession in the Coryell case might be introduced against him during the Nugent guilt phase. Further, Defendant avers that had he been warned that a confession in the Coryell case might be used against him in a later proceeding and might be used as a basis for admitting William's Rule evidence, Defendant would not have testified and admitted guilt during the penalty phase of the Coryell case.
>
> All of Defendant's arguments in Claim V involve alleged deficient performance in the Coryell case. All of Defendant's evidence, including the testimony elicited at the evidentiary hearing, concerns events that occurred prior to the Nugent trial. Indeed, these events occurred *prior* to Defendant even being charged with the Nugent murder. [FN11] **Defendant has failed to demonstrate how trial counsel's alleged deficient performance in the Coryell case affected trial counsel's performance in the Nugent case. As Defendant has not identified or even alleged any specific conduct of trial counsel during the guilt or penalty phase of the Nugent trial constituting deficient performance, the Court finds that Defendant has failed to meet his burden of proof in establishing ineffective assistance of counsel. Strickland, 466 U.S. at 690** (stating that a "defendant making a claim of ineffective assistance

must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment").

Accordingly, Claim V is denied.

> [FN11] Defendant admitted at the evidentiary hearing that at the time of the discussions prior to the penalty phase of Coryell, he had not been charged with the murder of Janice Nugent. (See July 12, 2007, transcript, pp. 853-857).

Moreover, even assuming it is possible that actions taken or events occurring during the Coryell case could somehow be evidence of ineffective assistance during the Nugent case, after considering the testimony from the evidentiary hearing, the Court finds that the alleged acts or omissions were not "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. Post conviction counsel has not provided, nor has this Court has been able to locate, any case finding that counsel has a duty to warn a defendant prior to taking the stand that anything he might say could be used against him in a separate case that might be brought against him in the future. While "an attorney must both consult with the defendant [regarding the decision whether or not to testify] and obtain consent to the recommended course of action", the defendant has the ultimate authority to determine whether or not to testify. *Florida v. Nixon*, 543 U.S. 175, 187 (U.S. 2004).

Joseph Registrato, who was primarily responsible for Defendant's penalty phase representation in the Coryell case, testified at the evidentiary hearing regarding this claim. He testified that after the jury had returned a guilty verdict in the Coryell case, the defense team held a specific meeting with Defendant about whether or not he would testify during the penalty phase. (See July 12, 2007, transcript, pp. 1028-29). **Mr. Registrato testified that Defendant indicated during this meeting that he wanted to take the stand and apologize to the victim's mother to gain himself some humanity and sympathy with the jury**. (See July 12, 2007, transcript, p. 1030). **Mr. Registrato also testified that they discussed whether or not**

Defendant should testify for a "long time;" the defense team made the point that it was ultimately Defendant's decision; it was against the advice of counsel; and Defendant was very adamant about testifying and apologizing to the victim's mother because he thought it would help him. (See July 12, 2007, transcript, pp. 1029-32). **Mr. Registrato further testified that it was against the advice of counsel because he did not feel that anything Defendant was going to say could help him or that there would be anything to gain from Defendant taking the stand, and, contrary to Defendant's allegation, Mr. Registrato denied having pressured Defendant to take the stand.** (See July 12, 2007, transcript, pp. 1029-31). Finally, Mr. Registrato testified that he did not recall ever warning Defendant that if he testified in the Coryell penalty phase it might be used against him in a future trial, and that neither he nor any other member of the defense team knew about Ms. Nugent or were aware of any other murder case pending against Defendant, so there was no way he or the defense team could have given Defendant such an admonishment. (See July 12, 2007, transcript, pp. 1044-45).

Mr. Littman, who represented Defendant in the guilt phase in both the Coryell and Nugent cases, also testified at the evidentiary hearing. **He testified that during the period between the Coryell guilt and penalty phases, he could not recall having specifically warned Defendant that his confession during the Coryell penalty phase might be used against him in a separate future case, that there was no Nugent case pending against Defendant at that time, and that the concern of the defense team at that time was to save Defendant's life.** (See June 14, 2007, transcript, pp. 404-08). **Mr. Littman further testified that the reason for having Defendant testify during the Coryell penalty phase was to "create a mitigator that there was genuine remorse for what had happened," and that the only way to establish that mitigator was through Defendant's own words.** (See June 14, 2007, transcript, pp. 406, 417).

Finally, Defendant testified that after he had been found guilty in the Coryell case, he and his defense team discussed strategy for the upcoming

penalty phase; the only pressure he felt to testify was because he had just been found guilty; he did not think he felt pressure from an actual attorney telling him "to do this for this reason;" and Defendant felt that his only option to save his life was to testify and try to explain. (See July 12, 2007, transcript, pp. 850-55). **Defendant also testified that the purpose of his testifying was to "admit it somehow and show remorse" for the jury.** (See July 12, 2007, transcript, p. 851). **Defendant further testified, "you know, it doesn't matter what the attorney told me or what Dr. Maher said. When it was all over with, [testifying] was all I had left."** (See July 12, 2007, transcript, pp. 854-55).

Based on the testimony of Mr. Registrato, Mr. Littman, and Defendant, the Court finds that: (1) Defendant was not pressured into testifying in the Coryell penalty phase and admitting his guilt; (2) Defendant was given adequate warnings regarding his right to testify or not to testify and the dangers involved in taking the stand; (3) it was a strategic decision on the part of counsel and Defendant to have Defendant testify in an attempt to establish a remorse mitigator; (4) neither Mr. Registrato nor Mr. Littman warned Defendant that his testimony in the Coryell penalty phase might be used against him in a future trial; and (5) from counsels' perspective at the time between the Coryell guilt and penalty phases, the failure to give such an admonishment was not unreasonable because neither Mr. Registrato nor Mr. Littman knew or should have known that Defendant would be charged with the Nugent murder, and their primary concern at that point was to save Defendant's life in the pending Coryell case. Accordingly, in light of the "strong presumption that counsel's conduct was not deficient," Henry v. State, 948 So. 2d 609, 616 (Fla. 2006), and based on the evidence that having Defendant testify "was part of a deliberate, tactical strategy that [Defendant] understood and approved," Id. at 617, the Court finds that Defendant has failed to establish deficient performance. Accordingly, Claim V is denied.

(PCR V8/1576-1580, e.s.)

This claim is <u>not</u> based on the Nugent trial, but is predicated entirely on Johnston's prior testimony in the Coryell penalty phase. Accordingly, Johnston cannot remotely establish, in Nugent, any deficiency of counsel and resulting prejudice under *Strickland*. Moreover, the decision whether or not to testify is a uniquely personal decision which belongs entirely to the defendant. See, *Florida v. Nixon*, 543 U.S. 175 (2004) (emphasizing that a criminal defendant has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"). In the Coryell case, the defendant was adamant about testifying, which was against the advice of counsel and contrary to defense counsel's repeated recommendations. (PCR V40/1253-1255). In post-conviction, Johnston confirmed that he wanted to testify at the Coryell penalty phase because <u>he</u> thought it would benefit <u>him</u>. As both a practical matter and a jurisdictional prerequisite, this IAC complaint is not fairly cognizable in Nugent and Johnston's self-serving claim is also without merit.

<u>ISSUE V</u>

THE IAC/GUILT PHASE CLAIM
(Failure to Seek Suppression of Johnston's Exculpatory Statements to Law Enforcement)

In this issue, Johnston attempts to bootstrap a challenge to his post-*Miranda* statements to law enforcement onto an IAC/guilt

phase claim. Any post-conviction attempts to challenge Johnston's post-*Miranda* statements to law enforcement are procedurally barred. Claims that could have been brought at trial and on direct appeal are procedurally barred in post-conviction. *Willacy v. State*, 967 So. 2d 131, 141 (Fla. 2007).

Although Johnston's IAC/guilt phase is properly raised in post-conviction, it is without merit. This IAC/guilt phase claim was denied after an evidentiary hearing. Both prongs of *Strickland* present mixed questions of law and fact; thus, this Court defers to the trial court's factual findings supported by competent, substantial evidence, and reviews legal conclusions *de novo*. *Bradley v. State*, 2010 WL 26522 (Fla. 2010).

The trial court found Mr. Littman's "testimony credible and his decision to not seek suppression of the [defendant's] statements was based on sound trial strategy that was well within the norms of professional conduct." (PCR V9/1651). The trial court's order of December 31, 2008 states, in pertinent part:

> In Claim XVII, Defendant alleges trial counsel was ineffective for failing to ensure that certain statements Defendant made to detectives in violation of his Fifth Amendment rights were suppressed. Defendant contends Detectives Noblitt and Stanton violated his rights by questioning him without a lawyer present after Defendant signed a written notice of invocation of constitutional rights on August 22, 1997. Without providing a date this alleged improper interrogation occurred or identifying with any degree of specificity which statements trial counsel should have ensured were suppressed, Defendant contends he "clearly did not

initiate the interrogation" and the detectives "were prohibited from approaching [Defendant] in the first place." (See Defendant's amended motion, p. 58).

The State responds that any post conviction challenge to the admissibility of Defendant's statements is procedurally barred. Providing specific record citations, the State also responds that the investigating detectives advised Defendant of his constitutional rights and obtained his waiver of those rights prior to interviewing Defendant on each occasion he was interviewed. Citing Ault v. State, 866 So. 2d 674 (Fla. 2003); Hess v. State, 794 So. 2d 1249 (Fla. 2001); and Thomas v. State, 748 So. 2d 970 (Fla. 1999), the State contends that Defendant's attempt to prospectively invoke his right to counsel through the written notice mentioned above is of no legal consequence and did not warrant suppression of his statements to detectives. Therefore, the State asserts, trial counsel's failure to obtain a legal remedy not authorized by law does not amount to deficient representation.

In an abundance of caution, this Court granted an evidentiary hearing on this claim. Defendant testified at the hearing that he was arrested in the Coryell case on August 21, 1997, and he signed the invocation of constitutional rights form in first appearance court on the morning of August 22, 1997. (See July 12, 2007, transcript pp. 832, 844). He was first interrogated by Detectives Noblitt and Stanton regarding the Nugent case on the afternoon of August 22, 1997. (See July 12, 2007, transcript p. 846). Defendant testified that he did not contact the detectives; rather, they requested to speak with him. (See July 12, 2007, transcript p. 846). He further testified that Detectives Noblitt and Stanton contacted Defendant to discuss the Nugent homicide two more times and that Defendant never requested that they come and interview him. (See July 12, 2007, transcript pp. 846-47).

During the direct examination of Mr. Littman at the evidentiary hearing, the Court asked post conviction counsel to specify which statements should have been suppressed as alleged in Claim XVII. Post conviction counsel responded that it was Defendant's statements to law enforcement, which were referenced in

the State's closing argument, that he used the victim's shower to rinse off after being burned with massage oil. (See June 14, 2007, transcript pp. 386-87). **Mr. Littman testified he felt these statements were exculpatory in nature and explained his rationale for not seeking their suppression as follows:**

> **Littman: Well, we attributed them to mean that there was an explanation for [Defendant's] fingerprints being on the bathtub water faucet, that he was telling them that he took a shower. And we couldn't put [Defendant] on the stand, so there we were offering explanation through the State's own evidence what [he]...had told Detective Noblitt without having to put him on the stand and subject him to cross-examination. So I consider that to be an exculpatory.** I know he never made any incriminating statement. He always denied it that he had anything to do with this woman.
>
> Hendry: Okay. So as far as investigating a motion to suppress these statements, based on that Invocation of Rights Form, are you saying you never pursued that option?
>
> Littman: **I'm saying the Invocation of Rights Form has nothing whatsoever, legally, to do with the issue. The law is very clear on this point. He would have to invoke the rights at the time interrogation has begun. He was not in custody, nor was there a Nugent case pending at the time he made those statements. In fact, if my recollection serves me, he initiated contact with the police on his own, despite our telling him not to do so, to talk about the Nugent case. And he was giving this explanation, which was always exculpatory, always self-serving. It wouldn't be covered by that form. The law says he has to invoke it at the time interrogation begins. He never did that.**
>
> **Court: What I'm gathering, you wanted the statement in anyway?**

> **Littman: <u>I wanted the statement in. We had to explain, Your Honor, why those fingerprints were on that faucet</u>. That's (sic), apart from the William's Rule of course, was the most damaging piece of physical evidence in the case, because a body was found in that bathtub. And as I recall, the victim Ms. Nugent' s daughter I think said that her mother was a very good housekeeper and that she always cleaned the bathroom. There would have been—there would have been no explanation for why latent prints would have been on there unless they were put there at the time of Janice Nugent's murder. That's my recollection of what the State's witness said.**

(<u>See</u> June 14, 2007, transcript pp. 3 87-89).

<u>On cross-examination, Mr. Littman indicated that he did not object to the introduction of Defendant's exculpatory statements for strategic reasons and that even if he had wanted to move to suppress Defendant's statements he did not believe there was a legal basis for filing such a motion</u>. (<u>See</u> June 14, 2007, transcript pp. 421-22). **Mr. Littman further testified that despite being advised not to talk to the police, Defendant initiated contact with them on more than one occasion to speak about the Nugent case, and at least one of those occasions was to Detective Noblitt**. (<u>See</u> June 14, 2007, transcript pp. 422-23). Mr. Littman testified that he filed a motion in limine seeking suppression of those statements of Defendant that Mr. Littman did not feel strategically benefited the case. (<u>See</u> June 14, 2007, transcript p. 423). The record reflects that on August 17, 2000, Mr. Littman filed a motion in limine on behalf of Defendant requesting that the Court instruct the prosecutor and any and all State witnesses to refrain from referencing in any manner the matters outlined in the motion, which included statements Defendant made to Detectives Noblitt and Stanton other than those concerning Defendant using the victim's shower after being burned by massage oil. (<u>See</u> Defendant's Motion in Limine filed August 17, 2000, attached).

At trial, Detective Noblitt testified that he and Detective Stanton interviewed Defendant about the

Nugent homicide three times. (See October 4, 2000, transcript, p. 806). **At the beginning of each interview, the detectives gave Miranda warnings, advised Defendant of his constitutional rights, and obtained Defendant's written consent to be interviewed**. (See October 4, 2000, PP. 806-08, 813-14, 821-23). **Detective Noblitt further testified that Defendant indicated a willingness to talk to the detectives and did not ask for an attorney to be present before he would talk.** (See October 4, 2000, transcript pp. 813-14). On cross-examination, Mr. Littman elicited that the detectives' interviews with Defendant took place more than six months after the victim's body was found and it was public knowledge to anyone who read the newspaper that the victim was found in her bathtub. (See October 4, 2000, transcript pp. 837-38).

"The presence of *both* a custodial setting and official interrogation is required to trigger the Miranda prophylactic...Absent one or the other, Miranda is not implicated." Sapp v. State, 690 So. 2d 581, 585 (Fla. 1997) (quoting Alston v. Redman, 34 F. 3d 1237, 1243 (3d Cir. 1994)). In Sapp, the defendant was arrested on an unrelated charge and signed a claim of rights form shortly before attending first appearance court. Sapp, 690 So. 2d at 583. A week later, while Sapp was still in custody, police initiated an interrogation concerning the facts of the case at bar. Id. Prior to questioning, Sapp was advised of his Miranda rights in writing and waived those rights in writing. Id. Sapp did not request an attorney and, after speaking about the facts of the case, he signed a written statement. Id. The Court concluded the claim of rights form executed before custodial interrogation had begun or was imminent was ineffective to invoke the Fifth Amendment Miranda right to counsel. Id. at 585-86.

In this case, Defendant testified that he signed the invocation of constitutional rights form at first appearance court for the Coryell case on the morning of August 22, 1997. He also testified that he was first interrogated by Detectives Noblitt and Stanton regarding the Nugent case in the afternoon of that same day. This testimony was uncontroverted. **There was no evidence presented that at the time Defendant executed**

the invocation of rights form at first appearance court, a custodial interrogation regarding the Nugent case had begun or was imminent. Under Sapp, the invocation of rights form was ineffective to invoke Defendant's Fifth Amendment Miranda right to counsel. Although Defendant testified that he did not initiate contact with Detectives Noblitt and Stanton to discuss the facts of the present case, he did not testify, and no other evidence was presented, that Defendant attempted to invoke his right to counsel once the interrogation had begun or was imminent. **Indeed, it appears the invocation of rights form is the only evidence upon which Defendant bases his claim that he effectively invoked his Fifth Amendment right to counsel and his Miranda rights were thereafter violated. Moreover, Detective Noblitt's trial testimony established that prior to each of the three interviews, Defendant was informed of his Miranda rights in writing and he waived those rights in writing. There was no evidence presented at the evidentiary hearing to refute this testimony. Accordingly, there was no Miranda violation and no legal basis for trial counsel to have sought suppression of Defendant's statements to detectives based on a Miranda violation.** See Hess v. State, 794 So. 2d 1249, 1258-59 (Fla. 2001).

Additionally, Mr. Littman specifically testified at the evidentiary hearing that he felt Defendant's statements that he used the victim's shower to rinse off after being burned with massage oil provided an innocent explanation for why Defendant's fingerprints were found on the bathtub faucet near where the victim's body was found. "[S]trategic 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). **The Court finds Mr. Littman's testimony credible and his decision to not seek suppression of the above statements was based on sound trial strategy that was well within the norms of professional conduct. This finding is further supported by the fact that Mr. Littman filed a motion in limine seeking to exclude reference to other statements of**

Defendant that Mr. Littman testified he felt would not strategically benefit the case. Accordingly, Defendant has failed to show that Mr. Littman provided ineffective assistance of counsel as alleged. Claim XVII is denied.

(PCR V9/1646-1651, e.s.)

The trial court's order is supported by competent substantial evidence. Trial counsel had no legitimate factual or legal basis, under either the Fifth or Sixth Amendment, for seeking suppression of Johnston's voluntary post-*Miranda* statements to law enforcement. See, *Sapp v. State*, 690 So. 2d 581 (Fla. 1997); *Hess v. State,* 794 So. 2d 1249, 1260 (Fla. 2001); See also, *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204 (1991); *Texas v. Cobb*, 532 U.S. 162, 166-168, 121 S.Ct. 1335, 1340 (2001). Trial counsel cannot be deemed ineffective for failing to argue a non-meritorious motion to suppress the defendant's voluntary post-*Miranda* statements. See, *Kormondy v. State*, 983 So. 2d 418, 430 (Fla. 2007). Furthermore, as confirmed in post-conviction, Johnston's experienced trial counsel, Kenneth Littman, made a reasoned strategic decision, at the time of trial, to utilize Johnston's exculpatory statements to law enforcement. Trial counsel's reasoned strategic decision is unassailable under *Strickland*.

ISSUE VI

THE IAC/GUILT & PENALTY PHASE CLAIM
(Failure to Inform the Jury that Johnston

was "Heavily Medicated and Sedated")

This post-conviction claim was raised in Johnston's Motion to Vacate as Claim XVI and denied after an evidentiary hearing. To the extent that Johnston seeks to raise an IAC claim regarding his trial in Coryell, it is not properly before this Court in this Nugent post-conviction appeal. In any event, the trial court, in an abundance of caution, addressed the testimony presented below and denied this IAC claim under *Strickland*. Again, this Court defers to the trial court's factual findings that are supported by competent, substantial evidence, and reviews the trial court's legal conclusions *de novo*. *Bradley*, *supra*, citing *Sochor*.

In denying this post-conviction claim, the trial court order of December 31, 2008 stated, in pertinent part:

> **In his next claim, Defendant alleges ineffective assistance of counsel during the guilt and penalty phases of trial because counsel failed to inform the jury that Defendant was heavily medicated and sedated throughout his trial.** Specifically, Defendant alleges when he testified in the penalty phase of the Coryell case, trial counsel should have asked Defendant what medications he was taking and should have questioned the mental health professionals about the effects of those medications. Defendant also alleges that when his testimony from the Coryell trial was read into evidence during the guilt phase of the Nugent trial, counsel should have informed the jury of the various medications Defendant was taking at the time he testified in the Coryell trial and their side effects. Defendant asserts that informing the jury of such information would have "softened the blow and prejudice of his penalty phase confession." In his written

closing arguments, Defendant asserts counsel was ineffective for failing to appreciate the number and know the types of medications Defendant was taking, and for failing to adequately challenge the Coryell testimony once he knew it was coming in as William's Rule evidence in the Nugent trial.

To the extent Defendant alleges deficient performance occurred during the Coryell case, these claims are not properly raised in this, the Nugent, case. However, in an abundance of caution, the Court will consider the testimony presented at the evidentiary hearing on this issue. Mr. Littman testified that at the time Defendant testified in the Coryell case, the defense team had no indication that Defendant "was on any kind of medication that affected his ability to knowingly, intelligently and voluntarily testify. That was never an issue." (See June 14, 2007, transcript p. 417). **On cross-examination Mr. Littman testified that after the guilty verdict was returned in the Coryell case, he and other members of the defense team met with Defendant at the jail to discuss how to save his life in the penalty phase.** (See June 14, 2007, transcript p. 426). The following exchange took place regarding this meeting:

> **Littman: [Defendant] made it clear that he wanted to [testify]. I don't remember if he insisted, but he clearly did it on his own choice.**
>
> Pruner: And during that conversation at the jail in the weekend between guilt and penalty phases, did you have an opportunity to observe the defendant's demeanor?
>
> Littman: Yes.
>
> Pruner: Did you have an opportunity to observe the lucidity of his thought process?
>
> Littman: Yes.
>
> Pruner: Did you have an opportunity to observe the clarity of his speech?
>
> Littman: Yes.

> Pruner: Did you find any deficit in the — in his speech, his thought process or his demeanor that led you to be concerned about the rationality of his thought processes?
>
> **Littman: Mr. Johnston is one of the most intelligent, well-spoken clients I've ever represented, which was a good thing because it was easy to deal with him in that regard. There [was] no evidence whatsoever that he wasn't thinking clearly or wasn't in his right mind or had any ailment that would prevent him. He had a lot of physical ailments, but nothing that would prevent him from speaking intelligently and knowingly.**
>
> **Pruner: Was there anything that you observed during that meeting that led you to suspect that his thought processes or his decisions were being adversely affected by any medications that he was taking?**
>
> **Littman: Definitely not.**
>
> **Pruner: Did he tell you or others in your presence that he was having difficulty following the discussion because of the medications that he was taking?**
>
> **Littman: No, he never said that. There was no evidence of that.**

(See June 14, 2007, transcript pp. 428-30). **Mr. Littman also testified that, "[he] never at any time in [his] dealings with [Defendant] ever thought he was out of his mind on drugs at any time."** (See June 14, 2007, transcript p. 432). **Defendant admitted on cross-examination that although he thought the various medications he was taking when he testified in Coryell influenced his reasoning and thinking abilities, he knew what he was doing when he chose to testify and he knew why he was doing it. (See July 12, 2007, transcript p. 872). As such, any claim of ineffective**

<u>assistance of counsel with respect to the Coryell penalty phase is without merit</u>.

As to Defendant's claim that Mr. Littman should have informed the Nugent guilt phase jury of the various medications Defendant was taking during the Coryell trial and their side effects, the following exchange took place:

> Hendry: Now, you would want to show that [Defendant] was under the influence of heavy medication at the time that he made that statement, would you not?
>
> **Littman: I didn't have any reason to believe that [Defendant] didn't know what he was saying on the witness stand because, again, this wasn't just a surprise to us. We had met with him and prepared him for penalty phase. So we knew exactly what [Defendant] was going to say. So of course if I had a reason to believe that he was – that at the time he was to testify he wasn't in his right mind, of course we would have brought that to the Court's attention or we wouldn't have put him on.**
>
> Hendry: You're saying you didn't know that he was out of his mind due to heavy medication at the time the he testified in the Coryell penalty phase?
>
> Littman: I don't believe that to have been the case.
>
> Hendry: Did you talk to [Defendant] about all the different medications that he was on there at the Hillsborough County Jail prior to him testifying in the Coryell penalty phase?
>
> **Littman: As I said a moment ago, [Defendant] has a very unfortunate history of physical ailments, that during the break I was talking to him. I see he still suffers from many of those. I don't know that that has anything to [do] with being able to make – speak intelligently and responsively. He's a very bright man. He's a very articulate man. I**

> **had no reason to believe that he didn’t know what he was saying when he testified at the penalty phase in the Coryell murder case.**

(See June 14, 2007, transcript pp. 401-03). Mr. Littman agreed with post conviction counsel that Defendant’s Coryell penalty phase testimony being read into evidence in the Nugent guilt phase was extremely damaging evidence and the following exchange ensued:

> Hendry: So would you not want to attack that evidence somehow, some way, the confession?
>
> Littman: Well, how could we attack it, when we’re the ones that put the evidence forth at the penalty phase? Mr. Registrato put [Defendant] on the stand in an effort to save his life. How could we attack that?
>
> Hendry: What if you were to attack it to say [Defendant] was on numerous medications, possibly 10 medications that may have clouded his mind?
>
> Littman: At the time he testified?
>
> Hendry: Yes.
>
> **Littman: I think there would be serious ethical problem in doing that. We knowingly put a client on the stand who we believe was not in his right mind and then argued against his testimony? I think that would be an ethical violation.**
>
> Hendry: Did you...think at the time of the Nugent case, there’s got to be some way we can attack this confession that we know is coming into the Nugent case against our [client], you know, fight to exclude it?
>
> Littman: Well, how we tried to attack was to try to fight the William’s Rule. We had a hearing, as I recall, and a rehearing on that. And I fought tooth and nail against Mr. Pruner. But the Court ruled in the State’s favor.
>
> Hendry: You tried a preemptive strike. But that

strike was denied, and now you know it's coming in.

Hendry: And did you think—we know this very damaging testimony is coming in, this very damaging testimony is coming in, how can we attack it? We couldn't exclude it; but did you think, how do we attack it now?

Littman: Well, the way we attacked it, starting with the voir dire, was to try to very carefully question the jurors, you're going to hear the evidence, which you correctly said we knew was coming in. And you realize that [Defendant's] on trial, not for the killing of Leanne Coryell, but because he's accused of killing Janice Nugent... As I said, my approach to this from virtually, probably 200 capital lawyers, not one of them had a suggestion as to how to handle that. Because as Judge Barbas just commented, they never heard of that happening of, a death penalty with a prior death penalty conviction being used as Williams Rule.

Hendry: Did you consider — after knowing that your preemptive strike was denied and knew the testimony was coming in, did you discuss with [Defendant] his medications that he was on at the time that he testified in the Coryell case?

Littman: I don't believe so. I had no reason to believe, as I said earlier, he was under — anything other than his right mind. But again, that was not my particular aspect of the case.

(See June 14, 2007, transcript pp. 412-415). **The Court finds Defendant has failed to establish deficient performance as to this claim. Trial counsel had no reason to believe Defendant was "out of his mind on drugs" when he testified in Coryell, and even Defendant admitted that he knew what he was doing and why he was doing it when he testified in Coryell. Moreover, trial counsel attempted to challenge the testimony by challenging admission of the William's Rule evidence both before trial and during trial. Under these circumstances it cannot be said that trial counsel's**

> **conduct fell "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. Accordingly, Claim XVI is denied.**

(PCR V9/1640-1645, e.s.)

In sum, although Johnston was taking medications for various medical complaints, the experienced defense team had no indication that Johnston "was on any kind of medication that *affected his ability to knowingly, intelligently and voluntarily testify. That was never an issue.*" CCRC nevertheless faults the trial court for denying a request to reopen the Nugent evidentiary hearing and hold it in abeyance until sometime after Dr. O'Donnell's anticipated testimony in the Coryell post-conviction case. However, CCRC's initial brief repeatedly focuses, instead, on the Coryell trial, not Nugent. See, *Initial Brief of Appellant* at 72 ("Johnston's mental state *during the Coryell trial*"); at 74 ("heavily medicated at the time he provided his confession *at the Coryell penalty phase*"); at 76 ("*medications at the time he testified in Coryell*"); at 77 ("*testify in Coryell*"). Accordingly, Johnston has not remotely demonstrated any abuse of discretion relating to trial counsel's performance in Nugent. (PCR V8/1499). See, *Brown v. State*, 894 So. 2d 137, 153-154 (Fla. 2004) (no abuse of discretion to deny CCRC's motion to reopen evidentiary hearing). This claim is also procedurally barred because after Dr. O'Donnell testified in

Coryell, and the Nugent proceedings were still pending, the defense did not seek consideration of Dr. O'Donnell's testimony.

Johnston also misinterprets attorney Littman's legitimate ethical concern. (*Initial Brief of Appellant* at 76). Attorney Littman's response, in context, was "I think there would be [a] serious ethical problem in doing that. *We knowingly put a client on the stand who we believe was not in his right mind and then argued against his testimony? I think that would be an ethical violation."* (PCR V9/1644).

Lastly, CCRC's blatant attempt to cross-reference the separate post-conviction record in Coryell (*Initial Brief of Appellant* at 77, citing Coryell post-conviction record) is improper and should be stricken. See, *Marek v. State*, 8 So. 3d 1123, 1128, fn. 2 (Fla. 2009), citing *Johnson v. State*, 660 So. 2d 648, 653 (Fla. 1995). Furthermore, CCRC's unauthorized reference to Mr. Hooper's testimony in the Coryell post-conviction hearing is misleading and incomplete.

ISSUE VII

SUMMARY DENIAL OF REMAINING CLAIMS

Johnston alleges an *entitlement* to an evidentiary hearing on all of his IAC claims. Johnston is incorrect. To be entitled to an evidentiary hearing on a motion claiming ineffective assistance of counsel, "the defendant must allege specific facts

establishing both deficient performance of counsel and prejudice to the defendant." *Jones v. State*, 998 So. 2d 573, 588 (Fla. 2008), citing *Rhodes v. State*, 986 So. 2d 501, 513-14 (Fla. 2008) (a claim of ineffective assistance of counsel will be summarily denied absent specific factual allegations of both a deficiency in performance and prejudice); *Doorbal v. State*, 983 So. 2d 464, 483 (Fla. 2008) (insufficiently pled claims "may not receive an evidentiary hearing"). If a defendant's conclusory allegations are not supported by a properly pled factual basis, the claim is facially insufficient and should be summarily denied. See, *Walls v. State*, 926 So. 2d 1156, 1163 (Fla. 2006).

The *only* IAC claim fairly presented in this issue is sub-claim (b) (IAC/penalty phase/failure to object to a verbal instruction and failure to request additional instructions). The remaining sub-claims, listed at pages 89-91 of Johnston's initial brief, are procedurally barred under *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). See also, *Pagan v. State*, 2009 WL 3126337, 13 (Fla. 2009). In this case, sub-claims (c) IAC/change of venue; (d) IAC/closing argument/golden rule/re-reading of testimony; (e) IAC/jury instruction/burden of proof; (f) listing the lower court's claims as "*Ring*; lethal injection; *Simmons v. South Carolina*;" and (g) IAC/chain of custody (fingerprint evidence) are insufficiently presented on appeal and, therefore,

waived under *Duest*.

In denying the IAC/penalty phase claim (based on the failure to object to an allegedly incorrect verbal instruction and request instructions on additional statutory mitigating circumstances), the trial court ruled that any challenge to the substance of the jury instructions is procedurally barred. As to the IAC/sub-claim, the trial court found that Johnston failed to establish that the jury was misled and no prejudice could be demonstrated where the written instructions correctly stated the law. As to the IAC/failure to request additional instructions claim, the trial court concluded that "there is no evidence that would support instructing the jury on the additional statutory mitigating factors and counsel cannot be deemed deficient for failing to request an instruction that is not supported by the evidence." (PCR V8/1557). See, *Duest v. State*, 855 So. 2d 33, 41 (Fla. 2003). Lastly, Johnston failed to allege or establish that he was prejudiced by trial counsel's failure to request the additional instructions because he failed to show that the sentencing court would have given such instructions if requested. *Id.*, citing *Evans v. State*, 946 So. 2d 1, 14 (Fla. 2006). The trial court's final order of December 31, 2008 states, in pertinent part:

> **Defendant alleges counsel was ineffective for failing to object to an alleged incorrect penalty phase**

jury instruction and for failing to request instructions on additional statutory mitigating circumstances. Specifically, Defendant asserts counsel was ineffective in the second penalty phase [FN7] for failing to object when the Court instructed the jury that "a mitigating circumstance *may not* be proved beyond a reasonable doubt by the defendant" when the correct instruction is that a mitigating circumstance *need not* be proved beyond a reasonable doubt. (emphasis added). Defendant alleges that this erroneous instruction misled the jury to believe that mitigating circumstances must be proved beyond a reasonable doubt, and implied that Defendant may not have met this erroneous high standard of proof in his case. In response, the State asserts this claim is procedurally barred as a matter for direct appeal. In the alternative, the State avers that the discrepancy appears to be a scrivener's error, especially in light of the fact that the written jury instructions stated the correct burden of proof.

[FN7] Defendant received a new penalty phase trial after the Court declared a mistrial of the first penalty phase. (See Order Granting Defendant's Motion to Declare a Mistrial and Grant a New Penalty Phase Trial, attached).

The Court agrees that any challenge to the substance of the jury instructions is a matter for direct appeal and is not cognizable by a motion for post conviction relief. Miller v. State, 926 So. 2d 1243, 1256-57 (Fla. 2006). **This procedural default may not be overcome by simply recasting the argument as a claim for ineffective assistance of counsel**. Id. "A defendant is entitled to an evidentiary hearing on his post conviction motion unless (1) the motion, files and records in the case conclusively show that the defendant is not entitled to any relief, or (2) the motion or a particular claim is legally insufficient." Johnson v. State, 904 So. 2d 400, 403 (Fla. 2005). Mere conclusory allegations will not warrant an evidentiary hearing; rather, the motion must be supported by specific factual allegations. Id. at 404 (citations omitted). As such, an evidentiary hearing was not held on this claim.

Moreover, assuming that counsel's conduct in not objecting to the erroneous jury instruction constitutes deficient performance, Defendant has failed to allege or establish how he was prejudiced by this omission. In determining prejudice with regard to alleged penalty phase errors, the test "is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695; see also Ponticelli v. State, 941 So. 2d 1073, 1094- 95 (Fla. 2006).

In this case, the court instructed the jury in the second penalty phase that "a mitigating circumstance *may not* be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." (See April 12, 2001, transcript, p. 2461) (emphasis added). **The written instructions provided to the jury correctly stated that "a mitigating circumstance *need not* be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established."** (See Penalty Proceedings – Capital Cases, written jury instructions filed April 21, 2001, attached) (emphasis added). **Considering the court's alleged misstatement in context, and in light of the fact that the written instructions provided to the jury contained the correct standard, the Court finds Defendant's assertion that the jury was misled to believe that mitigating circumstances must be proved beyond a reasonable doubt and that Defendant may not have met this erroneous high standard of proof is without merit. In addition, even if counsel's failure to object to the alleged misstatement can be considered deficient performance, the Court finds that Defendant is unable to establish prejudice because the jury was provided with the correct standard in the written instructions.** See Peterka v. State, 890 So. 2d 219, 240 (Fla. 2004) (assuming arguendo that counsel's failure to clarify the definitions of aggravating and mitigating circumstances could be considered deficient performance, the Court found the defendant could not "establish prejudice because the jury was properly

instructed during the penalty phase"). **Accordingly, this sub claim of Claim III is denied.**

Defendant also claims that trial counsel should have requested instructions on two (2) additional statutory mitigating circumstances: (1) the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance; and (2) the defendant acted under extreme duress or under the substantial domination of another person. Defendant asserts that because instructions were given in the first penalty phase on these two (2) statutory mitigators, they also should have been given in the second penalty phase. Defendant contends that evidence of Defendant's "extreme mental or emotional disturbance and duress" was presented through Dr. Michael Maher's testimony regarding Defendant's inability to react well in times of stress. In response, the State asserts that Defendant failed to allege that evidence was presented on his behalf that would have supported an instruction on either statutory mitigating circumstance, and that there is no evidence in the record that would have warranted the reading of either instruction.

Based on a review of Defendant's Amended Motion, the State's Response, the court file and record, **the Court finds there is no evidence that would support instructing the jury on the additional statutory mitigating factors and counsel cannot be deemed deficient for failing to request an instruction that is not supported by the evidence.** See Duest v. State, 855 So. 2d 33, 41 (Fla. 2003) (noting that "a defendant is entitled to have the jury instructed on a mitigating factor if there is any evidence to support the instruction"); Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000) (finding "counsel was not deficient in failing to present a mitigator unsupported by the record").

Moreover, Defendant has failed to allege or establish that he was prejudiced by trial counsel's failure to request the additional instructions because he has not shown that the sentencing court would have given such instructions if requested. See Evans v. State, 946 So. 2d 1, 14 (Fla. 2006) (finding the

defendant had not established we was prejudiced by counsel's failure to request instruction on certain statutory mitigation because defendant had not shown that the sentencing court would have given the instructions to the jury had they been requested). In its sentencing order, the trial court found:

> **It is evident from the testimony [of Dr. Maher and Dr. Krop] that there is no correlation between the alleged frontal lobe condition and this crime. The similarities of the crimes demonstrate that the Defendant carefully planned his crimes in advance and did not act on a random basis. The Defendant targeted a specific type of woman to be beaten and humiliated in a specific manner.**

(See August 22, 2001, Sentencing Order, pp. 3-4, attached). **Thus, based on the sentencing court's findings with regard to the evidence presented during the penalty phase, it is evident the court found Defendant acted on his own volition at the time of the murder and was not acting under extreme duress or the substantial domination of another person, and was not acting under the influence of extreme mental or emotional disturbance. Accordingly, because the Court finds that Defendant has failed to establish deficient performance or prejudice, this sub claim of Claim III is denied.**

(PCR V8/1555-1557, e.s.)

To support summary denial, the trial court must either state its rationale in the order or attach those portions of the record that refute the claims. *Doorbal v. State*, 983 So. 2d 464, 489 (Fla. 2008), citing *Nixon v. State*, 932 So. 2d 1009, 1018 (Fla. 2006). In this case, the trial court set forth a detailed rationale supporting the denial of relief and also attached those

portions of the record refuting Johnston's claims. The trial court's order should be affirmed. See, *Doorbal*.

ISSUE VIII

IAC/GUILT PHASE CLAIM
(Failure To: (1) Retain An Expert, Such As Dr. Simon Cole, Regarding Fingerprint Evidence; (2) Object To A Follow-Up Question On Redirect Examination Of Tom Jones; (3) Object To An Alleged Break In The Chain Of Custody And (4) Request Submission Of An Unidentified "DNA Profile To "CODIS")

In this commingled IAC/guilt phase claim, Johnston asserts that trial counsel was ineffective in failing to: (1) retain an expert, such as Dr. Simon Cole, regarding fingerprint evidence; (2) object to a follow-up question on redirect examination of state witness, Tom Jones; (3) object to an alleged break in the chain of custody; and (4) request submission of an unidentified "DNA" profile to the CODIS database. For the following reasons, Johnston's claims must fail.

Failure to retain an expert (Dr. Simon Cole)

At trial, the State introduced evidence that Johnston's fingerprint was on the faucet of the bathtub where Janice Nugent's body was found. CCRC argues that trial counsel was ineffective in failing to retain an expert, such as Dr. Simon Cole (who holds a Ph.D. in Science and Technology Studies), to challenge the State's fingerprint evidence. Dr. Cole admitted that he had no training or experience in the analysis and

comparison of latent fingerprints. (PCR V32/412). Dr. Cole did not examine the latent fingerprint left by Johnston at the murder scene. Dr. Cole conceded that he had no opinion as to whether the fingerprint comparison match was correct or not. (PCR V32/413). Dr. Cole had no opinion as to whether the methodology of the latent fingerprint examiner was flawed. (PCR V32/414). Instead, Dr. Cole opined, generally, that fingerprint analysis is unreliable because its underlying premise – that no two fingerprints are alike – has never been subjected to scientific validation. (PCR V32/417).

Pursuant to *State v. Armstrong*, 920 So. 2d 769 (Fla. 3d DCA 2006), the trial court excluded Dr. Cole's testimony. (PCR V32/335; 337). In *Armstrong*, prior to trial, the defense "listed Dr. Simon Cole, a self-described historian and sociologist, as an expert witness to testify as to his "informed hypothesis," derived from the study of the history of fingerprint analysis, that fingerprint analysis is unreliable because no one has ever proved the long-accepted proposition that no two fingerprints are alike. In this regard, Dr. Cole intended to testify generally about the lack of an objective, scientific study that validates the now widely accepted fingerprint identification analysis process, as well as the lack of uniform standards used for individual fingerprint comparison. Thus, he maintains that the weight a juror should give to the results of such an analysis is

questionable." *Armstrong*, 920 So. 2d at 770. The State sought to preclude Dr. Cole's testimony at Armstrong's trial, asserting that his methods were not generally accepted in the scientific community and his testimony would only serve to mislead and confuse the jury. The trial court denied the State's motion; however, on certiorari, the Third District Court quashed the trial court's order and explained:

> **We quash the order permitting Dr. Cole to testify because his "informed hypothesis" is irrelevant to any material issue.** See Fla. Stat. § 90.702 (an expert's opinion "is admissible only if it can be applied to the evidence at trial"); *Stano v. State*, 473 So. 2d 1282, 1285 (Fla. 1985) ("To be relevant, and, therefore, admissible, evidence must prove or tend to prove a fact in issue."). While Dr. Cole has raised a general concern about the use of latent fingerprint identification analysis in courts across the United States, he has not related that concern to the fingerprint identification made in this case. **Dr. Cole concededly has no formal training in latent fingerprint identification analysis; he did not examine the latent fingerprints taken from the crime scene in this case; he does not question the latent fingerprint analysis actually performed in this case; and he has no opinion about the standards or methods used by the fingerprint examiner in this particular case. Dr. Cole's testimony will, therefore, be no more than a general critique of the predicate underlying fingerprinting as a method of identification. <u>His testimony will not be probative as to whether the latent prints lifted from the scene match Armstrong's fingerprints, that is, his testimony will not be probative of Armstrong's guilt or innocence. Consequently, his testimony is not admissible</u>.** See *Huff v. State*, 495 So. 2d 145, 147-48 (Fla. 1986) (precluding a defense expert from testifying about the likelihood that the crime scene had been inadequately processed or contaminated where said expert "had neither visited the crime scene nor

read the testimony or reports of the investigating officers at the scene," and finding that, "at best, [the expert's] testimony would have been a general critique of proper police practice in processing crime scenes"); *Stano,* 473 So. 2d at 1285-86 (disallowing presentation of expert testimony which suggested that some people confess to crimes that they did not commit, where there was no evidence to suggest that the defendant's confession in the case at bar was infirm or tainted).

Armstrong claims that the expert testimony should be allowed because Dr. Cole is not challenging the admissibility of the State's fingerprint evidence, but only the weight a juror should give the evidence. We cannot agree. Notwithstanding his best efforts to the contrary, Dr. Cole's "informed hypothesis" is nothing more than a creative attempt to attack the predicate for the admission of latent fingerprint comparison analysis. [FN3]

> **FN3. Dr. Cole admits that no court has excluded fingerprint evidence based on his proffered testimony, despite repeated attempts.**

For over a hundred years, fingerprint comparison has been accepted as reliable by every court in the nation and in many courts abroad for the purpose of identification. In Florida, fingerprint evidence has been admissible in criminal prosecutions since at least 1930. See *Martin v. State*, 100 Fla. 16, 129 So. 112, 116 (1930)("Experience of recent years has shown that one of the most effective means of identifying and apprehending burglars, robbers, and thieves is through bureaus of identification by using the photograph and finger print. This method should be encouraged so long as its application does not result in a miscarriage of justice or violate fundamental rules of evidence."). To date, there have been no reported instances in which the prints from any two fingers or from two individuals have been found to be the same.

Of late, a spate of challenges to the reliability of fingerprint identification has been brought, primarily in the federal courts, premised on the same

"informed hypothesis" advanced here. Each has been rejected. See, e.g., *United States v. Abreu*, 406 F. 3d 1304, 1307 (11th Cir. 2005)(agreeing with the decisions of other federal circuits and holding latent fingerprint evidence reliable); *United States v. Mitchell*, 365 F. 3d 215, 246 (3d Cir. 2004)(holding latent fingerprint identification evidence reliable and thus admissible under *Daubert v. Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) [FN4]; United States v. Janis, 387 F. 3d 682, 690 (8th Cir. 2004)(finding fingerprint evidence to be reliable); United States v. Crisp, 324 F. 3d 261, 269-270 (4th Cir. 2003)(holding fingerprint analysis to be reliable identification evidence); *United States v. Havvard*, 260 F.3d 597, 601-02 (7th Cir.2001) (finding fingerprint identification to be reliable); *United States v. Sherwood*, 98 F. 3d 402, 408 (9th Cir. 1996)(holding that the trial court did not commit actual error in admitting fingerprint evidence).

> [FN4] See *Abreu*, 406 F.3d at 1306 (noting that "[t]o assess the reliability of an expert opinion, [Federal courts] consider[ ] a number of factors, including those listed by the Supreme Court in *Daubert* ").

These cases, although decided in the context of a defendant's motion to preclude fingerprint identification testimony, confirm that any lack of proof that fingerprints are unique, and the existence of objective standards for defining how much of a latent fingerprint is necessary to conduct a comparison, is irrelevant. **Hence, what Dr. Cole cannot do in challenging the admissibility of the State's fingerprint evidence, he equally cannot do here in purportedly challenging the weight of said evidence. Rather, if Armstrong wishes to question the State's comparison of his fingerprints with latent fingerprints recovered from the crime scene, Armstrong should present the jury with his own fingerprint examiner who has performed an independent latent fingerprint analysis.**

Armstrong, 920 So. 2d at 770-772 (e.s.)

This Court subsequently declined to exercise discretionary

jurisdiction to review the Third District Court's decision. *Armstrong v. State*, 945 So. 2d 1289 (Fla. 2006) (table). Accordingly, inasmuch as Johnston cannot show that Dr. Cole's testimony even would have been admissible at trial, any IAC/guilt phase claim necessarily fails.

Failure to Object to Tom Jones' Testimony

Johnston raised this issue as sub-claim 1 of Issue X in his Motion to Vacate, which the trial court denied as follows,

> In his first sub claim, Defendant contends trial counsel was ineffective for failing to object when the State asked its fingerprint expert, Mr. Jones, a hypothetical question on redirect examination concerning how long a fingerprint could remain on an object after being subjected to multiple touches. Defendant avers the fingerprint expert's response was based on common knowledge rather than expert opinion, and because the defense had previously received a favorable ruling on this issue, trial counsel should have objected. Defendant alleges that this failure to object was not based on trial strategy, and he was prejudiced by counsel's alleged deficient performance. **However, the Court finds that the question Defendant is now objecting to is not the same question to which the expert responded as involving common sense.**
>
> On direct examination, the State asked Mr. Jones the following question:
>
>> Assume that the sole resident occupying the house from which that fingerprint was lifted from the tub faucet was described as a neat freak who bathed on a daily basis. Do you have an opinion as to the likelihood that the latent print that has been preserved as State's Exhibit Number 27-A would remain in a condition suitable for comparison purposes for three weeks or more?
>
> (See October 4, 2000 transcript, pp. 688-89). The defense objected arguing the question invited an

opinion that was not within the realm of Mr. Jones' expertise and a bench discussion ensued. The jury was taken out of the court room and Mr. Jones ultimately admitted that his opinion, that it is highly unlikely a print would remain in a condition suitable for comparison purposes for three weeks or more, was based on common sense rather than science.

On redirect examination, the State asked Mr. Jones the following question: "If Mr. Littman was to touch that shiny water pitcher there and leave a fingerprint and you were to touch it in the same place repeatedly for an extended period of time, would you expect Mr. Littman's fingerprint to remain in a suitable for comparison purposes status?" (See October 4, 2000 transcript p. 718).

In his present Motion, Defendant claims that this second question is identical to the question Mr. Jones was asked on direct examination, and that trial counsel was ineffective for failing to object on the grounds that the State was again asking Mr. Jones for an opinion that was not scientifically based. **Defendant has failed to allege any specific facts demonstrating that the question asked on redirect invites an opinion based on common sense rather than science. The Court finds the two questions are not identical as Defendant asserts, and therefore trial counsel cannot be deemed deficient for failing to object on the basis that the court had already ruled the question was not allowed.**

Moreover, "[o]ne of the objectives of redirect examination is to explain, correct, or modify the testimony gathered from cross-examination." Jones v. State, 440 So. 2d 570, 576 (Fla. 1983). On cross-examination, the defense elicited testimony from Mr. Jones that the age of a fingerprint cannot be determined scientifically and "certain things such as hard, shiny metal, such as a bathtub faucet or know, or a plastic item might be more amenable to receiving latents." (See October 4, 2000, transcript, pp. 7 14-15). Defense counsel further asked:

> Littman: Would you agree with me, Mr. Jones, it's possible for two persons to touch the very same object even at the same time and one of them to

> leave behind an identifiable latent fingerprint and the other person not?
>
> Jones: Then you would have an overlay.
>
> Littman: I'm sorry if my question was unclear. I didn't necessarily mean the same exact spot on that object. For example, if you look to the left, the judge's water pitcher is a shiny silver pitcher. If you were to grasp one side of it and I grasped the other side at the same time without our fingers touching and overlaying, one of us might leave fingerprints and one of us might not. Would you agree?
>
> Jones: That's possible.

(See October 4, 2000, transcript, pp. 717-18).

The State's redirect question, which forms the basis of this claim, helps to explain Mr. Jones' response on cross-examination that there would be an overlay of fingerprints if two persons touched the same object at the same time. The State's redirect question also helps to clarify the earlier cross-examination testimony by explaining that while the age of a fingerprint cannot be scientifically determined and that certain things, such as hard shiny objects, might be more amenable to receiving latent prints, other factors may also affect whether a print would remain in a suitable for comparison purposes state. For instance, if one person touched a shiny, hard object and a second person touched the same object "in the same place repeatedly for an extended period of time," it would not be expected that the first fingerprint would remain in a suitable for comparison purposes status. The State's question comports with the purpose of redirect examination and is not identical to its prior direct examination question which drew the sustained objection. Accordingly, it cannot be said that counsel's failure to object fell below "the wide range of reasonable professional assistance." Strickland, 466 U.S. at 690. The Court further finds that Defendant has failed to establish prejudice because he has not alleged or demonstrated that the court would have

> **<u>sustained such a defense objection had one been made</u>. As such, sub claim one of Claim X is denied.**

(PCR V9/1604-1607, e.s.)

Johnston has not, and cannot, overcome the trial court's dispositive factual determinations that (1) "the State's question comports with the purpose of redirect examination and is not identical to its prior direct examination question which drew the sustained objection," and (2) Johnston has "not alleged or demonstrated that the court would have sustained such a defense objection had one been made." (PCR V9/1607). Accordingly, Johnston failed to establish any deficiency of counsel and resulting prejudice under *Strickland*.

<u>Fingerprint Evidence – Alleged Break in Chain of Custody:</u>

This issue was raised as sub-claim 7 of issue X in Johnston's Motion to Vacate. On appeal, Johnston sets forth a single paragraph alleging that there was a break in the chain of custody on the fingerprint evidence. (*Initial Brief of Appellant* at 95). The trial court's detailed ruling (PCR V9/1621-1625) should be affirmed for the following reasons. First, any "chain of custody" claim should have been raised on direct appeal and, therefore, is procedurally barred in post-conviction. See, *Floyd v. State*, 850 So. 2d 383 (Fla. 2002). Second, Johnston's perfunctory argument on appeal is insufficient under *Duest*. Third, Johnston's argument (*Initial Brief of Appellant* at 95),

does not assert any IAC/guilt phase claim based on an alleged failure to challenge the chain of custody; therefore, any IAC claim is procedurally barred. Fourth, any IAC claim below was facially insufficient inasmuch as Johnston failed to allege that but for trial counsel's failure to object, the result of the proceeding would have been different. See, *Blackwood v. State*, 946 So. 2d 960, 970-71 (Fla. 2006). Fifth, Johnston's bare allegation of a break in the chain of custody is insufficient to render relevant physical evidence inadmissible. See, *Floyd*, 850 So. 2d at 399. Sixth, Johnston cannot overcome the trial court's dispositive factual determination that, "Ms. Mcllwaine's evidentiary hearing testimony is credible and consistent with her trial testimony. There is no indication that shoe print lifts or latent fingerprints were stored in her car for three days, and Ms. Mcllwaine specifically testified that she never left any evidence in her car overnight." (PCR V9/1625). This claim is procedurally barred and without merit.

DNA Evidence - Denial of Request for CODIS Submission:

At trial, the defense, and the jury, knew that an unidentified DNA profile was obtained from a blood spot found on a table in the victim's home; the spot was discovered *seven months after* the victim's murder and *after* the home had been returned to the victim's family. Johnston's guilt phase counsel, Mr. Littman, testified in post-conviction that he felt the blood

from the table was meaningless because it was not discovered until months after the house was returned to the care of the victim's family and there was no proof that the blood was there at the time of the murder. In denying post-conviction relief, the trial court found that Johnston "failed to establish that the blood sample was capable of submission to CODIS at the time of trial. Post-conviction counsel admitted at the evidentiary hearing that he did not have any witnesses who could testify that the blood sample could have been submitted to CODIS at the time of trial for the purpose of determining whether it matched a known convicted felon." (PCR V9/1615). In light of this failure of proof and concession, this IAC claim was correctly denied.[5]

Furthermore, the trial court's fact-specific ruling denying Johnston's IAC/guilt phase claim (PCR V9/1617-1618) is unchallenged on appeal. In post-conviction, Mr. Littman confirmed that he felt the blood spot was meaningless because it was not discovered until months after the house was returned to the victim's family and there was no proof that the blood was there at the time of the murder. Further, at trial Mr. Littman presented this unidentified blood evidence through his cross-examination of Ms. Suddeth and argued it to the jury in closing.

[5] CCRC argues that there should be no dispute that the DNA "could" have been submitted to CODIS. (*Initial Brief* at 97). This was disputed below (because unlike "STR" typing, the profile was "PCR" DNA, which was not capable of being uploaded to CODIS at

Accordingly, Johnston failed to establish any deficiency of counsel and prejudice under *Strickland*. Essentially, CCRC, who failed to establish that the DNA profile was capable of submission to CODIS at trial, now seeks an order compelling FDLE, who was not a party below, to submit an unidentified DNA profile, unconnected to the putative perpetrator (if available for STR typing), into the CODIS databank, without first adhering to the rules, regulations and guidelines which establish uniform criteria for CODIS submission. CCRC's demand - essentially a request for mandamus relief against FDLE - is procedurally barred. It is also a "red herring" inasmuch as the unidentified DNA could not qualify as "newly discovered" evidence and fails to "give rise to a reasonable probability of acquittal or a lesser sentence." See, *Hitchcock v. State*, 991 So. 2d 337, 348 (Fla. 2008); *Sireci v. State*, 773 So. 2d 34 (Fla. 2000); *King v. State*, 808 So. 2d 1237 (Fla. 2002).

ISSUE IX

CUMULATIVE ERROR

This issue is procedurally barred. Johnston's "cumulative error" claim is based, entirely, on a single sentence which summarily asserts some unidentified errors "individually and cumulatively in the lower court." (*Initial Brief of Appellant* at

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the time of the defendant's trial). (PCR V7/1224-1225).

page 97). CCRC's perfunctory one-sentence complaint is insufficient to fairly present any issue on appeal; therefore, this claim is waived for appellate review. See, *Pagan v. State,* 2009 WL 3126337, 13 (Fla. 2009), citing *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). Furthermore, as this Court reiterated in *Bradley v. State*, 2010 WL 26522 (Fla. 2010):

> Where, as here, the alleged errors urged for consideration in a cumulative error analysis "are either meritless, procedurally barred, or do not meet the *Strickland* standard for ineffective assistance of counsel[,] ... the contention of cumulative error is similarly without merit." *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008); see also *Lowe v. State*, 2 So. 3d 21, 33 (Fla. 2008) (holding that where individual claims are either procedurally barred or without merit, the cumulative error claim must fail); *Parker v. State*, 904 So. 2d 370, 380 (Fla. 2005) (same). **Bradley has failed to provide this Court with any basis for relief in any of his postconviction claims. Therefore, the cumulative error claim is without merit**.
>
> *Bradley*, 2010 WL 26522 (e.s.)

Johnston's perfunctory claim of cumulative error is waived under *Duest;* and, even if adequately presented on appeal, must fail under *Bradley*.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, this Court should AFFIRM the trial court's order denying Johnston's Rule 3.851 motion to vacate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to David D. Hendry, Assistant CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this 16th day of March, 2010.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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