IN THE SUPREME COURT OF FLORIDA

MICHAEL WAYNE SHELLITO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC10-2043

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Shellito." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The following are other references:

"IB"	Shellito's Initial brief in this postconviction appeal;
"IAC"	Ineffective assistance of counsel;
"R"	Record on direct appeal, followed by a hyphen and volume number;
"T"	Transcript on direct appeal, followed by a hyphen and volume number;
"PCR" or "PCT"	Record or transcript for this postconviction appeal, followed by a hyphen and volume number;
"-Supp"	Designates a supplemental record.

Any applicable page numbers follow citations to the record. For example, "PCR-Supp-VII 1185-1221" references pages 1185 to 1221 of volume VII of the supplemental postconviction record, which is a State's response to one of Shellito's postconviction motions.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts.

Case Timeline.

The State submits the following Timeline as the basic framework for the background of the case.

DATE	NATURE OF EVENT OR PLEADING
8/31/1994	Sean Hathorne, murdered (See, e.g., T-XXIV 461-63; T-XXV 645-46);
02/15/1995	Michael Shellito, indicted for First Degree Murder (R-I 1-3;
07/17/1995-07/21/1995	Jury trial guilt phase (T-XXIII 92 et seq.), at which Shellito found guilty as charged (R-II 308; T-XXVIII 1210-12);
08/21/1995	Jury penalty phase (T-XXIX et seq.), at which jury recommended death by a vote of 11-to-1 (R-II 359; T-XXXI 1511);
09/08/1995	Spencer-type hearing (T-XXXI 1530-53);
10/20/1995	Shellito sentenced to death (R-II 375-402; T-XXXIII); the trial court finding as aggravators prior violent felonies of aggravated assault, two armed robberies, and aggravated assault upon a law enforcement officer, great weight (R-II 393); during a robbery or attempted robbery and financial gain (merged), great weight (R-II 394) and age (slight weight) (R-II 395-96) and several aspects of Shellito's background as mitigators (slight weight) (R-II 395-98);
1997	Shellito v. State, 701 So.2d 837 (Fla. 1997)(#86,931), affirmed the conviction and death sentence on direct appeal;
1998	Shellito v. Fla., 523 U.S. 1084, 118 S.Ct. 1537 (1998) denied certiorari;
1999	"Shell" postconviction motion (PCR-I 1-33); additional versions of Shellito's postconviction motion followed;

2004-2005	Huff hearing (PCR-Supp-X 1849-85); Huff order granting an evidentiary hearing on IAC sub-claims within Claims III to XI (PCR-Supp-VII 1235-36); Shellito's "Third Amended" postconviction motion (PCR-II 255-368) and State's written response (PCR-II 369-74, cross-referencing State's response at PCR-Supp-VII 1185-1221);
2005-2006	Postconviction evidentiary hearing (PCR-Supp XII to PCR-Supp XIX, PCR-Supp XXXIII) and parties' "Closing Arguments" (PCR-Supp-VIII 1471-1532; PCR-Supp-IX 1534-1606; PCR-III 449-471);
2010	Judge Peter Dearing's "Amended[1] Order Denying Defendant's Motions for PostConviction Relief" (PCR-IV 556-95), from which Shellito appealed here.

Guilt-Phase Facts.

This Court summarized the guilt-phase facts of the case in its direct-appeal opinion affirming the conviction and death sentence:

> On the evening of August 30, 1994, Shellito and a number of other individuals were staying at Stephen Gill's apartment. Shellito left the apartment around midnight on August 30 and returned approximately an hour later. When he returned, he showed Ricky Bays a gun that he said he 'got from a van' that night. Kevin Keyes, who lived about six miles from Gill's apartment, had a .9 millimeter gun stolen from his truck sometime after 10 p.m. on that same night.
>
> Around 4 a.m. on August 31, Shellito and Gill took Gill's girlfriend home in Gill's mother's white pickup truck. The girlfriend stated that, a block from her house, Shellito told Gill to let him out because he needed to 'talk to someone.' Gill let Shellito out and took his girlfriend home. Gill and his girlfriend talked for five minutes and then he left.[FN1]
>
> FN1. Gill did not testify in this proceeding.

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[1] Judge Dearing explained the reason for the amended order at PCR-IV 556 n.1 & 596-97; the order, as initially rendered, had not been served on the parties.

About this same time, Michael Green was awakened by a noise in front of his home. When he looked out his window, he saw a white pickup truck in the road; saw the victim standing by the truck; heard a pop; and saw the victim spin around, run, and fall over by Green's gate. By the time Green called 911, the truck was gone.

Police found the body of eighteen-year-old Sean Hathorne by Green's front fence. The cause of death was a gunshot wound to the chest. A shell casing was found near the body.

Shellito and Gill returned to Gill's apartment together around 5:30 a.m. At that time, Shellito told Ricky Bays that he shot someone after they dropped off Gill's girlfriend. He told Bays that he saw a man walking down the street, stopped and shook him down, and, after determining that the man had no money, shot him. Shellito did not say whether Gill was involved, but Gill was present when Shellito related the story to Bays.

On the evening of August 31, a group was again gathered at Gill's apartment. Shellito showed Lateria Copeland and Theresa Ritzer a gun and told them both about the murder, stating that he told the victim he was 'out of gas' just before he shot him.

That same night (in the early hours of September 1), police raided the apartment. Shellito jumped out a window and ran but was stopped by a police dog. After Shellito aimed a gun at an officer, officers shot and wounded him. The gun recovered from Shellito was identified as the gun that fired the shell casing found at the murder scene and that was stolen from Kevin Keyes' truck the previous night.

In his defense, Shellito argued that the murder was committed by Gill. Shellito also emphasized that Bays was a convicted felon and had been in jail since the night of the raid on unrelated charges. Shellito also presented one of Bays' cellmates, who stated that Bays had papers with him, including one that looked like a police report, and that Bays made an offer to him to 'jump' Shellito's case, i.e., trade information for a more lenient sentence. However, the story related by the cellmate about the murder at issue was totally inconsistent with the facts.

Shellito's mother testified that Gill, whom she had met only once before, came to her house after Shellito was charged with the murder and confessed to her that he had committed the crime. Shellito's father testified that he overheard parts of the conversation between Gill and Shellito's mother and that he heard Gill say he told his attorney that he killed the victim. Although neither reported this story to the police until a week before trial, Mrs. Shellito stated that she thought she told a court employee about her conversation with Gill. On rebuttal, the court employee stated that she had a

brief conversation with Mrs. Shellito, but that Mrs. Shellito said nothing about someone else having committed the murder.

Shellito also presented testimony from a witness who lived across the street from the murder site. The witness testified that around 4 a.m. he heard tires screeching as if a vehicle had stopped suddenly, and he looked out a window and saw the shadow of a person moving around the back of a truck. The person appeared to be coming from the driver's side of the vehicle and was not the person who was shot. On cross-examination, the witness admitted that he was not positive about this information and that he did not have on his glasses when he looked out the window.

Shellito was convicted as charged.

Shellito v. State, 701 So.2d 837, 838-39 (Fla. 1997)

The Jury Penalty Phase.

This court's direct-appeal affirmance also summarized the penalty-phase facts:

At the penalty phase proceeding, the State presented evidence that Bays and Shellito were convicted of two armed robberies they committed on the night of August 31 before the raid, and that Shellito was convicted for aggravated assault on a law enforcement officer (from the night of the raid) and for a March 1994 aggravated assault. Bays testified that Shellito held the gun to the victim's head during both of the robberies. One of the victims related a similar story.

Shellito presented testimony that his father was an alcoholic and was in the Navy and away a lot; that, when Shellito was about two years of age, the State took custody of the children for a month while their mother was in jail; that Shellito stuttered badly as a child, was very loving, and was hit by his father on at least three occasions. Shellito's mother testified that he was emotionally handicapped, had reading and psychological problems, had a learning disability, had organic brain disorder, and had tried to kill himself. A psychologist's report from Shellito's early childhood reflected that he had numerous problems as a child. Other reports showed that he had a low-to-average IQ, was learning disabled and emotionally handicapped, and suffered from organic mental disorder, conduct disorder, and developmental language disorder.

The jury recommended death by an eleven-to-one vote, which the trial judge followed. The judge found two aggravating circumstances (prior violent felony and pecuniary gain/committed during a robbery

(merged)). In mitigation, he gave slight weight to Shellito's age and background and character.

Shellito, 701 So.2d at 839-40.

Direct Appeal Affirmance.

On direct appeal, Shellito raised nine issues (See also Initial Brief, FSC case #86,931), three concerning the guilt phase and six concerning the penalty phase of the trial.

Concerning the guilt phase, Shellito, 701 So.2d at 840-42, decided as follows concerning each of the claimed errors:

I Error admitting evidence of Shellito's attempt to flee from Gill's apartment during the police raid -- no error;

II Error allowing a detective to testify about Bays' prior consistent statement -- no error, and alternatively, any error regarding claim II was harmless; and

III Error because the prosecutor's statements in closing deprived him of a fair trial -- no error, and alternatively, unpreserved;

Concerning the penalty phase, Shellito, 701 So.2d at 842-45, decided as follows concerning each of the claimed errors:

IV The prosecutor's remarks during the closing argument of the penalty phase deprived him of a fair sentencing proceeding -- error, but "on this record, we conclude that the brief reference to lack of remorse was of minor consequence and constituted harmless error";

V Error instructing the jury on, and finding, the aggravating factor of pecuniary gain -- no error;

VI Error in refusing to give Shellito's requested instructions on mitigating circumstances -- no error;

VII Error in refusing to give Shellito's requested instruction on who bears the burden of proving that death is the appropriate penalty -- no error;

VIII In failing to properly evaluate the evidence in mitigation -- no error; and,

IX. Shellito's death sentence is disproportionate -- "we do not find the sentence to be disproportionate."

In discussing the appellate claims, Shellito, 701 So.2d at 840-45, summarized some of the evidence:

> In his first guilt-phase issue, Shellito contends that the trial judge erred in admitting evidence of Shellito's attempt to flee from Gill's apartment during the police raid.
>
> ...
>
> Under the circumstances of this case, we conclude the State presented sufficient evidence to establish that Shellito's flight and use of deadly force against the officer were due to this crime. The flight and use of force occurred within twenty hours of the murder, Shellito had bragged to others in the apartment about the murder shortly before the raid, and the gun in his possession at the time of the flight was identified as the murder weapon. The fact that Shellito committed several robberies during the brief period of time between the murder and the raid does not prevent a jury from hearing evidence regarding his flight and use of force under these facts.
>
> In his second claim, Shellito contends that the trial judge erred in allowing an officer to testify regarding a statement made by Ricky Bays. During the State's case-in-chief, Bays testified that Shellito told him he shot someone. He also testified that, when he was arrested for robbery approximately twenty hours after Shellito made that statement, he told police what Shellito had said. During cross-examination, Bays admitted that at the time he made the statement to police he was concerned about the charges against him; that he kept evidence in his own case under his mattress; and that he read about the murder in this case in the newspapers while he was in jail. To counter statements Bays made on cross-examination and the inference of recent fabrication, the State sought to introduce testimony from an officer regarding the details of Bays' post-arrest statement and the fact that no homicide or police reports had been written at the time Bays made his statement. Shellito objected, contending that this testimony constituted cumulative, improper bolstering of Bays' testimony. The trial court allowed the testimony.
>
> ...
>
> Shellito argues next that the trial judge erred in instructing the jury on and in finding the aggravating factor of pecuniary gain. ...
>
> ...

The facts of this case reflect that Shellito stole a gun; told Gill and his girlfriend to let him out of the vehicle in which they were riding so he could 'do some work to make money'; stopped the victim at gunpoint and demanded money; and shook the victim down, looking in his pockets for anything of value. Further, when the victim's body was found, the contents of his left front pants pocket were 'pulled up' and 'partially exposed.' These facts reflect that Shellito initiated the criminal episode for pecuniary gain. We find no error in the giving of the instruction or the finding of this factor.

...

Shellito asserts that the trial judge failed to properly evaluate the evidence in mitigation. First, he contends that the trial judge erroneously found Shellito's age to be of little weight, and, second, that he failed to expressly evaluate, find, and weigh other factors in mitigation such as Shellito's learning disabilities, low IQ, and organic brain damage.

In evaluating Shellito's age, the trial judge stated the following:

> At the time of the murder, the defendant was 6'4" tall, weighed 176 pounds and was 19 years of age. He is now 20 years old. He was and is a physically mature adult male. The murder victim, Sean Hathorne, was 18 years of age.
>
> The defendant's criminal record started at age 13 in Juvenile Court. He was arrested 14 times as a juvenile and adjudged guilty of 4 felonies and committed to HRS. At age 16, he was certified from Juvenile Court to adult Felony Court for prosecution.
>
> The defendant's total criminal records as a juvenile and as an adult shows that he has been arrested 22 times, has been charged with 30 separate crimes and has now been convicted of 8 felonies as an adult. He also has 4 felony convictions as a juvenile.
>
> The defendant was on probation for 2 violent felonies at the time he committed this murder.
>
> The PSI and testimony show that the defendant has been using alcohol and drugs since an early age.
>
> The defendant stated in the PSI that he was primarily supported by 'different ladies in the community.'
>
> Although young in years, the defendant is old in the ways of the world and vastly experienced in crime. Outlawry, his chosen vocation, and the largess of favored females has been his livelihood.
>
> The defendant's age is a marginal mitigating circumstance and I assign it slight weight.

...

The trial judge found as follows regarding the mitigating evidence presented:

> The defendant was raised in a stable, lower middle class home with his mother, older sister and brother. His father was an alcoholic, a career Navy man and was away from home on duty about half the time during which the children were growing up. However, the father did take the defendant fishing, go-carting and to the movies on occasion.
>
> The father and mother have gone to Court with the defendant after each criminal episode and have counseled with him about the consequences of his behavior.
>
> The father treated and disciplined all of the children the same. On three occasions, he struck or pushed the defendant but on one of those occasions, the defendant was screaming at the mother and the father stepped in to protect her.
>
> The defendant did not do well when he started school and was put in a special education class.
>
> His sister and brother excelled in school, both graduated from high school (the brother with honors) and both have become successful, law-abiding citizens. The brother is an E-4 in the Navy and the sister works at AT&T.
>
> Much of the defendant's school problems were behavioral until he was finally dismissed from junior high school in the 8th grade and sent to a disciplinary camp after which he refused to return to high school. Since that time, he lived at home and could not or would not hold a job and set his own life style.
>
> The defendant had a loving relationship with his mother, brother and sister. All children had the same advantages in the home and all were taught morality and the importance of the work ethic.
>
> The defendant would frequently argue with his mother and have temper tantrums and threaten when he could not have his way.
>
> Although he lived at home, he seldom worked and frequently was away, staying with friends and often got money from his mother so he could stay at motels with his girlfriends. He spent much time in the company of older women.
>
> The defendant has, for short periods of time, been in several treatment and diagnostic facilities but without any specific diagnosis of mental illness or other disabling conditions.
>
> This may be a marginal mitigating circumstance and I assign it slight weight.

During the penalty-phase proceeding, Shellito presented no medical or other expert testimony to support his claims of organic brain damage or other impairment. Further, the evidence submitted to support his mental condition was conflicting.[FN4] In evaluating this evidence, the trial judge recognized that Shellito's father was an alcoholic and that Shellito did not do well in school; that he had been placed in a special education class; and that he had been in several treatment and diagnostic facilities without any specific diagnosis of mental illness or other disabling conditions. These inferences could be properly drawn from the evidence introduced at trial.

FN4. Shellito introduced documents reflecting that he was diagnosed in 1991 as having 'organic mental disorder,' 'conduct disorder undifferentiated,' and 'developmental language disorder.' However, that same documentation reflects that he appeared to be well oriented in all areas, showed no signs of psychosis, and showed no impairment of concentration and memory. His school records indicate a history of behavioral problems and functioning levels of intelligence in the low average range, and his family members testified that he was placed in a foster home at a very young age for approximately thirty days when his mother was evicted from her home for nonpayment of rent and served time in jail. However, his family members also testified that he 'was very quick on learning things and he took to mechanical repair really good,' learned a work ethic from his mother and father, and was taught at home not to lie, cheat, or kill.

...

The facts of this case reflect that Shellito previously had been sentenced as an adult for a violent felony conviction and was on probation at the time he committed the murder, and that he committed three robberies and an aggravated assault on a police officer within days of the murder. Further, Shellito was not a minor; the evidence regarding his intellectual functioning indicated he was in the low average range of intelligence; and the evidence regarding his mental status was not supported by expert testimony and was conflicting.

Postconviction Evidentiary Hearing.

The trial held an evidentiary hearing concerning several claims on December 12, 2005; April 18-21, 2006; and June 12, 2006.

Shellito presented the testimony of the following witnesses:

Refik Eler, trial counsel (PCT-Supp-XII 2040 to PCT-Supp-XIII 2265; PCT-Supp-XIV 2564-2621);

Dr. William Riebsame, forensic psychologist (PCT-Supp XIII 2297 to PCT-Supp-XIV 2487);

Lynn Edwards, childhood best friend of Shellito's brother (PCT-Supp-XIV 2488-2511);

Joseph Shellito, Defendant Shellito's brother (PCT-Supp XIV 2512-32);

Diane Edwards, neighbor whose four sons played with Shellito (PCT-Supp-XIV 2539-50;

Dr. Wu, PET scan expert (PCT-Supp-XIV 2622 to PCT-Supp-XV 2768);

Mark Allen, Shellito's childhood friend (PCT-Supp-XV 2771-78);

Rebecca Allen, Mark Allen's wife, Shellito's former roommate, and close friend of Shellito's mother (PCT-Supp-XV 2779-89);

Rebecca Shellito, Defendant Shellito's sister (PCT-Supp-XV 2789 to PCT-Supp-XVI 2860);

Oly Antonio, childhood friend (PCT-Supp-XVI 2870-78);

Johnny Hill, teenage friend (PCT-Supp-XVI 2879-99);

Quinn Edwards, neighbor (PCT-Supp-XVI 2900-2919;

Eric Edwards, Quinn Edwards' brother and Shellito's childhood friend (PCT-Supp-XVI 2920-47);

Dr. Sarkis, child psychiatrist who treated Shellito at Grant Psychiatric Hospital (PCT-Supp-XVI 2947-3032);

Dr. Beaver, neuropsychologist PCT-Supp-XVII 3140 to PCT-Supp-XVIII 3260);

Debra Dlugosz, trial clerk (PCT-Supp-XVIII 3274-79);

Jay Plotkin, trial prosecutor (PCT-Supp-XVIII 3284-3368);

Allison Tycoliz, kindergarten teacher (PCT-Supp-XVIII 3371-99);

Alan Chipperfield, attorney with Public Defender's Office (PCT-Supp-XVIII 3400-14);

Rosa Greenbaum, investigator assigned for collateral proceedings (PCT-Supp-XVIII 3414-38);

Judge Olliff, the trial judge (PCT-Supp-XXXIII 6112-26), and

Donald Marx, Mr. Eler’s investigator (PCT-Supp-XXXIII 6132-91).

The State presented the testimony of --

Dr. Lawrence Holder, expert in PET scan and nuclear medicine (PCT-Supp-XVI 3033 to PCT-Supp-XVII 3131);

Ester Haynes, secretary to Judge Olliff (PCT-Supp-XIX 3441-68).

Subsequently, Judge Peter Dearing rendered a 39-page written order PCR-IV 556-95) that denied each of the postconviction claims.

SUMMARY OF ARGUMENT

A number of Shellito's appellate claims are unpreserved or procedurally barred. None of them merit relief.

ISSUES I, II, & IV. Shellito failed to prove IAC concerning his defense counsel's preparation for, and presentation in, the penalty phase. Mr. Eler, Shellito's trial counsel, prepared for the penalty phase early in his representation of Shellito. He took depositions and reviewed documents and reports prior to trial. He conferred with Shellito and Shellito's family, strategized and prepared. He enlisted the assistance of a mental health expert, Dr. Miller, twice and provided the information the doctor needed. Ultimately, Mr. Eler made an informed and reasonable decision not to use Dr. Miller at trial because of all the negative aspects of Shellito's background that the prosecution could explore and stress through Dr. Miller or rebuttal to Dr. Miller. Instead of risking, for example, the State focusing on Shellito's anti-social personality disorder, Mr. Eler used Shellito's family to introduce selective aspects of Shellito's background. He called as penalty-phase witnesses Shellito's brother, sister, father, and mother and then effectively harnessed that evidence in his closing argument. Shellito's postconviction evidence, in spite of its volume, was, at best, roughly cumulative to the penalty-phase evidence.

Shellito also failed to meet his Stickland burdens concerning jury selection and various other matters in ISSUE II.

ISSUE III. There was no State-offered secret deal to one of the witnesses. Shellito's reliance on his self-serving assumptions and inferences is insufficient.

ISSUE V. The prosecutor's arguments to the jury complied with the law and were grounded on the evidence. Defense counsel was not ineffective for not objecting, and actually, as to one of the sub-claims, he did object.

ISSUE VI. The state did not draft or edit the Judge's sentencing order, and Shellito failed to prove otherwise. Instead, Shellito again relies on his assumptions and inferences that are not grounded in law or evidence.

ISSUE VII. The trial clerk giving the jury exhibits was not an improper ex parte communication.

ISSUE VIII. Shellito's age and argued brain damage are not bars to the death penalty.

To the degree that each of Shellito's claims is preserved through developed appellate argument and through presentation to the trial court and not procedurally barred by the direct appeal, each is meritless.

IAC STANDARD OF REVIEW

Several of the issues on appeal concern IAC. Therefore, at this juncture, the State discusses the standard of review for those claims.

For IAC claims, Strickland v. Washington, 466 U.S. 668 (1984), and its progeny impose upon the defendant rigorous burdens of demonstrating that defense counsel was deficient and that this deficiency was prejudicial. "[B]ecause the *Strickland* standard requires establishment of both [the deficiency and prejudice] prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So.2d 1176, 1182 (Fla. 2001). Strickland, 466 U.S. at 687, itself put it: "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

For the deficiency prong, the standard for counsel's performance is "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential." Stein v. State, 995 So.2d 329, 335 (Fla. 2008)(quoting Strickland, 466 U.S. at 689.) "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. "The object of an ineffectiveness claim is not to grade counsel's performance." 466 U.S. at 697. "[O]missions are inevitable."

Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc). "[T]he issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'" Id. at 1313 (quoting Burger v. Kemp, 483 U.S. 776 (1987)).

The standard is not whether counsel would have had "nothing to lose" in pursuing a matter. See Knowles v. Mirzayance, __U.S.__, 129 S.Ct. 1411, 1419 (2009)(reversed Court of Appeals, which used "improper standard of review ... [of] blam[ing] counsel for abandoning the NGI claim because there was nothing to lose by pursuing it").

The defendant must establish that his counsel's performance was "so patently unreasonable that no competent attorney would have chosen it," Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997). Accord Chandler v. U.S., 218 F.3d 1305, 1315 (11th Cir. 2000)("because counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take").

Applying Strickland's principles to the penalty phase, defense counsel is not required to present every available mitigation witness to be considered effective. See Bell v. Cone, 535 U.S. 685, 696 98 (2002)(not ineffective where defense counsel presented no mitigating evidence in the penalty phase). Accordingly, Grayson v. Thompson, 257 F.3d 1194, 1225 (11th Cir. 2001), explained that a failure to find more of the same type of mitigation is not unconstitutionally deficient:

> 'A failure to investigate can be deficient performance in a capital case when counsel totally fails to inquire into the defendant's past

> or present behavior or life history.' Housel v. Head, 238 F.3d 1289, 1294 (11th Cir. 2001). However, counsel is not required to investigate and present all mitigating evidence in order to be reasonable. See Tarver v. Hopper, 169 F.3d 710, 715 (11th Cir. 1999).

For the prejudice prong, Dillbeck v. State, 964 So.2d 95, 99 (Fla. 2007)(quoting Strickland, 466 U.S. at 694), summarized: "To establish prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" The reviewing court analyzes IAC penalty phase claims to determine whether the allegedly "'missing' testimony is significant enough to 'undermine [[its]] confidence in the outcome' of' the defendant's sentencing,' *Strickland*, 466 U.S. at 694, not to ask whether it would have had 'some conceivable effect on the outcome of the proceeding,' Id. at 693." Cade v. Haley, 222 F.3d 1298, 1305 (11th Cir. 2000).

Postconviction evidence that is substantially cumulative with evidence presented at trial is not a ground for relief. Its cumulative nature negates both prongs of Strickland. See, e.g., Everett v. State, 54 So.3d 464, 481 (Fla. 2010)("where the evidence presented at the postconviction evidentiary hearing was 'essentially cumulative' to that presented during the penalty phase, trial counsel cannot be considered deficient"); Groover v. State, 489 So.2d 15, 16 (Fla. 1986)("evidence now claimed to have been omitted centered on appellant's history of drug use and troubled family background ... largely cumulative to that presented by appellant at trial").

The trial court correctly applied standards in denying Shellito's IAC claims.

APPELLATE STANDARD OF REVIEW OF IAC CLAIMS

Principles applicable to this Court's appellate review of the denial of postconviction claims depend upon whether the trial court summarily denied the claim or denied it after an evidentiary hearing.

Franqui v. State, 59 So.3d 82, 95-96 (Fla. 2011)(footnote omitted), summarized the standard for reviewing the summary denial of a postconviction motion:

> A postconviction court's decision whether to grant an evidentiary hearing on a ... [postconviction] motion is ultimately based on written materials before the court. Thus, its ruling is tantamount to a pure question of law, subject to de novo review. *See Willacy v. State*, 967 So.2d 131, 138 (Fla.2007) (*citing State v. Coney*, 845 So.2d 120, 137 (Fla. 2003)). When reviewing a court's summary denial of a rule 3.850 motion or claim, the court must accept the movant's factual allegations as true to the extent they are not refuted by the record. *Occhicone v. State*, 768 So.2d 1037, 1041 (Fla. 2000). Generally, a defendant is entitled to an evidentiary hearing on a rule 3.850 motion unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient. *See Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000). The defendant bears the burden to establish a prima facie case based on a legally valid claim; mere conclusory allegations are insufficient. Id. We now turn to the specific claims of ineffective assistance of trial counsel that Franqui raises in this appeal.

In appellate review of a trial court order based upon an evidentiary hearing, the trial court's factual findings are presumed correct and merit affirmance if supported by competent, substantial evidence, and the trial ocirt's legal conclusions are reviewed do novo. See, e.g., Ford v. State, 955 So.2d 550, 553 (Fla. 2007)("Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed

standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo")(citing Sochor v. State, 883 So.2d 766, 771-72 (Fla. 2004)).

The state disputes Shellito's suggestion (IB I, 39 n.28; see also IB 60) that Porter v. McCollum, __U.S.__, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), changes IAC standards or appellate review of IAC claims.[2] In Porter, the United States Supreme Court reversed the Eleventh Circuit. Relying upon Strickland v. Washington, 466 U.S. 668 (1984), Porter merely applied of Strickland's two prongs of deficiency and prejudice to that particular case. Supporting its decision finding Strickland prejudice, Porter detailed the compelling mitigation evidence defense counsel omitted. Perpetual violence and physical abuse by Porter's father caused Porter to enlist in the Army at age 17. In the Korean War, Porter was shot in the leg during an advance "above the 38th parallel to Kunu-ri," but while wounded, Porter's unit was "attacked by Chinese forces." Porter's unit was ordered to "hold off the Chinese advance, enabling the bulk of the Eighth Army to live to fight another day." The weather was "bitter cold" and the unit was "terribly weary" and zombie-like because they had been in "constant contact with the enemy fighting [their] way to the rear, [and had] little or no

[2] This Court currently has pending a number cases in which the defendant is contending that Porter affects the method of Strickland analysis. See, e.g., Mark Allen Davis v. State (SC11-359); Chadwick Willacy v. State (SC11-99); William T. Turner v. State (SC11-946); Clarence James Jones v. State (SC11-1263).

sleep, little or no food," yet the unit "engaged in a 'fierce hand-to-hand fight with the Chinese' and later that day received permission to withdraw, making Porter's regiment the last unit of the Eighth Army to withdraw." Porter, 130 S.Ct. at 449-50.

Porter, 130 S.Ct. at 450-51 (internal citations omitted), continued:

> Less than three months later, Porter fought in a second battle, at Chip'yong-ni. His regiment was cut off from the rest of the Eighth Army and defended itself for two days and two nights under constant fire. After the enemy broke through the perimeter and overtook defensive positions on high ground, Porter's company was charged with retaking those positions. In the charge up the hill, the soldiers 'were under direct open fire of the enemy forces on top of the hill. They immediately came under mortar, artillery, machine gun, and every other kind of fire you can imagine and they were just dropping like flies as they went along. … Porter's company lost all three of its platoon sergeants, and almost all of the officers were wounded. Porter was again wounded and his company sustained the heaviest losses of any troops in the battle, with more than 50% casualties. Colonel Pratt testified that these battles were 'very trying, horrifying experiences,' particularly for Porter's company at Chip'yong-ni. … Porter's unit was awarded the Presidential Unit Citation for the engagement at Chip'yong-ni, and Porter individually received two Purple Hearts and the Combat Infantryman Badge, along with other decorations.
>
> Colonel Pratt testified that Porter went absent without leave (AWOL) for two periods while in Korea. He explained that this was not uncommon, as soldiers sometimes became disoriented and separated from the unit, and that the commander had decided not to impose any punishment for the absences. …

Based on these mitigation facts that trial counsel failed to marshal, Porter merely applied Strickland, found Strickland prejudice, and held that this Court's failure to find Strickland prejudice was unreasonable under federal habeas-corpus law. Porter did not change Strickland prejudice analysis.

Porter re-affirmed Strickland's requirement that it is the defendant's burden to demonstrate prejudice. Porter, 130 S.Ct. at 452, explained, "To

prevail under *Strickland*, **Porter must show** that his counsel's deficient performance prejudiced him" and then cites Strickland several times.

In a number of cases, this Court has recently cited to Porter in support of its discussion of pre-existing Strickland principles. See Hildwin v. State, 2011 WL 2149987, *5 (Fla. June 2, 2011); Franqui v. State, 59 So.3d 82, 95 (Fla. 2011); Troy v. State, 57 So.3d 828, 836 (Fla. 2011); Everett v. State, 54 So.3d 464, 472 (Fla. 2010); Stewart v. State, 37 So.3d 243, 247-48 (Fla. 2010); Rodriguez v. State, 39 So.3d 275, 285 (Fla. 2010); Grossman v. State, 29 So.3d 1034, 1042 (Fla. 2010). Thus, this Court has correctly recognized that Porter does not change the prejudice analysis. Instead, Porter applied the prejudice analysis to the distinctive facts of that case where war heroics and extreme suffering in the line of combat duty was omitted from the trial.

Actually, under federal habeas-corpus law ("AEDPA"), Porter could not substantially change Strickland. Porter was a federal habeas case governed by the AEPDA. According to the habeas statute, to grant habeas relief a state court decision must be contrary to "clearly establish Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1). Therefore, federal courts, including the Supreme Court when reviewing a habeas case, can only grant relief if the law was already established.

Shellito also incorrectly asserts (IB 39, n. 28, 60) Sears v. Upton, 130 S.Ct. 3259, 3266 (2010), requires a "probing and fact-specific analysis," and incorrectly suggests that it is per se reversible error for

the trial court not to conduct one. Contrary to Shellito's argument, in Sears, **the state court had found the deficiency prong but refused to evaluate the prejudice prong** vis-à-vis the very substantial mitigation. Sears reviewed a state court's prejudice discussion that did not evaluate the very substantial mitigation evidence that trial counsel failed to present, including, for example, the defendant's parents in "a physically abusive relationship... and divorced when Sears was young"; the defendant "suffer[ing] sexual abuse at the hands of an adolescent male cousin"; defendant's mother's "favorite word for referring to her sons was 'little mother fuckers'"; defendant's father "verbally abusive" and "discipline[ing] Sears with age-inappropriate military-style drills"; "Sears struggle[ing] in school, demonstrating substantial behavior problems from a very young age," for example, "Sears repeat[ing] the second grade ... and ... referred to a local health center for evaluation at age nine"; "[b]y the time Sears reached high school," Sears being "'described as severely learning disabled and as severely behaviorally handicapped'"; Sears' father "'berate[ing] [him] in front of' the school principal and her during a parent-teacher conference," which left an indelible and distinctive impression on a teacher; observable "significant frontal lobe abnormalities"; "several serious head injuries he suffered as a child, as well as drug and alcohol abuse" and "brain damage"; and, standardized tests showing Sears as "among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior only to relevant stimuli." Sears, 130 S.Ct. at 3262-63.

The absence of any state court evaluation of Strickland prejudice where the state court had found deficiency was error:

> A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation. *See Porter*, ... 130 S.Ct. at 453-54;...; *Strickland*, supra, at 694, 104 S.Ct. 2052. It is for the state court-and not for either this Court or even Justice SCALIA-to undertake this reweighing in the first instance.

Sears, 130 S.Ct. at 3267.

In Sears, the state court also confused "reasonableness" with a prejudice analysis. Sears, 130 S.Ct. at 3261, 3265. Consistent with Strickland, Sears, 130 S.Ct. at 3265, held that the state court erred in confusing "abstract" reasonableness of a defense theory with prejudice. Of course, the determination of whether a defendant has demonstrated Strickland prejudice is independent of reasonableness determination, which, instead, concerns the deficiency prong, See Strickland, 466 U.S. 668, 688, 104 S.Ct. 2052, 2064 (discussing deficiency prong, "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness"; "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances"). Thus, Sears, 130 S.Ct. at 3265 n.10, noted that "the reasonableness of the theory is not relevant when evaluating the impact of evidence that would have been available and likely introduced, had counsel completed a

constitutionally adequate investigation before settling on a particular mitigation theory."

Consistent with Sears, the Eleventh Circuit has treated Porter as a fact-bound, non-fundamental, decision. Reed v. Secretary, Florida Dept. of Corrections, 593 F.3d 1217, 1243 n.16 (11th Cir. 2010), explained that the "the crux of counsel's deficient performance in *Porter* was the failure to investigate and present Porter's compelling military history." Similarly, Suggs v. McNeil, 609 F.3d 1218, 1232 (11th Cir. 2010), recently cited to Porter for a Strickland principle: "Suggs cannot contend that his sentencing judge and jury 'heard almost nothing that would humanize [Suggs] or allow them to accurately gauge his moral culpability.' *Porter v. McCollum*, …."

Here, in contrast with Sears, Shellito has failed to demonstrate Strickland's deficiency prong as to each IAC claim on appeal here.

Moreover, when federal courts review Shellito's IAC claims, this court's reasonable factual findings will be binding in federal court. Compare 28 U.S.C.A. § 2254(d)(requires denial of federal habeas unless state court decision "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"); Marquard v. Sec'y for the Dep't of Corr., 429 F.3d 1278, 1303 (11th Cir. 2005)("state court's factual determinations are 'presumed to be correct' and the petitioner bears 'the burden of rebutting the presumption . . . by clear and convincing evidence'"; citing 28 U.S.C. §2254(e)(1)) with Dill v. Allen, 488 F.3d 1344, 1354 (11th Cir. 2007)("presumption of correctness

applies both to findings of fact made by the state trial court as well as the state appellate court"); Newland v. Hall, 527 F.3d 1162, 1199 (11th Cir.2008)("highest state court decision reaching the merits of a habeas petitioner's claim is the relevant state court decision"); Kokal v. Secretary, Dept. of Corrections, 623 F.3d 1331, 1345-46 (11th Cir. 2010)(applied principle of deferring to highest state court).

On January 19, 2011, Harrington v. Richter, __U.S.__, 131 S.Ct. 770 (2011), re-confirmed that neither Porter nor Sears required a new mode of prejudice analysis. Richter upheld a state court rejection of a Strickland claim even though the state court denied the defendant postconviction relief "**in a one-sentence summary order**," Richter, 131 S.Ct.at 783. Richter indicated that "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief," Richter, 131 S.Ct.at 784.

Certainly, in Richter the state court did not explicitly do any "probing" (IB 39 n.28, 60), yet Richter essentially upheld the state court rejection of the Strickland claim and reversed the U.S. Court of Appeals' reversal of a United States District Court order that had denied habeas relief:

> The California Supreme Court's decision on the merits of Richter's *Strickland* claim required more deference than it received. Richter was not entitled to the relief ordered by the Court of Appeals. The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

Richter, 131 S.Ct. at 792.

Here, the trial court issued much more than a "one-sentence summary order," which under Richter, would have been sufficient, and the State submits that, in any event, the record supports affirming the trial court's denial of postconviction relief.

Indeed, arguendo, even if the trial court had conducted an erroneous legal analysis but reached the correct legal result, this Court's recognition of the "Tipsy Coachmen" principle would support affirming the trial court. See State v. Hankerson, 65 So.3d 502, 505-507 (Fla. 2011)("trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment"); Robertson v. State, 829 So.2d 901 (Fla. 2002)(collected cases and analyzed the parameters of "right for any reason" principle of appellate review); Butler v. Yusem, 44 So.3d 102, 105 (Fla. 2010)("key to this ["Tipsy Coachman"] doctrine is whether the record before the trial court can support the alternative principle of law"); Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("... affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it"); Jaworski v. State, 804 So.2d 415, 419 (Fla. 4th DCA 2001)("we are obligated to entertain any basis to affirm the judgment under review, even one the appellee has failed to argue"); Ochran v. U.S., 273 F.3d 1315, 1316 (11th Cir. 2001)("We conclude that summary judgment for the defendant was appropriate, but for a different reason").

ARGUMENT

ISSUE I: IAC PENALTY PHASE? (IB 33-60, RESTATED)

ISSUE I claims that trial counsel failed to adequately investigate and present Shellito's background and mental state in the penalty phase, thereby demonstrating Strickland deficiency and Strickland prejudice. To the contrary, the record supports the reasonableness of trial counsel and provides a competent substantial foundation for the trial court's rejection of the IAC penalty claim.

A. The Trial Court's Order.

The trial court's ruling merits affirmance. Because part of the trial court's Order discussing the Ake claim ("Ground Five" of the postconviction motion) overlaps with ISSUE I, the State begins its quote of the trial court with part of its discussion of Ake, and where the trial court cross-references another claim, the ruling concerning the other claim is incorporated here:

> **Defendant's Ground Five**
>
> In ground five, the Defendant asserts that his mental health expert did not render adequate mental health assistance as required by Ake v. Oklahoma, 470 U.S. 68 (1985). The Defendant avers that the inadequacy of the examination stemmed from the ineffective assistance by trial counsel in not securing and providing the expert the materials 'necessary for an adequate and appropriate evaluation.'... As to the Defendant's claim that the inadequacy of the [mental health examination stemmed from trial counsel's ineffectiveness in failing to provide the expert with materials necessary for an 'appropriate evaluation,' trial counsel testified at the evidentiary hearing that while he could not be a hundred percent certain as to what documents he gave Dr. Miller, one of those of which he was certain he gave Dr. Miller was the Defendant's discharge summary from Grant Hospital. (P.C. Vol. I at 191.) Trial counsel went on to testify that the discharge summary made Dr. Miller aware that there were records showing a history of aggressive behavior, homicidal and suicidal threats, an organic mental disorder, that the Defendant was taking

Tegretol, and that the Defendant had a conduct disorder, developmental language disorder, and reading disorder. (P.C. Vol. I at 191.) Further, trial counsel also testified that had Dr. Miller requested or recommended additional testing, he would have done so. (P.C. Vol. I at 200.) Thus, trial counsel's testimony presented at the evidentiary hearing has demonstrated that both trial counsel and the retained expert performed the tasks required by Ake. Accordingly, this claim is without merit.

Defendant's Ground Six

In ground six, the Defendant asserts that trial counsel rendered ineffective assistance by failing to adequately investigate and present mitigation evidence, and failed to adequately challenge the State's case. Specifically, the Defendant raises four (4) separate instances of alleged failure on the part of trial counsel.

Subclaim One

In ground six, subclaim one, the Defendant asserts that counsel rendered ineffective assistance by failing to present a 'wealth' of known and knowable mitigation evidence that was not discovered through his investigation. Specifically, the Defendant appears to refer to information relating to the 'turbulent conditions' of the Defendant's childhood, and his mental health history. With respect to presenting the Defendant's hospital and school records, trial counsel testified at the evidentiary hearing that he chose not to do so because they contained, in his opinion, information detrimental to the defense. (P.C. Vol. I at I 93.)

As to testimony relating to the Defendant's childhood and mental health, trial counsel testified at the evidentiary hearing that he specifically chose not to have Dr. Miller testify to these aspects of the Defendant's history because of the danger that information harmful to the defense would also be presented on cross-examination of Dr. Miller. (P.C. Vol. I at 204.) Trial counsel testified that it was a strategic decision to have the Defendant's family members testify to aspects of his childhood and mental health because the State would be more sensitive in cross-examining family members, as opposed to an expert witness. (P.C. VoL I at 206.) Further, trial counsel testified that he was satisfied with how the family members testified and that through their testimony he was able to get a lot of the information relating to the Defendant's childhood and mental health out to the jury. (P.C. Vol. I at 206-207.) Any testimony that Dr. Miller could have provided would have been largely cumulative to the testimony presented by Defendant's family and friends. Counsel cannot be deemed ineffective for failing to present cumulative testimony. Valle v. State, 705 So. 2d (Fla. 1997); Card v. State, 497 So. 2d 1169 (Fla. 1986).

This Court finds it was within the wide range of professional judgment for trial counsel to make a tactical decision to have certain aspects of the Defendant's background come out a trial through family members and not through Dr. Miller. Such a decision by trial counsel does not amount to ineffective assistance. Songer v. State, 419 So. 2d 1044 (Fla. 1982); Gonzalez v. State, So. 2d 145, 146 (Fla. 3d DCA 1991). Accordingly, the Defendant's instant claim is denied.

Subclaim Two

In ground six, subclaim two, the Defendant asserts that counsel rendered ineffective assistance by failing to present a challenge to the aggravating circumstances presented by the State. The Defendant refers to Ground Seventeen for the substance of the instant claim. Therefore, for purposes of clarity, the instant subclaim shall be addressed *infra* with the discussion on the Defendant's Ground Seventeen.

Defendant's Ground Seventeen

In ground seventeen, ground three subclaim five, and ground six subclaim two, the Defendant asserts that his death sentence is premised upon fundamental error because the jury received inadequate guidance concerning the aggravating circumstances to be considered. Specifically, the Defendant avers that Florida's statute setting forth the aggravating circumstances to be considered in a capital case is facially vague and overbroad. This Court finds the instant claim is procedurally barred as it could have and should have been raised on direct appeal. Rodriguez v. State, 919 So. 2d 1252, 1280 (Fla. 2005) (claims regarding the adequacy or constitutionality of jury instructions should be raised on direct appeal.); Arbelaez v. State, 775 So. 2d 909 (Fla. 2000). Such claims will not be addressed under the guise of an ineffective assistance of counsel claim. Rodriguez, 919 So. 2d at 1280; Arbelaez, 775 So.2d at 919 (Fla. 2000) ('Arbelaezmaynotrelitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel.'). Accordingly, the Defendant's instant claims are denied.

Subclaim Three

In ground six, subclaim three, the Defendant asserts that counsel rendered ineffective assistance by failing to object to the presentation and consideration of non-statutory aggravating factors. The Defendant refers to Ground Twenty for the substance of the instant claim. Therefore, for purposes of clarity, the instant subclaim shall be addressed infra with the discussion on the Defendant's Ground Twenty.

Defendant's Ground Twenty

In ground twenty, ground three subclaim five, and ground six subclaim three, the Defendant asserts that his death sentence is fundamentally unfair and unreliable due to the State's introduction of non-statutory aggravating factors and the State's arguments upon non-statutory aggravating factors. To the extent trial counsel failed to object, the Defendant alleges ineffective assistance of counsel. The instant claim is procedurally barred as any challenge to the aggravators upon which the trial judge instructed the jury could have and should have been raised on direct appeal. Finney y. State, 831 So.2d 651, 657 (Fla. 2002); see also Rodriguez v. State, 919 So. 2d 1252, 1280 (Fla. 2005) (claims regarding the adequacy or constitutionality of jury instructions should be raised on direct appeal.); Arbelaez v. State, 775 So. 2d 909, 919 (Fla. 2000). Further, the Defendant's allegation of ineffective assistance of counsel is merely conclusory. Conclusory allegations of ineffective assistance of counsel fail to establish entitlement to re1ief. Parker [v. State, 603 So. 2d 616,617 (Fla. 1st DCA 1992)], ... Accordingly, the Defendant's claim is without merit.

Subclaim Four

In ground six, subclaim four, the Defendant asserts that counsel rendered ineffective assistance by failing to object to alleged prejudicial comments made by the State during closing arguments. The Defendant refers to Ground Ten for the substance of the instant claim. Therefore, for purposes of clarity, the instant subclaim shall be addressed infra with the discussion on the Defendant's Ground Ten.

Defendant's Ground Ten

In ground ten, the Defendant asserts that the State committed prosecutorial misconduct during arguments in the guilt and penalty phases of his trial, which presented impermissible considerations to the jury, misstated facts, and were inflammatory and improper. To the extent trial counsel failed to properly object to the State's arguments, the Defendant alleges ineffective assistance of counsel. The Florida Supreme Court has held substantive claims of prosecutorial misconduct could and should be raised on direct appeal and defendants are, therefore, procedurally barred from raising such claims in a motion seeking post-conviction relief. Spencer v. State, 842 So. 2d 52, 60 (Fla. 2003); see also Floyd y. State, 808 So.2d 175 (Fla. 2002); Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995). Thus, the Defendant's claim of prosecutorial misconduct is procedurally barred. Further, the Defendant's allegation of ineffective assistance of counsel is merely conclusory. Conclusory allegations of ineffective assistance of

> counsel fail to establish entitlement to relief. Parker, *supra*. Accordingly, the Defendant's claim is without merit.

(PCR 576-79, footnotes cross-referencing earlier postconviction motions omitted; underlining and bold in original). See also ISSUE IV infra.

B. Competent Substantial Evidence & Reasons Supporting the Trial Court's Ruling.

The trial court's order contains pinpoint citations to the record that support its rejection of the IAC penalty phase claim. On that basis alone, the trial court's order merits affirmance. In addition, the State submits the following support for the order.

The record, in fact, supports the trial court's denial of the claim that trial counsel was prejudicially deficient under Strickland.

Concerning his preparation for the penalty phase, trial defense counsel Refik Eler, testified at the evidentiary hearing that he prepared for the penalty phase from the beginning, while also preparing for the guilt phase. (See PCT-Supp-XII 2088; PCT-Supp-XIII 2260-61). He took all the depositions he needed and reviewed all documents and expert reports prior to trial. (PCT-Supp-XIII 2262-63). He conferred with his client and client's family, and strategized and prepared for his examinations. He prepared for mitigation. (PCT-Supp-XIII 2263).

Throughout his representation of Shellito, Eler discussed the progress of this case with Shellito's parents. (PCT-Supp-XII 2203) At a June 26 conference with the parents, they provided "mitigation documents." (PCT-Supp-XII 2090). Mr. Eler indicated that Shellito's mother denied any sexual molestation or neglect. (PCT-Supp-XII 2148-49) She denied that her son had

any history of depressive episodes, and Shellito and the parents denied a history of substance abuse. (PCT-Supp-XVI 2257) Shellito's father admitted he was an alcoholic and "not much of a father." (PCT-Supp-XVI 2248) Shellito's parents admitted Shellito was physically abused and neglected. (PCT-Supp-XIII 2248-49) This information, in fact, was presented at the penalty phase (See T-XXX; discussion infra), and Eler thought that the family did "fairly well testifying" at trial and introducing documents. The "dialogue was good." (PCT-Supp-XVI 2249)

Ultimately, defense counsel decided to stress Shellito's humanity: "mercy," "family," "human being," "young kid, may have some issues, spare his life." (PCT-Supp XII 2223-24)

As discussed infra, he strategically decided to introduce mitigation through family.

Eler testified that his records showed that in June 1995--

> I had requested a subpoena duces tecum for Charter Hospital, Grant Center, Doctors Alvarez and Mullen, Baptist Hospital, and the United States NAS Jacksonville Hospital ...

(PCT-XII 2092) At that time, he was not "starting the ball" rolling, he was "well into the ball." (PCT-Supp-XII 2093) Prior to the evidentiary penalty phase, Eler collected records from Charter Hospital, Baptist Hospital, Naval Hospital of Jacksonville, Drs. Angeles, Alvarez, and Mullen, Grant Center Hospital, Duval County Schools, and Jefferson Davis Middle School. (PCT-Supp-XII 2103-2124).

Even Shellito's Closing Argument in the trial court acknowledges Mr. Eler pulled "hundreds of pages" of background material. (See PCR-Supp-VIII 1487)

Shellito notes (IB 34 n.20) a comment trial counsel made to the trial court concerning his preparation (at R-II 2050), but Shellito overlooks that the trial court afforded trial counsel about an additional month of preparation time in between the guilty verdict and the start of the evidentiary part of the jury penalty phase. (Compare T-XXVIII 1210-12 with T-XXX) Moreover, Strickland test is not measured by what a diligent defense counsel would have liked to have done, but rather, by what he did do. Thus, it is even generally unpersuasive when defense counsel testifies at postconviction that he or she was ineffective. See Marek v. State, 14 So.3d 985, 1000 (Fla. 2009)("trial counsel's own admission that he or she was ineffective is not evidence of counsel's performance and thus fails to form the basis for an ineffective assistance of counsel claim")(citing Breedlove v. State, 692 So.2d 874, 877 n. 3 (Fla. 1997); Routly v. State, 590 So.2d 397, 401 n. 4 (Fla. 1991); Kelley v. State, 569 So.2d 754, 761 (Fla. 1990).) Indeed, here, Mr. Eler made no such admission and his actions in his preparation, decisions, and presentation were not Strickland deficient -- far from it.

As the trial court found while accrediting Mr. Eler's postconviction testimony, Mr. Eler strategically chose not to present Dr. Miller, who diagnosed Shellito with antisocial personality disorder. Eler hired Dr. Miller, an experienced mental health expert in death penalty cases. (PCT-

Supp-XII 2052). He hired him for both the guilt and penalty phases (PCT-Supp-XII 2050-51) and for more than only a competency evaluation (PCT-Supp-XII 2056-57). On June 30, 1995, Eler had "Dr. Miller appointed again," this time explicitly for a penalty phase assessment. (PCT-XII 2224)

Eler explained why he chose Dr. Miller:

> Q. Why Dr. Miller?
>
> A. Preeminent in that area at that time. He had handled hundreds of competency and mitigation cases, or I mean hundreds, I say hundreds, a large amount of them. He was respected by the courts here in Jacksonville, Duval County, and probably other circuits. Was accessible. Could go interview and had facilities that could do that.

(PCT-Supp-XII 2225)

Eler relied on Dr. Miller to tell him if a specialized mental health expert was needed in Shellito's case. (PCT-Supp-XII 2052, 2224) Dr. Miller's April 1995 report discussed Shellito's competency along with substance abuse issues. (PCT-Supp-XII 2056). Shellito told Dr. Miller he clearly remembered the events although he never admitted to any crime. (PCT-Supp-XII 2225-26). Mr. Eler made a strategic decision not to call Dr. Miller. That decision was informed and reasonable.

Eler rejected presenting Shellito's drug and alcohol abuse to the jury. Presenting intoxication to the jury when the defendant does not testify does not go over well with juries: "that's kind of talking out of both sides of your mouth." It was "very inconsistent" with the defense here. (PCT-Supp-XII 2218) He indicated that, although Florida law recognizes drugs and alcohol as technically mitigating, jurors, as a practical matter, view drugs and alcohol as no excuse. (See PCT-Supp-XII 2159-60). Mr. Eler explained:

> Our defense was that Stephen Gill was the shooter and Stephen Gill was present, Stephen Gill generically fit a description, time frame, factually was our guy that we were putting the case on.
>
> ...[I]n the guilt phase it was Gill did it, some other dude did it, wasn't me. It wasn't like I'm really messed up, screwed up and I didn't know what was going on. That was kind of inconsistent for me and then in the penalty phase the jury is not going to believe a word I said.

(PCT-Supp-XII 2066-67, 2160) Further, records showed that Shellito and his parents denied any history of substance abuse. (PCT-Supp-XII 2257)

Eler selected what to present to the jury to minimize the "criminal violations" that "peppered" the medical records. (PCT-Supp-XII 2162) He said that he was able to introduce evidence of organic brain damage through exhibits introduced through Shellito's mother, and --

> I kind of hand-picked some of the ones I thought would maybe kind of let the jury know there was a mental issue going on, but not allow the State, kind of keep them out of it from bringing their own experts or cross-examining those things. So I thought that there was a sufficient -- I thought there was basically some testimony of mental disorder through mom in some of the records I admitted.

(PCT-Supp-XII 2163)

Eler explained that it would have been "a lot worse" to present all of Shellito's records, which reflected negatively on Shellito's character and included "serious violence issues," because of its negative effect and because the State would have vitiated the mitigation before the jury. (PCT-Supp-XIV 2582-83).

Mr. Eler made a decision not to present negative testimony or evidence of anti-social personality disorder. He explained that "Dr. Miller made it clear to me on the 16th when I talked to him that if he testified it would

be more detrimental than beneficial," including evidence of "anti-social." (PCT-XII 2123-24, 2154-55; PCT-Supp-XIII 2237-38) Mr. Eler explained:

> I know in cases where I have used mental mitigation, where I have used experts for mitigation, and I have used experts in mitigation before that came up and said, well, he's also anti-social a little bit. But -- but in those cases what I've had, I've had experts that -- that would have said that he can conform, the anti-social is an aberration, not a trademark of the client, is not a consistent problem . . . .

(PCT-Supp-XII 2156) Eler testified that in Shellito's case "Dr. Miller, apparently, according to my memo, indicated that it smacked of him being more consistently defiant as opposed to an aberration . . . ." (PCT-Supp-XII 2156) Dr. Miller characterized Shellito as a "manipulator" (PCT-XII 2123), which Eler viewed as "very offensive" and "certainly ... prejudicial to Mr. Shellito" (PCT-Supp-XII 2128; see also PCT-Supp-XII 2129). Mr. Eler discussed additional anti-social-related evidence that would have been damaging:

> Q. March 14th, 1995, there was an arrest for a disturbance in a cell where it was alleged that Mr. Shellito grabbed an officer in a rec area and then he picked up a volleyball pole, used it to shatter a glass partition. Is that something you would have wanted to keep out?
>
> A. Definitely, yes, sir.
>
> Q. And was there a fear that could have come in some type of cross-examination of a mental health expert?
>
> A. Sure. As soon as I started talking about how he would be a good candidate for long-term incarceration, that would be the first question out of your mouth.
>
> Q. How about the defendant telling that officer on the March 14th, 1995 incident, saying, 'I'll gun you down, I have friends on the outside that will shoot you'?
>
> A. That's a statement that I would not want the jury to hear.
>
> Q. June 2nd, 1995, arrest for battery on a corrections officer. He attacked a sergeant and threatened to kill him by kicking the cell

door, taking a punch and spitting at him. You wanted to keep that out?

A. Want to keep that out, yes, sir.

Q. September 8th, 1995, battery in detention facility. Kicked a food flap while the officer was trying to open it. You'd keep that out?

A. Yes, sir.

Q. All that type of stuff was a part of your strategy in this case?

A. Yes, sir.

(PCT-Supp-XII 2244-45)

Although records showed a "learning disability," they also indicated "defiant disorder" (PCT-Supp-XII 2138) and fairly good planning abilities (PCT-Supp-XIII 2252-54). There was no indication of thought disorder. (Id. at 2253)

Eler said that, if an expert testifies about PET scan, then negative history could be elicited through a "pretty sharp cross-exam," and it opens the door for the State's experts. (PCT-Supp-XII 2126-28)

By the time of trial, no expert, including Dr. Miller, recommended any additional testing, and Eler would have pursued it if they had recommended it. (PCT-Supp-XIII 2243-44).

At the postconviction evidentiary hearing, Shellito called as a witness Dr. Sarkis, psychiatrist from Grant Hospital. (PCT-Supp-XVI 2947-3032) The doctor did not know Shellito's mental status at the time of the crime. (Id. at 3016) Dr. Sarkis referenced records that stated: "the defendant frequently was gesturing to staff and making statements about returning to Grant Center and shooting staff." Shellito denied any intent and the doctor thought they were empty threats. (PCT-Supp XVI 2996-97) Eler did not want

the jury to know that Shellito made threats against the staff at Grant Hospital, had to be put on restrictions, and told staff members that he thought he would be discharged early from in-patient care if he behaved poorly. (PCT-Supp-XIII 2241-42)

Sarkis referenced another record showing that, at that time, Shellito had "excellent control of his behavior" and had no "major mental illness" (PCT-Supp-XVI 3006), and the doctor admitted that "technically organic brain disorder is a mental illness," but still said Shellito has a brain disorder. (PCT-Supp-XVI 3007) Dr. Sarkis testified that he "didn't think he was suffering from schizophrenia or from bipolar and affective disorder." (PCT-Supp-XVI 3007-3008) An EEG showed that Shellito had "no lateralized or epileptic form abnormalities." (Id. at 3011-12) The record showed a "normal CT scan of the brain." (Id. at 3014-15) High-resolution MRI's were not available at the time of trial. (Id. at 3015) Shellito knew right from wrong. (Id. at 3009)

Accordingly, Dr. Beaver indicated Shellito never indicated any major head trauma (PCT-0XVII 3182), was not insane, was competent, was not delusional, not psychotic, and not mentally retarded (PCT-Supp-XVII 3196-97).

Dr. Riebsame's postconviction testimony concerning Shellito's background substantially overlapped the trial evidence that Eler marshaled. (See T-XXX)

Dr. Riebsame testified that Shellito meets the criteria for antisocial personality disorder. (PCT-Supp-XIII 2324) On cross, Riebsame testified:

Q. Now, you do believe that Mr. Shellito suffers from an anti-social personality disorder.

A. I think he meets -- you look at the diagnostic criteria, he meets the criteria for anti-social personality disorder, that's correct.

Q. And anti-social personality disorder is not really a mental disease, it's more a predictor of behavior?

A. It's a description of behaviors, yes.

Q. Included in that description would be a pattern of disregard for and violation of the rights of others?

A. Yes. You see that in that history of Mr. Shellito.

Q. And you also see a failure to function, to conform to societal norms?

A. Yes.

Q. Irritability?

A. Yes.

Q. Aggression?

A. Yes.

(PCT-Supp-XIII 2409-10) Although Dr. Riebsame attempted soften that diagnosis with an explanation (See PCT-Supp-XIII 2325-29), this was precisely the type of information Mr. Eler reasonably did not want the jury to know and reasonably did not want the State to use to open the door to highlight Shellito's extensive history of bad conduct.

Dr. Riebsame opined that Shellito was under extreme emotional disturbance at the time of the offense; however, this opinion is belied by Shellito not admitting involvement in the murder (See PCT-Supp-XIII 2331-32) and it is difficult to imagine how a psychologist can assess the mental state of a defendant during a crime when the defendant denies committing the crime. See Groover v. State, 489 So. 2d 15, 16 (Fla. 1986)("failing to

raise the defense of voluntary intoxication ... a reasoned strategic choice by trial counsel, who defended appellant on the theory that, although present at the murders, appellant was not the party who committed the actual killings"; "failing to present a defense based on duress and coercion ... meritless as the defense of appellant's role in these killings was presented at trial to be based on appellant's domination by Parker").

In Dr. Riebsame's opinion, Shellito's ability to conform his conduct to the requirements of the law was impaired, although, "not substantial" (PCT-Supp-XIII 2332), so, arguendo overlooking Shellito's denial of committing the murder, even on Riebsame's terms, this evidence does not reach the level of a statutory mitigator. According to Riebsame, Shellito's age, 18 at the time of the offense, would have been a mitigator. (PCT-Supp-XIII 2332-33) However, this Court reviewed the trial court's slight-weight of age on direct appeal, in Shellito v. State, 701 So.2d 837 (Fla. 1997).

Thus, over-all, the information provided by Dr. Riebsame was either cumulative to that admitted at Shellito's penalty phase or it was testimony Mr. Eler strategically did not present to the jury.

Dr. Wu, another doctor Shellito presented at postconviction (PCT-Supp XIV 2622 et seq.), was hired to interpret Shellito's PET scan results. He did not administer the scan. (PCT-Supp XV 2641-42) Dr. Wu said that a PET scan shows whether or not the patient's brain is normal or abnormal, but it does not make a specific diagnosis. (PCT-Supp-XV 2650-51, 2653, 2682) Thus, he flatly said, "I don't have a specific diagnosis based on his scan alone." (PCT-Supp XV 2682) Also, Dr. Wu refused to link the PET scan with

Shellito's behavior in this murder: "No, I'm not stating that there's a specific cause and effect relationship between his scan and any specific action." (PCT-Supp-XV 2683-84; accord Id. at 2716) In sum, on its face, Dr. Wu's testimony would not have made any difference at trial, and defense counsel was not deficient for not calling someone like him to the stand.

Dr. Lawrence Holder, M.D., was called as a witness by the State. PCT-Supp-XVI 3032 et seq.) Dr. Holder specializes in nuclear medicine and teaches at the PET Learning Center of the Society of Nuclear Medicine in Restin, Virginia. (PCT-Supp-XVI 3033-34, 3035-36) In addition, he teaches nuclear medicine technology and interpretations of its studies at the University of Florida. (PCT-Supp-XVI 3037 to PCT-Supp-XVII 3038) PET scans are incorporated within the field of nuclear medicine. (PCT-Supp-XVI 3038-39)). Dr. Holder said "there are no generally accepted standards that are nationwide for the quantitative analysis of the [PET] scan," and he described some progress that has occurred well after the trial in this case (PCT-Supp-XVII 3051-53), and, therefore defense counsel would not have been required to know about or marshal for trial.

Dr. Holder reviewed Shellito's PET scan images. PCT-Supp-XVII 3053) Shellito's scan was normal (PCT-Supp-XVII 3060-61, 3128), "absolutely normal" (PCT-Supp-XVII 3094). He detailed his findings concerning Shellito's PET scan (PCT-Supp-XVII 3072-76) and concluded:

> This is a normal scan. There are no significant differences from left to right. The front to back differences are normal. The relationship of the frontal to the parietal to the temporal to the cerebellum are all normal.

(PCT-Supp-XVII 3077) Dr. Holder did not see a single abnormality in Shellito's PET scan. (PCT-Supp-XVII 3077) Dr. Holder continued to clearly negate any probative value of the PET scan in this case:

> Q. Is there a scientifically recognized pattern that can be used to detect whether or not an individual has organic brain disorder?
>
> A. No.
>
> Q. Is there a scientifically recognized and accepted pattern that can be used to say that an individual has impulse control problems?
>
> A. No, and I need to come back and say --
>
> Q. Go ahead.
>
> A. Organic brain disorder as a non-specific disorder, I don't know what that means. I mean Alzheimer's is organic because something's the matter, but in terms of, for instance, impulse control, is there a pattern on the scan that says this pattern is related to impulse control, the answer is absolutely not and that's why this study is not done in a clinical setting, period.
>
> Q. And is there any pattern that can be used to determine whether or not a patient is under or has been in the past under the influence of extreme mental or emotional disturbance?
>
> A. No.

(PCT-Supp-XVII 3090-91) He continued:

> Q. Dr. Holder, do you believe that PET scans are reliable for diagnosing prior head trauma?
>
> A. You can't use it to diagnose head trauma.

(PCT-Supp-XVII 3095) And again:

> The use of PET scanning to diagnose frontal brain damage is not accepted and used clinically...

(PCT-Supp-XVII 3127)

Dr. Holder's testimony clearly established that defense counsel was not deficient for not hiring a PET scan expert, and, in any event, if he had presented one for the penalty phase, it would have made no difference.

Shellito bore the burden of demonstrating both of Strickland's prongs. He failed.

In contrast with Shellito's non-probative postconviction evidence, Mr. Eler, as a result of his preparation, was able to present the testimony of the following witnesses at the trial's penalty phase: Joe Shellito, brother; Rebecca Shellito, sister; Joseph Shellito Sr., father; and Migdalia Shellito, mother. (T-XXX 1347-1443) Shellito's school and medical records were introduced through the mother. The school records spanned Shellito's school history from kindergarten through age 16 and psychological evaluations. The medical records included information from Grant Center Hospital, Charter Hospital, and Naval Hospital. (See T-XXX 1410, 1414). The fact that, in postconviction, Shellito presented the evidence in a different manner does not eliminate the cumulative effect of the evidence presented at the evidentiary hearing, thereby establishing that Shellito failed to demonstrate either Strickland deficiency or Strickland prejudice.

More specifically, Mr. Eler marshaled the following evidence for Shellito's penalty phase:

- Shellito was the youngest of three children (See, e.g., T-XXX 1348); Shellito was born in Puerto Rico, then moved to Key West (T-XXX 1349, 1383-84);
- Shellito was in special education school (T-XXX 1349, 1438-39);
- Shellito was placed in an emotionally handicapped class in kindergarten, and he had reading problems (T-XXX 1398);
- Shellito stuttered badly as a child, so did not talk much; when he stuttered, he would hit himself in the head (T-XXX 1354, 1398, 1409-1411);

- When Shellito was 5 days old, he started choking on some milk and turned purple; he stopped breathing; they went to the emergency room; they said he had "clogged the back, the breathing to his brain" (T-XXX 1403-1404);

- The mother suspected psychological problems beginning at age 2; Shellito would sit on the couch and watch TV and not get up unless she moved him; in 5th or 6th grade, Shellito "kind of" hit himself in the head because "Something is walking in there" (T-XXX 1413-14);

- Even though Shellito's brother went to a different school, Shellito and his brother were close (T-XXX 1348-50);

- Shellito's father was out to sea a lot and their mother raised them; the children's relationship to the father was distant; Shellito did not get along with his father at all (T-XXX 1351, 1352-53, 1369, 1385-86, 1404, 1405-1406, 1420-21);

- Shellito slept with his mother until a late age, and napped with her until he was 15 or 16 (T-XXX 1351);

- Shellito's mother did not graduate from high school because her father was sexually abusing her (T-XXX 1400);

- Shellito helped his mother around the house (T-XXX 1420);

- Shellito persuaded his mother to take in an old, blind man; they kept the "grandfather" for 5 years (T-XXX 1421-22); Shellito really needed a father figure (T-XXX 1420-22);

- Shellito's relationship with their father was different from his brother and sisters (T-XXX 1359-60);

- The father was an alcoholic; he drank all day long, half a gallon every 2-3 days (T-XXX 1352; see also T-XXX 1383, 1405);

- The family moved to Orange Park when Shellito was about 12; the father’s drinking increased a lot (T-XXX 1373);

- When Joe Shellito was asked whether the parents were physically abusive, he said "I'd probably say my father was physical, my mother probably not" (T-XXX 1360);

- HRS took protective custody of the children when their father went out to sea and did not start his allotments in time; they were evicted from their trailer and lived in the car for a few days; their mother went to a priest for help and ended up in jail; the children were placed in shelters (T-XXX 1353-54, 1406-1407); when the father got back, he went to his parents house and

left the children in the shelter until the mother got out of jail (T-XXX 1372-73);

- Shellito always had younger friends; about the time that his older brother, Joe, joined the Navy, Shellito started having trouble with the types of friend he was hanging out with (T-XXX 1354-56);

- Shellito was a follower and did what other people wanted; he started getting into trouble when he began hanging around with the wrong people (T-XXX 1395, 1430-32)

- The family did not have a lot of money, and Joe and Shellito would do odd jobs to earn money; they mowed lawns, raked leaves, caught and sold shrimp, and washed cars; Shellito was very good with mechanical things; the both played Pop Warner baseball (T-XXX 1356-57; see also T-XXX 1388, 1399);

- The father would get drunk and hit Shellito; one time he put Shellito through a wall; he punched him in the mouth and busted his tongue; Shellito and his father got into a lot of fights (T-XXX 1369, 1370-71, 1377, 1386-87, 1408-1409); after the father pushed Shellito through the wall, the parents separated (T-XXX 1387);

- The father started hitting Shellito when he was 8 or 9; when the father was drunk, he had a short temper; the father was drunk from the time he woke up until he went to bed (T-XXX 1369-71);

- The father would also hit Shellito's mother (T-XXX 1371; see also T-XXX 1401-1402);

- Rebecca, Shellito's sister, moved out when she was 19; Shellito lived with her for a time and helped her any way he could (T-XXX 1373-74);

- Shellito's parents had a lot of marital problems (T-XXX 1353 passim); Shellito's father and mother were divorced for 3-4 months shortly before Shellito was born (T-XXX 1381; see also T-XXX 1400-1404);

- The mother had an affair (T-XXX 1404);

- The mother took Shellito to Grant Central Hospital; she was told he had a learning disability and something undeveloped in his brain (T-XXX 1414-15);

- Shellito was at Grant Hospital 47 days; Dr. Mullen confirmed the diagnosis of organic brain disorder (T-XXX 1415-17);

- Shellito tried to kill himself by taking an overdose of Tegratol; He told his mother "I just don't want to keep going through this anymore" (T-XXX 1417-18);

- Shellito threatened suicide another time (T-XXX 1434-35);

- Shellito would stay in a hotel with an older woman (T-XXX 1436-37);

- Medical records introduced at trial showed the following (See Initial Brief, SC# 86,931, pp. 28-33; T-XXX 1415-20):

  - Shellito was identified as having "severe emotional problems" in kindergarten (Defendant's Exhibit 1);

  - A psychologist report dated June 1981 stated that Shellito was referred to a pediatrician because he was extremely hungry, "sneaks extra milk and even eats glue ... has also been known to fall asleep in class ...and it is very difficult to awake him." (Defendant's Exhibit 1);

  - Dr. Aymer placed Shellito as having the behavior level of a two-year-old when he was actually six years old (Defendant's Exhibit 1);

  - Dr. Aymer recommended an emotionally handicapped program and psychological counseling (Defendant's Exhibit 1);

  - Community Mental Health Clinic report describes Shellito as "severe withdrawal, clinging to pillars, hiding behind chairs, crawling under desks to very violent outbursts or holding scissors to children's necks and choking them" (Defendant's Exhibit 1);

  - The above report also described Shellito as extremely distractible, moving constantly, speaking softly to yelling angrily; using obscene language, eating all sorts of objects such as glue, and always having something in his mouth (Defendant's Exhibit 1);

  - Shellito began stealing food, wandering the streets until 10 p.m. and smoking cigarettes (Defendant's Exhibit1);

  - When Shellito was approached by a psychologist, he hid behind a pole, dug a hole, and tried to hide his head in the hole. (Defendant's Exhibit 1);

  - Shellito's family was "in crisis" (Defendant's Exhibit 1);

  - Shellito was evaluated again at age 7; there was no change. Intelligence tests showed low to borderline functioning. He

was functioning two grade levels below placement. (Defendant's Exhibit 1);

- At age 13, Shellito had another psychological evaluation and was placed in emotionally handicapped program. His IQ was borderline. He had the verbal ability of a 9-year old, the short-term memory of a 6-year old, and the motor ability of a 12-year old;

- At age 14, a Child Study Team described Shellito as having a severe learning disaiblity and severe behavioral problems. He was referred to Charter Hospital (Defendant's Exhibit 1);

- A Jacksonville Naval Hospital report dated August 17, 1990, shows a tongue laceration from a fight with his father (Defendant's Exhibit 2);

- Report from Grant Center Hospital where Shellito was hospitalized for a month when he was 16. Report shows history of "homicidal and suicidal threats." (Defendant's Exhibit 2);

- Shellito was diagnosed with Organic Mental Disorder, Conduct Disorder, Developmental Language Disorder, and Developmental Reading Disorder. Tegretol was prescribed. (Defendant's Exhibit 2);

- Dr. Mullen's report of November 11, 1991, shows diagnosis of organic mental disorder, conduct disorder undifferentiated, and developmental language disorder. (Defendant's Exhibit 2);

- Shellito missed counseling session because mother "too busy" to take him; January 6 notes of Dr. Mullen document Shellito’s suicide attempt (Defendant's Exhibit 2);

- Shellito stole a guinea pig from a pet store (Defendant's Exhibit 2);

- Naval Hospital report of January 5, 1991, documents a suicide attempt by overdosing (Defendant's Exhibit 2).

Therefore, through multiple witnesses and through records, the vast majority of the information Shellito now faults trial counsel for not presenting, was, in fact and in detail, presented.

Accordingly, while avoiding the specter of the anti-social personality and its heavy negative baggage, Mr. Eler was able to argue to the jury in the penalty phase that Shellito was "diagnosed by Grand Hospital as having

organic brain disorder," (T-XXX 1478) which did not afflict his brother and sister 9Id. at 1482). "He was diagnosed as having developmental language disorder," and he was "well below the national average in reading and other areas." (Id. at 1478-79) Defense counsel discussed Shellito's school records, including extreme hunger. (Id. at 1479) Shellito's mental age lagged his chronological age and required special classes. "He's classified emotionally handicapped." (Id. at 1480) Mr. Eler discussed Shellito's poor grades in detail. (Id. at 1481) At age 13, Shellito's IQ scored at 78. (Id. at 1482) Defense counsel continued discussing the documents in detail, including emotionally handicapped, poor reading, low test scores. (Id. at 1482-83)

Shellito's parents failed to follow-through on their agreement to take Shellito to therapy. (Id. at 1480) Shellito's father abused alcohol. (Id. at 1481, 1483) Mr. Eler argued that Shellito's only male role model, his brother, left home. (Id. at 1482) Mr. Eler tied the brain disorder together with Shellito's parents' deficiencies. (Id. at 1483-84)

Defense counsel weaved in discussions of "suicidal" (Id. at 1484), falling in with the wrong crowd, abuse, the failed marriage of Shellito's parents (Id. at 1485), and the mother being arrested when she sought help (Id. at 1485-86). Defense counsel's argument continued with detailed and extensive reliance on the penalty-phase mitigation evidence he had developed and introduced. (See T-XXX 1486 to T-XXXI 1489-96, 1500-1501)

In sum, Shellito has failed to demonstrate that his trial counsel was Strickland deficient, and Shellito has failed to show that his

postconviction evidence reaches the level of Strickland prejudice, even though Shellito's postconviction attorneys had the Strickland-prohibited benefit of years to hindsight defense counsel.

C. Case Law Supporting the Trial Court's Finding.

Mr. Eler's informed decision not to risk presenting Shellito's anti-social personality disorder and related traits is well-grounded in the law. For example, Reed v. State, 875 So.2d 415, 437 (Fla. 2004), reasoned that "this Court has acknowledged in the past that antisocial personality disorder is 'a trait most jurors tend to look disfavorably upon.' *Freeman v. State*, 852 So.2d 216, 224 (Fla.2003)." The fact that Shellito used drugs and alcohol and was antisocial is negative information, particularly when he denies involvement in the murder. The Eleventh Circuit has also recognized the harmful impact of anti-social personality disorder. See, e.g., Suggs v. McNeil, 609 F.3d 1218, 1231-32 (11th Cir. 2010); Cummings v. Secretary for Dept. of Corrections, 588 F.3d 1331, 1364-65 (11th Cir. 2009); Reed v. Secretary, Florida Dept. of Corrections, 593 F.3d 1217, 1248-49 (11th Cir. 2010).

Accordingly, substance abuse is a two-edged sword, See, e.g., Suggs, 609 F.3d at 1231 (collecting cases), and, as such, counsel's decisions to avoid the harmful edge of the sword is reasonable.

Thus, the humanizing theme defense counsel presented in the penalty phase was a reasonable course of action. See Arbelaez v. State, 898 So.2d 25, 39 (Fla. 2005)("We have generally denied relief where the attorney's chosen strategy was to 'humanize' the defendant rather than to portray him

as psychologically troubled")(citing Henry v. State, 862 So.2d 679, 685-86 (Fla. 2003); Rutherford v. State, 727 So.2d 216, 223 (Fla. 1998); Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997); Bryan v. Dugger, 641 So.2d 61, 64 (Fla. 1994)).

Here, supported by a reasonable investigation through Dr. Miller and through family, Mr. Eler reasonably decided not to further pursue mental health witnesses. As illustrated by Jones v. State, 928 So. 2d 1178, 1183-86 (Fla. 2006), trial counsel can reasonably decide not to use an expert at trial. Here, Shellito's postconviction experts were unconvincing, as discussed supra, and they further validated as more than reasonable trial counsel's fear that putting an expert on the witness stand would have actually been harmful to Shellito's acuse.

Moreover, to the degree that Shellito adduced any significant evidence at the postconiction hearing, it was substantially cumulative with the evidence defense counsel produced in the penalty phase, as bulleted supra. In Davis v. State, 928 So.2d 1089, 1109 (Fla. 2005), as here, the facts that Shellito produced at the evidentiary hearing "were ... cumulative to that which trial counsel anticipated presenting through Davis's mother's testimony." Here, Mr. Eler anticipated and actually presented Shellito's mother (Migdalia), as well as his brother (Joseph), his sister (Rebecca), his father (Joseph, Sr.). See also, e.g., Everett, 54 So.3d at 481 ("where the evidence presented at the postconviction evidentiary hearing was “essentially cumulative” to that presented during the penalty phase, trial counsel cannot be considered deficient").

Defense counsel is not required to present every available mitigation witness to be considered effective. See Bell v. Cone, 535 U.S. 685, 696-98 (2002)(not ineffective where defense counsel presented no mitigating evidence in the penalty phase). Accordingly, Grayson v. Thompson, 257 F.3d 1194, 1225 (11th Cir. 2001), explained that a failure to find more of the same type of mitigation is not unconstitutionally deficient:

> 'A failure to investigate can be deficient performance in a capital case when counsel totally fails to inquire into the defendant's past or present behavior or life history.' *Housel v. Head*, 238 F.3d 1289, 1294 (11th Cir. 2001). However, counsel is not required to investigate and present all mitigating evidence in order to be reasonable. *See Tarver v. Hopper*, 169 F.3d 710, 715 (11th Cir. 1999).

Here, defense counsel underttook the requisite "inquir[y]."

Rutherford v. State, 727 So.2d 216, 224 (Fla. 1998), rejected a claim, like ISSUE I, because similalr evidence was adduced at trial:

> Rutherford further argues as a basis for ineffective assistance of counsel that his trial counsel was deficient for failing to investigate, develop, and present substantial available mitigating evidence regarding his harsh childhood and Vietnam war experience. At trial, the 'mitigating evidence consisted of testimony from Rutherford's friends and family members about his background and his nonviolent nature and from Rutherford himself about his experiences as a Marine infantryman in Vietnam.'

Indeed, arguendo, even assuming that Shellito's postconviction experts, and other evidence, would have been more beneficial to Shellito than the evidence produced in the penalty phase, Shellito has still failed to demonstrate that defense counsel was unreasonable: favorable testimony of mental mitigation and brain damage at a later date does not render counsel's investigation into mitigation ineffective.

In Asay v. State, 769 So. 2d 974, 985-86 (Fla. 2000), defense counsel consulted an expert, like here, and the defendant produced other experts

who testified at postconviction. There and here, trial counsel conducted a "reasonable investigation of mental health mitigation prior to trial and then made a strategic decision not to present this information." Moreover, like here Assay involved the dangers attendant to antisocial personality disorder.

Cooper v. State, 856 So.2d 969, 976 (Fla. 2003), like here, concerned postconviction allegations that counsel should have produced more and evidence in the penalty phase. Like here, in Cooper, "the introduction of Cooper's additional proffered evidence regarding his unfortunate and abused background does not constitute a 'clear, substantial deficiency [which] so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.' *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986)." Like here, in Cooper, the defendant "also takes issue with his trial counsels' decision not to present a mental health expert at trial. Cooper's reasoning concerning Dr. Merin applies here:

> Trial counsels' decision not to present Dr. Merin as a mitigation witness, because his conclusions regarding Cooper's culpability were potentially damaging, is precisely the type of strategic decision which Strickland protects from subsequent appellate scrutiny. The issue before us is not 'what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense,' *Occhicone v. State*, 768 So.2d 1037, 1049 (Fla.2000); therefore, the attack upon trial counsels' performance on this basis fails.

Mendoza v. State, 2011 WL 2652193, *9-10 (Fla. 2011), recently rejected a claim based upon taking "issue with the manner in which trial counsel presented the evidence at trial." There and here, the gravamen of any

arguably salutary postconviction evidence was presented at the penalty phase, and therefore, the claim failed, as it should here.

If Shellito argues that Mr. Eler had "nothing to lose" by presenting his postconviction evidence, such as at the Spencer-type hearing, this overlooks that the United States' Supreme Court has expressly rejected "nothing to lose" as part of Strickland's test. See Knowles v. Mirzayance, __U.S.__, 129 S.Ct. 1at 1419. In any event, counsel's strategy applies regardless of whether a jury was present, and the cumulative and non-probative nature of the postconviction evidence applies to the Spencer-type hearing.

The determinations of Strickland's prongs are not measured by the volume of the postconviction evidence but rather how it measures up to the specific Strickland criteria; Hannon v. State, 941 So.2d 1109, 1136 (Fla. 2006), explained that, there, "the mitigation provided by witnesses during the postconviction evidentiary hearing was not compelling."

Thus, concerning Strickland's prejudice, the postconviciton evidnce, when re-weighed "against the totality of available mitigating evidence," Hannon v. State, 941 So.2d 1109, 1134 (Fla. 2006)(quoting Wiggins v. Smith, 539 U.S. 510 (2003)), would not have reached the requisite "reasonable probability" of a diffeernt outcome. Indeed, Shellito's postconviciton evidence would have made it more likely that the jury recommendation would have been unanimous and not the 11-to-1 recommendation for death (R-II 359; T-XXXI 1511), and it also would not have changed the relative weights of the aggravation and mitigation. See, e.g., Breedlove v. State, 692 So.2d

874, 877-78 (Fla. 1997) (holding that trial counsel was not ineffective for failing to present testimony of friends and family members that would have been subject to cross-examination that would have countered any value defendant might have gained from favorable evidence).

Moreover, very weighty aggravation in this case more than offset any arguable increment of postconviction evidence. The prior violent felony aggravator was supported by an aggravated assault on a police officer and two robberies, occurring within about 20 hours, and also an aggravated assault less than six months earlier. (See R-II377-93) The trial court gave the prior violent felony aggravator great weight (Id. at 393), and this Court recognizes prior violent felony as one of the weightiest aggravators. See, e.g., Silvia v. State, 60 So.3d 959, 974 (Fla. 2011)("prior violent felony aggravator is considered one of the weightiest aggravators"); Hayward v. State, 24 So.3d 17, 39 (Fla. 2009)("prior violent felony aggravator has been regarded as one of the weightiest aggravators").

In sum, Strickland's admonition not to hindsight defense counsel is especially applicable here. At postconviction, inmates second-guess defense counsel and find one or more witnesses who did not testify at trial, but the proper test is whether defense counsel was reasonable given the situation at that time. Here, Mr. Eler met the reasonableness standard, and what he produced holds up more than well enough vis-à-vis Shellito's postconviction evidence. Neither of Strickland's prongs was proved here.

D. Shellito's IAC Case Law, Not Applicable.

As a preliminary matter, the State disputes Shellito's heavy reliance (See IB 33-34) on ABA standards. The ABA does not set Strickland standards, but instead, the judiciary does. Mendoza v. State, 2011 WL 2652193, at *5, recently reiterated that "ABA Guidelines are not a set of rules constitutionally mandated under the Sixth Amendment and that govern the Court's *Strickland* analysis," but rather can be a guide. Indeed, Shellito would replace the broad discretion of his trial counsel with the rules of a non-judicial organization. This violates Strickland.

Shellito cites to Sears as purported support for Shellito's new standard, which, as discussed in the section "APPELLATE STANDARD OF REVIEW OF IAC CLAIMS, supra, does not support Shellito's principle. Sears, 130 S.Ct. 3259, (IB 39 n.28, 60) also does not assist Shellito based on its disparate facts. There, defense counsel failed to discover a litany of probative facts, as listed supra. Here, there was no such prejudicial deficiency.

Neither Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000) (IB 59), nor Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003)(IB 33-34, 58-59), assist Shellito. Rutherford v. Crosby, 385 F.3d 1300, 1315 (11th Cir. 2004), explained the significance of the disparity of the evidence omitted from the trial but proved at postconviction.: "this is not a situation like the one in *Williams v. Taylor* or *Wiggins v. Smith*,..., where the jury heard very little mitigating circumstance evidence and heard none at all about the type of mitigation presented during the post-conviction

proceedings." Here, like Rutherford, and unlike Williams and Wiggins, defense counsel adduced substantial mitigating evidence. Here, defense counsel, in fact, produced for the jury and judge Shellito's arguable "excruciating life history," 123 S.Ct. at 2543, and the supposedly omitted evidence is not "powerful," 123 S.Ct. at 2527.

Similar to Rutherford and unlike Wiggins, stressing mental health more than defense counsel's controlled presentation through Shellito's mother and through records "would have come with a price," 385 F.3d at 1315, and unlike Williams, here the State established more than "only one aggravating circumstance" and the omitted defense evidence was not compelling. See 385 F.3d at 1316.

Further, in Williams, defense counsel "erroneously believed that state law didn't permit" him to access the crucial records that were omitted from the trial. There, unlike here, defense counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." 529 U.S. at 395. Here, defense counsel made no such erroneous assessment of the law, defense counsel did reasonably pursue records, and did find and evaluate pertinent information about Shellito's background.

Wiggins, 539 U.S. at 533, reaffirmed the principle that "*Strickland* does not require counsel to investigate every conceivable line of

mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing."

In Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003)(IB 37 n.26, 38 n.27, no mitigation was introduced at trial, and unlike here, this Court had held that the initial state court evidentiary hearing was inadequate to resolve the postconviction claims, see Hardwick v. Dugger, 648 So.2d 100, 102 (Fla. 1994). Like Williams and unlike here, Hardwick said that defense counsel substantially misapprehended Florida law on mitigation. See 320 F.3d at 1175 n.190, 1186, 1189. Here, for example, Mr. Eler knew that additional evidence could have been pursued, but he made a reasoned and Strickland-reasonable decision not to go further with it.

Rompilla v. Beard, 545 U.S. 374, 385, 390, 125 S.Ct. 2456, 2465 (2005) (IB 59), concerned omitted information in a "readily available file" about "Rompilla's childhood and mental health very different[] from anything defense counsel had seen or heard." Here, defense counsel did not fail to pursue or find such un-heard-of information. Instead, Mr. Eler knew about evidence of Shellito's childhood and used it while reducing the risk of opening prejudicial doors for the prosecution.

E. Shellito's Additional Groundless Assertions.

Shellito's Initial brief mentions, in passing (IB 39-40, 41-42), that Mr. Eler failed to challenge the aggravating circumstance of "pecuniary gain" and the "jury was given no guidance" regarding that aggravator. Thus, if these are intended as appellate claims, they are undeveloped on appeal and, on that basis, they are unpreserved here. See Whitfield v. State, 923

So.2d 375, 379 (Fla. 2005)("we summarily affirm because Whitfield presents merely conclusory arguments"); Lawrence v. State, 831 So.2d 121, 133 (Fla. 2002)("Lawrence complains, in a single sentence ... bare claim is unsupported by argument); Sweet v. State, 810 So.2d 854, 870 (Fla. 2002)("Sweet simply recites these claims from his postconviction motion in a sentence or two"; unpreserved). Shellito's Initial brief, where he must fully argue his claims, fails to show how the jury instruction was so vague that it violated the Eighth Amendment and fails to show specifically Mr. Eler should have done to contest this aggravator. Indeed, the State does not concede that these arguments were preserved below through adequate presentation to the trial court.

Further, as indicated by the trial court (See PCR-IV 578,586-87), the adequacy of the jury instruction and the evidence for the pecuniary gain aggravator are procedurally barred by the direct appeal, which also established the law of the case:

> Shellito argues next that the trial judge erred in instructing the jury on and in finding the aggravating factor of pecuniary gain. Shellito contends that the fact that he shot the victim because the victim had no money conclusively demonstrates that the taking of money or property was not the motive for the murder. The trial judge concluded otherwise and instructed the jury on the aggravating factors of commission for pecuniary gain and commission during the course of a robbery. He also gave the jury an instruction that these two aggravators were to be merged and considered as one aggravating factor if both were found. In finding these aggravating factors, the judge considered them as one aggravating factor.
>
> The facts of this case reflect that Shellito stole a gun; told Gill and his girlfriend to let him out of the vehicle in which they were riding so he could 'do some work to make money'; stopped the victim at gunpoint and demanded money; and shook the victim down, looking in his pockets for anything of value. Further, when the victim's body was found, the contents of his left front pants pocket were 'pulled

> up' and 'partially exposed.' These facts reflect that Shellito initiated the criminal episode for pecuniary gain. We find no error in the giving of the instruction or the finding of this factor.

Shellito, 701 So.2d at 842. See, e.g., Davis v. State, 928 So.2d 1089, 1120-22 (Fla. 2005)(claim alleging prosecutor's argument inflammatory "was presented and rejected by this Court on direct appeal, and therefore is procedurally barred"; claim attacking good faith of prosecutor available at time of direct appeal and therefore procedurally barred); Duckett v. State, 918 So.2d 224, 234 (Fla. 2005)("claim[] that the State improperly engaged in expert shopping … is procedurally barred because it should have been raised on direct appeal").

Shellito argues (IB 42) that counsel was ineffective for failing to object to inaccurate information in the sentencing order. Shellito makes conclusory allegations but does not specifically indicate how the information was inaccurate. This Court has repeatedly held that conclusory allegations are insufficient to warrant relief on an ineffective assistance claim. See, e.g., Freeman v. State, 761 So.2d 1055, 1061 (Fla. 2000); Bryant v. State, 901 So.2d 810, 821-22 (Fla. 2005)("Neither in his pleadings below nor in his brief before this Court does Bryant allege specific facts about which a confession expert would testify"; "Nowhere does Bryant describe the substance of any proposed familial testimony"). Accordingly, this argument is not developed sufficiently to be preserved n appeal. Shellito claims the trial judge did not know his name or proper age. This claim most likely refers to the fact that Judge Olliff’s draft sentencing order had the name of Michael Bernard Shellito, which was

obviously a inconsequential typo since Judge Olliff had a prior death penalty case for Michael Bernard Bell. (See PCT-XXXIII 6119). On direct appeal, this Court considered the age distinction (that Shellito was one month shy of being 19 years old) and held:

> In his next claim, Shellito asserts that the trial judge failed to properly evaluate the evidence in mitigation. First, he contends that the trial judge erroneously found Shellito's age to be of little weight, and, second, that he failed to expressly evaluate, find, and weigh other factors in mitigation such as Shellito's learning disabilities, low IQ, and organic brain damage.
>
> In evaluating Shellito's age, the trial judge stated the following:
>
> > At the time of the murder, the defendant was 6'4" tall, weighed 176 pounds and was 19 years of age. He is now 20 years old. He was and is a physically mature adult male. The murder victim, Sean Hathorne, was 18 years of age.
> >
> > The defendant's criminal record started at age 13 in Juvenile Court. He was arrested 14 times as a juvenile and adjudged guilty of 4 felonies and committed to HRS. At age 16, he was certified from Juvenile Court to adult Felony Court for prosecution.
> >
> > The defendant's total criminal records as a juvenile and as an adult shows that he has been arrested 22 times, has been charged with 30 separate crimes and has now been convicted of 8 felonies as an adult. He also has 4 felony convictions as a juvenile.
> >
> > The defendant was on probation for 2 violent felonies at the time he committed this murder.
> >
> > The PSI and testimony show that the defendant has been using alcohol and drugs since an early age.
> >
> > The defendant stated in the PSI that he was primarily supported by "different ladies in the community."
> >
> > Although young in years, the defendant is old in the ways of the world and vastly experienced in crime. Outlawry, his chosen vocation, and the largess of favored females has been his livelihood.
> >
> > The defendant's age is a marginal mitigating circumstance and I assign it slight weight.
>
> Shellito argues that the judge's conclusion that his age was to be given slight weight is erroneous because he was actually eighteen, not nineteen, at the time he committed the crime; drug and alcohol

> use is a sign of immaturity and is itself mitigating; physical maturity and lack of employment are irrelevant; and his past criminal history demonstrates immaturity rather than maturity. He also contends that the trial judge ignored other evidence relating to Shellito's emotional and intellectual maturity.
>
> The State concedes that Shellito was one month shy of his nineteenth birthday when he committed the crime. The record reflects that, during the course of this case, both the State and Shellito's counsel referred to him as being nineteen at the time he committed the murder; however, his date of birth was presented to the judge and jury during the trial, and on a number of occasions he was properly referred to as being eighteen at the time of the murder. We conclude that the trial judge did not abuse his discretion in giving this mitigator only 'slight weight.' We have previously determined that, whenever a murder is committed by a minor, the mitigating factor of age must be found and weighed but that the weight can be diminished by other evidence showing unusual maturity. *Ellis v. State*, 622 So. 2d 991, 1001 (Fla. 1993). In this case, however, Shellito was no longer a minor. Where the defendant is not a minor, no per se rule exists which pinpoints a particular age as an automatic factor in mitigation. *Peek v. State*, 395 So. 2d 492, 498 (Fla. 1980). Instead, the trial judge is to evaluate the defendant's age based on the evidence adduced at trial and at the sentencing hearing. Id. For instance, in *Cooper v. State*, 492 So. 2d 1059 (Fla. 1986), we found that the trial judge acted within his discretion in rejecting the defendant's age of eighteen as a mitigator. *See also Merck v. State*, 664 So. 2d 939, 942 (Fla. 1995)(proper for court to reject as mitigating factor defendant's age of nineteen). Because the trial judge was in the best position to judge Shellito's emotional and maturity level, on this record we will not second-guess his decision to accept Shellito's age in mitigation but assign it only slight weight.

Shellito, 701 So.2d at 843-44. Therefore, this Court has already resolved the age-matter against Shellito, which procedurally bars it here and established the law of the case. Counsel cannot be ineffective for failing to pursue such an inconsequential matter.

In conclusion, for each of the foregoing reasons, as well as those in the trial court's record-grounded and record-documented order, ISSUE I should be rejected.

ISSUE II: IAC TRIAL PREPARATION AND SEVERAL ALLEGED IN-TRIAL DEFICIENCIES? (IB 61-73, RESTATED)

ISSUE II asserts a variety of IAC claims, which the State has categorized in two sub-sections.

A. IAC Jury Selection (IB 62-64).

The trial court's order, on its face, merits affirmance:

> **Defendant's Ground Three**
>
> **Subclaim One** ... [does not concern jurors]
>
> **Subclaim Iwo** [IB 62]
>
> In ground three, subclaim two, the Defendant asserts that counsel rendered ineffective assistance by failing to question potential jurors about their views regarding drugs, alcohol abuse, or mental illness. Although the potential jurors were not questioned about their views regarding drugs, alcohol abuse, or mental illness, such a failure does not render trial counsel's performance deficient. Specifically, the Defendant has failed to provide any evidence to show that this alleged failure on the part of trial counsel resulted in an unqualified juror with a bias or animus towards the mentally ill or those suffering from drug or alcohol addiction sitting on his jury. Davis v. State, 928 So. 2d 1089, 1117 (Fla. 2005) (affirming the denial of capital defendant's post conviction claim that he was prejudiced by counsel's failure to question potential jurors concerning drugs, alcohol abuse, or mental illness.) Moreover, trial counsel testified at the evidentiary hearing that he chose not to question the potential jurors about their views on drug and alcohol abuse and mental illness because it was his experience that in Duval County the jury venire are not very sympathetic to drug, alcohol or mental illness as an excuse for behavior, and may even consider it as aggravation. (P.C. Vol. I at 167.) Based on his testimony at the evidentiary hearing, this Court finds that trial counsel's decision to not question the potential jurors with respect to their views regarding substance abuse and mental illness was tactical in nature. Since tactical decisions do not constitute ineffective assistance, this Court finds that counsel's performance was not deficient. Songer v. State, 419 So. d 1044 (Fla. 1982); Gonzalez v. State, 579 So. 2d 145, 146 (Fla. 3d DCA 1991) ('Tactical decisions of counsel do not constitute ineffective assistance of counsel.') Accordingly, the Defendant has failed to establish error on the part of counsel, and the instant claim is denied. Strickland, 466 U.S. 668.
>
> **Subclaim (a)** [IB 62-63]

In ground three, subclaim two(a), the Defendant asserts that 'several' potential jurors were never questioned by trial counsel, and were removed for cause as a result of their views about the death penalty. The Defendant avers that trial counsel rendered ineffective assistance by failing to make an attempt at rehabilitating these potential jurors. However, the Defendant fails to allege who the potential jurors were, or how trial counsel could have rehabilitated them sufficiently to preclude them from being removed for cause. Reaves v. State, 826 So. 2d 932 (Fla. 2002). The Defendant is basing the instant claim purely on his speculative assertion that trial counsel should have attempted to rehabilitate these unnamed potential jurors, and that such rehabilitation would have been successful. Such speculation, however, 'fails to rise to the level of ineffective assistance under Strickland.' Johnson v. State, 921 So. 2d 490, 504 (Fla. 2005}, citing Reaves v. State, 826 So. 2d , 939 (Fla. 2002). Accordingly, the instant claim is denied.

Subclaim (b) [IB 63-64]

In ground three, subclaim two(b }, the Defendant asserts that trial counsel rendered ineffective assistance by failing to use all of his peremptory challenges and not requesting more, as 'numerous individuals on the jury did not belong.' The jurors that the Defendant argues should not have sat on the panel were: Robert Wilson (had friends and/or relatives in law enforcement and had fingerprint training), Rebekah Futrell (had friends and/or relatives in law enforcement), Marilyn Hill (a former nurse who took courses dealing with gunshot injuries) and Alexander Ruthledge (a security guard with specialized firearms training). The Defendant avers that based upon their responses during voir dire, trial counsel should have used his remaining peremptory challenges to exclude these potential jurors, and should have determined if they could disregard their specialized training for deliberations.

There is no requirement that a defense attorney exhaust all of his peremptory strikes. Phillips v. State, 894 So.2d 28 (Fla. 2004). Moreover, "[t]he ultimate result of voir dire is achieving an impartial jury." Id. at 36. Despite his assertion to the contrary, the Defendant has failed to provide any evidence to show that his jury was anything but impartial. Further, at the evidentiary hearing held on the instant Motion, trial counsel testified that he communicated with the Defendant throughout jury selection, was granted recesses by Judge Hudson 011iffto confer with the Defendant in private about jury selection, and discussed with the Defendant .whether he was approving of the jurors selected by trial counsel. (P.C. Vol. I at 165.) This Court specifically finds trial counsel's testimony that he conferred with the Defendant about the jurors selected to sit on the panel both more credible and more persuasive

than the Defendant's allegations. Laramore v. State, 699 So. 2d 846 (Fla. 4th DCA 1997).

With respect to Mr. Wilson, trial counsel testified at the evidentiary hearing that he felt it would be advantageous to have someone with Mr. Wilson's prior fingerprinting experience on the jury because he may have discounted the efforts and procedures used by law enforcement in this case with respect to the gathering of fingerprint evidence. (P.C. Vol. I at 169.) As to Ms. Futrell, trial counsel testified that he did not object to her because she was a Christian, and he generally preferred Christians on death cases because they may be more inclined to be sympathetic. (P.C. Vol. I at 169.) As to Mr. Ruthledge, trial counsel testified that he was not objectionable because he was a young, black male who may have been able to identify with the Defendant. (P.C. Vol. I at 169-70.) Although there was no questioning of trial counsel concerning Ms. Hill at the evidentiary hearing, this Court notes, as discussed supra, the Defendant has failed to provide any evidence to show that Ms. Hill's prior experience as a nurse in any way affected her ability to render an impartial decision in the Defendant's case. Carratelli v. State, 961 So. 2d 312, 324 (Fla. 2007) (holding that where a postconviction movant alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased to be entitled to relief.) Based on his testimony at the evidentiary hearing, this Court finds that trial counsel's decision to not challenge any of these potential jurors was tactical in nature. Since tactical decisions do not constitute ineffective assistance, this Court finds that counsel's performance was not deficient. Songer v. State, 419 So. 2d I 044 (Fla. 1982); Gonzalez y. State, 579 So. 2d 145, 146 (Fla. 3d DCA) ("Tactical decisions of counsel do not constitute ineffective assistance of counsel.") Accordingly, the Defendant has failed to establish error on the part of counsel which prejudiced his case. Strickland, 466 U.S. 668.

Subclaim (c) ... [not raised in ISSUE II]

Subclaim (d) [IB 62-63]

In ground three, subclaim two(d), the Defendant asserts that counsel rendered ineffective assistance by not attempting to rehabilitate prospective jurors that indicated reservations or ideological opposition to the death penalty. Although the Defendant refers to various prospective jurors as expressing such reservations, he only specifically discusses Barbara Pough and Emily Bester. The Defendant fails to provide any specific questions that counsel could have asked any of these potential jurors which could have rehabilitated them as jurors. Kimbrough v. State, 886 So.2d 965 (Fla. 2004). Thus, the Defendant's claims are mere conjecture, with no support. Reaves

> v.State, 826 So. 2d 932 (Fla. 2002). Accordingly, the Defendant's instant claim is denied.
>
> **Subclaim (e)** ... [not raised in ISSUE II]

(PCR-IV 562-66, bold and underlining in original)

While the trial court's reasoning and findings merit affirmance on their face, the State adds the following.

In essence, this batch of claims attempts to hindsight trial counsel's jury selection by arguing that he should have asked more questions (about drugs, alcohol, abuse or mental illness, IB 62), should have asked more questions of struck jurors concerning their views on the death penalty to attempt to rehabilitate them (IB 62-63), should have struck a number of jurors because of their occupations as a nurse or a security guard and because one juror knew about firearms and another about fingerprints. The meritless character of these allegations is illustrated by the point that if the nurse had been struck, Shellito would likely contend that nurses should be kept on a jury.

The trial court correctly references Carratelli v. State, 961 So. 2d 312 (Fla. 2007), which held that in IAC jury selection claims, the defendant must demonstrate actual bias of a juror who the defendant attacked at postconviction. Indeed, the same rationale applies to jurors who Shellito now believes should have been somehow been rehabilitated. In any event, Shellito failed to show actual bias. If Shellito responds that Carratelli's burden is high, he would be correct because, as it correctly explained, Strickland imposes that burden.

Moreover, the allegation of counsel should have done "more" is insufficient to demonstrate not only Carratelli prejudice but also insufficient to demonstrate Strickland deficiency. Shellito's wishful thinking that somehow counsel could have rehabilitated jurors or could have elicited better information or gotten better jurors than those who served does not meet Strickland's standard of presuming that trial counsel was not deficient and that Shellito would not have gotten a better trial result.

Indeed, as suggested by Carratelli's rationale, a juror's occupation or prior training, alone, is not the proper basis of an IAC claim. See Dufour v. State, 905 So.2d 42, 53 -55 (Fla. 2005)("Dufour asserts that his trial counsel was ineffective during voir dire in failing to strike jurors Cheryl Frazier and Polly Sullen, who Dufour claims should have been discharged ..."; "Frazier clearly indicated that she could proceed with the guilt and penalty phases and consider according to applicable law whether the aggravating factors outweighed the mitigating factors. Therefore, notwithstanding that Frazier did initially express views pertaining to the death penalty, Frazier was properly permitted to serve because she clearly indicated an ability to follow the trial court's instructions and weigh the aggravating and mitigating factors; "juror Sullen specifically stated that she did not believe that every premeditated murder should by punished by death. Juror Sullen also stated that she could weigh and consider the aggravators and mitigators in making a determination with regard to whether to recommend life or death, trial court, therefore, did not abuse its discretion in denying Dufour's challenge for cause to juror Sullen, nor was

counsel ineffective"; "we deny Dufour's claim with regard to both jurors Frazier and Sullen"); Evans v. State, 995 So.2d 933, 942-43 (Fla. 2008)("assertion in this claim is that counsel was ineffective for failing to reassert his challenge for cause against juror Combs or use a peremptory challenge to remove him from the jury when Combs stated that he knew two potential witnesses"; "... even if counsel was deficient in failing to object based upon juror Combs' potential bias, we conclude that Evans cannot demonstrate prejudice because neither of the identified witnesses testified during the trial").

Indeed, Green v. State, 975 So.2d 1090, 1104-1105 (Fla. 2008), suggests that for IAC allegedly based on leaving someone on the jury, the defendant must demonstrate that, as a matter of law, the jury was unqualified to sit on the jury: "Guiles met the test for juror competency enunciated in *Davis v. State*, 461 So.2d 67, 70 (Fla.1984) ('The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given ... by the court.')."

See also Ferrell v. State, 29 So.3d 959, 973-74 (Fla. 2010)("subclaim ... that trial counsel's voir dire was inadequate because it comprised only eight pages of the transcript, versus the State's 141-page voir dire *** Ferrell failed to establish deficient performance because he does not identify additional questions that counsel failed to ask but should have. Ferrell also failed to establish prejudice because he did not identify any juror who, with more extensive questioning, would have been found to be

either unqualified or biased against Ferrell or Ferrell's theory of defense"); Green v. State, 975 So.2d 1090, 1104 -1105 (Fla. 2008)("Second, Parker did not render ineffective assistance in failing to ask Guiles more questions, because an allegation that there would have been a basis for a for cause challenge if counsel had followed up during voir dire with more specific questions is speculative"; citing Johnson v. State, 903 So.2d 888, 896 (Fla.2005); Davis, 928 So.2d at 1117-18 (claim challenging "stipulat[ion] to the removal for cause of eleven potential jurors" and merely asserting that if counsel had 'followed up' during voir dire with more specific questions"; holding as "mere conjecture"); Smithers v. State, 18 So.3d 460, 464 n.2 (Fla. 2009)("To the extent that Smithers argues that trial counsel was ineffective for failing to question juror Collins about potential mitigation *** Moreover, ... an allegation that further questioning would have established a basis for a cause challenge was “speculative” and not a basis for relief"); Barnhill v. State, 971 So.2d 106, 114 (Fla. 2007)("Barnhill asserts conclusory allegations that the outcome of the trial would have been different if counsel's questioning had been done differently. Barnhill has not alleged, much less demonstrated, that any of the jurors who sat were prejudiced as a result of any action or inaction by counsel *** 'conclusory allegations are insufficient to warrant relief' on an ineffective assistance of counsel claim"); Reaves v. State, 826 So.2d 932, 939, 942 (Fla. 2002)(affirmed summary denial; defendant’s allegations that "if counsel would have 'followed up' during voir dire with more specific questions there would be have a basis for a for-cause

challenge ... mere conjecture" and not sufficient to state a meritorious claim under Rule 3.850); Davis, 928 So.2d at 1117 ("Davis contends trial counsel was ineffective during voir dire in failing to question jurors about their views regarding drugs, alcohol abuse, and mental illness"; "Davis has not provided evidence that any unqualified juror served in this case, that any juror was biased or had an animus toward the mentally ill or persons suffering from drug addiction").

B. Failure to Use[3] Depositions, Failure to Know that Gill Would not Testify, Failure to Fully Use Prior statements, & failure to Pursue Voluntary Intoxication. (IB 64)

The State submits the trial court's reasoning on its face as meriting affirmance concerning the preparation and using witness' prior statements:

> **Defendant's Ground Three**
>
> ...
>
> **Subclaim Three**
>
> In ground three, subclaim three, the Defendant asserts that trial counsel rendered ineffective assistance by failing to challenge the testimony of witnesses with their alleged prior inconsistent . statements, or material gathered through investigation. The witnesses that the Defendant cites to in the instant claim are: Theresa Ritzer, Migdalia Shellito (Defendant's mother), John Bennett, and Detective Hinson.
>
> With respect to Theresa Ritzer,[4] the Defendant asserts that trial counsel's cross-examination of her elicited information that was

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[3] Shellito mentions (IB 64) in passing that some deposition were not taken or were taken late. This is facially insufficient as conclusory.

[4] It does not appear that the third claim of the Third Amended postconviction motion contains a claim that makes the argument that the Initial Brief [IB 70-73] makes, and Shellito's makes no attempt to cross-reference his postconviction motion in his brief. As such, the argument in the initial brief concerning Ms. Ritzer was not sufficiently pled below.

> harmful to the Defendant's case. As to what the 'harmful' information was, the Defendant fails to provide specifics in the instant claim. At the evidentiary hearing, however, trial counsel testified that his questioning of Ms. Ritzer about her prior statement to police that she never saw or heard anything suspicious was 'powerful' cross-examination material, and that had he not questioned her about it, all the jury would have been left with would be the incriminating statement she gave on direct examination where she said the Defendant made admissions to her. (P.C. Vol. I at 173-174.) Based on his testimony at the evidentiary hearing, this Court finds that trial counsel's decision to question Ms. Ritzer as he did was tactical in nature. Since tactical decisions do not constitute ineffective assistance, this Court finds that counsel's performance in questioning Ms. Ritzer was not deficient. Songer v. State, 419 So. 2d 1044 (Fla. 1982); Gonzalez v. State, 579 So. 2d 145, 146 (Fla. 3d DCA 1991).
>
> [IB 65-67] As to Migdalia Shellito, John Bennett, and Detective Hinson, the Defendant argues that trial counsel should have questioned these witnesses in such a manner as to place 'serious' suspicion in the minds of the jury that Stephen Gill was the perpetrator. With respect to John Bennett, the Defendant argues that trial counsel should have focused on 'inconsistencies' between Mr. Bennett's deposition and trial testimonies. Specifically, the Defendant alleges that at trial Mr. Bennett testified that he was awoken by the sound of tires squealing and saw a silhouette inside a truck before it sped away, but in his deposition Mr. Bennett stated that he also heard gunshots.

If the merits of the Ritzer argument are addressed, it has none. The argument is internally inconsistent: At one point, Shellito contends that the prosecution did not timely disclose a statement (IB 72), while he also contends that trial counsel was IAC. Shellito attempts to extract himself from the inconsistency by untimely adding yet another sub-claim that defense counsel should have asked for a Richardson hearing (IB 72). Further, Shellito fails to explain how deposing Ms. Ritzer (IB 72) again would change anything. Moreover, it is not unreasonable for a trial counsel to confront a witness with what reasonably appears to be a change, and Shellito's threat to a witness was admissible. See Brooks v. State, 918 So.2d 181, 204 (Fla. 2005)("threat against the police officer simply portrayed Brooks as an individual determined to kill anyone who might send him back to jail"). In addition, the State contests Shellito's apparent self-serving inference (See IB 72 n.41) that the State "knew" about a change well in advance of the trial. In any event, the State has no duty to call all its potential witnesses.

[IB 65] Upon review of both Mr. Bennett's deposition and trial testimony, this Court finds no inconsistency between the testimony given in either proceeding. While Mr. Bennett does state in his deposition that he heard gunshots that night, Mr. Bennett was not asked about gunshots during his trial testimony. In both proceedings, Mr. Bennett stated that he was initially awoken by the sounds of squealing tires, and that he saw a silhouette inside and out of the truck. (R.O.A. at 927-40; T.T. at 826-37.) At no time during his trial testimony did Mr. Bennett state that he did not hear gunshots, nor was he asked about any gunshots. The failure to ask Mr. Bennet about whether he heard any gunshots hardly rises to the level of 'startlingly different' testimony. Additionally, although the Defendant attempts to insinuate that Mr. Bennett indicated during his deposition that the truck was in fact Stephen Gill's, that is a knowingly false and misleading assertion. At no time did Mr. Bennett provide any details as to the make, model, or color of the truck he saw, nor for that matter did he identify the truck as being Stephen Gill's. Moreover, at the evidentiary hearing, trial counsel testified that he got information out of Mr. Bennett during his testimony that he felt was beneficial to the Defendant's case. (P.C. Vol. I at 179.) Without alleging more, the Defendant has failed to provide any showing that he was prejudiced by trial counsel's failure to question Mr. Bennett about hearing gunshots on the night of the incident.

[IB 65-66] With respect to Migdalia Shellito, the Defendant asserts that trial counsel should have called his investigator to testify that Ms. Shellito told him that Stephen Gil1 confessed to her. At the evidentiary hearing, trial counsel testified that he was not even sure if that allegation was true or not, but even if it did occur it would not automatically have been admitted at trial since trial counsel would have had to overcome various hearsay objections to such testimony. (P.C. Vol. I at 178.) Trial counsel also stated that had he listed his investigator as a potential witness, he would have ceased to be his investigator and would have been subject to deposition and cross-examination by the State. (P.C. Vol. I at 177-78.) Trial counsel testified that strategica11y, allowing his investigator to be subject to examination by the State would be a situation he would absolutely want to avoid. (P.C. Vol. I at 178.) Based on his testimony at the evidentiary hearing, this Court finds that trial counsel's decision to not call his investigator was tactical in nature. Since tactical decisions do not constitute ineffective assistance, this Court finds that counsel's performance was not deficient. Songery. State,419 So. 2d 1044 (Fla. 1982); Gonzalez y. State, 579 So. 2d 145, 146 (Fla. 3d DCA).

[IB 67] Regarding JSO Detective Robert Hinson, the Defendant asserts that trial counsel was ineffective for failing to re-call Detective Hinson to testify once Stephen Gill became unavailable as a witness. The Defendant avers that trial counsel should have then questioned

Detective Hinson about statements Stephen Gill made to him about the night of the murder. At the evidentiary hearing, trial counsel testified that even though Stephen Gill was unavailable to testify, any statements made to Detective Hinson would have had to overcome various hearsay objections. (P. C. Vol. I at 176.) Thus, Stephen Gill's unavailability for trial did not automatically mean that any statement given to Detective Hinson would be admissible. (P.C. Vol. I at 176.) Further, trial counsel testified that his questioning of Detective Hinson at trial was sufficient to get out the information from the Detective that he thought was important. (P.C. Vol. I at 176.) Moreover, trial counsel testified that he was unaware of any confession Stephen Gill may have made to Detective Hinson about having committed the murder. (P.C. Vol. I at 176.)

[IB 64] As to the Defendant's referencing trial counsel's mention during opening statements that Stephen Gill would be testifying, trial counsel stated at the evidentiary hearing that he made reference in his opening statement to Stephen Gill because at the time he had a "good faith belief' that the State would place him on the stand, and that there would be testimony to the effect that he was the actual murderer in the case, and not the Defendant. (P.C. Vol. I at 175.) With respect to the actual information that trial counsel would have examined Mr. Gill about had he testified, trial counsel stated that the substance of that information came out through his examination of Detective Hinson. (P.C. Vol. I at 176.) Moreover, trial counsel was able to get the statement that Mr. Gill gave to Ms. Shellito admitted at trial. (P.C. Vol. I at 177.) Accordingly, the Defendant has failed to establish error or prejudice to his case as a result of trial counsel's failure to can and question Mr. Bennett, Ms. Shellito, and Detective Hinson as the Defendant alleges, and the instant claim is denied. Strickland, 466 U.S. 668.

Subclaim (a)

[IB 67-70] In ground three, subclaim three(a), the Defendant asserts that trial counsel rendered ineffective assistance by failing to develop a theory of voluntary intoxication as a defense in his case. The Defendant alleges that there were people who saw the Defendant hours before the victim's death who would have testified that the Defendant was 'extremely drunk and wrecked a car that night.' The Defendant further alleges that he continued to drink throughout the next day and night of his arrest. The Defendant avers that this evidence should have been presented in order to negate the specific intent, premeditation, or aggravating circumstances.

At the evidentiary hearing, trial counsel testified that arguing that the Defendant was intoxicated at the time of the crime would have run contrary to the defense asserted, which was that the Defendant was

> not the perpetrator of the crime, i.e., that he did not shoot the victim. (P.C. Vol. I at 179.) Trial counsel also testified that to argue during the guilt phase that the Defendant did not shoot the victim, and then to trn around during the penalty phase and argue that he did, but that he was intoxicated, would have been disingenuous in the eyes of the jury. (P.C. Vol. I at 179.) Based on his testimony at the evidentiary hearing, this Court finds that trial counsel's decision to not investigate or pursue an intoxication defense at trial was tactical in nature. Since tactical decisions do not constitute ineffective assistance, this Court finds that counsel's performance was not deficient. Songer v. State, 419 So. 2d 1044 (Fla. 1982); Gonzalezy. State, 579 So. 2d 145, 146 (Fla. 3d DCA). Accordingly, the Defendant has failed to establish error on the part of counsel which prejudiced his case. Strickland, 466 U.S. 668.

(PCR-IV 569-73, bold and underlining in original)

Moreover, concerning his mother, Shellito erroneously accuses defense counsel of "demonstrat[ing] a fundamental misunderstanding of the law" (IB 66). To the contrary, Shellito's argument would have risked a broader inquiry and admissibility through the rule of completeness. See Larzelere v. State, 676 So.2d 394, 401 (Fla. 1996). Further, investigator Marx' testimony for the evidentiary hearing was that Shellito told him that Migdalia Shellito told Shellito that Steven Gill confessed to his attorney that he committed the murder, but Gill’s attorney could not discuss it. (PCT-Supp XXXIII 6161-62). This is double and triple hearsay, and Marx would not have been able to testify to this at trial. Therefore, as the trial court discusses, there would have been a viable hearsay objection. Marx' testimony was inadmissible; therefore, counsel cannot be ineffective. Furthermore, the record shows that Mr. Eler successfully elicited testimony that Gill confessed to the murder. (T-XXVII 964).

Concerning pursuing voluntary intoxication, Heath v. State, So.3d 1017, 1028-29 (Fla. 2009), also applies:

> Since Heath never admitted being at the crime scene, it would have been inconsistent for trial counsel to argue that he was present and assisted in the murder of Sheridan, but was too intoxicated to know what he was doing. Further, the decision to not present inconsistent defenses for fear of harming credibility with the jury was a matter of trial strategy. (*See Remeta v. Dugger*, 622 So.2d 452, 455 (Fla.1993) (trial counsel not ineffective for making a tactical decision not to present a voluntary intoxication defense where the theory of the defense was that an accomplice was 'the primary perpetrator and trigger man in the killing [and a]n intoxication defense would be inconsistent with Remeta's contention that he did not commit the crime')(quoting trial court's order)).

Further, here as in Owen v. State, 986 So.2d 534, 555 (Fla. 2008), "the evidence at trial demonstrated that [the defendant] knew what he was doing the night of the murder." Also, as discussed in ISSUE I, supra, substance abuse is a two-edged sword. Also, Shellito has not demonstrated that a diminished capacity defense would have been viable for him, as a matter of law, at the time of this trial. Pietri v. State, 885 So.2d 245, 254 (Fla. 2004), explained, discussing Chestnut v. State, 538 So.2d 820, 822 (Fla. 1989):

> It is unquestionable that at the time of Pietri's trial, diminished capacity was not a cognizable defense in Florida. *See Chestnut*, 538 So.2d at 825. In *Chestnut*, we held that evidence of an abnormal mental condition not constituting legal insanity is not admissible for the purpose of proving that the defendant could not or did not entertain the specific intent necessary for proof of the offense. See id. at 820. Pietri essentially asserts that evidence could have been presented, not to show that he was legally insane or voluntarily intoxicated, but instead that his prior drug abuse resulted in a mental defect-'metabolic intoxication'-a diminished capacity which produced an inability to form the specific intent to commit premeditated murder. Such evidence was inadmissible.

Shellito bears the burden of demonstrating both of Strickland's prongs. He needed to show that the defense was available to him as a matter of law, that he could prove the elements of the defense, that any competent counsel

would have produced the defense, and that it would have made a difference in the outcome. He failed on all points.

The Initial Brief also throws in a facially insufficient vague and conclusory accusation of "fail[ing] to impeach witnesses" "throughout the trial" (IB 70).

In sum, the trial court's order merits affirmance, and each aspect of ISSUE II should be rejected.

ISSUE III: BRADY/GIGLIO VIOLATION? (IB 74-82, RESTATED)

ISSUE III contends that the prosecutor made a deal with Richard Bays, did not disclose it to defense counsel, and knew that the witness' testimony was false, thereby violating Giglio v. United States, 405 U.S. 150 (1972).

As a threshold matter, Shellito's Third Amended postconviction motion failed to allege a Giglio violation. (See PCR-II 276-79) Instead, it claimed a violation of Brady v. Maryland, 373 U.S. 83 (1963), which does not have identical elements: Giglio is a more defense-friendly theory. See Taylor v. State, 62 So.3d 1101, 1114-15 (Fla. 2011). The trial court decided the Brady claim. (See PCR-IV 574-76) Therefore, having been given multiple opportunities to amend his postconviction motion, Shellito failed to timely present to the trial court a Giglio claim, and failed to obtain a ruling on a Giglio claim. Therefore, ISSUE III is unpreserved below. See, e.g., Farina v. State, 937 So.2d 612, 629 (Fla. 2006)(relevancy objection insufficient to preserve appellate claim of prosecutorial misconduct; not "the specific contention asserted as legal ground for the objection ...

below"); Harrell v. State, 894 So.2d 935, 940 (Fla. 2005)(three components for "proper preservation"; "purpose of this rule is to 'place[] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings'"); Gore v. State, 706 So.2d 1328, 1334 (Fla. 1997)(argument below was not the same as the one on appeal); Armstrong v. State, 642 So.2d 730, 740 (Fla. 1994)("trial judge reserved ruling on this issue and apparently never issued a ruling. Consequently, this issue is procedurally barred").

The trial court did reject a Brady claim, and if ISSUE III is somehow construed as a Brady claim, the trial court merits affirmance:

> **Defendant's Ground Four**
>
> In ground four, the Defendant asserts that the State committed a Brady violation by withholding material and exculpatory evidence, and/or presented misleading evidence, which rendered trial counsel's representation ineffective. Specifically, the Defendant avers that the State did not inform the defense that any deals or benefits had been discussed with witnesses, but that he now knows that 'this is not the case.' The Defendant argues that Richard Bays testified against the Defendant in exchange for reconsideration by the State in seeking to classify Mr. Bays as a Habitual Violent Felony Offender (HVFO).
>
> To prevail on a Brady claim, a defendant must show '[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and (3] prejudice must have ensued.' Jennings v. State, 782 So.2d 853, 856 (Fla. 2001).
>
> At the evidentiary hearing, former Assistant State Attorney Jay Plotkin testified that the Notice of Withdrawal of Habitual Violent Felony Offender was filed as a public record on Ju]y 17, 1995, the day that the Defendant's capital trial started. Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993). (P.C. Vol. VI at 26.) Mr. Plotkin also testified that the Notice was sent to defense counsel and stated the reasons why the Habitual Violent Felony Offender status was not being pursued against Mr. Bays; name1y, that he did not qualify for such status pursuant to Johnson v. State, 616 So.2d 1 (Fla. l993).

> (P.C. Vo1VIat27.) While Mr. Plotkin acknowledged that his initial filing of the Notice to Habitualize was in error, he remedied that mistake immediately upon his realization of such by filing the Notice of Withdrawal. (P.C. Vol. VI at 29-30.) Additionally, Mr. Plotkin testified that no agreements were ever made with Mr. Bays regarding HVFO status and his testimony, and the terms of Mr. Bays' plea agreement were not worked out until subsequent to the Defendant's case. (P.C. Vol. VI at 33.) Moreover, even assuming arguendo that there had been an agreement between the State and Mr. Bays concerning an exchange of testimony for not pursuing habitualization, the Defendant still has not established prejudice to his case since the testimony of Mr. Bays mirrors that of others at trial, as well as other evidence presented, which supports the jury finding that the Defendant murdered Stephen Gill [sic]. (T.T. at 484-486; 708; 711; 759-760.) Thus, the Defendant has failed to establish that there is a reasonable probability that the outcome of his trial would have been any different had the existence of any such agreement been made and known, as the Defendant alleges. Accordingly, the Defendant's instant claim is denied.

(PCR-IV 574-76, bold and underlining in original, internal footnotes omitted)

In addition to the trial court's record-supported sound reasoning, it is also noteworthy that Shellito assumes that, from lenient treatment after Shellito's trial, there was some sort of deal with Bays even though Shellito did not prove a deal existed. Shellito's burden includes a communication from the prosecutor beyond "'speak[ing] a word' on the witness's behalf" and beyond a promise that "cooperation would be taken into consideration," Ventura v. State, 794 So.2d 553, 563 (Fla. 2001)(discussing Tarver v. Hopper, 169 F.3d 710 (11th Cir. 1999)). See also Depree v. Thomas, 946 F.2d 784, 797-98 (11th Cir.1991). An "ambiguous, loose, and marginal," Ventura, 794 So.2d at 563, promise is not a cognizable claim. A witness' subjective belief that the prosecutor would help him is not the basis for a Brady or Giglio claim. See, e.g., Hill v.

Johnson, 210 F.3d 481, 485-86 (5th Cir. 2000)(subjective beliefs of witnesses regarding the possibility of future favorable treatment are insufficient to trigger the State's duty to disclose under Brady and Giglio). Indeed, someone's subjective beliefs fail to provide state action on which to apply a U.S. constitutional claim.

Here, Shellito failed to prove that the prosecutor offered anything to Bays to induce his testimony. After-the-fact leniency is insufficient because, by itself, it does not demonstrate that the prosecutor had promised anything substantive prior to the witness testifying. Here, Bays actually entered a plea and was sentenced a week after Shellito, which was not unusual: "if you have a codefendant who's cooperating in a case and he's ultimately going to be sentenced, it's not unusual for him to be sentenced after the case is disposed of that he cooperated in." (PCT-Supp XVIII 3302-3303). Indeed, here, the prosecutor hid nothing, and any supposed IAC claim (See IB 75 n.44) is insufficiently developed in the Initial Brief to be preserved at the appellate level, and, there was not developed IAC allegation in CLAIM IV of the postconviction motion (See PCR-II 276-79). Further, there has been no proof demonstrating an IAC claim.

Here, the trial court's accredited the prosecutor's denial of any promise to Bays, and the trial court merits affirmance under either Brady or Giglio. See Dailey v. State, 965 So.2d 38, 46 (Fla. 2007)("Because recantation testimony 'entails a determination as to the credibility of the witness, this Court "will not substitute its judgment for that of the trial court on issues of credibility" so long as the decision is supported by

competent, substantial evidence'")(quoting Marquard v. State, 850 So.2d 417, 424 (Fla. 2002) (quoting Johnson v. State, 769 So.2d 990, 1000 (Fla. 2000))).

Yet further, argeundo, if defense counsel had been able to cross-examine Bays based on some sort of agreement or reduced exposure, its impact would have not reached a level of materiality or prejudice under any legal theory. The maximum prison sentence without the notice that was withdrawn would have still been life for Bays (See PCT-Supp XVIII 3337, 3366), and law enforcement had taken a statement from Bays well-before the supposed foundation for this claim arose (PCT-Supp-XVIII 3326-27), and that statement was consistent with Bays' trial testimony (Id. at 3327); Bays was "cooperative from the beginning" (Id. at 3328).

ISSUE IV: AKE VIOLATION? (IB 83-90, RESTATED)

This issue contends that Shellito rights were violated under Ake v. Oklahoma, 470 U.S. 68 (1985). The trial court's order merits affirmance;

> D**efendant's Ground Five**
>
> In ground five1, the Defendant asserts that his mental health expert did not render adequate mental health assistance as required by Ake v. Oklahoma, 470 U.S. 68 (1985). The Defendant avers that the inadequacy of the examination stemmed from the ineffective assistance by trial counsel in not securing and providing the expert the materials 'necessary for an adequate and appropriate evaluation.' With respect to the Defendant's claim that he received an inadequate mental health examination, such a claim is procedurally barred as it could have been and should have been raised on direct appeal. Marshall v. State, 854 So.2d 1235 (Fla. 2003); see also Cherry v. State, 781 So. d 1040 (Fla. 2000). As to the Defendant's claim that the inadequacy of the examination stemmed from trial counsel's ineffectiveness in failing to provide the expert with materials necessary for an 'appropriate evaluation,' trial counsel testified at the evidentiary hearing that while he could not be a hundred percent certain as to what documents he gave Dr. Miller, one of those of

> which he was certain he gave Dr. Miller was the Defendant's discharge summary from Grant Hospital. (P.C. Vol. I at 191.) Trial counsel went on to testify that the discharge summary made Dr. Miller aware that there were records showing a history of aggressive behavior, homicidal and suicidal threats, an organic mental disorder, that the Defendant was taking Tegretol, and that the Defendant had a conduct disorder, developmental language disorder, and reading disorder. (P.C. Vol. I at 191.) Further, trial counsel also testified that had Dr. Miller requested or recommended additional testing, he would have done so. (P.C. Vol. I at 200.) Thus, trial counsel's testimony presented at the evidentiary hearing has demonstrated that both trial counsel and the retained expert performed the tasks required by Ake. Accordingly, this claim is without merit.

(PCR-IV 576-77)

Indeed, as discussed in ISSUE I, Dr. Miller was actually appointed twice to evaluate Shellito.

ISSUE IV's allegation concerning "drugs and alcohol" (IB 88 n.56) is conclusory[5] and, if the merits are reached, ineffectual. As discussed in ISSUE I, Shellito would not admit to committing the murder, rendering his mental state irrelevant.

The trial court's ruling that this claim is procedurally barred remains correct under recent case law:

> Kilgore asserts that he was also denied his rights under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). However, the State is correct that Kilgore's claim that he was deprived of his right to an evaluation by a competent mental health expert is procedurally barred because it could have been raised on direct appeal. *See Marshall v. State*, 854 So.2d 1235, 1248 (Fla.2003) (citing Cherry v. State, 781 So.2d 1040, 1047 (Fla. 2000)) ('[T]he claim of incompetent mental health evaluation is procedurally barred for failure to raise it on direct appeal.').

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[5] The Third Amended postconviction motion's passing mention of "intoxicat[ion]" (PCR-II 283) is even more conclusory than the Initial Brief, and thereby facially deficient.

Kilgore v. State, 55 So.3d 487, 506 n.14 (Fla. 2010).

As represented by an officer of the Court, the State acknowledges Stewart v. State, 37 So.3d 243, 255 (Fla. 2010)(citing Raleigh v. State, 932 So.2d 1054, 1060 (Fla. 2006)(quoting State v. Sireci, 502 So.2d 1221, 1224 (Fla.1987)):

> While ordinarily a postconviction claim based on *Ake* is procedurally barred because it could have been raised on direct appeal, a defendant is entitled to litigate during postconviction a claim that a prior mental health expert's examination was so 'grossly insufficient' that the expert 'ignore[d] clear indications of either mental retardation or organic brain damage.'

Here, Shellito was not retarded, and here, as the trial court's order and the ISSUE I discussion supra, indicate, adequate records were provided to Dr. Miller and Dr. Miller appears to have been informed of the prior notation of brain disorder. (See PCT-Supp-XII 2228-pCT-Supp-XIII 2235) Moreover, as discussed at length in ISSUE I, ultimately, the voluminous expert testimony that Shellito tendered at the evidentiary hearing, especially when juxtaposed to Dr. Holder's testimony, indicates that even with additional years of hindsight, Shellito still could not show that "more" evidence is "better"; to the contrary, here, Shellito's postconviction evidence proves that Dr. Miller's evaluation was not "grossly insufficient. Akin to IAC analysis, the ability of a postconviction defendant to find more favorable experts does not demonstrate an Ake claim. Thus, Anderson v. State, 18 So.3d 501, 519-20 (Fla. 2009), rejected an Ake claim:

> The fact that Anderson's postconviction experts concluded that he suffered from various mental health disorders does not discount Dr.

> McMahon's evaluation, which did not detect any mental disorder or evidence of statutory or nonstatutory mitigation.

Therefore, the trial court "findings are supported by competent, substantial evidence. No "clear indications of ... organic brain damage" were missed. Raleigh v. State, 932 So.2d 1054, 1060 (Fla. 2006).

Shellito has failed to meet the pertinent burdens.

ISSUE V: IAC REGARDING PROSECUTOR'S ARGUMENTS? (IB 91-93, RESTATED)

Shellito points to four prosecution arguments to the jury as his alleged basis for IAC. However, as the trial court found (See PCR-IV 582), the postconviction claim concerning prosecutorial argument failed to develop any IAC argument. Instead, it focused on a substantive claim of prosecutorial misconduct. (See PCR-II 318-22) Instead of alleging Strickland's two prongs and specifying how his allegations meet those burdens, the sum-total of the IAC allegation in CLAIM X of the Third Amended postconviction motion merely repeats a conclusion that defense counsel "ineffectively failed to object" (PCR-II 320) and defense counsel was "unreasonable" in his failure to object and no tactical reason applies (Id. at 322). Similarly, two claims cross-referenced by CLAIM X (CLAIM XV and CLAIM XX) focus on the underlying substantive argument, not IAC. (See Id. at 328-29, 341-43) Also, CLAIM XXI barely mentions defense counsel. (See Id. at 344) As such, this issue was not preserved below. See, e.g., Blackwood v. State, 946 So.2d 960, 968 (Fla. 2006)(affirmed summary denial of IAC claim; postconviction motion must demonstrate both ineffective performance and prejudice as a result of that deficiency); Spera v. State, 971 So.2d 754, 758 (Fla. 2007)("Failure to sufficiently allege both prongs

[of IAC claim] results in a summary denial of the claim"). For this reason, as well as the trial court's discussions of the merits, the trial court should be affirmed.

The trial court ruled as follows:

Defendant's Ground Ten

In ground ten, the Defendant asserts that the State committed prosecutorial misconduct during arguments in the guilt and penalty phases of his trial, which presented impermissible considerations to the jury, misstated facts, and were inflammatory and improper. To the extent trial counsel failed to properly object to the State's arguments, the Defendant alleges ineffective assistance of counsel. The Florida Supreme Court has held substantive claims of prosecutorial misconduct could and should be raised on direct appeal and defendants are, therefore, procedurally barred from raising such claims in a motion seeking post-conviction relief. Spencer v. State, 842 So.2d 52, 60 (Fla. 2003); see also Floyd y. State, 808 So.2d 175 (Fla. 2002); Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995). Thus, the Defendant's claim of prosecutorial misconduct is procedurally barred. Further, the Defendant's allegation of ineffective assistance of counsel is merely conclusory. Conclusory allegations of ineffective assistance of counsel fail to establish entitlement to relief. Parker, *supra*. Accordingly, the Defendant's claim is without merit.

Defendant's Ground Fifteen

In ground fifteen and ground three subclaim five, the Defendant asserts that his death penalty is unconstitutional because the penalty phase jury instructions were incorrect under Florida law and shifted the burden to the Defendant to prove that death was inappropriate. To the extent trial counsel failed to object to the instructions, the Defendant alleges ineffective assistance of counsel. The record reveals that the penalty phase instructions given in the instant case were the standard penalty phase instructions. This Court finds the instant claim is procedurally barred because it could have and should have been raised on direct appeal. Sireci v. State, 773 So. 2d 34 (Fla. 2000); Demps v. Dugger, 714 So.2d 365 (Fla:. 1998); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995). Moreover, the Florida Supreme Court has consistently held that the Defendant's burden shifting argument is without merit. Randolph v. State, 853 So.2d 1051, 1067 (Fla. 2003); Floyd v. State, 808 So. 2d 175 (Fla. 2002); Demps v. Dugger, 714 So.2d 365, 368 (Fla. 1998); Johnson v. State, 660 So.2d 637, (Fla. 1995). Further, the Defendant's allegation of ineffective assistance of counsel is merely conclusory. Conclusory allegations of ineffective assistance of

counsel fail to establish entitlement to relief. Parker, supra. Accordingly, the Defendant's claim is denied.

Defendant's Ground Twenty

In ground twenty, ground three subclaim five, and ground six subclaim three, the Defendant asserts that his death sentence is fundamentally unfair and unreliable due to the State's introduction of non-statutory aggravating factors and the State's arguments upon non-statutory aggravating factors. To the extent trial counsel failed to object, the Defendant alleges ineffective assistance of counsel. The instant claim is procedurally barred as any challenge to the aggravators upon which the trial judge instructed the jury could have and should have been raised on direct appeal. Finney y. State, 831 So. 2d 651, 657 (Fla. 2002); see also Rodriguez v. State, 919 So. 2d 1252, 1280 (Fla. 2005) (claims regarding the adequacy or constitutionality of jury instructions should be raised on direct appeal.); Arbelaez v. State, 775 So.2d 909, 919 (Fla. 2000). Further, the Defendant's allegation of ineffective assistance of counsel is merely conclusory. Conclusory allegations of ineffective assistance of counsel fail to establish entitlement to re1ief. Parker, supra. Accordingly, the Defendant's claim is without merit.

Defendant's Ground Twenty-One

In ground twenty-one and ground three subclaim five, the Defendant asserts that the sentencing jury was misled by comments, questions and instructions that diluted the jury's sense of responsibility towards sentencing the Defendant. To the extent trial counsel failed to object, the Defendant alleges ineffective assistance of counsel. A claim concerning the alleged diminution of the jury's sense of responsibility in the sentencing process could have and should have been raised on direct appeal. Hodges v. State, 885 So.2d 338 (Fla. 2004); Knight v. State, 923 So.2d 387 (Fla. 2005). As such, this claim is procedurally barred. Further, 'the Florida Supreme Court has recognized that the jury's penalty phase decision is advisory and that the judge makes the final decision.' Knight, 923 So.2d 387; Combs v. State, 525 So. 2d 853, 855-58 (Fla. 1988). Accordingly, the jury in the Defendant's case was properly instructed and counsel cannot be deemed ineffective for failing to object to the comments, questions, or instructions. Thus, the Defendant's instant claim is denied.

(PCR-IV 582-83, 585-86, 588-89, bold and underlining in original, internal footnotes omitted)

The trial court's order should be affirmed.

If the merits of ISSUE V are reached, each sub-claim has none.

In the **first sub-claim**, Shellito argues (IB 91) that the prosecutor's reference to the defendant "want[ing] to kill Kenneth Wolfenberger" was improper non-statutory aggravation. He says that there was no such charge and "no such testimony."

ISSUE V overlooks Wolfenberger's penalty-phase testimony indicating that on August 31, 1994, (the same day as this murder) as he was hitchhiking in a car occupied by Shellito, Shellito said "this was good," jumped out of the car, and ordered Wolfenberger to get out of the car. (T-XXX 1324-26) [Defense counsel objected on the ground of relevancy. (Id. at 1325-26)] Shellito was pointing a gun at Wolfenberger and ordered Wolfenberger to get down on his knees and put his hands behind his back. Shellito then rummaged through Wolfenberger's bag looking for money. (Id. at 1327-28) The driver of the car yelled, "Lights" and Wolfenberger saw another car. Shellito, with his gun, then jumped back in the car in which he had been riding and they drove off. (Id. at 1328)

Immediately prior to Wolfenberger testifying, Richard Bays essentially testified that he was with Shellito when Shellito robbed Wolfenberger. Bays was driving and they picked up a hitchhiker. [When a robbery was mentioned in court, defense counsel objected on the ground of relevancy, prejudice, and feature. (Id. at 1311-16)] After the trial court overruled the objection, Bays testified about Shellito robbing the hitchhiker and telling Bays, "I wanted to shoot the hitchhiker." (Id. at 1316-17) Bays testified that he was the person who told Shellito that there were "lights coming, get in the car, let's go." (Id. at 1317)

The prosecutor used the robbery of Wolfenberger as a prior violent felony aggravator. (See, e.g., XXX 1305-1306; R-II 393)

It is proper for the prosecutor to present the actual facts and circumstances of the prior violent felony through additional testimony such as the lead investigator or the victim of the prior offense beyond the mere fact of conviction. See Miller v. State, 42 So.3d 204, 225 (Fla. 2010)(" State introduced details with regard to Miller's prior conviction for manslaughter in Oregon. This Court has repeatedly held that the State is not restricted to the bare admission of a conviction when presenting evidence in support of the prior violent felony aggravating circumstance"; citing Rhodes, 547 So.2d at 1204; Delap v. State, 440 So.2d 1242, 1255–56 (Fla. 1983); Elledge v. State, 346 So.2d 998, 1001–02 (Fla. 1977)).

The prosecutor's argument was not concerning a non-statutory aggravator. It was a statutory aggravator. The prosecutor's argument was directly based upon the evidence that had been properly introduced. There was evidence that Shellito did say, "I wanted to shoot the hitchhiker." As such, the prosecutor's argument was proper. See, e.g., Barwick v. State, 2011 WL 2566310, *18 (Fla. June 30, 2011)("proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence"; quoting Wade v. State, 41 So.3d 857, 868 (Fla. 2010) (quoting Bertolotti v. State, 476 So.2d 130, 134 (Fla.1985)).

Moreover, defense did object, so he was not ineffective. (See T-XXX 1313-16, 1325, 1454)

The **second sub-claim** asserts (IB 91-92) IAC based upon a supposedly improper comment by the prosecutor regarding not "always" seeking death penalty. However, Shellito takes the prosecutor's argument out of context. Instead of asserting, in essence, that because the State charged Shellito, the jury should recommend death, the prosecutor introduced the targeted comment as follows:

> May it please the Court. What do we in our society ... with murderers? All murderers should be severely punished if you take someone's life you earn that punishment, you deserve that punishment. But the ultimate punishment is not appropriate for all murderers. We don't always seek the death penalty in every murder, we don't always even seek the death penalty in every first degree murder. As you are well aware, there are some potential jurors who ... felt that the death penalty was always appropriate, no matter what the circumstances and **that's not the law** and they are not here as jurors and they should not be. Some jurors felt that **they could not follow the law**, **the law that says** that where the facts surrounding the murder and the character of the murderer suspect support the death penalty it should be imposed, **they could not follow the law**. We all know that you can and that's why we are here.

(T-XXX 1445-46) the prosecutor then continued by arguing the facts and that they support the death penalty. (See Id. 1446-47) He then argued: "If the aggravators outweigh the mitigators, you should recommend the death penalty." (Id. 1448) The prosecutor then discussed various aspects of the weighing process, aggravators, mitigators, and the State's burden of proof. (Id. at 1448-67) The prosecutor began to wrap up his closing with reminding the jurors of their "**duty ... to follow the law**." (T-XXX 1467) After defense counsel gave his argument (T-XXX 1468 to T-XXXI 1503), the trial court instructed the jury on the prosecution's burdens. (T-XXXI 1503-10) When viewed in its context, the prosecutor's argument was referring to a generic "we" that decides whether a case merits the death sentence as

determined by the trial court's instructions, not by any prosecutor vouching.

In Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982), the defendant complained on appeal about several prosecutorial arguments, including "3) appeal to community prejudice (violence in Dade County)." The "prosecutor said: 'When **we** walk the streets we take **our** chances.' In response to an objection the [trial] court said: 'Stay on the evidence in this case.' The prosecutor then said: "One place in the world where **we** ought to be free from this kind of violence, this kind of crime, is in **our** own home.' The court overruled an objection to this remark. These comments appear to reflect common knowledge and are probably the sentiments of a large number of people. They do not appear to be out of place." Accordingly, "we" here, especially when viewed in its context, was referring to a collective of people who are governed by the law.

Analogously, in Bailey v. State, 998 So.2d 545, 554 (Fla. 2008), the prosecutor introduced himself, "I'm Steve Meadows, I'm the State Attorney for the 14th Circuit and I'm here representing the community." The defendant on appeal contended that "the prosecutor improperly positioned himself as a member of the jurors' community who represented the community's best interest."

Therefore, it was not error for the prosecutor to use the generic "we" in his argument, and it was not prejudicially deficient under Strickland for defense counsel not to object.

Next, Shellito contends (IB 92) that the State "misstat[ed] the regarding the jury's role in sentencing" and that the prosecution "shifted the burden." However, with one exception, these two sub-claims contain no specificity whatsoever. Instead, there is a string cite of record pages after each one. The State respectfully submits that it should not be required to speculate on exactly the parts of those pages to which Shellito is referring and exactly the nature of Shellitos argument(s) applied to those unknown passages and then rebut its own argument. Shellito's arguments are undeveloped on appeal and therefore unpreserved at the appellate level. See, e.g., Whitfield, 923 So.2d at 379 ("we summarily affirm because Whitfield presents merely conclusory arguments"); Lawrence, 831 So.2d at 133 ("Lawrence complains, in a single sentence ... bare claim is unsupported by argument); Sweet, 810 So.2d 8at 870 ("Sweet simply recites these claims from his postconviction motion in a sentence or two"; unpreserved)

The one passage that Shellito isolates is the comment that "mitigation in this case can be characterized as excuses, not sufficient to outweigh the clear aggravation in this case." (T-XXX 1448) However, the same page of the transcript also shows that the prosecutor argued to the jury:

> If the aggravators outweigh the mitigators, you should recommend the death penalty. The law says that the aggravators[,] when they outweigh the mitigators[,] call for the death penalty.

(Id.) Moreover, the prosecutor's argument essentially tracked the jury instructions in their import (See T-XXXI 1503-1510), and, on direct appeal, this Court established the law of the case:

> In his sixth and seventh claims, Shellito argues that the trial judge erred in refusing to give his requested clarifying instructions on mitigating evidence and on who bears the burden of proving that death is the appropriate penalty. We reject each of these claims. This Court has repeatedly determined that the requested clarifying instructions on mitigating evidence are not required. Finney v. State, 660 So.2d 674 (Fla.1995), cert. denied, 516 U.S. 1096, 116 S.Ct. 823, 133 L.Ed.2d 766 (1996); Ferrell v. State, 653 So.2d 367 (Fla.1995). Likewise, we do not find that the standard instructions improperly shift the burden of proof. *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)(so long as state's method *843 of allocating burdens of proof does not lessen state's burden to prove existence of aggravating circumstances, defendant's constitutional rights are not violated by having to prove mitigating circumstances sufficiently substantial to call for leniency); Robinson v. State, 574 So.2d 108 (Fla.1991).

Shellito, 701 So.2d at 842-43.

Bertolotti v. Dugger, 883 F.2d 1503, 1525 (11th Cir. 1989), upheld jury instructions like the ones on which the prosecutor's argument was based here:

> The judge instructed the jury as follows:
>
> > [I]t is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> The judge then explained Florida's statutory aggravating circumstances to the jury. Following the explanation, the judge instructed the jurors:
>
> > If you find the aggravating circumstances do not justify the death penalty, then your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years.
> >
> > Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.
>
> The judge next explained the mitigating circumstances, concluding by informing the jury that it could consider in mitigation '[a]ny other aspect of the defendant's character or record and any other circumstance of the offense.' The judge further cautioned the jury

> that any aggravating circumstance must be established beyond a reasonable doubt, but that mitigating circumstances need not be so established. If the jury found an aggravating circumstance, it was to 'then consider all of the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.'

Moreover, given the state of the law in 1995, when this case was tried, including Bertolotti at only six years old, it was not unreasonable for trial counsel not to object to the prosecutor's argument.

In conclusion, there was no "improper commentary" (IB 93), and arguendo, even if something the prosecutor is someday construed as technically incorrect, it certainly did not rise to a level where, in 1995, it was unreasonable and prejudicial given the totality of the evidence, arguments, and instructions in this case.

ISSUE VI: ERROR IN DRAFTING SENTENCING ORDER? (IB 94-96, RESTATED)

This issue appears to argue that, since no one could recall some events from 1995, it must be true that the State drafted or assisted drafted the sentencing order. However, Shellito overlooks that the prosecutor flat-out said he did not prepare the order, the Judge said he prepared the order, and the Judge's assistant said that the Judge prepares his sentencing orders. Moreover, Shellito bears the burden, which is not met based upon Shellito's subjective and groundless suspicions.

Concerning this claim, the trial court, Judge Dearing, ruled concerning Judge Ollif's sentencing order:

> **Defendant's Ground Nine**
>
> In ground nine, the Defendant asserts that the trial court failed to 'independently' weigh the aggravating and mitigating circumstances

> used in sentencing the Defendant to death. To the extent his argument is discernible, the Defendant appears to allege that the trial court used an order allegedly prepared by the State in sentencing the Defendant. To support his claim, the Defendant avers that there is an unsigned sentencing order contained in the files of the State Attorney, which he alleges is similar to the sentencing order signed by Judge Olliff.
>
> Initially, this Court notes that the Defendant's claim is procedurally barred as it could have been and should have been raised on direct appeal. Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995); Cherry v. State, 659 So.2d 1069 (Fla. 1995); Straight v. State, 488 So. 2d 530 (Fla. 1986). Further, in his deposition, Judge Olliff testified that he 'always did every death sentence personally.' (P.C. Vol. VII at 7-8.) At the evidentiary hearing, trial counsel testified that the sentencing order was consistent with Judge 011iffs writing style, of which he was familiar. (P.C. Vol. I at 219.) Moreover, former Assistant State Attorney Jay Plotkin testified at the evidentiary hearing that it was Judge Olliff s regular practice to provide the State and defense unsigned copies of the sentencing order before he sentenced a defendant. (P.C. Vol. VI at 86.) The Defendant has failed to provide any evidence to show that Judge 011iff deviated from his customary practice in drafting his own sentencing orders, nor has he provided any support to show that the State drafted the sentencing order. Accordingly, the Defendant's instant claim is denied.

(PCR-IV 581-82, bold and underlining in original, internal footnotes omitted)

Judge Dearing's ruling is well-grounded on the record and the law and, so, on its face, merits affirmance.

In addition, the state also points out that the testimony of Ester Haynes, judicial assistant to retired Judge Hudson Olliff, was consistent with the trial court's findings regarding ISSUE VI. She testified that she was very familiar with the Judge Olliff's methods for preparing sentencing orders in capital cases. (PCT-XIX 3443). Judge Olliff wrote his own sentencing orders and was very particular in the punctuation and layout of the paragraphs. (Id. at 3445-47).

Therefore, Shellito has failed to prove that Judge Olliff failed to do his job sentencing Shellito in this case, and, to the contrary, the evidence demonstrates that he did do his job. ISSUE VI should be rejected.

ISSUE VII: IMPROPER JUROR-WITNESS CONTACT? (IB 97, RESTATED)

It appears that this claim argues that "[r]elief is warranted" because a clerk testified in the state's trial rebuttal and then gave the jury the trial exhibits. Judge Dearing's order stands on its own merit:

> **Defendant's Ground Eleven**
>
> In ground eleven, ground three subclaim five, and ground six subclaim four, the Defendant asserts that he was denied his due process rights when the trial court and a trial witness allegedly had contact with the jury outside the presence of the Defendant or his trial counsel. Specifically, the Defendant alleges that the trial court clerk, Debbie Dlugosz, went into the jury room to deliver a 'note' written by the trial judge. The Defendant fails to provide any support for the instant claim. However, at the evidentiary hearing, neither Ms. Dlugosz, Judge Olliff (via his deposition), nor trial counsel could reca1l any notes of paper being delivered to the jury as the Defendant alleges in the instant claim. (P .C. Vol. I at 221.) This Court specifically finds trial counsel's, Judge Olliff's, and Ms. Dlugosz's testimony both more credible and more persuasive than the Defendant's allegations. Laramore v. State, 699 So.2d 846 (Fla. 4th DCA 1997). As the record fails to support the Defendant's assertion that anyone had inappropriate contact with the jury, his instant claims are denied.

(PCR-IV 582-83, bold and underlining in original) Indeed, as part of her job, Ms. Dlugosz brought the jury the evidence, jury forms, verdict forms, jury instructions, pad and pencils. (PCT-Supp-XVIII 3275-77). She performed these duties in every trial. (Id. at 3276) She did nothing other than ministerial ("clerical") tasks. (See Id. at 3277-78) Ministerial matters do not constitute improper "ex parte communication." See, e.g., Tompkins v. State, 994 So.2d 1072, 1082 (Fla. 2008)("ex parte communication was not

improper because it did not constitute a substantive discussion on the merits of Tompkins's case"); Jimenez v. State, 997 So.2d 1056, 1073 (Fla. 2008)("fact that the State informed Judge Ward that no evidentiary hearing occurred for this successive rule 3.851 motion does not constitute a substantive discussion concerning the merits of the case").

ISSUE VIII: BRAIN DAMAGE & AGE PRECLUDE EXECUTION? (IB 98-99, RESTATED)

As discussed in ISSUE I, Shellito was only one month shy of 19 years old when he committed this crime, and the postconviction evidence of his brain damage was weak. In any event, Connor v. State, 979 So.2d 852, 867 (Fla. 2007), is among the cases that have resolved ISSUE VIII against Shellito's position:

> To the extent that Connor is arguing that he cannot be executed because of mental conditions that are not insanity or mental retardation, the issue has been resolved adversely to his position. *See*, *e.g.*, *Diaz v. State*, 945 So.2d 1136, 1151 (Fla. 2006) (indicating that neither this Court nor the United States Supreme Court has recognized mental illness as a per se bar to execution).

The state submits that Connor et al were well-decided and merit this Court's adherence.

Further, the applicable test for a non-juvenile is whether the death sentence is proportionate, which this Court resolved on direct appeal here:

> Shellito contends that the death penalty in this case is disproportionate. ... The facts of this case reflect that Shellito previously had been sentenced as an adult for a violent felony conviction and was on probation at the time he committed the murder, and that he committed three robberies and an aggravated assault on a police officer within days of the murder. Further, Shellito was not a minor; the evidence regarding his intellectual functioning indicated he was in the low average range of intelligence; and the evidence regarding his mental status was not supported by expert testimony and was conflicting. Under the circumstances of this case, we do not find

> the sentence to be disproportionate. See, e.g., Merck v. State, 664 So.2d 939 (Fla.1995); Hayes v. State, 581 So.2d 121 (Fla.1991).

Shellito, 701 So.2d at 845. Therefore, to the degree that this claim seeks to re-litigate proportionality review, it is procedurally barred by the direct appeal. See, e.g., Lukehart v. State, 2011 WL 2472801, *16 (Fla. June 23, 2011)("challenges this Court's proportionality determination from the direct appeal and ..."; " procedurally barred, as it was raised and rejected on direct appeal"; citing Ferrell v. State, 918 So.2d 163, 178 (Fla. 2005); Smith v. State, 445 So.2d 323, 325 (Fla. 1983)).

Moreover, Shellito is appealing from a trial court order in this case, and it appears that he did not present this claim to the trial court. Instead, he presented a so-called "Ring" claim (See PCR-II 302-312), which is not appealed here. Therefore, this age-organic-brain-damage claim is unpreserved below.

ISSUE VIII is unpreserved and meritless.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court denial of postconviction relief.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on October 28th, 2011: Linda McDermott; McClain & McDermott P.A.; 20301 Grande Oak Blvd., Suite 118-61; Estero, FL 33928.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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