IN THE SUPREME COURT OF FLORIDA

EMANUEL JOHNSON,

Appellant,

v. **Case No. SC10-2219**
L.T. No. CRC 88-3200/3438 CFANO
(Jackie McCahon)

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM DENIAL OF RULE 3.851 MOTION
THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT ON DESIGNATIONS TO THE RECORD

References to the direct appeal record will be designated by "DAR" followed by the appropriate volume and page number.

References to the post-conviction record on appeal will be designated by "PCR" followed by the appropriate volume and page number.

OBJECTION TO JOHNSON'S REQUEST FOR CONSOLIDATION OF APPEALS

Although it would be appropriate for Johnson's two post-conviction appeals (White, SC10-2008 and McCahon, SC10-2219) to be considered at the same time, the State objects to Appellant's request to consolidate these appeals, which involve separate judgments and sentences.

STATEMENT OF THE CASE AND FACTS

This case involves murder victim Jackie McCahon. On direct appeal, this Court set out the following summary of the facts adduced at trial:

> On September 22, 1988, Sarasota police found Jackie McCahon's body on a sidewalk in front of her residence. She had been stabbed nineteen times, and twelve of the wounds were fatal. A broken-off piece of a knife blade was found in her body. Blood spatter evidence suggested that McCahon had been attacked as she opened the door, or while inside a bathroom. Police at first suspected several men, but later turned their attention to a tenant of McCahon's named Emanuel Johnson. When first questioned, Johnson said he had heard police cars arrive and had gone out to see what was happening, but that he did not know McCahon was the victim until someone told him so the next day.
>
> After a lengthy police interrogation, however, Johnson confessed. He said he had gone to McCahon's residence to say he needed to use her phone because his wife was about to give birth. McCahon knew that Johnson's wife was pregnant. When McCahon let Johnson in the door, he grabbed her and choked her to semi-consciousness. Then he found a knife, stabbed her several times, cut the phone cord, then took twenty dollars he found. Later, Johnson stated that he then went across the street to his apartment, but saw McCahon stagger out of her residence on to the sidewalk. At this point Johnson said he took a knife from his apartment, went out, and stabbed McCahon repeatedly. Police later found a broken knife handle where Johnson said he had thrown the second knife. It matched the broken blade found in the body.
>
> Johnson was found guilty at trial of first degree murder and armed burglary. The jury recommended death by a vote of 10–to–2. The trial court found the following aggravating factors: (1) prior violent felony; (2) murder committed for pecuniary gain; (3) the murder was heinous, atrocious, or cruel. The trial

> court found the following mitigating factors: (1) Johnson was raised by the father in a single-parent household; (2) He had a deprived upbringing; (3) He had an excellent relationship with other family members; (4) He was a good son who provided for his mother; (5) He had an excellent employment history; (6) He had been a good husband and father; (7) He showed love and affection to his two children; (8) He cooperated with police and confessed; (9) He had demonstrated artistic and poetic talent; (10) "The age of the Defendant at the time of the crime"; (11) Johnson "has potential for rehabilitation and productivity in the prison system"; (12) "The Court can punish the Defendant by imposing life sentences"; (13) Johnson had no significant history of criminal activity before 1988; (14) He exhibited good behavior at trial; and (15) He suffered mental pressure not reaching the level of statutory mitigation.
>
> *Johnson v. State*, 660 So. 2d 648, 652 (Fla. 1995)

Post-Conviction:

The trial court granted an evidentiary hearing on four post-conviction claims: (1) ineffective assistance of counsel for mishandling mental health experts, (2) State failed timely to disclose exculpatory evidence, which rendered counsel ineffective in failing to diligently prepare for trial, (3) State engaged in prosecutorial misconduct, and (4) ineffective assistance of counsel for failure to call competent mental health experts in the penalty phase.

The evidentiary hearing was held August 3-4, 2009. (McCahon PCR V19/3339-V20/3683). CCRC presented the testimony of Dr. John Brigham, Marjorie Hammock, Dr. Walter Afield and Johnson's

trial team attorneys: Public Defender Elliot Metcalfe, Chief Assistant Public Defender Tobey Hockett, and Assistant Public Defender Adam Trebrugge. The State did not call any witnesses, but did offer several exhibits, including the Public Defender's investigative file on background mitigation information from family members and lay witnesses.

Dr. John Brigham: Neither of the capital trials involved eyewitness identifications. The eyewitness identification sub-claim related to a non-capital case (Cornell). Dr. Brigham, a retired professor, obtained degrees in psychology. He is not a licensed psychologist. (McCahon PCR V19/3347). Brigham was tendered as an expert in the "field of social psychology with the specialty in the field of eyewitness identification." (McCahon PCR V19/3350). The State objected to his testimony as irrelevant and inadmissible, specifically arguing any testimony regarding the credibility of a witness would invade the province of the jury. (McCahon PCR V19/3350; 3354-55). The trial court stated its understanding of CCRC's argument regarding Brigham as:

> And maybe I misapprehended Mr. Gruber's 3.850 argument and the thrust if his argument, please correct me if I have. My understanding in reading that, a conclusion that I drew in having Dr. Brigham testify, was not to address *i.e.* whether or not a witness was credible, but to show that as a result of his studies the areas that the attorneys should have attacked it at the trial with other witnesses and their motions pretrial.

(McCahon PCR V19/3351). CCRC maintained that Brigham's testimony was expert testimony that would have been admissible at trial. (McCahon PCR V19/3354). Since the hearing was outside the presence of a jury, the trial court allowed CCRC to proceed with Dr. Brigham. (McCahon PCR V19/3355). Although the trial court reserved ruling on the State's objection (McCahon PCR V19/3682), no later ruling was made.

Brigham was contacted in the Spring of 1991 to possibly testify as an expert in the Cornell case. (McCahon PCR V19/33355-56). Brigham was not able to participate at that time, but informed Hockett that if the case could be postponed he would be interested in participating. (McCahon PCR V19/3356).

According to Brigham, in order to test the fairness of lineups, Brigham needed to use several groups of students who would be given a description of the perpetrator and they would then "guess" who the perpetrator was from a [photo] lineup. (McCahon PCR V19/3357). The students were not available until summer school began. (McCahon PCR V19/3357). The study, Brigham agreed, was nothing more than a "guessing game." (McCahon PCR V19/3375). The students never would have an opportunity to see who they were trying to identify, even though

Brigham agreed perception plays an important role in identification. (McCahon PCR V19/3375-76).

Brigham believed the nine months between the crime and the identification in Cornell was significant. (McCahon PCR V19/3361-62). In Brigham's view, in a traumatic event, it is more likely that a person would not be able to encode an accurate memory.[1] (McCahon PCR V19/3366-67). According to Brigham, an eyewitness cannot know with any certainty that he or she is correct, certainty is independent of accuracy, but "no research suggests that it's impossible for somebody to be accurate." (PCR V19/3385-86). None of the research studies Brigham referred to involved crime victims. (McCahon PCR V19/3380-81). Brigham further admitted that he was not challenging the credibility of the victim (Cornell) or her identification or her accuracy. (PCR V19/3385-86).

Brigham never performed any study for this case; and he never tested the accuracy of the [photo] lineup. (McCahon PCR V19/3382). Brigham would have been able to provide expert consultation or testimony in 1990 - 1991. (McCahon PCR

[1]Brigham addressed the factors he considered, including the three phases of memory: acquisition, retention and retrieval. In Cornell's case, where she saw many photos over a period of time, Brigham thought it would be difficult for most people, or the average person, to retain an accurate memory. (McCahon PCR V19/3361). Brigham acknowledged that when Cornell selected Johnson, she knew "right away" that "was the guy." (McCahon PCR V19/3382-83).

V19/3371). At the time of trial, Brigham did not have students available for a mock study; Brigham did not know if he would have had the time to testify only about general principles in eyewitness identification. (McCahon PCR V19/3383-84).

Marjorie Hammock: Marjorie Hammock, a social worker and professor in social work, was offered as an expert in clinical social work and in conducting Biopsychosocial Assessments. (McCahon PCR V19/3391). In 2002, Hammock was retained by CCRC to conduct an assessment of Johnson. (McCahon PCR V19/3400). She was given a number of records to review, conducted family interviews, and went to Mississippi to see the current living arrangements of some of Johnson's family, as well as some sites he resided as a child. (McCahon PCR V19/3400-02). Hammock interviewed Johnson three times. (McCahon PCR V19/3402).

Ms. Hammock knew that the Public Defender Office's investigator Beverly Ackerman also went to Mississippi. (McCahon PCR V19/3426). Hammock interviewed the same people that Ackerman interviewed. (McCahon PCR V19/3428-30). Ackerman's interviews were transcribed and in the Public Defender's file. (McCahon PCR V19/3428). Ackerman also interviewed additional people that Hammock did not meet. (McCahon PCR V19/3428-29). The records Hammock reviewed, such as Johnson's medical records, and interviews with Johnson, were

from the Public Defender's file. (McCahon PCR V19/3429-31).

Ms. Hammock concluded that Johnson grew up in poverty, experienced traumatic events, was teased and presented an inability to cope. (McCahon PCR V19/3424). She described Johnson as sad, angry and a loner. (McCahon PCR V19/3424-25). Ms. Hammock agreed that most of what she did was already included in the Public Defender's file. (McCahon PCR V19/3430). Although she believed her information was not necessarily the same, she did not identify any information that was different [from that obtained by the Public Defender's Office]. (McCahon PCR V19/3430-31). Ms. Hammock believed her findings were consistent with Dr. Afield's findings. (McCahon PCR V19/3417). Hammock read the reports of some of the other doctors [Dr. Michael Maher, Dr. Richard Ofshe and Dr. Sidney Merin], but she did not find anybody who agreed with Dr. Afield.[2] (McCahon PCR V19/3434-36).

Dr. Walter Afield: Dr. Afield, a psychiatrist, was court-appointed as a confidential expert to examine sanity and competency. (McCahon PCR V20/3504-05). In October 1988, Afield

[2]Ms. Hammock had not read any other reports or reviewed any information from other doctors who were also contacted by the defense at the time of trial, including: Dr. Emanuel Tanay, Dr. Stephen Pittel, Dr. Greg DeClue, Dr. Milton Burglass, Dr. Clifford Levin, Dr. Padar, Dr. Ronald Aungdin, Dr. Bernard O'Neil or Dr. Theodore Probst. (McCahon PCR V19/3434-36). Ms. Hammock also had not reviewed the report or information from Dr. Daniel Sprehe. (McCahon PCR V19/3436).

interviewed Johnson. (McCahon PCR V20/3509). Afield concluded that Johnson was borderline retarded, had a probable learning disability and had chronic undifferentiated schizophrenia. (McCahon PCR V20/3509-10). Johnson's IQ -– of 100 -- was normal. (McCahon PCR V20/3544). Afield saw many records over the years and his opinion remained unchanged. (McCahon PCR V20/3510).

Afield reported to attorney Hockett that Johnson was vague and rambling. (McCahon PCR V20/3510-11). He described Johnson as "all over the place," speaking in circles and having "loose associations." (McCahon PCR V20/3511-12). According to Afield, Johnson was very inappropriate in his behavior, full of delusions, hallucinating and hearing voices. Afield's sanity evaluation was based upon Johnson's self-reports. (McCahon PCR V20/3513). Johnson confirmed that he confessed to the police, understood he was charged with first-degree murder, and knew the name of his attorney. (McCahon PCR V20/3513). Prior to April 19, 1991, Afield advised the Public Defender's Office he did not believe there was a basis for an insanity defense. (McCahon PCR V20/3520).

Afield opined that Johnson was psychotic at the time of the offense and did not think Johnson could stand trial because of his psychosis. (McCahon PCR V20/3522-23). Afield discussed

this with several attorneys. (McCahon PCR V20/3522). After his deposition in September 1990, there was some unspecified discussion with Johnson's attorneys; Afield did not believe he did any additional work on Johnson's case after the deposition. (McCahon PCR V20/3535-36).

At the time of his pre-trial deposition, Afield had not given a definitive opinion concerning sanity. (McCahon PCR V20/3537). Afield thought Johnson was too retarded to pretend to be insane. (McCahon PCR V20/3511-12). Afield did not believe Johnson was capable of legal research and writing. (McCahon PCR V20/3541). At the State's request, the Circuit Court took judicial notice of Johnson's numerous *pro se* filings. (McCahon PCR V20/3548).

The post-conviction evidentiary hearing was held approximately 20 years after the trial proceedings. In post-conviction, Afield could not recall any of Johnson's hallucination or delusions and testified "I don't even remember the man frankly." (McCahon PCR V20/3542-43). Afield could not remember any specific behavior or statements related to Johnson's psychosis or schizophrenia. (McCahon PCR V20/3544).

Adam Tebrugge: Attorney Adam Tebrugge was an assistant Public Defender in the 12th Judicial Circuit from 1985 through 2008; Tebrugge is a Florida Bar board certified criminal trial

attorney. (McCahon PCR V19/3446). Tebrugge has lectured at the Florida Public Defender Association's life-over-death training conferences. (McCahon PCR V19/3447). In 1990, Tebrugge handled his first penalty phase in another capital case and that defendant was sentenced to life in prison. (McCahon PCR V19/3448). Johnson's case was his second capital case. (McCahon PCR V19/3448). Since that time, Tebrugge has worked on over one-hundred homicide cases, handling ten capital cases to completion. (McCahon PCR V19/3448-49).

Trebrugge was Johnson's attorney in the Lawanda Giddens case; but he did not participate in the Cornell case. (McCahon PCR V19/3449) Trebrugge handled the penalty phases in the McCahon and White cases. (McCahon PCR V19/3450). Trebrugge argued the existence of extreme mental or emotional disturbance as a statutory mitigator. (McCahon PCR V19/3450). A jury instruction was requested and given in each case. (McCahon PCR V19/3451).

A number of Johnson's family members testified at the penalty phase in each case, but a mental health expert was not presented. (McCahon PCR V19/3451). Dr. Afield was appointed within a few weeks of Johnson's arrest and Dr. Maher was later appointed as a confidential adviser. (McCahon PCR V19/3453). Trebrugge decided not to call Afield as a witness. (McCahon PCR

V19/3453). When asked why he made the decision to not call Dr. Afield, Tebrugge responded:

> Apparently Dr. Afield was employed early on in the case, when I was asked to assume some responsibility for the case, one of the things that I did was set an appointment with Dr. Afield. At the conclusion of the appointment I had some concerns about the work that he had done. Subsequently, if I'm not mistaken, I was present at the deposition of Dr. Afield, and again had concerns at the conclusion of the deposition. **Ultimately I believe that I decided that Dr. Afield was not a helpful witness overall for the Defense.**

(McCahon PCR V19/3462-63) (e.s.).

Trebrugge recalled conversations with Afield months prior to trial where they met Afield and reviewed his work. (McCahon PCR V19/3471). Trebrugge was "not satisfied" with Afield's work on the case; Afield had not done work that was "helpful" and Tebrugge did not think Afield should be used. (McCahon PCR V19/3471; 3473-74; 3476). Trebrugge conferred with co-counsel regarding the decision not to call Afield.[3] (McCahon PCR V19/3474). At this point in time, Afield had been on the case for about three years. (McCahon PCR V19/33473). Trebrugge testified that it was "extremely likely" that he discussed possible mental health mitigation with Afield.[4] (McCahon PCR

[3]Trebrugge's notes concerning his conversations with Afield were admitted as State's Exhibit 1. (McCahon PCR V19/3474-75; 3477-78).

[4]Tebrugge's letter to Dr. Afield, dated May 6, 1991, states "I would like to apologize to you for your recent difficulties with

V19/3472). The opinions of other experts, who did not agree with Afield, were not a significant factor in his decision not to call Afield. (McCahon PCR V19/3472). Remarks the State made regarding using Dr. Maher as a possible witness were not a significant factor in Tebruuge's decision not to call Afield either. (McCahon PCR V19/3473). Tebrugge was not satisfied with the work done by Afield, a decision was made not to call Afield, the defense then retained somebody else; and, ultimately, they did not call a mental health witness at trial. (McCahon PCR V19/3490).

Trebrugge made the decision to have Dr. Maher involved because he was a psychiatrist, experienced in substance abuse, and had appeared in many capital cases. (McCahon PCR V19/3453-54). Maher was appointed to not only look at insanity and competency, but also as a penalty phase expert. (McCahon PCR V19/3454). Trebrugge worked with Maher many times over the past twenty-five years, and first worked with Maher prior to the Johnson case. (McCahon PCR V19/3453). Trebrugge was not satisfied with Afield's work and recommended Maher in the hopes that Maher could add something to the defense's presentation. (McCahon PCR V19/3454; 3474). Tebrugge agreed:

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the Court. . . . We would very much like to call you as a witness during the penalty phase of these trials. . . . [set for May 27, 1991 and June 17, 1991]. (PCR V40/2).

> Q: Thank you. And Dr, Maher was another angle in this case; correct? It was for cocaine psychosis, cocaine intoxication.
> A: I knew that Dr. Maher had expertise in these fields and thought that potentially he could help explain that to the jury.

(McCahon PCR V19/3474).

After Maher examined Johnson, he informed Tebrugge of his findings and a decision was made to list Maher was a potential penalty phase witness.[5] (McCahon PCR V19/3478). Tebrugge was confident that he spoke to Maher about what his testimony would be. (McCahon PCR V19/3457). Trebrugge was aware that once you list a witness, they can be deposed. (McCahon PCR V19/3488-89). Tebrugge recalled that the trial court had ordered that all depositions were to be completed prior to trial. (McCahon PCR V19/3478-79). Tebrugge did not believe the State could call a defense expert to make their case. (McCahon PCR V20/3490-91).

Tebrugge addressed a portion of the White record wherein the State threatened to call Dr. Maher as a witness regarding

[5]The documentation reflecting the Public Defender Office's efforts to contact numerous professionals in preparation for Johnson's case was admitted into evidence as State's Composite Exhibit 2. (McCahon PCR V19/3476-78; [Composite exhibit 2 included the PD's correspondence to Dr. Afield on May 6, 1991; to Dr. Pittel on March 14, 1991; to Dr. Burglass on March 25, 1991; to Dr. Levin on March 25, 1991; to St. Joseph's Hospital and Sarasota Memorial Hospital on February 19, 1990 [re: diagnostic tests]; to Emanuel Johnson on February 27, 1990 [re: brain mapping test] and correspondence dated November 8, 1989, from Emanuel Tanay, M.D., a psychiatrist in Michigan, confirming plans to examine Johnson on December 8, 1989.]

admissions by Johnson. (McCahon PCR V19/3456-57). Tebrugge had argued that the statements to Maher would be privileged. (McCahon PCR V19/3458). Trebrugge discussed with Johnson what evidence would be presented and agreed they did not wish to use Dr. Maher if he was going to be asked about admissions made by Johnson. (McCahon PCR V19/3471). The decision not to call Maher was made by Tebrugge; Johnson participated in that decision and it was not based upon the State's comments. (McCahon PCR V19/3479).

Beverly Ackerman is the Public Defender Office's chief investigator. (McCahon PCR V19/3480). Ackerman was responsible for mitigation investigation in Johnson's case; she did a lot of work on Johnson's case, and traveled to Mississippi to interview people who knew about Johnson's background, character and other potential mitigating circumstances. (McCahon PCR V19/3481). Tebrugge reviewed Ackerman's work. (McCahon PCR V19/3481-82).

Records which indicated a suicide attempt by Johnson at the jail were proffered at trial, but not admitted due to the State's objection. (McCahon PCR V19/3465). Trebrugge thought perhaps he had "laid a sufficient predicate and disagreed with the Judge." (McCahon PCR V19/3465-66). Trebrugge's relationship with Johnson was uneven; the trial was stressful and Johnson "shut down" as the cases progressed. (McCahon PCR

V19/3469). Trebrugge never had any problems with Johnson; Johnson never threatened him, never had outbursts of anger and Trebrugge thought they communicated "pretty well." (McCahon PCR V19/3469). However, during the trial, when Tebrugge was not able to spend as much one-on-one time with Johnson, Johnson became unresponsive to the point that Trebrugge informed the trial court that he believed Johnson might be incompetent. (McCahon PCR V19/3469). Johnson was evaluated, but no evidence was found that he was not competent. (McCahon PCR V19/3470).

Tobey Hockett: Tobey Hockett was admitted to practice law in 1968. Hockett spent eleven years in private practice before joining the Public Defender's office in 1979. (McCahon PCR V20/3550). Prior to Johnson's case, Hockett had handled two other capital cases and recalled handling several others around the same time. (McCahon PCR V20/3441-52). When Johnson's case was tried, Hockett was the Chief Assistant Public Defender. (McCahon PCR V20/3557).

Tebrugge actively worked on the case from the beginning, focusing on the penalty phases. (McCahon PCR V20/3555-56). Hockett was working on discovery and pretrial motions. (McCahon PCR V20/3556). Elliot Metcalfe, the Twelfth Circuit's Public Defender, was also involved in the case. The state and defense witnesses were divided among the three attorneys. (McCahon PCR

V20/3556). Hockett did not participate in the penalty phases of the capital cases. (McCahon PCR V20/3583). Hockett did not participate in the trial in the Cornell or Giddens cases, but helped prepare them for trial.[6] (McCahon PCR V20/3628-29).

The Public Defender Office's capital division met regularly to discuss the case and its progress. (McCahon PCR V20/3556). When it came down to trial, Hockett estimated he, Trebrugge and Metcalfe, worked on Johnson's case almost full-time. (McCahon PCR V20/3557). Tebrugge also was working up the insanity defense part of the case, lining up doctors, and trying to find doctors who were willing to work on the case. (McCahon PCR V20/3558).

Hockett sought the assistance of Dr. Ofshe because Ofshe was cited in a court opinion as an expert in coerced confessions. Ofhse was appointed in August of 1990. (McCahon PCR V20/3559-61). Thereafter, Hockett took a number of lengthy taped statements from Johnson in an effort to gather as much information as possible to assist Ofhse in determining whether or not a coerced confession took place. (McCahon PCR V20/3559-61). The tapes were later transcribed. (McCahon PCR V20/3561). When asked for his response to CCRC's allegation that this

[6]State Exhibit 19 included the notes of all three defense attorneys indicating their strategy in the Cornell case. (McCahon PCR V20/3629-30).

process was unusual and risky, Hockett appeared to disagree, noting that if you ever were going to have a shot at unraveling what took place in an interrogation room, you have to do this. Furthermore, it saved a lot of money because they did not have to pay Dr. Ofshe thousands of dollars to come to Florida and spend hours and hours interviewing the client, when Hockett could do the same thing and Ofshe would have the benefit of the transcripts. (McCahon PCR V20/3561-62). After Hockett completed his interviews, Ofshe interviewed Johnson. (McCahon PCR V20/3562-63). It was Hockett's understanding that Ofshe deliberately avoided asking Johnson about the crimes; Hockett recalled that Ofshe was cross-examined on this point. (McCahon PCR V20/3563).

Dr. Afield was appointed as a confidential adviser.[7] (McCahon PCR V20/3566). If the defense listed Afield as a witness, they intended to call him and the State would be entitled to depose him. (McCahon PCR V20/3566). During Afield's deposition, Hockett objected when the State attempted

[7]State Exhibit 20 is a memo from Hockett to Metcalfe, dated September 13, 1989, which indicated that Hockett spoke to Dr. Afield and Afield was willing to come see Johnson again. (McCahon PCR V20/3632). According to the memo, Hockett went over the notice of intent to rely on the defense of insanity with Afield, Hockett read a portion of the notice to Afield, and Afield agreed it accurately described "the insanity." The memo also reflected Hockett reviewed the exact terminology that he was going to use in the notice with Afield. (McCahon PCR V20/3633).

to ask Afield about admissions made by Johnson. (McCahon PCR V20/3567-68). Hockett remembered bringing the objection to the court at a later time. (McCahon PCR V20/3567). Hockett believed that by objecting he was preserving the objection so that it could be brought before the court. (McCahon PCR V20/3567-68). Hockett did not feel he had the authority to instruct Afield not to answer. (McCahon PCR V20/3568).

Hockett was asked if, in retrospect, he recognized a problem in disclosing Doctors Ofshe and Afield as witnesses. (McCahon PCR V20/3578). Regarding Ofshe, Hockett explained he was disclosed because that was the only chance the defense had of having Johnson's confession suppressed as coerced. (McCahon PCR V20/3578). Regarding Afield, Hockett did not discuss Afield's deposition with him; Hockett agreed that he knew or should have known Afield would have revealed that Johnson made incriminating admissions, and Hockett objected to those statements at the deposition. (McCahon PCR V20/3578-79).

According to Hockett, the defense would not abandon any potential defense until after the suppression hearing. (McCahon PCR V20/3581). If the trial court had granted the motion to suppress Johnson's statements to law enforcement, that would dramatically impact what came next. (McCahon PCR V20/3582). If that were the case, Hockett thought it still would have been

possible to pursue an insanity defense and the State could not have called Dr. Ofhse. (McCahon PCR V20/3582).

Dr. Sprehe and Dr. Merin were appointed by the Court to report to the Court, defense and State. (McCahon PCR V20/3569).

According to Hockett, the defense demanded a speedy trial in the White case based on an honest representation that they thought they were ready. (McCahon PCR V20/3586). They were trying to advance the White case; the State had very few aggravators, without convictions in the other cases. (McCahon PCR V20/3586; 3635). The suppression hearings were concluded, ruled upon and preserved, and Hockett saw no good reason not to proceed. (McCahon PCR V20/3586-87). As a result of filing the demand for speedy trial, a trial schedule was locked in for all four cases. (McCahon PCR V20/3592). Once the trial schedule was fixed, Hockett argued to alter the schedule, but the ruling was not in his favor. (McCahon PCR V20/3592).

On the issue of late disclosure, Hockett and Trebrugge went to the State Attorney's Office, where the State made its entire file available for review when information of new material came to light. They went through the entire file. (McCahon PCR V20/3589).

When asked whether the defense considered using Dr. Ofshe in the guilt phase, Hockett did not think so. (McCahon PCR

V20/3592). They had preserved the issue at the suppression hearing, and repeating a week's worth of testimony in front of the jury would not do any good. (McCahon PCR V20/3592-93). Hockett knew that he could challenge the voluntariness and credibility of Johnson's statements; Hockett thought they did so at trial, but just did not use Dr. Ofshe. (McCahon PCR V20/3593; 3631-32).

In the early stages of the case, Johnson had difficulty communicating with Hockett. Johnson got better as time went on. (McCahon PCR V20/3597). According to a PD memo, one of their attorneys, Larry Combs,[8] interviewed Johnson the day after his arrest and Johnson confessed to the crimes. (McCahon PCR V20/3598-99; State Ex. 4). This memo indicated that Johnson admitted killing the victim for money to supply his cocaine habit. (McCahon PCR V20/3602-03). Hockett was also shown an interview form from one of the P.D. investigators, Bob Keyes. (McCahon PCR V20/3600-02; 3603-05; State Ex. 6).[9] This interview

[8]Public Defender Metcalfe also testified that Larry Combs was as assistant who handled many serious cases. Metcalfe identified State's Exhibit 4 as a memo which indicated that Combs interviewed Johnson and Combs thought Johnson was "faking" mental illness. (McCahon PCR V20/3658).

[9]The State's exhibits, admitted at the post-conviction hearing, included several documents from trial counsel's files. These included a memo from Hockett to Public Defender Metcalfe. (McCahon PCR V20/3610; State Ex. 8). The memo stated the rules, the law and Hockett's understanding of Johnson's cases. (McCahon PCR V20/3610). Hockett's handwritten note to his file,

included details about how Johnson committed the crime and later disposed of evidence. (McCahon PCR V20/3602).

Prior to trial, there were hearings regarding Dr. Afield's failure to provide a report as to sanity. (McCahon PCR V20/3634). Although Hockett did not recall that Afield faxed a response saying there was no insanity defense, Hockett believed that there came a point when Johnson did not want the defense to pursue an insanity defense and they abided by his wish. (McCahon PCR V20/3634-35).

During the several years Hockett was representing Johnson, he met with him on several occasions and provided Johnson with

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dated September 28, 1990, confirmed that Hockett spoke to the FBI and that blood tested at his request did not find any indications of any drugs or any indication of cocaine. (McCahon PCR V20/3615). The State also provided supplemental discovery in May 1, 1991 in open court which contained an FBI hair report dated October 2, 1990. (McCahon PCR V20/3619-20; State Ex. 11).

The P.D.'s file included a handwritten note by Hockett concerning others suspects and other persons involved in the McCahon case. (McCahon PCR V20/3621-22; State Ex. 13). The note listed officers Hockett might call as witnesses and even the order as to how they may be called. State Exhibit 14 includes Hockett's prepared cross-examination of Detective Sutton. (McCahon PCR V20/3611) Hockett believed he either photographed or videotaped his examination of the evidence. (McCahon PCR V20/3624). Hockett deposed the FBI analyst and cross-examined him at trial. Hockett obtained the FBI analyst's bench notes and prepared a chart tracking all the fibers and hairs, where they came from, and who looked at them. He used the notes and chart in cross-examination. Hockett also hired a hair and fiber expert and sent the expert the reports and part of FBI analyst Paul Bennett's deposition. (McCahon PCR V20/3626; State Exhibits 16, 17, and 18).

depositions and police reports. (McCahon PCR V20/3636). Johnson reviewed these documents and communicated with Hockett in writing and orally, his thoughts, feelings and differences with what was provided. (McCahon PCR V20/3636).

Elliott Metcalfe: Elliot Metcalfe, this Circuit's Public Defender, was part of Johnson's defense team and was on the case from the beginning. Metcalfe began his career as an assistant public defender in 1972. Metcalfe worked on the first capital cases after the reinstatement of the death penalty. Metcalfe has tried felony and murder cases and trained lawyers in criminal defense work. In 1976, Metcalfe was elected Public Defender and remained in that position until his retirement in 2009. Metcalfe has taught an eyewitness identification seminar and litigation skills course. (McCahon PCR V20/3646-47).

At the beginning of Johnson's case, the defense discussed the issue of insanity as a possible defense. (McCahon PCR V20/3648). Having worked with Dr. Afield previously, Metcalfe initially made contact with Afield. Over a period of time, the defense team was having problems communicating with Afield and Metcalfe had the impression he could not get a straight answer from him. (McCahon PCR V20/3648-49). Metcalfe was "very nervous" about calling Afield as a witness; Afield was a "flip-flopper" who would never stick to an opinion. (McCahon PCR

V20/3649). Metcalfe's opinion was "any insanity defense would collapse on his testimony." (McCahon PCR V20/3649). When asked about the decision not to call Afield, and whether he recalled discussing mitigation with Afield, Metcalfe responded:

> My recollection is that it had gotten to the point where we were not getting anything from Afield, and **I was not comfortable using him for any purpose at all, period**. We couldn't get an answer out of him on the insanity defense that was any way stable.

(McCahon PCR V20/3649) (e.s.)

Metcalfe recalled strategy sessions about Afield being a witness, but did not recall any discussion regarding his deposition. (McCahon PCR V20/3649-50). Dr. Ofshe's part in the case was to challenge the validity of Johnson's confession. (McCahon PCR V20/3650). Metcalfe did not recall any discussions regarding allowing Dr. Ofshe or Dr. Maher to be deposed. (McCahon PCR V20/3650-51).

The penalty phase was presented by Tebrugge. (McCahon PCR V20/3651). Metcalfe recalled discussions with Tebrugge about the penalty phases and getting Johnson's family members to cooperate and help. (McCahon PCR V20/3651-52). Metcalfe did not recall discussions regarding using an expert in the penalty phases. (McCahon PCR V20/3652). Metcalfe testified:

> **My recollections are that I wanted to make sure we got to his family, the people that knew him in Mississippi, to get as much information as we could about him as a person.** And I recall that –- that's

> how I think we got Beverly involved in the case, because she's a black female, has good contacts with black families, they can relate to her, and I thought that she would be a good person to go do that in Mississippi.

(McCahon PCR V20/3652) (e.s.)

Beverly Ackerman is an investigator in the P.D.'s office; she has a great deal of experience working on penalty phases. She was assigned to do the investigation of Johnson's family, friends, and others she could find that knew Johnson in Mississippi.[10] (McCahon PCR V20/3662). The defense discussed possibly using Brigham on the issue of eyewitness identification in the non-capital cases. (McCahon PCR V20/3654).

Metcalfe explained that the speedy trial demand was filed in the White case to try to avoid the State getting the aggravators from the other cases. (McCahon PCR V20/3656-57).

When asked what the operative event was that would allow the State to use a defense witness, Metcalfe recalled that it was the taking of the deposition. (McCahon PCR V20/3656-57). Metcalfe testified that up until that point, he could choose simply not to use that witness. (McCahon PCR V20/3657).

Metcalfe met with Johnson a number of times. (McCahon PCR

[10]State Exhibit 3 includes an index to the P.D.'s interviews with Johnson's family members. (McCahon PCR V20/3663). Metcalfe sent Ackerman to Mississippi to meet and interview potential mitigation witnesses in person and obtain records, such as the school and medical records. (McCahon PCR V20/3663).

V20/3657). When asked if he saw any indication of mental illness, Metcalfe answered that he saw inappropriate behavior from Johnson. (McCahon PCR V20/3657). Metcalfe assigned himself and most of his best staff to represent Johnson. (McCahon PCR V20/3665). Metcalfe and his staff attempted to provide Johnson with the best defense possible. (McCahon PCR V20/3665-66). This included contacting professionals from around the country. (McCahon PCR V20/3665-66). Metcalfe had conversations with Dr. Emanual Tanay regarding his evaluation of Johnson and that there were probably another six mental health experts that were contacted by either Metcalfe, Hockett or Tebrugge. (McCahon PCR V20/3666).

SUMMARY OF THE ARGUMENT

The trial court properly denied Johnson's post-conviction claims. Johnson's intertwined IAC complaints essentially second-guess trial counsel's tactical decisions regarding which witnesses to present at trial. "Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that [the court] will seldom, if ever, second guess." *Allen v. Sec'y, Florida Dept. of Corrections,* 611 F.3d 740, 759 (11th Cir. 2010), quoting *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (*en banc*).

Johnson's claims of ineffective assistance of counsel were denied following an evidentiary hearing. The testimony from the hearing established that Johnson's trial attorneys did not perform deficiently and that no prejudice could be found even if some deficient performance could be shown. As to each claim, the trial court outlined factual findings to explain the denial of the issue presented; all of the factual findings are supported by competent, substantial evidence. As no procedural or substantive error has been shown with regard to the factual findings entered or the application of the relevant legal principles by the lower court, no relief is warranted and this Court must affirm the order entered below denying post-conviction relief.

Johnson's remaining claims were properly summarily denied under this Court's precedent. In order to support summary denial of post-conviction relief, "the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claims." *Nixon v. State*, 932 So. 2d 1009, 1018 (Fla. 2006). Here, as in *Rose v. State*, 985 So. 2d 500 (Fla. 2008), the trial court entered a comprehensive written order disclosing the basis for the summary denial of Johnson's motion to vacate and providing for meaningful appellate review. *Id.*, citing *Nixon*, 932 So. 2d at 1018. As no error has been demonstrated in the denial of Johnson's post-conviction motion, this Court should affirm the Circuit Court's ruling below.

ARGUMENT

ISSUE I

THE IAC/MENTAL HEALTH EXPERTS CLAIM

In this intertwined IAC/guilt and penalty phase claim, Johnson argues that his experienced trial team attorneys (Public Defender Metcalfe, Chief Assistant Public Defender Hockett, and Assistant Public Defender Tebrugge) allegedly "mishandled" three of their expert witnesses, none of whom testified at trial. This IAC/guilt and penalty phase claim was denied following an evidentiary hearing; the trial court's factual findings are reviewed with deference while the legal conclusions are considered *de novo*. *Stephens v. State*, 748 So. 2d 1028, 1033 (Fla. 1999). Post-conviction relief was properly denied because Johnson failed to demonstrate any deficient performance and resulting prejudice under *Strickland*.

The legal standards to be applied to Johnson's claims of ineffective assistance of counsel are well-established. The decisive case of *Strickland v. Washington*, 466 U.S. 668 (1984) governs the analysis of a constitutional challenge to the adequacy of legal representation. In *Strickland*, the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient

and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 690. Only a clear, substantial deficiency will meet this test. See, *Johnson v. State*, 921 So. 2d 490, 499 (Fla. 2005). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 695. The deficiency must have affected the proceedings to such an extent that confidence in the outcome is undermined. *Johnson,* 921 So. 2d at 500.

Proper analysis of this claim requires a court to eliminate the distorting effects of hindsight and evaluate the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689; *Chandler v.*

United States, 218 F.3d 1305, 1313-19 (11th Cir. 2000), *cert. denied*, 531 U.S. 1204 (2001); *Johnson*, 921 So. 2d 499-500. Judicial scrutiny of attorney performance must be highly deferential. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. The defendant bears the heavy burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy, and that prejudice resulted. *Strickland*, 466 U.S. at 689; *Chandler*, 218 F.3d at 1313; *Johnson*, 921 So. 2d at 500. In this case, Johnson was represented by an experienced trial team. When reviewing the performance of such seasoned trial attorneys, the strong presumption of correctness ascribed to their actions is even stronger. *Chandler*, 218 F.3d at 1316. Finally, this Court has repeatedly recognized that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Henry v. State*, 937 So. 2d 563, 573 (Fla. 2006).

Essentially, CCRC disagrees with trial counsel's strategic decisions and CCRC concludes, instead, that: (1) Dr. Ofshe, a

sociologist, should have been called during the guilt phase (to relitigate the validity and voluntariness of Johnson's confession), (2) Dr. Afield, a psychiatrist, should have been called at the penalty phase (on the statutory mental mitigator of "under the influence of extreme mental or emotional disturbance") and (3) although CCRC agrees with trial counsel that Dr. Maher, a psychiatrist, should not have been, and never was, called at trial, CCRC nevertheless argues that Dr. Maher should not have been disclosed at all. Thus, Johnson essentially takes issue with the manner in which trial counsel presented the evidence at trial. "This is not, however, a proper basis to establish deficient performance on the part of trial counsel." *Mendoza v. State*, 2011 WL 2652193, 10 (Fla. 2011), citing *Everett*, 54 So. 3d at 478 ("That there may have been more that trial counsel could have done or that new counsel in reviewing the record with hindsight would handle the case differently, does not mean that trial counsel's performance during the guilt phase was deficient.") (quoting *State v. Coney*, 845 So. 2d 120, 136 (Fla. 2003)).

CCRC spends several pages discussing waivers of client confidentiality and eventually concludes that "defense counsel lost the ability to present an insanity or impairment defense in the guilt/innocence phase and mental mitigation in the penalty

phase because they waived confidentiality across the board." (Initial Brief of Appellant at 66). However, (1) there was no legitimate insanity defense available, as Dr. Afield confirmed; (2) Florida law does not permit the introduction of a "diminished capacity" defense[11] at the guilt phase; (3) defense counsel elected to call Dr. Ofshe only at the suppression hearing, preserved the confession claim for direct appeal, concluded that "repeating a week's worth of suppression hearing all over again in front of the jury would not do us any good," and challenged the validity and voluntariness of Johnson's confession *via* cross-examination and argument at trial; (4) defense counsel made a tactical decision not to use Dr. Afield at trial "for any purpose at all;" (5) despite alleging that trial counsel improperly waived the confidentiality of Dr. Ofshe and Dr. Afield, CCRC simultaneously insists that both Ofshe and Afield should have been called at trial and admits, correctly,

[11]See, *Lukehart v. State*, 2011 WL 2472801 (Fla. 2011) (rejecting IAC claim for trial counsel's failure to raise unavailable defense of diminished capacity during the guilt phase), citing *Evans v. State*, 946 So. 2d 1, 11 (Fla. 2006) ("[D]efense counsel is not ineffective for failing to present the defense of diminished capacity because diminished capacity is not a viable defense in Florida."); *Hodges v. State*, 885 So. 2d 338, 352 n. 8 (Fla. 2004) ("This Court has held on numerous occasions that evidence of an abnormal mental condition not constituting legal insanity is inadmissible to negate specific intent."); *Spencer v. State*, 842 So. 2d 52, 63 (Fla. 2003) (holding that evidence of defendant's disassociative state would not have been admissible during the guilt phase).

that calling a confidential expert to testify waives the privilege, Initial Brief of Appellant at 45, citing *Sagar v. State*, 727 So. 2d 1118 (Fla. 5th DCA 1999); (6) if both Dr. Ofshe and Dr. Afield had been called by the defense at trial, as CCRC insists they should have been, then Ofshe and Afield still would have been subject to deposition, cross-examination, impeachment and the contrary opinions of other expert witnesses; (7) if the defense had called Dr. Afield at the penalty phase, the State not only would have brought out that Johnson admitted to Dr. Afield that he had killed two people, but could have presented the testimony of other mental health experts, including Dr. Daniel Sprehe and Dr. Sidney Merin, the mental health experts called by the State at the suppression hearing;[12] and (8) if Dr. Ofshe had been called at trial, then his testimony –- which included that Ofshe felt that Johnson was trying to manipulate him, Johnson admitted he was manipulating doctors that were examining him, and Johnson admitted he had faked insanity – also would have undermined the testimony of Dr.

[12]At the pre-trial suppression hearing, which began on February 25, 1991, the State called six witnesses and the defense called eighteen witnesses. The State's witnesses included Dr. Sidney Merin, a clinical psychologist and neuropsychologist, and Dr. Daniel Sprehe, a psychiatrist. Among other things, Dr. Sprehe concluded that "Johnson has malingered an attempt to use the insanity plea by malingering symptoms of mental illness. . ." (McCahon DAR V40/6846). The defense expert witnesses at the pre-trial suppression hearing included Dr. Afield and Dr. Ofshe.

Afield. Lastly, any speculative claim based on the unpresented testimony of Dr. Maher, the mental health expert that CCRC agrees was not called, and should not have been called at trial, is, as a practical matter, irrelevant.

After conducting an evidentiary hearing on Johnson's intertwined IAC/guilt and penalty phase claims, the trial court found no basis for relief under *Strickland* and its progeny. As to Dr. Afield, the trial court concluded, in pertinent part:

> **The Court finds that the Defendant's counsel was not ineffective in not calling Dr. Afield during the penalty phase. It was clear from the testimony of the Defendant's attorneys that the choice not to use Dr. Afield was a tactical one because he would have been more harmful than helpful.** "This Court previously has found no deficiency where trial counsel made a strategic decision not to present expert witness testimony after investigating and concluding that the testimony would be more harmful than helpful." *Winkles v. State*, 21 So.3d 19, 26 (Fla. 2009)(counsel reasonably feared that raising the topic of sexual abuse or the psychological impact of that abuse could have opened the door to admission as rebuttal evidence of defendant's taped statements discussing the abuse), citing *Bowles v. State*, 979 So.2d 182, 188 (Fla. 2008) (holding that counsel made reasonable strategic decision not to call mental health expert as witness where expert would have testified that defendant was only mildly impaired, impulsive, and dangerous). *See Pace v. State*, 854 So.2d 167, 173-174 (Fla. 2003) (holding that counsel made reasonable strategic decision not to present evidence of drug use where counsel consulted expert witnesses and witnesses gave unfavorable reports); *Griffin v. State*, 866 So.2d 1, 9, (Fla. 2003) (concluding there was no deficiency where counsel chose not to present witness who would have testified about defendant's penchant for stealing automobiles and his prior difficulties with murder victim). **Indeed, both Mr. Tebrugge and Mr. Metcalfe**

testified that they did not feel Dr. Afield would be a helpful witness for the defense. *See, e.g.*, Attachment 1, pp. 123-124 ("I decided that Dr. Afield was not a helpful witness overall for the Defense"; "I was not satisfied with his work, and I reported back that I did not think that he should be used"); Attachment 2, p. 309 ("it had gotten to the point where we were not getting anything from Afield, and I was not comfortable using him for any purpose at all, period"). Additionally, the Court notes that where the Court rejected Dr. Afield's testimony during the suppression hearing, it was certainly reasonable for the defense to then reassess whether his opinion would not be persuasive at the trial.

Having said that, the Court agrees that calling Dr. Afield would have come with a price. If the defense had called Dr. Afield to testify, the State not only would have brought out that the Defendant admitted to him that he had killed two people, but would have presented the contrary opinions of several other mental health experts. As stated in *Reed v. State*, 875 So.2d 415, 437 (Fla. 2004), "[a]n ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword."

Finally, the Defendant cannot show that the failure to call Dr. Afield at the penalty phase prejudiced him. The Supreme Court specifically noted on the Defendant's direct appeal that the Defendant's case for mental disturbance in the suppression hearing was consistent with the trial court's conclusion that Johnson's psychological troubles did not rise to the level of a statutory mitigator. See *Johnson v. State*, 660 So.2d 637, 646-647 (F1a. 1995) **("[p]sychological experts had testified extensively as to Johnson's mental state in the earlier suppression hearing, though counsel chose not to bring these same experts before the jury in the penalty phase. Even then, Johnson's case for mental disturbance in the suppression hearing was partially controverted and is itself consistent with the trial court's conclusion that Johnson's psychological troubles did not rise to the level of a statutory mitigator").**

> The Court therefore denies the Defendant's motion as to this ground.
>
> (McCahon PCR Order, V19/3326-33)(e.s.)

As to Dr. Ofshe, the Circuit Court found, *inter alia*, that (1) the decision not to use Dr. Ofshe during the guilt phase was a tactical decision and was not based on any ruling by the trial court regarding any potential use of Dr. Maher's testimony, (2) Johnson suffered no prejudice from the absence of Dr. Ofshe's testimony at the guilt phase, (3) Dr. Ofshe's testimony presented a double-edged sword because Ofshe previously testified that Johnson was manipulative and deceptive, (4) "the credibility of Dr. Ofshe's opinion was diminished effectively during the motion to suppress hearing on cross-examination by the State," (4) the defense challenged the legality of Johnson's confession at trial, and (5) the attorneys' presentation during the trial was more "effective because the 'lack of credibility' component was not present." (McCahon PCR Order V19/3336-37).

In denying the IAC claim based on Dr. Maher, the Circuit Court specifically found that "Dr. Maher was employed because the defense was not satisfied with Dr. Afield. Mr. Tebrugge knew Dr. Maher had expertise in cocaine psychosis and cocaine intoxication, and thought he potentially could help explain that to the jury." (McCahon PCR Order, V19/3329). Furthermore,

Johnson suffered no prejudice because Dr. Maher's testimony was never used by either side. In denying this intertwined IAC sub-claim, the trial court ruled, in pertinent part:

> **4. Dr. Maher**
>
> *** * ***
>
> **d. Analysis**
>
> **The Court denies this claim for several reasons. First, the actual testimony from Dr. Maher regarding the admissions made by the Defendant did not prejudice the Defendant whatsoever, because Dr. Maher was never called and the jury never heard such testimony. Further, based upon the testimony of Mr. Tebrugge, the Court finds the decision not to call Dr. Maher was strategic.**
>
> **Second, both Mr. Hockett and Mr. Tebrugge testified that the decision not to call Dr. Ofshe during the guilt phase was not related to any testimony Dr. Maher would have provided.** *See* Attachment 1, p. 125 (Tebrugge: "I would say no [to the question of whether the decision not to call Dr. Ofshe was because the State threatened to call Dr. Maher, but you'd be better suited to put those questions to either Mr. Hockett or Mr. Metcalfe, as I had no contact with Dr. Ofshe in this case"). In fact, during Mr. Hockett's testimony, the following occurred:
>
> > **CCRC: Did the Defense ever consider the use of Dr. Ofshe in the guilt phase of the—well, of any of the cases, to challenge the credibility of the confession.**
> > **HOCKETT: I don't think so. Thinking back right now, I don't think so. I think our feeling was that we had preserved the issue, and that repeating a week's worth of suppression hearing all over again in front of the jury would not do us any good**.
> > CCRC: You all did challenge the validity and voluntariness in preparation for cross examination; is that a fair statement?
> > HOCKETT: Correct.
> > CCRC: So all I'm asking is whether you also

considered the use of expert testimony to bolster that particular defensive strategy.
HOCKETT: I don't recall at this point.
CCRC: Were you aware at the time that you could in fact challenge the voluntariness and credibility of a defendant's statement?
HOCKETT: I thought we did. I think we did, but we just didn't do it with Dr. Ofshe.

Attachment 2, pp. 252-253. On cross-examination, Mr. Hockett further explained:

HOCKETT: **Looking back today my recollection was that we had gotten everything we needed to preserve the record on a suppression hearing, even though we didn't win it, that we would need for an appellate issue.** And looking back today, once again I cannot think of what more we could have done with him in front of the jury as opposed to in front of a Judge. We had already done the Judge. Yes, you could have presented him to a jury. And the specific reason for not doing it, I cannot tell you today, I do not recall.

Attachment 2, pp. 291-292. **It was therefore a tactical decision made by the Defendant's counsel.**

Third, the Defendant suffered no prejudice from the absence of Dr. Ofshe's testimony, which, under the Defendant's argument, may have been offered if Dr. Maher's deposition had not been taken. Dr. Ofshe was offered during the hearing on the Defendant's Motion to Suppress the confession. At the hearing, Dr. Ofshe testified:

DEF'S ATTY: Now, can you tell the Court what your opinion or analysis of the Emanuel Johnson interrogation shows?
***
OFSHE: Yes. In order to analyze this interrogation it's convenient to break it down into parts because it really took place—
DEF'S ATTY: If that makes it easier for you, please do it that way.
OFSHE: It took place in a series of steps, and

for my purposes I've broken the interrogation down into six, six periods that occurred during the interrogation and then have some Interest in some of Mr. Johnson's behavior following the completion of the interrogation.
***

The first part of the interrogation deals with the period roughly from 10:00pm to 11:30. This would have been the initial interrogation of Mr. Johnson. This is up to the point at which, just to bound this, up to the point at which Mr. Johnson agrees to take the polygraph examination.
***

At about 11:30 Mr. Johnson agrees to take the polygraph examination. Mr. Johnson reports that he was told that if he passed the polygraph he could go home. *** And in my judgment the initial failure of the interrogation to make any progress with Mr. Johnson is what led to the suggestion that he take the polygraph, because it was necessary to develop more pressure on him to get him to revise his estimate of whether or not he was going to be able to convince the police that he did not commit these crimes and to shake his constant denials of what had happened.

At that point, for about 11:30 to 12:00, the interrogation essentially comes to a halt because they've gone as far as they can go with the techniques available, and hence have decided to bring in the polygraph procedure.

[During this time,] Mr. Johnson reports that Detective Sutton told him that he knows about his criminal activities, his burglaries, and that he could be charged with over three hundred burglaries.
***

Sutton also during this period goes on to, according to Mr. Johnson, tell him that Johnson is a prime suspect in the Iris White and the Jackie McCahon killings, that he knew them both, and that if he would accept responsibility for having committed these crimes and plead insanity that Sutton would help with the judge insofar as he could, and that everyone would understand and

that he would be out in two or three years.
***
Then in the third part of the interrogation, which transpires from about 12:30 to 2:45 in the am, Mr. Johnson undergoes a polygraph test. And he is told that he failed the polygraph test with respect to both Iris White and Jackie McCahon.
***
Now the polygraph here is used as a polygraph is traditionally used, as a way of manipulating both the basis for the police asserting that we know you did it, they can now be more assertive and make the sort of statement, it's no longer a question of whether but only a question of why, and at the same time change Mr. Johnson's estimate of whether or not he was going to be able to escape from this interrogation or conclude this interrogation successfully from his point of view without being subjected to murder charges.
***
Following period four, following the polygraph interrogation, and this covers the period from about 2:45 in the morning until about 3:30, Mr. Stanton [(the polygrapher)] develops a. . . out of control behavior theme. ***This is after he's reported that Mr. Johnson has flunked the polygraph and he's now in the part of the polygraph procedure in which he would be attempting to use the fact of having flunked the polygraph to elicit a confession.
***
And at about 3:30 when this period ends Detective Sullivan and Sutton reenter the interrogation, and as they reenter the interrogation they emphasize that Mr. Johnson should listen to what Detective Stanton is saying because he's trying to help, or help him. So that again he's constantly being told that these people have our best interest at heart. Everyone is trying to help you. And he's now being told that in a situation in which, at least as he reports it to me, he no longer has anything available to him that leads him to think he'll be able to maintain his denials and

> escape the murder charges....Which of course tends to make the option of admitting responsibility and saying that I was insane when I did it a more desirable option because it, as represented to him, would have only a two or three year period of incarceration in a mental hospital.
>
> This brings us up now to the period from about 3:30 to 4:00am when Mr. Johnson actually made his confession.

Attachment 22, pp. 629-660. **Dr. Ofshe also testified that at one point during his interview with the Defendant, he felt the Defendant was trying to manipulate him, and the Defendant told him that he was manipulating doctors that were examining him. Att. 22, pp. 696-697. He also noted that the Defendant told him he was faking an insanity defense. *Id*. The Court specifically rejected Dr. Ofshe's testimony during the hearing, and ultimately denied the Defendant's motion. *See* Attachment 21.**

During the McCahon trial, the defense attacked the legality of the Defendant's confession at length. *See* generally Attachment 9. During opening statements, the defense stated:

> They brought Emanuel Johnson in to interrogate him. At the time they did this, at the time they started talking to him, they had absolutely no evidence that he had committed this crime. They had no fingerprints, they had no blood evidence, they had no hairs, no fibers. They had nothing.
>
> The evidence in this case will show you, though, that three clever detectives...worked on this man nonstop for six and a half hours, from 10:00pm on October the 11th, 1988, until past 4:30 in the morning, October the 12th, 1988.
>
> ***
>
> Ladies and gentlemen, you will hear that they got this statement. You will hear how they got it, and you will learn that it is a false confession; one that was obtained by skillful manipulation by these officers. What you hear in this statement is nothing more than a frightened young man who was parroting back...what he has

> already been told by the police during the six and a half hours.

Attachment 9, pp. 48-50. Additionally, during the cross examination of the law enforcement witnesses, the defense attacked the methods law enforcement used to get the Defendant's confession. *See* Attachment 9, pp. 511-522 (Detective Paul Sutton); 551-563 (Sgt. Michael Stanton); 577-583 (Officer Sapp). Finally, during closing argument, the defense argued:

> When we started out, I told you that this was a false confession, one that resulted from the skillful manipulation by the police.
>
> In order to understand this, you need to carefully look at how they got it, how they got, and what was really said in it.
>
> Remember this: when they started out that interrogation they had absolutely no evidence that Emanuel Johnson had committed this crime. The facts are clear that they got this man in there and they lied to him.
>
> ***
>
> Emanuel Johnson was committed to whatever they wanted. They got that hook into him. They got what they wanted. They closed out the case. For them, it was all over with. They got what they wanted. There was no need to look at any other suspects. There was no need to look at any more information that was still coming in, as of October the 11th, 1988. They got what they wanted. No need to examine the physical evidence. Call the FBI, tell them to forget it. That's what happened.

Similar tactics and arguments were used during the Iris White trial. *See* Attachment 23.

It is unlikely that if Dr. Ofshe had testified during the guilt phases of the White and McCahon cases, his testimony would have added much. In addition, Dr. Ofshe's testimony presented a double-edged sword, where he previously testified that the Defendant was manipulative and deceptive. Additionally, the credibility of Dr. Ofshe's opinion was diminished effectively during the motion to

> **suppress hearing on cross examination by the State, *see* Attachment 22, and the Court finds that the attorneys' presentation during the trial to have been more effective because the "lack of credibility" component was not present. The Court finds that the outcome of the trials would not have been different.**
>
> The motion is therefore denied as to this claim.
>
> (McCahon PCR Order, V19/3332-37) (e.s.)

The trial court correctly denied post-conviction relief on Johnson's intertwined claims of ineffective assistance of counsel at the guilt and penalty phases. CCRC alleges that the possibility of using Dr. Afield as a mitigation witness was not even explored. (Initial Brief of Appellant at 50). To the contrary, as the Circuit Court noted, attorney Tebrugge testified that he believed he and Dr. Afield did discuss the mitigating circumstance of extreme mental or emotional distress.[13] (McCahon PCR Order, V19/3326). Furthermore, both Tebrugge's handwritten notes, dated 4/8/91, and Tebrugge's

[13]Tebrugge's handwritten note titled: Dr. Walter Afield 4/8/91 include the following remarks:

- competency
- insanity
- second stage
– visit D again?
– what you need

* * *

2d stage

1. emotional/mental disturbance
2. capacity of D to conform to requirements of law substantially impaired

(PCR V40/1). Tebrugge's letter to Dr. Afield, dated May 6, 1991, included "We would very much like to call you as a witness during the penalty phase of these trials." (PCR V40/2).

letter to Dr. Afield, dated May 6, 1991, specifically reference the penalty phase. Next, CCRC faults attorney Hockett's objection at Dr. Afield's deposition on September 21, 1990. At that deposition, Dr. Afield testified that during their first meeting, Johnson was psychotic, "not smart enough to malinger," delusional and borderline retarded. (McCAhon PCR Order, V19/3320). When the State asked Dr. Afield to relate what Johnson said [about the crimes], attorney Hockett objected to disclosure of any privileged matters and stated:

> DEFENSE: Just a second. I want to put on the record—and, Doctor, I'm not your lawyer, so I can't tell you what to do or not to do, but in the case of *McMunn vs. State*, 264 So.2d 868, the court discussed this issue and said that an inquiry directed to court-appointed psychiatrist by the State must be limited to insanity or sanity. A psychiatrist is not permitted to testify directly as to facts elicited from the defendant during the course of compulsory examination.
>
> STATE: I think that's about trial, Tobey.
>
> (McCahon PCR Order, V19/3321).

Hockett recalled bringing this objection to the Court at a later date. Since the defense made a tactical decision not to use Afield at trial for any reason, CCRC's challenge to the adequacy of Hockett's objection at the deposition is, as a practical matter, a moot point. Furthermore, on January 31, 1991, Dr. Afield testified as a defense witness at the hearing on Johnson's motion to suppress his confession and admissions.

Inasmuch as CCRC insists that Dr. Ofshe and Dr. Afield should have been called at trial and CCRC admits that calling the expert witnesses to testify waives their privilege, CCRC's IAC complaint –- that trial counsel was ineffective in allowing Dr. Afield and Dr. Ofshe to be deposed – fails to support any deficient performance and resulting prejudice.

On cross-examination, Dr. Afield testified that Johnson said that he killed two people. To the extent Johnson suggests that he would have the right to use a mental health expert at the penalty phase without providing an opportunity for the state to depose such expert beforehand, any such suggestion is meritless. This Court has repeatedly indicated the desire to have a level playing field in penalty phase. See, *Dillbeck v. State*, 643 So. 2d 1027, 1030-31 (Fla. 1994); *Davis v. State*, 698 So. 2d 1182, 1191 (Fla. 1997); *Kearse v. State*, 770 So. 2d 1119, 1125-27 (Fla. 2000).

Despite Dr. Ofshe's testimony that Johnson admitted faking insanity, CCRC insists that Dr. Afield "would have stuck to his guns." This argument is nothing more than hindsight disagreement with trial counsel's contemporaneous assessment of Afield as a "flip-flopper." CCRC also asserts that trial counsel did not address "opening the door." However, as the United States Supreme Court reiterated in *Harrington v. Richter*,

562 U.S. ––––, 131 S.Ct. 770, 790 (2011), "*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." Moreover, CCRC does not dispute the accuracy of the trial court's finding -- that presenting Dr. Afield, in fact, would have "opened the door" to Johnson's admissions[14] and other adverse expert testimony. After finding no deficient performance, the Circuit Court recognized that calling Dr. Afield would have come with a price. As the trial court recognized, "[i]f the defense had called Dr. Afield to testify, the State not only would have brought out that the Defendant admitted to him that he had killed two people, but would have presented the contrary opinions of other mental health experts. As stated in *Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004), "[a]n ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence

[14]Thus, if Dr. Afield had been offered at the penalty phase, Dr. Afield still would have been asked about the fact that Johnson admitted to Dr. Afield that he had killed two people, and this would certainly undercut any defense suggestion of a "residual doubt" theory. At the beginning of the penalty phase, defense inquired what would be allowed in opening statement about residual doubt. Defense counsel acknowledged the adverse case law (DAR V35/5840-44). The State relied on the case law and argued that if the court allowed residual doubt testimony, then the State would like to call Dr. Maher. (DAR V35/5845-48). The defense announced it would not call Dr. Maher and the trial court ruled that residual doubt was not an appropriate mitigating factor.

presents a double-edged sword." (McCahon PCR Order, V19/3327-3328).

Johnson likewise failed to establish any deficient performance and resulting prejudice in connection with either Dr. Ofshe or Dr. Maher. CCRC's disagreement with trial counsel's decision to use Dr. Ofshe only at the suppression hearing is nothing more that hindsight second-guessing which is precluded by *Strickland*. Furthermore, Johnson cannot remotely demonstrate any prejudice in light of this Court's rejection of Johnson's confession claim on direct appeal. Where this Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument. *Johnston v. State*, 63 So. 3d 730, 737 (Fla. 2011).

The deposition of Dr. Maher was taken May 15, less than a week prior to the White trial, which began Monday, May 20, 1991 (the penalty phase was a week later). The defense announced on May 28 that Dr. Maher would not be called in the penalty phase (White DAR VR33/5841) and the defense rested its case the next day, May 29, 1991. Dr. Maher's deposition testimony was not used by either side and was not presented to the jury. Thus, there was no deficiency by counsel and certainly no prejudice that occurred in the guilt or penalty phases by the taking of

Dr. Maher's deposition.

In the penalty phase, the defense presented the testimony of a number of witnesses, including Kenneth Tyrone Johnson, Bridget Chapman, Henry Ben Johnson, Lee Arthur Johnson, Marvin Johnson, Evelyn Syprett, Jim Syprett, Margie Johnson, Clair Lewis, Angela Johnson, Charlene Johnson and Wendy Fiati. Johnson repeats that trial counsel also should have called Dr. Afield as a penalty phase witness. But, trial counsel decided not to use Dr. Afield for any reason at trial. In addition, as the Circuit Court noted, the trial court had rejected Dr. Afield's testimony in the suppression order denying relief and Dr. Afield's testimony came with a price – including the contrary opinion of other mental health experts -- Dr. Sidney J. Merin (DAR V8/1271-1318) and Dr. Daniel J. Sprehe (DAR V8/1319-1336). Johnson's second-guessing of trial counsel's performance also ignores the fact that counsel did call almost a dozen friends and relatives to describe his personal attributes. Johnson's claim that trial counsel was ineffective for failing to present a mental health expert at the penalty phase was correctly denied. See, *Cave v. Sec'y, Dept. of Corrections*, 638 F.3d 739 (11th Cir. 2011), *Cave v. State*, 899 So. 2d 1042 (Fla. 2005).

Finally, even if Johnson could establish any deficiency of

trial counsel, which the State emphatically disputes, he cannot demonstrate any resulting prejudice under *Strickland*. To meet the second prong of *Strickland*, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Valle v. State*, 778 So. 2d 960, 965–66 (Fla. 2001) (quoting *Williams v. Taylor*, 529 U.S. 362, 391, 120 S.Ct. 1495 (2000)). CCRC cites to *Porter v. McCollum*, 130 S. Ct. 447, 455–56 (2009), which reiterated that "a reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052; see *Porter*, 130 S. Ct. 447, 455–56. And, "[t]o assess that probability, [the Court] consider[s] the totality of the available mitigation evidence - both that adduced at trial, and the evidence adduced in the habeas proceeding - and reweigh[s] it against the evidence in aggravation." *Porter*, 130 S. Ct. 447, 453-54 (quotation marks and brackets omitted).

In *Porter*, trial counsel failed to uncover and present any evidence of Porter's heroic military service in two of the most critical, and horrific, battles of the Korean War, his mental health or mental impairment, or his family background. In *Porter*, the mental health evidence, which included Dr. Dee's testimony regarding the existence of a brain abnormality and

cognitive defects, was not addressed as *nonstatutory* mitigation. *Porter*, 130 S. Ct. at 455, n. 7. Also, the United States Supreme Court found that evidence of Porter's childhood abuse and combat military service was unreasonably discounted.

Unlike *Porter*, Johnson does not have any heroic military service, Johnson's psychological troubles were already considered as non-statutory mitigation, Dr. Afield previously testified at the suppression hearing, Afield could not remember Johnson at the time of the post-conviction evidentiary hearing and, therefore, Afield could not offer anything substantially new to what the defense team knew at the time of trial -- when Afield's testimony and Johnson's "case for mental disturbance in the suppression hearing was consistent with the trial court's conclusion that Johnson's psychological troubles did not rise to the level of a statutory mitigator." See, *Johnson v. State*, 660 So. 2d 637, 646-647 (F1a. 1995). As the Circuit Court concluded,

> Finally, the Defendant cannot show that the failure to call Dr. Afield at the penalty phase prejudiced him. **The Supreme Court specifically noted on the Defendant's direct appeal that the Defendant's case for mental disturbance in the suppression hearing was consistent with the trial court's conclusion that Johnson's psychological troubles did not rise to the level of a statutory mitigator.** *See Johnson v. State*, 660 So.2d 637, 646-647 (F1a. 1995)("[p]sychological experts had testified extensively as to Johnson's mental state in the earlier suppression hearing, though counsel chose not to bring these same experts

> before the jury in the penalty phase. Even then, Johnson's case for mental disturbance in the suppression hearing was partially controverted and is itself consistent with the trial court's conclusion that Johnson's psychological troubles did not rise to the level of a statutory mitigator").

(McCahon PCR Order, V19/3328).

Under *Strickland*, it is not enough for Johnson to show that any "errors had some conceivable effect on the outcome of the proceeding." 466 U.S. at 693. Instead, Johnson must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. Johnson must show that "absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id*. at 695.

The egregious facts and aggravated nature of this crime demonstrates that death is the appropriate sentence, and there is no reasonable probability of a different outcome had Johnson's attorneys presented the testimony of Dr. Ofshe at the guilt phase and Dr. Afield at the penalty phase. Johnson brutally killed two women; and, as the United States Supreme Court recognized in *Bobby v. Van Hook*, 130 S. Ct. 13 (2009), the alleged "benefit" of adding an expert witness is undermined when the defendant committed two separate murders.

ISSUE II

The IAC/Identification Expert Claim

Neither the White nor McCahon trials involved eyewitness identification testimony. Thus, Johnson cannot demonstrate any deficiency and resulting prejudice under *Strickland.* Nevertheless, Johnson argues that trial counsel was ineffective for failing to call Dr. Brigham as an expert in eyewitness identification to allegedly impeach the identification testimony from the Cornell non-capital case. The conviction in the Cornell case was used in the penalty phase of the capital cases to help establish the prior violent felony conviction aggravators.

To the extent Johnson is attempting to raise a residual or lingering doubt claim on the prior violent felony convictions used as aggravating factors, "Florida does not recognize residual doubt, much less residual doubt as to the aggravators." See, *Lukehart v. State*, 2011 WL 2472801, 5 (Fla. 2011), citing *Williamson v. State*, 961 So. 2d 229, 237 (Fla. 2007). Counsel cannot be deemed ineffective for failing to pursue a meritless claim. *Ferrell v. State*, 29 So. 3d 959, 975 (Fla. 2010) (citing *Mungin v. State*, 932 So. 2d 986, 997 (Fla. 2006)).

The Circuit Court held an evidentiary hearing on this IAC claim and correctly denied post-conviction relief because (1)

there was no deficiency and resulting prejudice since neither capital trial involved any eyewitness identification testimony; (2) counsel could not be deemed deficient in the non-capital cases because the defense did seek a continuance, but the request for more time (in order for Dr. Brigham to conduct various studies with his students) was denied, (3) even if Dr. Brigham had been called to testify on general principles of eyewitness information,[15] any such testimony would have been properly excluded under *Simmons v. State*, 934 So. 2d 1100 (Fla. 2006), (4) the defense vigorously challenged the police photopak methods and identification of Johnson at the Cornell trial; (5) Johnson's prior violent felony aggravating factor did not rest solely on one prior conviction, but was supported by multiple felony convictions, including "the other homicide as well as . . . attempt to commit murder in the first degree with a weapon, burglary of a dwelling while armed with a dangerous weapon, and robbery while armed with a dangerous weapon, and convictions for robbery and burglary of an occupied structure, and armed

[15]At the April 22, 1991 hearing on the defense motion to suppress identification (Case 88-3202), the prosecutor announced that Dr. Brigham was available and could testify the following day. (V12/1881-1882; 2001-2002). Defense counsel declined that offer and responded that they "had hired Dr. Brigham to . . . conduct a study of the various [photo] lineups in this case" and those studies "could not be completed until mid May." (V12/1882; 2002) Thus, Dr. Brigham was available, but only without any studies where he used his students to guess the identification.

burglary," see, *Pagan v. State*, 29 So. 3d 938, 951 (Fla. 2009) (affirming denial of IAC claim where prior violent felony aggravator did not rest solely on one conviction, but was also supported by several other more violent convictions); and (6) the defense made a strategic decision to demand speedy trial in the White case, as part of an effort to limit the aggravating factors.

ISSUE III

THE IAC/ PENALTY PHASE CLAIM
A. Failure to Employ a Mitigation Expert and
B. Failure to Authenticate Medical Records

In this claim, Johnson first argues that trial counsel was ineffective for failing to employ a "mitigation expert," other than an "in-house" investigator, and trial counsel should have called a "mitigation expert" at the penalty phase. The trial court denied this IAC claim after an evidentiary hearing, finding no deficient performance or resulting prejudice. 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*. See, *Sochor v. State*, 883 So. 2d 766, 771–72 (Fla. 2004).

At the time of trial, the Public Defender's Office sent an investigator (i.e., "in-house" mitigation expert) to Mississippi to interview family members and lay witnesses. The Public Defender's investigator did an extensive background search, collected materials for mitigation, interviewed family members and lay witnesses, and accumulated essentially the same information as that summarized by CCRC's post-conviction witness, Ms. Hammock. (State Composite Ex. 3, Index to Summary

of Mitigation Investigation by Public Defender's Office, See also, White PCR V40/14-16, Tab references 6-32). Ms. Hammock admitted that most of what she did in her investigation was included in the report that the Public Defender's investigators prepared at the time of the trial. Counsel cannot be found ineffective for failing to provide cumulative evidence. *Gudinas v. State*, 816 So. 2d 1095, 1108 (Fla. 2002).

In denying this IAC/penalty phase claim, the Circuit Court found, *inter alia*, that: (1) mitigation was a focus of the defense team, as Mr. Metcalfe sent an office investigator to the Defendant's hometown "to get as much information" about the Defendant as possible; (2) as part of that strategy, Metcalfe specifically chose Ms. Ackerman because he thought the Defendant's family would relate to her more, and give her more information; and (3) not only was much of the information from Ms. Hammock testified to by family members during the penalty phase, but the information was expressed clearly, articulately, and credibly. See*, Wong v. Belmontes*, 130 S. Ct. 383, 388 (2009) (jury simply did not need expert testimony to understand "humanizing" evidence; it could use its common sense or own sense of mercy). Finally, the trial court found that Johnson failed to show how having a "mitigation expert" at his trial instead of the evidence presented by family members would have

provided a reasonable probability, sufficient to undermine confidence in the outcome, that the penalty phase proceeding would have been different.

The trial Court summarized the penalty phase mitigation presented by the defense at the time of trial as follows:

> 1. **Kenneth Johnson (Defendant's brother)**-the Defendant was born and raised in Hollandale, Mississippi, a "very rural, poor town" that was divided by race. Their father left when the Defendant was almost a year old. Their mother remarried, but their stepfather was killed in car accident. The loss of the father and stepfather was especially hard on the Defendant, as he felt like those he loved were taken away from him. The Defendant has 2 full brothers (Kenneth and Henry, Jr.), three half-brothers (Marvin, Jeff, and George), and a half-sister (Angela). The Defendant was teased a lot in school because he did not have nice clothes, and did not "reach his potential in high school." Although the Defendant dropped out of school, he later went to the Job Corps and got a GED. After Job Corps the Defendant moved to Sarasota to get work, but he often visited. Kenneth lived with the Defendant for a few months, but moved to Orlando to go to UCF. One of the Defendant's babies was born stillborn, which devastated him. He then had Emanuel, Jr. The Defendant wrote from jail all the time; he is a very loving and nurturing person as far as friends and family are concerned, and he has been an inspiration to Kenneth.
>
> 2. **Bridget Chapman (Defendant's girlfriend)**-Defendant took care of her and her daughter, and he was a hard worker. Her daughter, Crystal, really loved him; he was a father figure to her. She miscarried their first child, but later gave birth to their son. Defendant was very hurt by the miscarriage of the baby, and carried around a picture of her body. Defendant brought Crystal

to church, and would read the bible to her, taught her how to tie her shoes and how to write, took her to the beach, and took her to ride her bike. He was a good family man.

3. **Henry Ben Johnson (Defendant's brother)**—Defendant's father left when they were young, and their mother remarried. Defendant's stepfather later died in a car accident, and Defendant took it hard. Defendant was a very kind, loving brother. Defendant left Mississippi and moved to Florida after he went to the Job Corps. Defendant encouraged him to move from Mississippi to Florida to better himself, and Defendant helped him get on his feet while he was in Sarasota. When Defendant moved to Orlando, he gave Henry his truck and tools. Defendant would bring Crystal to Henry's house and she played with his 4 children, and Defendant would take them to the beach and barbecue. He visited almost every day. Henry's 4 children loved Defendant like their own father. Henry has maintained a relationship with Defendant while he is in jail, and Defendant sent pictures of their father to him.

4. **Lee Arthur Johnson (Defendant's half-brother)**-His father (Defendant's step-father) died in a car accident when he was two years old. They grew up in a small house "and none of us had anything going for ourselves," so Defendant dropped out of school in sixth grade and decided to enter Job Corps and make things better for himself. After Defendant moved to Sarasota, he got the rest of his siblings to move to Florida and all of them got better jobs. Defendant helped him get on his feet when he came down here—paid his rent for a month, and gave him a job. Defendant was an inspiration to him. Lee was aware of Defendant's relationship with Bridget and Crystal, and that Defendant was devastated by the miscarriage.

5. **Marvin Johnson (Defendant's half-brother)** After Defendant's stepfather died, their mother worked very hard. All seven of them lived in a

small house with one bedroom. Defendant entered the Job Corps program, then moved to Sarasota. He maintained contact with the family and wanted to help his mother. Marvin moved to Sarasota after Defendant said he should better himself, and when he moved to Sarasota, Defendant paid his rent and helped him get on his feet by employing him for awhile. Defendant brought Crystal to Hollandale in July 1988, and took her to barbecues and the swimming pool.

6. **Evelyn Syprett (Defendant's friend)**-Defendant worked for her for six years, doing yard work. He was a hard worker, and was dependable, polite, protective, honest, and trustworthy.

7. **Jim Syprett (Evelyn Syprett's son/Defendant's friend)**-Spoke with Defendant several times while he was at his mother's house, and he never picked up on anything that caused him concern; he was comfortable with Defendant working for his mother. His mother is a hard person to please, and she was pleased with Defendant's work. Defendant was very meticulous and a hard worker.

8. **Margie Johnson (Defendant's paternal step-grandmother)**-Defendant was a bright child, who needed a lot of love and affection, was gentle and kind, and would help anybody with anything he could. He was very concerned about his father, and would often ask about him.

9. **Claire Lewis (Defendant's maternal aunt)**—Defendant was a good kid growing up, and was very respectful, thoughtful, and helpful. Defendant kept in contact with her over the years.

10. **Angela Johnson (Defendant's sister)**—She has 6 brothers, and Defendant was her favorite brother growing up. He would take her places and helped her out. After he left home, he wrote to her often. She met Bridget and Crystal and saw that he was a loving boyfriend to Bridget and he

was a nice step-father to Crystal—he loved them very much and took care of them. Defendant writes to her a lot, and has encouraged her to do everything right and not get in any trouble. He always helped out with his maternal grandparents.

11. **Charlene Johnson (Defendant's mother)**—She has 6 sons and 1 daughter. Defendant's father left when Defendant was about 6 months old, and never provided for the family after he left. She met Defendant's stepfather, but he was killed in a car accident. Stepfather had developed a relationship with Defendant, and Defendant thought of him as his father. No other person acted as Defendant's father after that. When Defendant was growing up, blacks lived in one section of Hollandale and whites lived in another. When Defendant got old enough, he would go out looking for jobs to help the family.

When Defendant was 13, he "overdosed" on sinus medication. She thinks he did so because he thought his mother did not like him because she spanked him. He did well in school, and got along well with other kids. He dropped out of school at 13 or 14 because he didn't want to go anymore—did some field work and work as a carpenter to earn money for the family. He then went into the Job Corps when he was 16 and then moved to Florida. Defendant wrote often to her.

She met Bridget and her daughter, and saw that Defendant had a strong relationship with them. When the miscarriage happened, it really affected Defendant—he spoke about it a lot and carried a photo of the baby with him and showed it to people.

12. **Wendy Fiati (Defendant's friend)**—employed Defendant to do yard work and work on the swimming pool. As an employee, he was honest and dependable, always there on time, cared about what he did, always looked for her best interests, and was a good worker. He worked for her for about seven years, and he was sensitive, never cursed, believed in God, cared very much about what he did. He was family oriented, cared

about Crystal, has a big heart and is good natured. Defendant wrote poetry, "was always questing for knowledge," and tried to better himself. She never felt uncomfortable around Defendant.

13. **George Johnson (Defendant's half brother)**— Defendant tried to be a father figure to him because his father died before he was born, and tried to teach him right from wrong and how to succeed in life. Defendant offered encouragement to him after he got kicked out of the Job Corps. He lived with Defendant in Sarasota for awhile and saw the relationship Defendant had with Bridget and Crystal; he was a good father and provided for them.

In preparing for the penalty phase, Mr. Metcalfe testified that the defense's strategy was to make sure they "got to his family, the people that knew him in Mississippi, to get as much information as we could about him as a person," and that he specifically sent Beverly Ackerman "because she's a black female, has good contacts with black families, they can relate to her, and [he] thought that she would be a good person to go do that in Mississippi." Att. 2, p. 312; 323. In preparing for the penalty phase, the Public Defender's office reviewed additional information that was never presented, including statements from other family members and friends. Thus, more information was reviewed than was presented to the jury.

iv. Analysis

There is no doubt that Ms. Hammock spoke with many of the Defendant's family members and reviewed many records related to the Defendant. There is equally no doubt, however, that the investigator for the Public Defender's Office interviewed many of the same people, and reviewed many of the same records. Having said that, Ms. Hammock agreed on cross examination that there were numerous reports the Public Defender's Office reviewed that she did not.

The Court finds that the Defendant's counsel was not deficient in failing to call a mitigation specialist for several reasons. **First, it is clear**

that mitigation was a focus of the defense team, as Mr. Metcalfe specifically noted that he sent an office investigator to the Defendant's hometown "to get as much information" about the Defendant as possible. As part of that strategy of getting as much information as possible, he specifically chose Ms. Ackerman because he thought the Defendant's family would relate to her more, and give her more information.

Second, the Defendant argues that a mitigation expert would have been more articulate, more forthcoming and comfortable on the stand than lay witnesses, and more objective than family members. The Court, however, notes that not only was much of the information from Ms. Hammock testified to by family members during the penalty phase, the information was expressed clearly, articulately, and credibly. *See Wong V. Belmontes*, 130 S.Ct. 383, 388 (2009) (jury simply did not need expert testimony to understand the 'humanizing' evidence; it could use its common sense or own sense of mercy"). As noted by the State, the Defendant does not challenge the information presented at the penalty phase, it challenges the way it was delivered. The Court agrees with the State, in that, to suggest that a mitigation expert would have been more articulate, credible, or objective is certainly a second-guessing of counsel's strategic decisions. *See Gudinas v. State*, 816 So.2d 1095, 1108 (Fla. 2002) ("the decision to hire a social worker appears to be second-guessing by current counsel, rather than identification of a defect in trial counsel's strategy").

Finally, the Defendant has not shown how having a "mitigation expert" at his trial instead of the evidence presented by family members would have provided a reasonable probability, sufficient to undermine confidence in the outcome, that the proceeding would have been different.

The Defendant's motion as to this ground is, therefore, denied.

(McCahon PCR Order, V19/3313-3317) (e.s.)

CCRC's reliance on a "mitigation expert" appears to be rank second-guessing, rather than identification of a defect in trial counsel's strategy. As *Strickland* recognized, "Even the best criminal defense attorneys would not defend a particular client in the same way." 466 U.S. at 689. Again, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. In post-conviction, Ms. Hammock testified to numerous hearsay statements. However, hearsay would be admissible in the penalty phase only if the State would have fair opportunity to rebut the hearsay evidence. See, *Marek v. State*, 14 So. 3d 985, 996 (Fla. 2009). Thus, if the State did not have a fair opportunity to rebut the hearsay, it would not be admissible at the penalty phase, no matter how articulate, forthcoming and informed the "mitigation expert" might be.

On direct appeal in both cases, *Johnson v. State,* 660 So. 2d 637, 645 (Fla. 1995) and *Johnson v. State*, 660 So. 2d 648, 662 (Fla. 1995), this Court affirmed the trial court's refusal to admit the medical records at the penalty phase, noting that the records had not been authenticated and that the trial court found that the records were not complete in themselves and

required interpretation to be understood by the jury.[16] Johnson does not dispute these findings, but argues, instead, that a mitigation specialist or mental health expert would have been able to "supply the predicate" for the medical records. If Johnson is suggesting that the medical records themselves would have been admissible, *carte blanche*, simply because an expert witness relied on them in forming an opinion, any such suggestion is incorrect. An expert's testimony "may not merely be used as a conduit for the introduction of the otherwise inadmissible evidence." *Linn v. Fossum,* 946 So. 2d 1032, 1037-1038 (Fla. 2006).

Furthermore, Johnson cannot show any deficiency of counsel

[16]On direct appeal in White, Johnson also argued that the trial court improperly limited the medical records from Mississippi and Sarasota. The prosecutor objected to the records because they "were only part of a medical record that does not fully explain what it was." (DAR 5985). Johnson also contended that the records showed the presence of drugs but did not explain whether they were prescribed to him or whether he did something improper. The records were not capable of being explained by the defendant's witness. The trial court excluded the records but allowed Johnson's mother to testify about the incident. Similarly, the trial court excluded records from the Sarasota jail because they were not being presented through the records custodian and the testifying witness could not verify them or explain their content. (DAR 6011). Defendant's Exhibit #4 was not the original medical record, but, rather, a discharge summary taken from the South Washington County Hospital microfilm file. As the trial court found, the summary merely represents that Johnson had taken an unknown amount of a drug. It did not say whether he had been mis-prescribed, accidently overdosed, taken an illegal drug or attempted suicide. (DAR 8674-8675).

and resulting prejudice where this Court, on direct appeal, found no error in refusing to admit the medical records. *Johnson,* 660 So. 2d at 645; *Johnson,* 660 So. 2d at 662. Although the medical records were not admitted, Johnson was still allowed to present testimony concerning these events. Given the overwhelming evidence in aggravation and the admission of testimony on these events, the death penalty still would have been imposed even if the medical records had been admitted.

ISSUE IV

The *Johnson v. Mississippi* Claim

Next, CCRC summarily asserts a perfunctory "anticipatory" claim under *Johnson v. Mississippi,* 486 U.S. 578, 590, 108 S. Ct. 1981 (1988). In its "Order Following *Huff* Hearing. . ." of March 1, 2007, the trial court ruled:

> Upon hearing argument of counsel at the *Huff* hearing, the court denied on the merits claims V in case numbers 1988 CF 3198, 3199, 3200 and 3438, which alleged that the prior violent felony aggravator was based upon invalid convictions. *See Hall v. Moore*, 792 So. 2d 447, 500 (Fla. 2001).

(McCahon PCR *Huff* Order, V13/2330).

The trial court properly denied this claim because the prior violent felonies have not been vacated and are still valid convictions. See, *Nixon v. State*, 932 So. 2d 1009, 1023 (Fla. 2006). If Johnson is suggesting a claim of ineffective assistance of counsel, because his prior violent felony convictions have not been vacated, this is not a cognizable claim and counsel cannot be deemed ineffective for failing to pursue a meritless claim. See, *Lukehart v. State*, 2011 WL 2472801, 5 (Fla. 2011), citing *Ferrell*, 29 So. 3d at 976.

ISSUE V

THE FLORIDA BAR RULE 4-3.5(d)(4) CLAIM

Next, CCRC argues that the Florida Bar rule governing juror interviews is unconstitutional. This post-conviction claim is procedurally barred. See, *Kilgore v. State*, 55 So. 3d 487, 511 (Fla. 2010), citing *Allen v. State*, 854 So. 2d 1255 (Fla. 2003) (finding a challenge to the constitutionality of the rules governing juror interviews procedurally barred in post-conviction proceedings). It is also without merit because this Court has repeatedly rejected claims that Rule Regulating the Florida Bar 4–3.5(d)(4) is unconstitutional. See, *Kilgore*, 55 So. 3d at 511, citing *Floyd v. State*, 18 So. 3d 432, 459 (Fla. 2009). Lastly, to the extent Johnson appears to suggest ineffective assistance of post-conviction counsel, this does not constitute any cognizable claim. See, *Spencer v. State,* 842 So. 2d 52, 72 (Fla. 2003), citing Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996) (claims of ineffective assistance of post-conviction counsel do not present a valid basis for relief).

ISSUE VI

THE *RING v. ARIZONA* CLAIM

This perfunctory claim is procedurally barred. It was not raised on direct appeal. See, *Parker v. State*, 790 So. 2d 1033, 1034-35 (Fla. 2001). Additionally, any purported reliance on *Ring* is misplaced in light of the aggravating factors, which included the defendant's multiple prior violent felony convictions and during the course of a felony aggravator. See generally, *King v. State/King v. Moore*, 831 So. 2d 143 (Fla. 2002); *Lugo v. State*, 845 So.2d 74, 119 n. 79 (Fla. 2003). Furthermore, *Ring* does not apply retroactively. *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004).

CCRC states, "This claim is reasserted for preservation purposes." (Initial Brief at 78). However, this perfunctory statement is insufficient to preserve any specific argument for review. In *Troy v. State,* 57 So. 3d 828, 843 (Fla. 2011), the defendant raised a *Ring* claim on direct appeal and later sought to add additional arguments on post-conviction appeal. In *Troy*, this Court applied a procedural bar to new arguments and explained:

> Troy next challenges the constitutionality of Florida's death penalty statute as applied to him and concedes he does so for preservation purposes. In his direct appeal, Troy unsuccessfully asserted the unconstitutionality of Florida's death penalty

statute:

> Troy next argues that Florida's death penalty statute is unconstitutionally invalid because it does not require the findings of each aggravating factor to be made by the jury, pursuant to *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court has denied relief in appeals where the trial judge has found the "during the course of a felony" aggravator. Given that Troy was convicted of this crime simultaneously with two counts of armed burglary, two counts of armed robbery, and attempted sexual battery, relief on this *Ring* claim is denied.
>
> Troy, 948 So.2d at 653–54 (citations omitted). Troy now claims that Florida's death penalty statute is unconstitutional as applied because (1) the indictment fails to provide notice as to aggravators; (2) the statute permits jury recommendations of death based upon a simple majority vote; and (3) the statute does not require jury unanimity as to the existence of specific aggravators. **The additional claims that Troy now raises are procedurally barred because Troy failed to raise them on direct appeal**. See Evans v. State, 946 So.2d 1, 15–16 (Fla.2006). Therefore, Troy is not entitled to relief on this claim.

Troy, 57 So. 3d 828, 843 (Fla. 2011).

Johnson's current attempt to preserve some unspecified arguments in this post-conviction appeal is insufficient to fairly preserve any argument for review.

ISSUE VII

THE *SIMMONS v. SOUTH CAROLINA* CLAIM

Johnson admits that this claim was raised on direct appeal, *Johnson v. State*, 660 So. 2d 637, 645 (Fla. 1995), this Court found "no merit" to this claim and denied relief. Issues that were, or could have been, raised on direct appeal are procedurally barred in post-conviction. See, *Willacy v. State*, 967 So. 2d 131, 141 (Fla. 2007) (“Claims that could have been brought on direct appeal are procedurally barred in postconviction proceedings.”).

ISSUE VIII

THE PENALTY PHASE JURY INSTRUCTION CLAIM

In its "Order Following *Huff* Hearing. . .", of March 1, 2007, the Circuit Court denied this claim as follows:

> The claims in ground IX are denied as the issue was raised on direct appeal and it is improper to recast this issue under the guise of ineffective assistance of counsel. *See Johnson v. State*, 660 So.2d 637, 647-648 (Fla. 1991). *See also Valle v. State*, 705 So.2d 1331, 1337 n.6 (Fla. 1997).

(McCahon PCR *Huff* Order, V13/2330)

Again, claims which were raised, or could have been raised, on direct appeal are procedurally barred in post-conviction. See, *Willacy v. State*, 967 So. 2d 131, 141 (Fla. 2007).

ISSUE IX

THE LETHAL INJECTION CLAIM

In its "Order Following *Huff* Hearing. . .", of March 1, 2007, the Circuit Court ruled:

> The claims in ground X alleging that legal injection is cruel and unusual punishment is denied. *See Provenzano v. State*, 761 So.2d 1097, 1099 (Fla.), *cert. denied*, 530 U.S. 1255 (2000).

(McCahon PCR *Huff* Order, V13/2330)

CCRC admits that this claim is not supported by the caselaw. (Initial Brief of Appellant at 81, fn. 2). Johnson's method of execution claim is procedurally barred and also without merit. See, *Suggs v. State*, 923 So. 2d 419, 441 (Fla. 2005) ("Suggs claims that execution by electrocution or lethal injection constitutes cruel and unusual punishment. Because this claim was not raised on direct appeal, it is procedurally barred.") It is also without merit. See, *Tompkins v. State*, 994 So. 2d 1072, 1080–82 (Fla. 2008) (upholding the constitutionality of Florida's capital-sentencing scheme and lethal-injection protocol); *Troy v. State*, 57 So. 3d 828, 839–40 (Fla. 2011) (rejecting Troy's claims regarding deficiencies in Florida's lethal injection protocol); *Baze v. Rees*, 553 U.S. 35, 128 S. Ct. 1520 (2008); *Valle v. State*, 2011 WL 3667696, 14 (Fla. 2011).

ISSUE X

THE CUMULATIVE ERROR CLAIM

Johnson next claims cumulative error rendered his trial and sentencing fundamentally unfair. This is a purely legal claim, so review is *de novo*. *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009); *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

This Court has held that claims which are procedurally barred or were rejected on direct appeal cannot be considered in a post-conviction claim of cumulative error. *Rogers v. State,* 957 So. 2d 538, 553-54 (Fla. 2007); see also, *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003) ("Where individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail."); *Schoenwetter v. State*, 46 So. 3d 535, 562 (Fla. 2010) (citing cases). Johnson's shotgun complaints (Initial Brief at 83) are not sufficient to preserve any issue for appeal. See, *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) ("Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."). Furthermore, Johnson's IAC claims were refuted at the evidentiary hearing or waived by failure of proof. As Johnson has not demonstrated any error, he is not entitled to any relief based on a claim of cumulative error.

ISSUE XI

THE CLAIM OF INCOMPETENCE TO BE EXECUTED

In this issue, Johnson speculates that he may be incompetent at the time of his execution. In its "Order Following *Huff* Hearing. . ." of March 1, 2007, the Circuit Court denied this claim as premature. (McCahon PCR *Huff* Order, V13/2331). This is a purely legal claim to be reviewed *de novo*. *Walton*, 3 So. 3d at 1005; *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

Johnson has acknowledged that his claim is premature. As this Court has repeatedly recognized, this claim is not ripe for judicial consideration until a death warrant has been issued. At that time, the claim must be pursued in accordance with Section 922.07, Florida Statutes. As this is not the appropriate time or vehicle for presentation of this claim, case law mandates the summary denial of this claim at this time. *Sexton v. State*, 997 So. 2d 1073, 1089 (Fla. 2008); *Barnhill v. State*, 971 So. 2d 106, 118 (Fla. 2007); *Philmore v. State*, 937 So. 2d 578, 590 (Fla. 2006); *Kimbrough v. State*, 886 So. 2d 965, 984 (Fla. 2004); *Griffin v. State*, 866 So. 2d 1, 21-22 (Fla. 2003); *Troy v. State*, 57 So. 3d 828, 843 (Fla. 2011).

ISSUE XII

THE SUPPLEMENTAL CLAIMS SUMMARILY DENIED

In 2008, Johnson filed several *pro se* motions indicating a desire to raise six claims that he felt CCRC did not adequately raise. CCRC expressly adopted these six claims. In response, the State maintained that the six *pro se* claims duplicated claims that were previously raised by CCRC in the motion to vacate (as amended), were summarily denied in the *Huff* order, and should be summarily denied again, as facially insufficient and/or refuted by the record.

The Circuit Court summarily denied the original six claims in the *Huff* order, filed on March 1, 2007 (McCahon PCR *Huff* Order, V13/2330-2335), and also summarily denied the supplemental claims in the order filed on April 28, 2009. (McCahon PCR V17/3013-3020).

The six sub-claims on post-conviction appeal are: Claim 12(A) prosecutorial misconduct (arguing facts not in evidence) and IAC; Claim 12(B) prosecutorial misconduct (false evidence at suppression hearings) and IAC; Claim 12(C) prosecutorial misconduct (inconsistent theories) and IAC; Claim 12(D) IAC/failure to introduce evidence of actual innocence; Claim 12(E) State used illegally obtained rolled prints; Claim 12(F)

arrest and search and seizure based on defective affidavit which contained false statements and IAC. These sub-claims, 12(A) – 12(F), overlap both the original post-conviction claims 13, 14, 15, 16, 17, and 19 and the *pro se* supplemental claims adopted by CCRC.

All of Johnson's allegations of prosecutorial misconduct are procedurally barred. These claims are based on the documents and exhibits presented at the time of trial and were cognizable on direct appeal. As a result, Johnson's allegations of prosecutorial misconduct are procedurally barred in post-conviction. See, *Lukehart v. State*, 2011 WL 2472801, 14 (Fla. 2011), citing *Spencer*, 842 So. 2d at 60–61 (substantive claims of prosecutorial misconduct could and should have been raised on direct appeal and thus were procedurally barred from consideration in a post-conviction motion).

Claim 12(A) Prosecutorial misconduct (allegedly arguing facts not in evidence) and IAC

In his initial motion to vacate, as amended (post-conviction claim 13), Johnson alleged a substantive claim of prosecutorial misconduct (arguing facts not in evidence) and ineffective assistance of counsel for failure to challenge the alleged prosecutorial misconduct.

The prosecutorial misconduct claim was based on the failure

to introduce laboratory slides which contained evidence linking Johnson to the murder victim. This claim, based on the trial record, was available for direct appeal and is procedurally barred in post-conviction. See, *Lukehart*. The trial court's *Huff* order summarily denied this post-conviction claim, stating: "The claims in ground XIII are denied because prosecutorial misconduct must be raised on direct appeal and the record also refutes the Defendant's claim. See *Brown v. State*, 894 So. 2d 137, 145 (Fla. 2004). (See attached Tr. 152-154)." (McCahon PCR *Huff* Order, V13/2331).

This sub-claim was correctly summarily denied. The State presented testimony of a hair and fiber expert from the FBI analyst who testified as to the procedures followed by the FBI. His testimony established a chain of custody for the evidence from the points of origin to the lab and through his analysis. During his testimony, the documentation, i.e., packaging, envelopes, etc., were introduced into evidence to establish a basis for his expert opinion. This procedure was followed not only by the State, but also by the defense -- who used the agent to introduce evidence favorable to Johnson. Agent Bennett testified that the items (hairs) found in a specific exhibit were examined by him and found to be consistent with the hair standard of the defendant. Nothing in this procedure was

untruthful and did not establish prosecutorial misconduct.

Johnson further complains about photographs entered into evidence and comments made by the State regarding injuries to the victim's vaginal and anal areas. This evidence was the subject of pre-trial and trial motions and objections ruled on by the Court. Thus, there could be no ineffective assistance of counsel for failing to raise these issues. See, *Strickland*. Additionally, these issues also were ones which could have been raised on direct appeal and, therefore, are procedurally barred in post-conviction. See, *Lukehart*.

Claim 12(B) Prosecutorial misconduct (allegedly presenting false evidence at suppression hearings) and IAC

In his initial motion to vacate, as amended (post-conviction claim 14), Johnson alleged a claim of prosecutorial misconduct in presenting evidence during a hearing on a motion to suppress, specifically an FDLE analyst who originally examined hair found on the victim's body, when subsequent analysis by the FBI laboratory after Johnson's arrest reported that those same hairs did not match Johnson. The trial court's *Huff* order ruled that the "claims in ground XIV are denied as refuted by the record. (See attached Tr. 154-162, Evidence Record and Fingerprint card)." (McCahon PCR *Huff* Order, V13/2331).

A review of the record established that the testimony of the FDLE analyst was presented by the defense. The State argued the evidence to recreate for the court the facts known to law enforcement at the time of the defendant's arrest. The evidence was not "false evidence" and the record establishes that this evidence was presented merely to establish probable cause. It was not used to mislead the court or in an effort to prove guilt, and Johnson failed to establish any deficient performance and resulting prejudice under *Strickland*. This sub-claim was correctly summarily denied.

Claim 12(C) Prosecutorial misconduct (allegedly presenting inconsistent theories) and IAC

In his initial motion to vacate, as amended (post-conviction claim 15), Johnson alleged a claim of prosecutorial misconduct for allegedly presenting inconsistent theories and ineffective assistance of counsel for failure to challenge misconduct. This sub-claim intersects, somewhat, with the previous sub-claim (12B). The trial court's *Huff* order summarily denied this post-conviction claim as follows:

> The claims in ground XIV are denied as refuted by the record. (See attached Tr. 154-162, Evidence Record and Fingerprint card). The claims in ground XV are denied as refuted by the trial court record and for the reasons given in ground XIV. (See attached Deposition of Tech. Virginia Casey, Supplementary Offense Report, Deposition of Tech. Mike Zagorski, Sarasota Sheriff's Dept., Investigative Report, Deposition of Madelyn Luzier, Supplementary Offense

Report).

(McCahon PCR *Huff* Order, V13/2331).

The State used the results of the FDLE analysis (finding hair from the crime scene as consistent with a black male) as evidence in a motion to suppress to establish probable cause. A later FBI analysis found this hair evidence to be inconsistent with the defendant. At trial, the defense introduced the FBI findings and argued that hairs found at the scene did not match the defendant. The State merely argued that hair unlike the defendant's found at the crime scene did not overcome the evidence that Johnson's hair and fiber from his clothing was identified in the victim's pubic combing. These arguments were clearly not inconsistent theories of prosecution, and there is no prosecutorial misconduct. Once again, Johnson's claim of alleged prosecutorial misconduct is based on the trial record; therefore, it was available for direct appeal and is procedurally barred in post-conviction. See, *Lukehart*. Furthermore, Johnson failed to show any deficiency of counsel and resulting prejudice under *Strickland*. Johnson's claim was without basis and refuted by the record and, therefore, correctly denied without a hearing.

Claim 12(D) IAC/failure to introduce evidence of actual innocence

In his initial motion to vacate, as amended (post-conviction claim 16), Johnson asserted a claim of ineffective assistance of counsel for failure to introduce alleged evidence of "actual innocence." The Circuit Court's *Huff* order summarily denied this claim as follows:

> The claims in ground XVI, specifically the failure to introduce evidence of innocence and that the search warrants were not issued by a neutral and detached magistrate are denied as refuted by the record. (See attached Tr. 763, 770 and Affidavit and Application for Search Warrant and Returns and Probable Cause Affidavits and Arrest Warrant).

(McCahon PCR *Huff* Order, V13/2331).

Johnson repeats that trial counsel was ineffective for failing to introduce evidence that Johnson allegedly "could not have caused" the injuries to the vaginal and anal areas of the victim because he was a chronic nail biter. At trial, the medical examiner testified that in his opinion, the injuries to the victim were consistent with having been inflicted at the time of the attack and that the injuries were caused by a forceful opening of those areas by the hands or fingernails. On cross-examination, the medical examiner further testified that he "could not exclude the possibility that the injuries occurred in some other fashion." Thus, Johnson's alleged lack of

fingernails, in light of the medical examiner's qualified opinion and all of the additional overwhelming evidence against the defendant, would not exonerate Johnson as the perpetrator of this brutal homicide. This self-serving allegation does not establish a deficiency on the part of counsel and any resulting prejudice under *Strickland*. This IAC claim was correctly summarily denied.

Claim 12(E) The State allegedly used illegally obtained rolled prints

In his initial post-conviction motion, as amended (post-conviction claim 17), Johnson alleged that the State used illegally obtained prints in violation of the Constitution of the United States and the Constitution of the State of Florida. The trial court's *Huff* order, which summarily denied several post-conviction claims, did not separately designate a claim XVII, but did state the following ruling on ground XIV, which appears to overlap Johnson's "illegally obtained" rolled fingerprints claim:

> The claims in ground XIV are denied as refuted by the record. (See attached Tr. 154-162, Evidence Record and Fingerprint card).
>
> (McCahon PCR *Huff* Order, V13/2331).

In his motion to vacate, as amended (post-conviction claim 17) and repeated here as claim 12(E), Johnson argued that the

fingerprints taken after his arrest were an illegal seizure as being outside the scope of the search warrant issued for body samples. Prior to Johnson's arrest on October 11, 1988, the Sarasota Police Department had his fingerprints on file. Those prints were used to identify Johnson as the perpetrator of this offense and as probable cause in the warrant for his arrest. After Johnson's arrest and as part of the arrest process, a new set of prints were taken in conjunction with the execution of the search warrant for the body samples.

The fingerprint evidence complained of was obtained according to police arrest procedures. This evidence was already in the custody of the police in the form of prints taken from Johnson at a prior arrest. Even if the prints complained of were not available to the State, Johnson's prints also could have been obtained later in the proceedings. Thus, this evidence was already readily available to the State and would have been inevitably discovered. See, *Nix v. Williams*, 467 U.S. 431, 448, 104 S. Ct. 2501 (1984).

Johnson's IAC claim failed both the deficient performance prong and the prejudice prong in *Strickland*. The record establishes that the prints were legally obtained, the evidence of the defendant's fingerprints was already available to the State, and the fingerprint evidence could have been obtained by

inevitable discovery. Johnson failed to establish a reasonable likelihood that the outcome of the trial would have been different without the complained of evidence and, therefore, this sub-claim was correctly denied without a hearing.

Claim 12(F) Arrest and search and seizure allegedly based on defective affidavit which contained false statements and IAC

In his initial motion to vacate, as amended (post-conviction claim 19), Johnson alleged that the arrest, search and seizure was based on a defective affidavit which allegedly contained false statements and counsel was ineffective for failing to present these facts at the suppression hearing.[17] Johnson also alleged that Virginia Casey's affidavits stating that Technicians Madelyn Luzier and Mike Zagorski verified the fingerprint identification were false. Johnson based this allegation on the fact that neither Casey, Luzier, nor Zagorski testified regarding the verification. There is an apparent discrepancy between the claim numbers in the *Huff* order and the numbers in the post-conviction motion, as amended, perhaps

[17]On direct appeal in the White case, Johnson also argued that material seized from his apartment pursuant to a search warrant should have been suppressed on that grounds that the officer's sworn affidavit was defective and also because the warrant did not describe with particularity the items to be seized. In addition, Johnson argued that the relevant portions of the warrant were invalid because the accompanying affidavit made no mention that fibers had been gathered at the scene of the crime. This Court denied both claims. *Johnson v. State*, 660 So. 2d 637, 644 (Fla. 1995).

attributable to overlapping amendments to the post-conviction claims and intertwining of the cases. In any event, the *Huff* order states, in pertinent part:

> The claims in ground XV are denied as refuted by the trial court record and for the reasons given in ground XIV. (See attached Deposition of Tech. Virginia Casey, Supplementary Offense Report, Deposition of Tech. Mike Zagorski, Sarasota Sheriff's Dept., Investigative Report, Deposition of Madelyn Luzier, Supplementary Offense Report). The claims in ground XVI, specifically the failure to introduce evidence of innocence and that the search warrants were not issued by a neutral and detached magistrate are denied as refuted by the record. (See attached Tr. 763, 770 and Affidavit and Application for Search Warrant and Returns and Probable Cause Affidavits and Arrest Warrant).
>
> The remaining claims in case numbers 1988 CF 3202 NC and 1988 CF 3246 NC are identical and are denied for the following reasons:
>
> * * *
>
> Claims VII are denied as refuted by the record which reflects that the affidavits were verified. (See attached Investigative Reports and Depositions of Casey, Luzier, and Zagorski).
>
> Claims VIII are denied as refuted by the record which reflects that the fingerprints were not destroyed, but in fact, were used by the defense at the hearing on the motion to suppress. (See attached copy of Tr. 154-162, Evidence Record and Fingerprint Card).
>
> Claims IX are denied for the reasons given in this order under ground VIII above.
>
> Claims X are denied as the record reflects that Technician Casey did not sign the application for search warrant, but rather her affidavit was attached to the application. (See attached Affidavits and Applications for Search Warrants and Search Warrants).

(McCahon PCR *Huff* Order, V13/2331-2334).

On April 27, 2009, the Circuit Court issued an additional order which summarily denied the supplemental *pro se* claims adopted by CCRC (McCahon PCR *Pro Se* Order, V17/3013-3020) and stated, in pertinent part:

> All of the Defendant's additional claims are predicated on the argument that certain documents. i.e., the affidavit in support of the application for search warrant,[18][fn. 4] the "original" search warrant,

[18][fn 4 of Order]:

> The affidavit in support of the search warrant application, signed by Sgt. Lacertosa in October 1988, provided as follows:
> ***
> 1. On October 4, 1988 at 1259 hours, the Sarasota Police Department received a report of a homicide at 1775 10th Street. Sarasota, Florida . . . .
> 2. Your affiant responded to that homicide scene shortly thereafter. At that location the homicide victim was identified as Iris White, a white female, age 72. Iris White had what appeared to be numerous stab wounds to her upper body. 1775 l0th Street is the permanent residence of the victim—Iris White.
> 3. Dr. W. Pearson Clack-12 District Medical Examiner's Office, responded to the homicide scene and pronounced Iris White dead, the victim of a homicide.
> 4. The Sarasota Police Department Criminalistics Section was called to the crime scene. That Criminalistics investigation resulted in evidence of the following being collected and preserved for comparison to possible suspects:
> a. Hair
> b. blood
> c. latent fingerprints
> d. shoe print impressions
> e. knife impression evidence
> The blood found at the scene would indicate that the perpetrator would have large amounts of blood on his person/clothes when he left the homicide scene. The shoe

impressions were of a distinct type, size, and pattern that could be compared to the perpetrator's shoes. The knife wounds on the victim indicate a size weapon that could be compared as far as length and blade width. The knives found at the scene did not appear to be the murder weapon. The perpetrator could have taken the murder weapon from the scene with him.

5. Your affiant directed a human hair sample found on the victim's body to be hand carried to the [FDLE] Laboratory in Orlando, Florida on October 5, 1988. That hair was identified positively as a public hair from a black male.

6. Your affiant requested the Sarasota Police Department Criminalistics Section to conduct a fingerprint search of all Sarasota Police Department fingerprints to compare with latents left by the perpetrator at the homicide crime scene—1775 10th Street.

7. On October 11, 1988 at approximately 1730 hours. Criminalistics Technician Virginia Casey made a positive fingerprint identification comparison with Emanuel Johnson. . .

That fingerprint comparison was also examined by SPD Criminalistics Technician Madelyn Luzier and SSO Criminalistics Technician Michael Zagurski. Both technicians also positively confirmed this fingerprint identification comparison.

8. Based on the aforementioned information and the entirety of the investigation, your affiant prepared a Probable Cause Affidavit and Arrest Warrant for Emanuel Johnson. . . That warrant for: First Degree Murder F.S.S. 782.04; Burglary F.S.S. 810.02; and Sexual Battery F.S.S. 794.011

9. Emanuel Johnson . . . was arrested by your Officer K. Castro of SPD on October 11, 1988 at 2148 hours . . . .

10. During arrest procedures, Emanuel Johnson advised Detectives B.J. Sullivan and P. Sutton that he has been residing at 332 N. Cocoanut Avenue, apartment #2, Sarasota Florida for the last three to four weeks.

11. Your affiant received information from the owner (Jeffrey Schryer) of 332 N. Cocoanut Avenue that Emanuel Johnson paid rent on apartment #2 at that address on 9/21/88 and has lived there until this date.

D. On the basis of the foregoing facts I believe the following evidence, fruits or instrumentalities of the crimes or contraband may he found in the aforesaid

[fn 5][19] and the "original" search inventory list [fn 6][20] are all "false." The Defendant claims that these documents are "false" in that they were back-dated and signed after the search of his premises had been completed.

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premises:

1. Blood stained clothing items
2. Knife-tvpe objects
3. Footwear
4. Stolen items, including but not limited to personal household items belonging to Iris White.
5. Hair, fiber, tissue or any other items of forensic comparison value.

***

[19][fn 5 of Order]:

The search warrant allowed law enforcement to search the Defendant's premises for, and seize, "contraband, or fruits, instrumentalities, or evidence relating to the aforesaid crime, the following:

1. Blood stained clothing items
2. Knife-type objects
3. Footwear
4. Stolen items, including but not limited to, personal and household items, belonging to Iris White.
5. Hair, fiber, tissue or any other items of forensic comparison value."

The search warrant was signed by Judge Dakan on October 12, 1988.

[20][fn 6 of Order]:

The Inventory List indicates that the following items were retrieved as a result of the search warrant:

Business Card "Jacqueline McCahon"
Business Card Public Defender
White handle folding knife
Court Receipt
Heart Shaped ladies watch-silver
Strand of Suspected Blond Hair
Storer Cable TV Box KB6575279
Crossman Pellet Gun Model 381
Black shoulder holster
Video Cassette[e] Tape
Light Brown leather jacket waist length
Misc, legal papers
Jewelry Box w/ misc. jewelry
Jump Suit (mens)
Blue Cut-off shorts
Blue & White Stripe Shirt
Folder w/ Poetry & Letters
Black T-Shirt
2 pair underware [*sic*]
13 kitchen knives
Red t-shirt, maroon t-shirt
Green pants, gray pants, blue jeans, green pants
Sarasota Herald Tribune, metro sect. Oct 6
Sarasota Herald Tribune metro sect. Oct. 5

As to those "False documents," the Defendant argues: (1) the State had a duty to disclose "impeachment evidence," i.e., the "false documents" (Claim I); (2) the State had a duty to disclose that "false documents" had been filed (Claim H); (3) the State committed a "fundamentally unfair act" by fabricating and filing "false documents" and relying on them (Claim III); (4) the judge was not "neutral and detached" in back-dating arid signing the "false documents" (Claim IV); (5) the State committed "per se reversible error" by using and failing to advise defense about the "false documents" (Claim V); and (6) his claims regarding the "false documents" are not procedurally barred because he was deprived of substantive due process (Claim VI).

First, the Court questions how the alleged "falsity" of these records could not have been discovered until "years after the prosecution had predicated all of its convictions and sentences of defendant." Def's Br. at 9. The alleged "false" documents (attached as "Exhibit 1" to Defendant's motion) were file-stamped by the Clerk in October 1988 and became public record. [fn 7][21] The alleged "original" documents (attached "Exhibit 2" to Defendant's motion), which are identical to the alleged "false" documents, except for the signature, were the documents attached to the Defendant's Motion to Suppress Physical Evidence, filed August 17, 1989, and Amended Motion to Suppress Physical Evidence, filed April 9, 1990. *See* Attachments 2 and 3.

Second, the Defendant makes conclusory allegations as to the alleged "falsity" of these documents, "A defendant may not simply file a motion for postconviction relief containing conclusory allegations . . . and expect to receive an evidentiary hearing." *Parker v. State*, 904 So.2d 370, 378 (Fla. 2005) (defendant's allegation of ineffective assistance of counsel was conclusory and thus did not

[21][fn 7 of Order]:
The Court recognizes that during the Motion to Suppress hearing, which occurred May 29 and 30, 1990, that a copy had to be sworn as a true and correct copy of the original *See* Att. 2, 3, 4.

require an evidentiary hearing, where he contended that police planted spent bullet casing on the victim's body, but provided no factual support for these allegations). There is no evidence, other than the Defendant's simply attaching a copy of the search warrant signed by the judge and a copy of the application before it was signed by the judge, that any of these documents are "false" or "back-dated." Indeed, during the Motion to Suppress hearing, Lacertosa testified that "[it was some time after midnight on the morning of the 12th" that he and Lt. Hogle went to Judge Dakan's house to get a search warrant. *See* Att. 4. The Court additionally notes that, except for the lack of the judge's signature on Defendant's "Exhibit 2," both versions of the affidavit, search warrant, and inventory list are identical.

Third, such claims, as they pertain to any alleged wrongdoing by the State, the judge, or law enforcement, should have been raised on appeal. "Despite its widespread use, rule 3.850 does not provide a mechanism for further review as a matter of course in every criminal case. To the contrary, the rule affords an extraordinary remedy for a limited class of errors that cannot be corrected on direct appeal." *Moore v. State*, 768 So.2d 1140, 1142 (Fla. 1st DCA 2000). *See Thorp v. State*, 777 So.2d 385, 391 (Fla. 2000)(challenge to affidavit for search warrant containing false statements raised on direct appeal): *Henry v. State*, 933 So.2d 28, 29 (Fla. 2d DCA 2006)("claims of prosecutorial misconduct and trial court error should have been raised on direct appeal").

Finally, a review of the record shows that these issues were previously raised by the Defendant. At the *Huff* hearing, the Defendant, himself, specifically argued:

> [B]ut during the course of an evidentiary hearing, the fact is going to come out that affidavits and the search warrant for my home and inventory that you relied on during the May 29th and May 30th 1989, evidentiary hearing was completely different than the affidavits and

search warrant and the affidavits--I mean, the inventory list that we filed, my Defense filed, as well as the statements of September of last year, they filed a different one than the one you relied on. These are different documents. And my position is, if you have two different search warrants and only one was signed on the night of my arrest when Detective Sergeant Lasko and Detective Holler took these documents to the Judge's home, one affidavit, one search warrant, and one inventory list, not inventory, but one search warrant and one inventory list that was taken on the morning after my search was executed, only one copy was made that night. This second copy was made at some point after this search and that copy there would be invalid.

My position is that the copy that you relied on on May 29th and 30th in 1990 was the false copy. This will come out during the course of an evidentiary hearing. And the State wants you to make some kind of ruling that would preclude us from being able to make that a legal argument later on and I don't think that's fair, especially since we all know now that these false documents did—well I called them false. The purpose of the hearing would be to prove that they was false, but were two different documents and one was false and that's my position on that. They going back to what you were saving earlier, sir.

Huff Hearing Transcript, pp. 56-58. The Defendant, himself, also argued later during that hearing:

As far as relevance of Ms. Cornell's and Ms. Gidden's cases, during the pretrial suppression hearing, both pretrial suppression hearings, Ms. Giddens' and Ms. Cornell's cases were on the motions as well as on your order of denial, as well as that of Judge Silvertooth, and also the Ms. Demers' case was also on that motion. The relevance comes when those officers who engaged in misconduct in those cases because they are part of the prosecution, they were required to

> inform both the Court and the Defense of their misconduct as related to that case because it's their credibility on the line.
>
> When Detective Sutton testified during the pretrial proceedings, he had an obligation to inform the Court that in the Demers case that he had forged her signature on the back of that photo and that he had filed a false document. All of that would have went to the Defense attacking Mr. Sutton's credibility during that pretrial proceeding.
>
> ***
>
> All of these eases are relevant because the case at that point—because the detectives are part of the prosecution, the State had an obligation to inform the Defense and the Court of this impeachment evidence and in each one of these cases, in Cornell and Ms. Giddens, any type of misconduct by these officials went to the weight of these pretrial proceedings and without the success, at least for the State of these pretrial proceedings, there wouldn't have been any trial.

Huff Hearing Transcript, pp. 71-72. The Defendant again addressed the issue later during that hearing:

> DEF.: There are certain types of issues and I strongly believe that the use of false affidavits and a false search warrant is such an issue where a judge has that discretion and would be well within reason to address that and I would ask the Court to please consider that when considering my pro se filings.
>
> COURT: All right. I hope—we'll certainly consider I think we are going to be considering some of those issues.
>
> DEF.: I appreciate that, sir.

Id. at 78.

The Court therefore finds that the Defendant is not entitled to an evidentiary hearing as to these claims.

(McCahon PCR V17/3014-3020).

Although the trial *testimony* might not reflect the fact of the verification due to the objectionable nature of such evidence, the record nevertheless included evidence of the verification and the trial court attached the Investigative Reports and depositions of Casey, Luzier, and Zagorski. Because there was no legitimate basis for this sub-claim, it was correctly denied without a hearing.

In post-conviction, Johnson also alleged that the search warrants were not issued by a neutral and detached magistrate in violation of the Fourth and Fourteenth Amendments and that trial counsel was ineffective for failing to raise this claim. Johnson alleged that Technician Virginia Casey did not appear before the magistrate who signed the search warrants, therefore, the magistrate was not neutral, the warrants are invalid and counsel was ineffective for failing to raise this claim. An affidavit of Casey was merely attached to the search warrants and incorporated therein by reference. Casey did not sign the application for search warrant as an affiant. The search warrants and the record clearly reflect that Sgt. Gerald Lascertosa was the affiant on the application for search warrant, that he appeared before the magistrate and that all statutory requirements were fulfilled. Additionally, this issue

was raised by counsel during a Motion to Suppress hearing held on May 29-30, 1990.

Moreover, this is a claim which was argued at the trial court level and which should have been raised on direct appeal and cannot be raised now under the guise of ineffective assistance of counsel. Finally, Johnson's supplemental complaint also focused on an *unsigned* exhibit. However, the mere presence of a copy of an unsigned document does not necessarily constitute any credible basis for relief. See, *Stein v. State*, 995 So. 2d 329 (Fla. 2008). The trial court correctly summarily denied this post-conviction sub-claim. Johnson's allegations were untimely raised, facially insufficient, procedurally barred and also without merit.

CONCLUSION

In conclusion, Appellee, State of Florida, respectfully requests that this Honorable Court affirm the trial court's denial of Johnson's motion to vacate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished by U.S. Regular Mail to Mark S. Gruber, Assistant CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136 this 20th day of September, 2011.

CERTIFICATE OF FONT COMPLIANCE

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

/s/ Katherine V. Blanco_____
COUNSEL FOR APPELLEE