IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-31

JOHN M. BUZIA,

Appellant
v.

STATE OF FLORIDA,

Appellee

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

BILL McCOLLUM
ATTORNEY GENERAL

BARBARA C. DAVIS
ASSISTANT ATTORNEY GENERAL
444 SEABREEZE BLVD., 5th Floor
DAYTONA BEACH, FLORIDA 32118
(386)238-4990
FAX - (386) 226-0457
COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

Statutes

Rules

STATEMENT OF THE CASE

Appellant was indicted on the following charges for crimes which occurred March 14, 2000:

(1) First degree murder of Charles Kersch;

(2) Attempted first degree murder of Thea Kersch;

(3) Burglary of a dwelling with intent to commit assault or battery on Charles and/or Thea Kersch; possession of weapon, an axe;

(4) Robbery of Charles and/or Thea Kersch with a deadly weapon.

(R19-21).[1]

The case was tried by jury on March 24-28, 2003. Appellant was found guilty of both felony and premeditated murder. (R470, 1463). Additionally, he was found guilty of attempted first degree premeditated murder with a weapon, burglary of a dwelling with an assault or battery while armed with a weapon, and robbery with a deadly weapon. (R471-473, 1463). The penalty phase began April 1, 2003. On April 4, the jury returned an 8-4 recommendation for a sentence of death. (R502, 510). The *Spencer* hearing was held August 18, 2003. (R597). On March 11, 2004, Appellant was sentenced to death for the murder of Charles Kersch. The trial judge made detailed findings in a twenty-six page sentencing order. (R653-678). The following aggravating

[1] "R" refers to record on direct appeal. Pursuant to Fla. R. App. P. 9.142 (a) (1) (C), this Court automatically takes judicial notice of the record on direct appeal.

circumstances were considered:

(1) Prior Violent Felony: the attempted murder of Thea Kersch - given great weight (R656-657);

(2) During a Robbery/Burglary/Kidnapping: robbery and burglary were not considered as underlying felonies since they were used in the "pecuniary gain" aggravating circumstance. The State argued the uncharged felony of kidnapping supported this circumstance; however, the court did not find the aggravating circumstance because there was no jury verdict on kidnapping (R658-659) - no weight;

(3) Avoid Arrest: Appellant was known to both victims, purpose of killing Charles Kersch was to eliminate witness who could identify him (R660-661) - great weight;

(4) Pecuniary Gain: Appellant found guilty of burglary and robbery, took money and property, waited for Charles to come home to acquire more money, credit cards and vehicle; however, this circumstance merges with Robbery/Burglary (R661-663) - no weight;

(5) Heinous, Atrocious and Cruel: attack took place in stages, elderly victim attempted to stand and struck again, after second attack, was struck twice with axe, period of time elapsed between three stages of beating, not immediately struck dead, high degree of pain and awareness of plight, when Defendant left, victim was breathing and groaning (R664-666) - great weight;

(6) Cold, Calculated, Premeditated: murder was in three stages and reflection at each stage, beat Thea Kersch then tried to clean up crime scene and lay in wait for Charles Kersch to come home, beat Charles with fists and when that did not succeed he struck him with axe (R666-669)- great weight.

The following mitigating circumstances were considered:

(1) Extreme Mental or Emotional Disturbance: not proven as statutory mitigating circumstance, but given substantial weight as non-statutory

mitigating circumstance (R671);

(2) Capacity to Appreciate Criminality/Conform Conduct: actions contradict this mitigating circumstance; however, non-statutory mitigation found and given substantial weight (R672);

(3) Additional Non-Statutory Mitigation:

(a) Gainfully employed - little weight (R673);

(b) Appropriate courtroom behavior - little weight (R674);

(c) Cooperation with law enforcement - little weight (R674);

(d) Difficult childhood - somewhat contradictory - little weight (R674-675);

(e) Remorse - little weight (R675).

Appellant was also sentenced to life imprisonment on the attempted murder, burglary and robbery. (R677). The three life sentences were concurrent to each other and to the sentence of death. (R677, 681-684). Buzia appealed. This Court affirmed the convictions and sentences. *Buzia v. State*, 926 So. 2d 1203 (Fla. 2006). In affirming the death sentence, the Florida Supreme Court accepted the trial court's findings of fact in the sentencing order.[2] The United States Supreme Court denied

[2] The issues on appeal were: (A) trial court erred in finding the prior violent felony aggravating circumstance; (B) trial court erred in finding the avoid-arrest aggravating circumstance; (C) trial court erred in finding the HAC aggravating circumstance; (D) trial court erred in finding the CCP aggravating circumstance; (E) the death penalty is not warranted in this case; and (F) Florida's capital sentencing procedures violate *Ring v. Arizona*, 536 U.S. 584 (2002).

certiorari on October 2, 2006. *Buzia v. State*, 549 U.S. 874, 127 S.Ct. 184, 166 L.Ed. 2d 129 (2006).

Buzia filed a Motion to Vacate Judgments of Conviction and Sentence on August 30, 2007. (V1, PCR1-111). On October 24, 2007, the State filed a motion to strike certain Claims: I(c), I(e), I(f), I(g), II(b), II(d), II(e), II(f), II(g), II(i), IV and V. (V1, PCR115-19). The State filed a Response to the motion to vacate concurrently with the motion to strike. (V1, PCR120-213). On December 5, 2007, Buzia moved to amend Claim VII. (V2, PCR227-31). The State responded to that motion on December 11, 2007. (V2, PCR234-36). The State also filed an amended motion to strike on December 11, 2007. (V2, PCR237-55). Buzia filed an Amended Motion to Vacate on December 17, 2007. (V2, PCR256-367). The State responded on December 27, 2007. (V3, PCR370-476). The trial court held a Case Management Conference on February 1, 2008, (V4, PCR683-86) at which time Buzia filed another Amended Motion to Vacate. (V4, PCR605-82).

On March 17, 2008, the trial court entered an order setting an evidentiary hearing on Claims 1b, 1c, 1d, 1e, 1g, 1h, 2a, 2b, 2c, 2d, 2f, 2i, 4a, 4b, and 5. (V4, PCR725-28). The trial court found that Claims 1i and 2e were abandoned, that Claim 6 was deferred, and that Claim 8 was premature. The trial court held that Claims 2g, 2h, 3 and 7 were purely legal claims and denied those claims. The trial

court ruled that Claim 9 was procedurally barred. Claim 1a was also denied.

The evidentiary hearing was held June 23-27 and August 27-28, 2008. (Vols. 14-22, PCR1-1738).

The trial judge denied relief in a 26-page order rendered March 11, 2004. (V13, PCR 2282-2320). This appeal follows.

STATEMENT OF THE FACTS

This Court made the following findings of fact on direct appeal:

> The Kersches, both 71 years old and retired, lived in a gated community. In the past, Buzia had performed odd jobs around their residence and rental properties. On the morning of March 14, 2000, Charles Kersch and his wife Thea expected Buzia at their residence for work, but he did not appear. In a videotaped interview with the police, Buzia stated that he had a "money issue" with the Kersches and, on that day, decided to steal money from them.
>
> Buzia arrived at the residence at about 2:30 p.m. He waited twenty minutes for someone to arrive. Mrs. Kersch arrived home between 4 and 4:30 p.m. Buzia told her that his brother had been beaten up and that he needed to talk to her husband. She allowed him to wait in the enclosed patio area until Mr. Kersch returned.
>
> On the patio, Buzia retrieved a serving tray he found and approached the sliding glass door that led into the kitchen. Mrs. Kersch opened the door, and he handed it to her. Once she placed the tray on a table inside, Buzia entered. They briefly conversed. Mrs. Kersch said nothing to upset him. Yet, without warning, Buzia struck her several times with his fist. Blood sprayed from her nose. Buzia admitted that he was trying to make her unconscious so that he could take her money. He knocked her down and kicked her. She lost consciousness. He took her keys and removed about $80 from her purse. He dragged her into the back bedroom and covered her with a blanket. Then he searched the house and removed a Mastercard

from her purse.

Buzia then heard the garage door open and assumed that Mr. Kersch had arrived home. He considered at this point whether he should tell Mr. Kersch that he had attacked his wife, or whether he should assault him, too, and leave. As soon as Mr. Kersch entered the house through the garage entrance, Buzia hit him with his fist, causing him to fall on the floor and hit his head on the tile. Mr. Kersch was breathing, but bleeding severely. Buzia told the police, “I was ... thinking ... you know ... he's gonna die, if [I] leave right now.” Mr. Kersch attempted to rise to his feet, getting up on his hands and knees. Buzia stated that his “intention was ... obviously to keep him down longer, so maybe [he] could drive away and get more time.” He was “committed” at this point. He struck him again with his fist, and Mr. Kersch again fell to the floor. He removed about $100 from Mr. Kersch's wallet.

Buzia obtained one of the two axes from the garage. He thought about “using it to make ‘em unconscious” but then “threw it on the ... puddle of mess.” He claims he never hit Mr. Kersch with that ax. However, after hearing moaning and groaning from Mrs. Kersch in the back bedroom, he went to the garage a second time and returned with another ax. It is unclear which ax he used on the Kersches-the first one or the second one. It seems that he used the second one and hit Mr. Kersch once in the head with the flat side of it. He stated that his intention in hitting Mr. Kersch with the ax was to “slow him” and “put him out.” In the back bedroom, Mrs. Kersch was awake and attempting to get up, but he also hit her once with the same flat side of the ax. She lost consciousness again.

He covered Mr. Kersch with a blanket, and he duct-taped the door handle in the back bedroom where Mrs. Kersch lay unconscious. After looking in closets and other things, he tried to clean up the residence a little bit, but he admitted that it was “overwhelming.” Buzia then took Mr. Kersch's car keys and one of his T-shirts. He changed his shirt because it was “nasty” and “dirty.” The Kersches were both moving, moaning, and groaning when he left. He drove away in Mr. Kersch's car. Shortly thereafter, the paramedics arrived. Mrs. Kersch survived, but Mr. Kersch died of blunt force injuries to the head.

> The following morning, the police arrested Buzia at a bank after he attempted to cash a check for $830 drawn from Mr. Kersch's account. Buzia appeared to understand the officers' commands, did not have any trouble walking, and did not resist the officers' efforts to search him.
>
> Investigators found Mr. Kersch's body lying near the garage door and covered with a blanket. They also found a single-headed ax on the chair at the dinette table inside the house and a double-headed ax behind the couch. The medical examiner also testified regarding the various injuries Mr. Kersch suffered and the causes of those injuries.

Buzia v. State, 926 So. 2d 1203 (Fla. 2006).

Penalty Phase Facts. At the penalty phase, the defense called 14 lay witnesses:

Patricia Breslin, mother;
William McKenna, school friend;
Tom Crepeau, school friend;
Jonathan Hicks, school and family friend;
Harry Zegers, school friend;
Amber Buzia, neice;
Pastor Smart, family pastor;
William Bennett, college friend;
William Behr, college friend;
P.J. Behr, employer at Outback Steakhouse in Orlando;
Gary Selje, brother-in-law;
Mary Carol Lohr, cousin;
Sally Borgetti, family friend (via video);
John Raaen, friend.

The defense also presented testimony from two police officers, and an expert witness: psychologist William Riebsame. The State called Officer Barber, Ann Coy, and psychiatrist Jeffrey Danziger.

Spencer Hearing. The *Spencer* hearing was held August 18, 2003, at which

time the defense presented the additional testimony of Officers Samuel Peterson, Richard Dickens, and Daniel Buffington, clinical pharmacologist. Defense counsel requested the trial judge review letters received from friends and family concerning Appellant. (R2638). Thea Kersch was the only State witness.

Evidentiary Hearing Facts. At the evidentiary hearing, Buzia called thirty witnesses and the State called four. Buzia presented the testimony of the following:

Trial counsel: Timothy Caudill and James Figgatt;

Seminole County Sheriff Office: Inv. Joy Williams, Ann Mallory;

Defense fingerprint examiner: Ken Zercie;

Childhood friends and neighbors: Jonathan Hicks, William Bennett, Peter McCray, Robert Smart, Jean McIntosh;

Family members: Amber Buzia, Gary Selje, Roxanne and Charles Heller, Jack Buzia; former co-worker: Mark Watson;

"Ineffectiveness" expert: Robert Norgard;

Clinical social worker: Jan Vogelsang;

Toxicologist: Dr. Ed Barbieri;

Seminole County jail case worker: Catherine Stimpert;

Mental health professionals: Dr. Howard Bernstein, Dr. Mark Cunningham, Dr. Daniel Buffington, Dr. Joseph Sesta, Dr. Joseph Wu;

Psychopharmacologist: Dr. William Morton;

Neurologist: Dr. Jonathan Tanner.

The State called four experts relating to mental health issues: Dr. Helen Mayberg, Dr. Eric Cotton, Dr. Jeffrey Danziger, and Dr. William Riebsame.

Buzia called three mental health experts in rebuttal: Dr. Joseph Wu, Dr. Jonathan Tanner, Dr. Joseph Sesta.

Timothy Caudill and James Figgatt were Buzia's trial attorneys. Caudill, the primary attorney, had defended at least 20 capital cases prior to Buzia's. (V14, PCR15, 29 133). Figgatt had been employed by the public defender's office for almost thirty years and has conducted more than a dozen penalty phases. (V15, PCR282-83, 287). Caudill's understanding of Buzia's background was that he was raised in a comfortable environment. After attending college, Buzia developed a drug habit and abused alcohol. (V14, PCR24-25). Due to his addiction, Buzia's "life had fallen apart and that all contributed to the things that happened at Mr. & Mrs. Kersch's home." (V14, PCR25).

When Buzia was arrested for the murder, Caudill met with him within two days. (V20, PCR1230), and visited with Buzia approximately 45 times before the penalty phase, spending at least two hours on each visit. (V20, PCR1231). The mitigation investigation began shortly after the Public Defender was appointed to represent Buzia. (V20, PCR1233). Caudill spoke with Buzia's family, friends, former neighbors, and co-workers. (V14, PCR30, 36-39, 157). Buzia had provided at least 140 names as

potential mitigation witnesses (V14, PCR148). There were numerous witnesses, so Caudill asked Buzia to prioritize the witnesses. (V20, PCR1232). Buzia provided more complete information as to how to locate the witnesses. (V20, PCR1233). Multiple charts were made and notes written on the charts as witnesses were contacted. (V20, PCR1234; V5, PCR 768-809). Mr. Caudill reviewed all the notes during his mitigation investigation. (V20, PCR1235). Caudill and Investigator Harris divided the list and tried to contact each one. (V20, PCR1238). Caudill visited both the Mayflower, and a community in which Buzia landscaped, and a neighborhood in which Buzia worked. (V20, PCR1236). He spoke with three people in the neighborhood. (V20, PCR1243). Caudill also visited the house where Buzia's mother lived. (V20, PCR1280). Buzia wanted Caudill to visit a location on Church Street where he bought crack, but Caudill's superiors told him not to go to the area because it was not safe (V20, PCR1237).

Caudill asked Buzia about all major times in his life including information about family, friends, employers, and co-workers. (V14, PCR34). Caudill had at least five banker's boxes of discovery material and mitigation information. (V20, PCR1222-23). After obtaining employment records, Caudill found out Buzia would fail to show up for work after a payday. This was due to Buzia's drug habit. In addition, Buzia's living arrangements were unstable. (V14, PCR43-44, 48).

Prior to Buzia's trial, Buzia's sister Cathy Selje was killed by a car as she crossed the road. She was intoxicated at the time. (V14, PCR48-49, 156). The trial judge and jury were aware of Cathy Selje's death. (V14, PCR156). Buzia's brother, Jack, suffered a head injury after a drinking binge. (V14, PCR50). Caudill made a strategic decision not to call Jack as a witness because the State had scheduled a State Attorney Investigation conference with Jack, and Jack gave testimony that was inconsistent and detrimental to the defense theory of the penalty phase. (V20, PCR1275-76).

Caudill retained several mental health expert witnesses: Dr. Riebsame, Dr. Hall, and Dr. Bernstein. (V14, PCR104-105). Dr. Bernstein met with Buzia several times. He opined that Buzia met the statutory mental health mitigators and recommended neuropsychological testing. (V14, PCR106). Caudill arranged for an MRI to be conducted, and results indicated Buzia suffered from a venous angioma, a brain abnormality associated with seizures. (V14, PCR108). There was nothing in the MRI to indicate a problem with Buzia's cognitive abilities. (V14, PCR175). Caudill decided not to have a PET scan conducted because Dr. Riebsame said the PET scan would not provide any useful additional information. (V14, PCR113-114). Caudill made a strategic decision not to call Bernstein because he felt Bernstein "might be willing to offer conclusions that weren't absolutely supported by his test data." (V20, PCR1276).

It was the defense strategy to minimize the State's case through cross-examination and argument on the evidence. (V14, PCR142). Caudill would never force a witness to testify on a client's behalf. (V15, PCR235). When he made a decision not to call a certain witness, it was because:

> My feeling has always been that if a person for whatever reason is reluctant to come and testify in a matter such as this, it may impact upon their testimony. They may not be as strong a witness.

(V14, PCR160).

Starting in February 2001, Caudill wrote over sixty letters and follow-up letters to thirty-six potential mitigating witnesses. (V20, PCR1242-47, 1282). There were handwritten investigative notes on some of the letters. (V20, PCR1241). He also communicated with potential witnesses by e-mail. (V20, PCR1267). Mr. Caudill stayed in communication with the witnesses he intended to call in the penalty phase. His process was three fold: (1) find them (2) talk to them; and (3) if the witness had useful information and was willing, stay in contact with him. (V20, PCR1245). Some of the witnesses were not willing to testify; i.e., the McIntoshes, and a couple of ladies at Universal Studies. (V20, PCR1245). A gentleman named Carswell was in poor health and not able to testify. (V20, PCR1246). A decision was made not to call Roxanne Heller and her husband because:

> We were concerned about some information that they might have and the state of Mr. Buzia's activities with a particular female while he was living

with them or working for them.

(V20, PCR1246). Mr. Caudill kept notes of his conversations with the Hellers, Jack Buzia (defendant's brother), and Buzia. (V20, PCR1250). Caudill spoke with Buzia's mother, Patricia Breslin, numerous times before the penalty phase, but

> [w]hen she got on the witness stand, she was embarrassed about some of the things that had happened to her family, the family life, her relationship with my client's father, her husband. Those things were obviously difficult for her to talk about and so she didn't talk about them in the detail ---

(V20, PCR1276-77). Breslin had talked openly with Caudill before she testified; however, she not forthcoming when she was on the stand. (V20, PCR1277). Caudill tried to bring out the information, but it became futile. (V20, PCR1278). Caudill knew there was more "depth" of information and he made an effort to ask her questions to elicit the answers. (V20, PCR1285). Breslin did testify about specific examples of abuse by Buzia's father. (V20, PCR1286). Caudill had extensive discussions with Breslin before the trial. (V20, PCR1302). Buzia also gave him a wealth of information about the part the people played in his life. (V20, PCR1303).

On March 25, 2002, the Hellers wrote a letter to Caudill. (V20, PCR1263). The letter stated:

> Having been John's employer in the past, my husband Charles feels that questions might be asked for which he could not be able to respond in a way favorable to John. Our son Mark also has reservations about testifying for the same reasons. He and John worked and socialized

> together. I do not think my sister is aware of the unfavorable circumstances under which John left his employment with our company.

(V20, PCR1273).

Mr. Caudill consulted with Buzia on which witnesses to call in the penalty phase. (V20, PCR1267). Caudill was allowed to fly in between ten and twenty witnesses for the penalty phase. (V20, PCR1268). He had seventeen witnesses for Buzia's penalty phase, the most he has ever had. (V20, PCR1268-69). Mr. Caudill chose the best witnesses that he was able to secure to testify. (V20, PCR1269).

Caudill filed a motion to preserve blood and hair samples. (V14, PCR62). Although blood had been drawn for DNA testing, the State Attorney's office directed law enforcement to take more blood from Buzia for the purpose of toxicology testing. (V14, PCR64). Caudill received results from the DNA testing but did not receive toxicology results. (V14, PCR66). He later learned the toxicology test had not been done. (V14, PCR69). He sought independent testing from Wuesthoff Laboratories. (V14, PCR71). Buzia's blood was drawn on March 15, 2000; however, the toxicology test was not conducted until December 5, 2001. It was the defense's theory that Buzia was suffering from cocaine withdrawal. (V14, PCR197; V15, R227). The results were negative for cocaine. (V14, PCR76). The elected public defender denied Caudill's request to have Buzia's hair tested. (V14, PCR80, R170). Further, the possibility of another negative test result could have severely impacted the case. (V14, PCR170).

Caudill considered filing a motion to suppress Buzia's videotaped confession but there was no basis to file it. (V14, PCR84, 170-171). Buzia even told Caudill that his statement to police was voluntary. (V14, PCR171). During the evidentiary hearing, collateral counsel published the last twenty minutes of the videotape, which was not published for the jury during the penalty phase. (V14, PCR88-99). Buzia appears visibly upset and crying. (V14, PCR99). Caudill and Figgatt had decided not to show the jury this portion of the tape because Buzia asks for a gun to kill himself. Caudill said he thought the jury "might want to assist him and it might make them more apt to vote for the death penalty." (V14, PCR101). Figgatt and Caudill had discussed the issue with Buzia and a decision was reached not to play the entire tape. (V15, PCR323).

Figgatt and Caudill discussed strategy on how to present their closing arguments. In Buzia's case, they decided to present their best arguments in the final closing; however, the State waived its closing argument, which denied the defense the opportunity at a final closing. (V15, PCR325). Caudill and Figgatt made a strategic decision to give a "weak" argument for the first part of closing argument because the prosecutor would know "where we might be going in the second part of our argument and you would tear it apart." (V14, PCR181). It was very unlikely that the State would waive argument in a capital case. (V14, PCR182).

In 2007, Investigator Joy Williams conducted an investigation of the latent fingerprint unit at the Sheriff's office, specifically focusing on fingerprint examiner, Donna Birks. (V15, PCR240-41, 242). Inv. Williams determined the unit's manager, Ann Mallory, did not properly review and verify her subordinates' work. (V15, PCR244). Of the reviewed 300 case files that Birks had worked on, 5 or 6 contained bad identifications. (V15, PCR248).

Anne Mallory, manager of forensic services, Seminole County Sheriff's Office, formerly supervised the crime scene, evidence and latent print units. (V17, PCR733-34). In 2007, Mallory received an oral and subsequent written complaint from a print examiner. Mallory sent the complaint "up the chain of command." (V17, PCR734-45). The complaint was about Donna Birks' work as well as some personality conflicts and professionalism issues with some of the examiners. Mallory did not participate in the investigation. (V17, PCR736). Ken Zercie, latent fingerprint expert, examined prints involved in Buzia's case. (V18, PCR938-39). Zercie concluded that based the latent print did not have sufficient quantity or quality to be compared to anyone. (V18, PCR942). He could not say whether Buzia contributed or not. (V18, PCR943).Deborah Fisher, Supervisor of the latent print section, Seminole County Sheriff's Office, agreed with Zercie. (V18, PCR940-41, 942).

Jonathan Hicks, a childhood friend of Buzia's, testified at trial but said he had

very little contact with the defense attorneys. (V15, PCR255-56). Buzia was a "partier" in high school and abused drugs and alcohol. (V15, PCR259). Hicks, Buzia, and Buzia's siblings partied frequently during their high school years. (V15, PCR262). Buzia's mother Patty "was very accepting and tolerant" of the alcohol and drug use. (V15, PCR262-63). Hicks spoke to Buzia by phone about a month before the murder. It had been 20 years since they last had contact. Hicks said Buzia was "lucid and spoke fairly well," but jumped from one subject to another. (V15, PCR264). Hicks later learned that Buzia made several similar calls to other mutual friends. (V15, PCR265). He had no further contact with Buzia. (V15, PCR268).

Peter McCray lived with Buzia's family for almost two years from 1979 to 1980. (V17, PCR740-41, 750). The Buzia home was "a very loose situation. Basically anything went. Alcohol, pot, smoking." (V17, PCR742). Buzia's mother, Patty, started drinking early in the morning. Eventually, McCray had an intimate relationship with Patty. (V17, PCR743). Patty attempted suicide twice. (V17, PCR747). McCray had no contact with Buzia after 1980. (V17, PCR750).

Robert Smart, Presbyterian minister, was Buzia's childhood friend. (V17, PCR752). He recalled Buzia drinking beer at least one time at age five. (V17, PCR754, 762). In junior high school, they frequently smoked marijuana. (V17, PCR754). At one point, they experimented with mescaline. (V17, PCR756). Smart lost

contact with Buzia in 1981 and did not have any further contact until he wrote to Buzia in 2000 when he was awaiting trial for this crime. (V17, PCR757-58).

William Bennett, an attorney, and friend of Buzia's, testified at the penalty phase. Bennett met Buzia at Florida State University in the 1980's. (V16, PCR411-12, 422). He is a qualified death penalty attorney and defends court-appointed murder cases. He assists other attorneys to ensure there is no "appellate error." (V16, PCR433). He spoke with Caudill a few times by phone prior to testifying at the penalty phase. (V16, PCR414, 417). When Bennett arrived to testify at the penalty phase, Caudill called Bennett to testify in the morning. Bennett had planned on testifying in the afternoon and did not believe he was prepared. (V16, PCR418-19). Bennett said Buzia's counsel did not discuss the questions they would ask. He only knew he would testify about Buzia's drug use. (V16, PCR420). Bennett was afraid to mention things that Buzia did during his college days because he did not know what counsel's trial strategy was. (V16, PCR420-21, 422). Bennett described a college incident during which he and Buzia prevented two individuals from getting beaten. (V16, PCR423-24). Buzia befriended another student who attempted suicide. Buzia gave the other student "confidence. He didn't rag on him ... he gave him a lot of confidence." (V16, PCR425-26). In college, everyone wanted to be Buzia's friend. He made people feel good about themselves. He was always willing to help others. (V16, PCR427).

Bennett saw Buzia in 1991 when Buzia was arrested on solicitation charges. (V16, PCR435). Buzia looked "disheveled," as if he was not doing well. (V16, PCR429). Bennett did not see Buzia for the next nine years. (V16, PCR436, 441-42). After Buzia was arrested for the murder in 2000, Bennett visited him in jail. Buzia "was like a zombie." (V16, PCR430). While in jail, Buzia made collect calls to Bennett. Any complaints Buzia made about jail procedures, Bennett relayed to Caudill. (V16, PCR437-38, 444-45).

Amber Buzia, the defendant's niece, is 20 years younger than Buzia and testified at the penalty phase. (V16, PCR449-50, 461). There is a long history of substance abuse in the Buzia family. (V16, PCR451-52). Amber did not see Buzia much while growing up, but when she was a teenager, she recalled Buzia was "always ... under the influence." (V16, PCR459, 464).

Gary Selje was married to Buzia's sister, Cathy. (V16, PCR508-09). He testified at the penalty phase, but said he had limited contact with trial counsel before he testified. (V16, PCR509, 518-19, 521). Selje met the Buzia family in Ogden Dunes, Ohio, in 1978 when he was twenty years old. He recalled a time when Cathy openly smoked marijuana in front of Patty. (V16, PCR510). He found it strange that the family was open about drug use. (V16, PCR510-11). There was a lot of drinking at the Buzia's house, "like an open door policy there." (V16, PCR513). Patty Buzia was

aware of the drinking and drank with her children and their friends. (V16, PCR514). Cathy drank excessively, and by 1995, her drinking was out of control. Selje and Cathy separated in 1996. He was not aware of Buzia's habits after that time. (V16, PCR519-20). He saw Buzia in September 1998 and was "shocked" at his appearance. He was unshaven, wearing tattered clothing, had bloodshot eyes, and had lost a great amount of weight. He appeared to be under the influence of drugs and alcohol. (V16, PCR516-17). That was the last time Selje saw Buzia prior to the murder. (V16, PCR516, 521).

Roxanne Heller, Buzia's aunt, said Buzia lived with her and her husband for a few months when he was 17 years old. When he was 25, he lived with them for a short period and worked in their dessert company for the next few years. He was very pleasant and was a hard worker. (V16, PCR616, 618, 621-22, 627, 649). Heller saw Buzia drink alcohol numerous times to the point of intoxication but did not see him exhibit a "really negative nature." (V16, PCR4, R623). There were occasions Buzia got into fights in bars. On one occasion, he was asked not to deliver to a particular restaurant due to his behavior. (V17, PCR626-27, 628). She never saw Buzia abuse cocaine. (V17, PCR629). She did not testify at Buzia's penalty phase because she thought her testimony would be detrimental to his case. (V16, PCR624, 630).

Charles Heller has known Buzia since he was a child. (V17, PCR632-33). He knew Buzia's mother and siblings had substance abuse problems. (V17, PCR634-35).

When John lived with him and Roxanne, he was a wonderful employee, "management material." (V17, PCR637). When Buzia drank excessively, he became moody. (V17, PCR638). Towards the end of his employment with the Heller's, he missed work because of his drinking. (V17, PCR639). Buzia picked fights and was argumentative. (V17, PCR642-43). After Buzia left the Heller's in 1990, Charles had no further contact with him. (V17, PCR647).

Mark Watson worked with Buzia at the Heller's dessert company. Buzia was a good employee. (V17, PCR648-49). Buzia told Watson that both his parents were alcoholics. (V17, PCR651). When Watson and Buzia went to social gatherings, Buzia became more aggressive when he drank alcohol. (V17, PCR652). Watson recalled "one or two times" when he and Buzia drank "a little more than we should." (V17, PCR652).

Jean McIntosh was neighbors with Buzia's stepmother, Gail. (V17, PCR656-57). The entire Buzia family was friendly and outgoing but had a drinking problem. (V17, PCR656-57, 658-59, 661, 662-63). McIntosh knew Buzia's mother, Patty, but did not know whether she abused alcohol. (V17, PCR663). McIntosh communicated with Buzia during his incarceration at the jail prior to trial. (V17, PCR667, 673). She visited him a few times and thought he looked "more at peace." Prior to his incarceration, he looked like he had been "abusing his body ... unkempt." (V17,

PCR673). She did not testify at trial as she thought any information about Buzia would be detrimental. (V17, PCR668).

Jack Buzia, brother, testified that Buzia was protective of him while growing up. (V17, PCR674-75). Every member of their family struggled with substance abuse. Buzia abused cocaine and alcohol: crack cocaine from the mid-1990's up to the time of the crimes. (V, R676). Jack had not seen Buzia for three and a half weeks prior to the murder and did not know if John used crack cocaine during that time. (V17, PCR677).

Catherine Stimpert was a forensic caseworker at the Seminole county jail in March 2000 when Buzia was arrested. (V17, PCR678-79). She first saw Buzia when he arrived at the jail. (V17, PCR680). "He was unkempt, disheveled ... like in a daze." (V17, PCR681). Buzia was repetitive, "couldn't believe what had happened." He kept saying, "they were my friends." (V17, PCR681). She saw him frequently and he expressed remorse to her. He was very emotional, "a lot of crying, disbelief, couldn't believe he had done this." (V17, PCR683). Stimpert met Buzia's family. Cathy and Jack visited Buzia frequently and were usually drunk. (V17, PCR684). Buzia participated in the Operation Right Track program. Inmates talk to youngsters visiting the jail about their lives and how a pattern of behavior and substance abuse lands them in jail. (V17, PCR687). The youngsters seemed to identify with Buzia. To a degree, he was brighter than most of the other inmates. (V17, PCR689-90). Stimpert stopped

seeing Buzia when jail personnel misinterpreted a card Buzia gave her. She had no romantic relationship with him. Nonetheless, she was told she could no longer visit him. (V17, PCR686, 691).

Jan Vogelsang is a clinical social worker. (V17, PCR468-69). Vogelsang said the Buzia family did not have any boundaries. (V16, PCR497-98). The children and their friends came and went without adult supervision. (V16, PCR524). Patty Buzia was more a friend with her children's friends than she was a mother. (V16, PCR541). While growing up, Buzia was considered "sweet" in his neighborhood. He loved sports and was very protective of his younger brother. (V16, PCR505). They were socially accepted in their neighborhood. (V16, PCR586). His father, a salesman who traveled frequently, drank excessively. Buzia's parents were "very social people" who drank a lot and argued repeatedly. (V16, PCR505). There was some physical abuse as well. (V16, PCR506). The Buzias eventually divorced. (V16, PCR557).

Buzia attended a private boarding high school and graduated in 1978. (V16, PCR548, 551). He was on the wrestling team, played soccer and baseball, and was an average student. (V16, PCR551). After high school, he lived with his relatives and attended college. (V16, PCR560, 566). While attending Florida State University, Buzia got involved with drugs. (V16, PCR567, 569). He maintained regular employment and had many friends, but abused alcohol and drugs. (V16, PCR572). His friends saw him

as a leader. (V16, PCR599). Eventually, Buzia's drug habit worsened. In the mid-1990's, he was working solely to maintain his drug habit. (V16, PCR573, 581; V17, R611). He ended up living on the streets, doing odd jobs. (V16, PCR576-77).

Edward Barbieri, forensic toxicologist, reviewed a toxicology report from Wuesthoff laboratories that pertained to Buzia. (V16, PCR526, 529-30). Barbieri said cocaine is not a stable substance and breaks down rather quickly. It converts to many different metabolites but primarily to benzoylecgonine, "BZE." (V16, PCR530). If blood containing cocaine is stored in a tube, it will lose 25 to 30 percent of the amount of cocaine during the course of a few weeks. At least 50% will disappear over the course of three months. (V16, PCR530). Unless the initial level of cocaine was "sky high," there would be little chance of cocaine remaining after twenty-one months. (V16, PCR531). If the blood containing the cocaine had been frozen, the BZE and cocaine would last for a longer period of time. (V16, PCR533).

Dr. Howard Bernstein, forensic psychologist, evaluated Buzia prior to trial. (V17, PCR693-94, 699). Buzia did not have a psychotic disorder, but had a peculiar way of thinking, as homeless people tend to have. (V17, PCR703-704). Buzia had sustained a head injury in 1994 and had been in multiple fights. Based on his history, Dr. Bernstein suspected Buzia might have brain damage. In February 2001, he recommended a neurological workup. (V17, PCR705). In March 2001, he administered

an "adult neuropsychological questionnaire" in order to rule out issues related to brain injury, organic brain damage, organic mental disorder, or brain dysfunction. (V17, PCR706, 708). He also administered a timed test which monitors ability to complete an incomplete picture. Buzia performed poorly on this test, which indicated visual processing deficits "which would be perhaps secondary to brain injury." He performed poorly on an evaluation which monitors visual suppression, tactical suppression, and auditory suppression. (V17, PCR710). There was no impairment on the rest of this evaluation. (V17, PCR710).

In April 2001, Dr. Bernstein administered a neurological mental status examination. (V17, PCR712). Digital repetition, memory function, and remote function were intact. Buzia's performance on verbal recall was borderline. (V17, PCR712). The Hunt Minnesota test for organic brain damage indicated an average level of intelligence. (V17, PCR713). Dr. Bernstein administered more tests in September and October 2001. (V17, PCR715). The MRI results indicated a "venus angioma" but there was no indication Buzia suffered from seizures. (V17, PCR724). During the twenty hours Dr. Bernstein spent with Buzia, he was irritable, agitated, depressed and moody, although his energy level was intact. (V17, PCR725).

In Dr. Bernstein's opinion, Buzia does not have antisocial personality disorder and did not have a conduct disorder prior to age fifteen. (V17, PCR717, 723). Dr.

Bernstein opined that Buzia met the criteria for the "substantially impaired" mitigator due to "substance intoxication, substance abuse, substance withdrawal, mental disorders at the time, transiency, homelessness, life going out of control so to speak, and the probability of some kind of brain syndrome maybe minimal…" (V17, PCR720-21). In addition, Buzia was under extreme emotional distress: he had lived ten days in a box and was alternating between alcohol, crack, and pot up to an hour before the murder. (V17, PCR721). In reaching the conclusion that Buzia suffered from two mental mitigators, he relied on the reports prepared by defense experts, Dr. Sesta and Dr. Wu. (V17, PCR728, 731).

Dr. Mark Cunningham, forensic psychologist, interviewed Buzia on May 1, 2007. (V17, PCR768, 779). In Dr. Cunningham's opinion, Buzia's actions on the day of the crimes reflected "reactive impulsivity" and "judgment impulsivity." (V17, PCR786-87). Dr. Cunningham believed that testimony should have been presented regarding the nexus between alcohol or cocaine abuse and criminal violence. (V17, PCR796). Heavy cocaine abuse is associated with homicidal offending and increases the likelihood of "overkill" as was the case with the Kersches. (V18, PCR815-16). Dr. Cunningham concluded Buzia was under the influence of extreme mental and emotional disturbance at the time of the crime. His capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was

substantially impaired. (V18, PCR818, 930, 933-34). Dr. Cunningham also believed that testimony regarding Buzia's predisposition to alcohol and drug abuse should have been presented at trial. (V18, PCR821). The majority of Buzia's family were alcoholics. (V18, PCR827). More complete testimony about the generational dysfunctional factors in Buzia's family should have been presented. (V18, PCR834). The jury should have heard expert testimony on how parental alcoholism or drug abuse affects the parents' capabilities for taking care of their children. (V18, PCR841). In Dr. Cunningham's opinion, Buzia's years of alcohol and drug abuse could have resulted in brain impairment or brain damage. (V18, PCR902, 904). However, "the drugs did not make him do it." The drugs were "part of the equation of this occurring, but not that it compelled his conduct." (V18, PCR944).

Dr. Daniel Buffington, clinical pharmacologist, testified at Buzia's *Spencer* hearing. (V18, PCR962-63, 964). At that time, he reviewed the report generated from Wuesthoff laboratories which indicated a negative result for cocaine metabolites in Buzia's blood. (V18, PCR965-66). The compound being tested in the blood would have a tendency to dissipate over time. He did not know how the blood sample was stored at the Sheriff's office. (V18, PCR967). In his opinion, there might not have been any cocaine left in the blood due to the time lapse between the last time Buzia used cocaine and the time the blood was taken. (V18, PCR980). Dr. Buffington's interview

with Buzia indicated he was probably not under the influence of cocaine intoxication the day of the murder. (R2624-2625). There are two different metabolites in cocaine. The parent compound is typically gone within 2-4 hours and other compounds can last for 12-18 hours. (V19, PCR979). Dr. Buffington believed Buzia was under extreme mental or emotional disturbance at the time of the crime. His capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. (V18, PCR973-74).

Dr. William Morton, psychopharmacologist created a timeline of Buzia's actions leading up to the murder of Mr. Kersch and attempted murder of Mrs. Kersch:

> Saturday, March 12, 2000 - Buzia is paid by the Kersches for a week's worth of work; immediately goes to a motel, purchased and smoked crack cocaine throughout the day and night;
>
> Sunday, March 13, 2000 - Buzia worked ten hours with Mr. Kersch; went to Target and purchased $100.00 worth of new clothes; smoked crack cocaine; returned clothes to Target, got his money back and purchased and smoked more crack cocaine;
>
> Monday, March 14, 2000 – Buzia smoked remaining crack cocaine (2 rocks) on his way back to the Kersches; he was seeking a money advance from the Kersches as well as getting paid for his Sunday work; Buzia claimed he arrived at the Kersches at approximately 2:00 p.m.; sometime in the afternoon, the attack on the Kersches took place; Buzia steals $180.00 from the Kersches, stole their car, and returned to the same motel; he bought more cocaine and smoked it; he unsuccessfully attempted to cash one of the Kersches' checks at Albertson's, purchased beer at some point; and fell asleep in their car until the next morning;
>
> Tuesday, March 15, 2000 – upon waking, he went to a bank, attempted to

> cash a check; arrested and taken to the Seminole County Sheriff's Office; gave a statement.

(V18, PCR995-98).

Dr. Morton said it was significant that Buzia's initial introduction to alcohol was at age five. His parents gave him sips of beer and, at age twelve, Buzia began abusing alcohol. (V18, PCR998-99). He also started abusing marijuana in Junior high school, smoking marijuana with his mother and his friends on a regular basis. (V18, PCR999). He also abused cocaine intermittently. (V19, PCR1011). Throughout his high school years and while working in Massachusetts, he abused alcohol and marijuana. He used LSD and PCP. Upon returning to Florida, he started abusing powder cocaine on a regular basis. (V19, PCR1011). Buzia held a relatively high level management job with Universal Studios. He continued using cocaine in a "recreational setting." (V19, PCR1012). Over time, he had many jobs all of which he ultimately lost due to cocaine usage; specifically, crack cocaine. (V19, PCR1012-13).

Dr. Morton said Buzia's drug use, together with a "significant head injury and brain dysfunction," are why Buzia is where he is today. (V19, PCR1014-15). Dr. Morton admitted that when Buzia sustained the head injury in 1994, he was not hospitalized: he was treated in an emergency room. (V19, PCR1049). A physical injury to the brain would show up on a scan. (V19, PCR1050). Dr. Morton saw the results of Buzia's MRI scan but not the PET scan report. (V19, PCR1051).

Dr. Morton concluded Buzia suffered from cocaine and alcohol dependence. (V19, PCR1035). Buzia was under an extreme mental or emotional disturbance at the time of the crime. His capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. (V19, PCR1037). Dr. Morton agreed that Buzia had decisions to make after he attacked Thea Kersch. But, "the majority of them looked like they were poor decisions to me." (V19, PCR1040). Dr. Morton acknowledged that Buzia denied any drug use during his statement to police. Dr. Morton said Buzia was lying. (V19, PCR1044).

Dr. Jonathan Tanner, neurologist, evaluated Buzia on November 29, 2007. (V19, PCR1066, 1067-68). Buzia denied any history of epilepsy, staring spells, fainting, numbness, weakness or blindness in one eye, or a history of headaches. (V19, PCR1069-70). Buzia admitted to abusing alcohol, cocaine, crack cocaine, and using acid a few times in high school. (V19, PCR1071). The attention tests Dr. Tanner administered to Buzia were within normal parameters. (V19, PCR1074). Buzia had a "mild abnormality" with his short-term memory. (V19, PCR1075). Buzia does not have a sense of smell. (V19, PCR1079). Buzia's hearing, vision, and fine motor skills were normal. (V19, PCR1079-1081). Dr. Tanner reviewed the medical records from Buzia's 1994 head injury. Buzia was treated at an emergency room after being hit on the left side of his face with a pipe. A CT scan and x-ray confirmed a fracture to

anterior and posterior maxillary sinus. (V19, PCR1091, 1122). Due to Buzia's loss of sense of smell, and an indication of some neurological impairment on the neuropsychological testing, Dr. Tanner opined that Buzia could have suffered a traumatic brain injury in 1994. (V19, PCR1091, 1100). Based on Dr. Wu's PET scan report, Dr. Tanner concluded Buzia had "a clinically significant brain injury" with a diagnosis of "mild cognitive impairment." (V19, PCR1097). Drug or alcohol use can cause brain dysfunction by causing structural damage to the brain cells. (V19, PCR1101). The brain damage as well as Buzia's cocaine usage contributed to the murder of Mr. Kersch. (V19, PCR1109). Buzia's 2001 MRI results showed a "venous angioma" in the upper front quadrant of his brain. However, the venous angioma has not clinically affected him. (V19, PCR1121).

Dr. Joseph Sesta, forensic neuropsychologist, administered the Minnesota Multiphasic Personality Inventory 2 ("MMPI-2"). (V19, PCR1142-43). In Dr. Sesta's opinion, Buzia did not show antisocial behavior unless he was under the influence of drugs or alcohol. (V19, PCR1143). Dr. Sesta administered the Wexler Abbreviated Scale of Intelligence, which showed Buzia has a full scale IQ of 112, the "high average" range. His verbal IQ was 123, "superior," the level of most people with doctorate degrees. His performance IQ was 99, the "average" range. (V19, PCR1144). The difference between the verbal IQ and performance IQ was statistically significant

and clinically abnormal, suggesting impairment in the right cerebral hemisphere. (V19, PCR1145). Dr. Sesta believed Buzia has evidence of mild brain impairment with a greater impairment in the left cerebral hemisphere than the right. He could not tell if there was impairment in the anterior or posterior. (V19, PCR1147). Dr. Sesta attributed this impairment to Buzia's 1994 head injury and alcohol and cocaine abuse. He did not believe this was going to be progressive impairment. (V19, PCR1147-48).

In Dr. Sesta's opinion, Buzia had brain damage prior to the murder in March 2000. (V19, PCR1156). Prolonged cocaine and alcohol abuse can cause brain dysfunction and ultimately, brain damage. (V19, PCR1157). Based on all the data, Dr. Sesta concluded Buzia was not able to appreciate the criminality of his conduct and was not able to conform his conduct to the requirements of the law. (V19, PCR1160-61).

Dr. Joseph Wu, M.D., studies neuropsychological disorders through brain imaging. (V20, PCR1311, 1313). He said that a PET scan by itself is not a diagnostic test but a corroborative tool. (V20, PCR1331-32). Dr. Wu examined PET scan images that were conducted on Buzia on February 26, 2008. (V20, PCR1336, 1338). In Dr. Wu's opinion, Buzia has a "degree of asymmetry" in the left ventral temporal cortex with a clinically significant difference. (V20, PCR1344, 1345, 1357, 1363). He did not see any frontal lobe deficiencies. (V20, PCR1351, 1386). Dr. Wu examined the skull

films taken of Buzia after his 1994 head injury. (V20, PCR1346, 1387). The injury could have caused a traumatic brain injury. (V20, PCR1348). However, there was no evidence on the PET scan of an injury to the front part of his brain. (V20, PCR1386). The 2001 MRI scan showed Buzia had a "venous angioma" in the left frontal area which was an abnormality in the temporal lobe. However, Dr. Wu ruled out this abnormality as a cause for the asymmetry decrease. (V20, PCR1349-50).

Dr. Wu said Buzia's family history was "one of the most severely addicted family histories that I have ever seen in my clinical experience." (V20, PCR1350). A traumatic brain injury, together with multigenerational addiction, are factors which increase addiction. Chronic and long-term alcohol and cocaine abuse can injure the brain. (V20, PCR1351). Dr. Wu said Dr. Sesta's neuropsychological assessment of Buzia correlated with the abnormalities seen in the PET scan images. (V20, PCR1354).

When Buzia was struck in the face with a pipe in 1994, there was no vision impairment or loss of consciousness, and emergency room physicians did not order tests for brain injury. (V21, PCR1412-13, 1473). According to Dr. Wu, the fact the ER physicians did not request brain testing "doesn't mean that they think that there was no evidence of brain trauma." (V21, PCR1415). There was no testing close in time to the injury which could be compared to Dr. Wu's current PET scans. (V21, PCR1417).

Dr. Helen Mayberg, M.D., is a board certified neurologist employed as professor

of psychiatry and neurology at Emory University. (V21, PCR1429). She is the endowed chair of the Dorothy Fuqua neuroimaging and advanced therapeutics division at Emory. (V21, PCR1429). She was qualified as an expert in psychiatry, neurology, nuclear medicine and the use of PET scans and brain imaging. (V21, PCR1431). Dr. Mayberg testified that PET scan is used as an alternative to an invasive biopsy to diagnose Alzheimer's disease, brain tumors or epilepsy. (V21, PCR1432). PET scans are not a reliable indicator for neuropsych testing. (V21, PCR1439-40, 1479). Taking a PET scan in 2008 to try to determine the mental state of a person in 2000 is like trying to take a picture of an intersection of an accident a year after the accident happened. (V21, PCR1441). The scene simply cannot be re-created. (V21, PCR1441).

Dr. Mayberg reviewed the medical records from Buzia's facial injury. (V21, PCR1442). He sustained a facial fracture, not a skull fracture. (V21, PCR1443). Buzia did not lose consciousness; there was no confusion or blurred vision; and no description of an abnormal neurological exam. (V21, PCR1444). There was no entrapment of the eye muscle. (V21, PCR1444). A CT scan was conducted of the facial bones. There was nothing in the medical record to suggest anything abnormal. Buzia was released from the ER 2 ½ to 3 hours after he arrived. (V21, PCR1445). The cheek bone was fractured, but there was no indication the fracture extended to the zygomatic arch. (V21, PCR1446). If there had been any concern for Buzia's well

being, he would have been kept in the hospital 24 hours for observation. (V21, PCR1447). Buzia was not even given a "head" sheet to follow up with a neurologist or watch for certain things. (V21, PCR1447).

Aside from the CT scan of the face in 1994 after the pipe-to-the-face incident, Buzia had an MRI in 2001, soon after the murder. (V21, PCR1447). The report of that MRI was normal, except for a venous angioma, which "tend to be a congenital anomalies so you're born with them." (V21, PCR1447, 1451). The angioma was not in the frontal lobe, so it was unrelated to any frontal lobe symptom. (V21, PCR1448). There was no indication of any damage from the 1994 pipe incident. (V21, PCR1448).

Dr. Mayberg reviewed images 20 and 21 which Dr. Wu referred to as the temporal lobe. She testified that the area in the images was not the temporal lobe: it was the insula, a fold in the brain between the temporal and frontal lobes. (V21, PCR1451). The PET images indicated a "natural appearance of the infolding of the brain." (V21, PCR1452). Dr. Mayberg had reviewed Dr. Wu's report, which referred to "metabolic asymmetries with the left ventral temporal cortex" as shown in images 20 and 21 (V21, PCR1454). Dr. Mayberg was "surprised" at this finding because slides 20 and 21 did not show the ventral temporal cortex. (V21, PCR1455). Although Dr. Wu classified the PET scan as "abnormal," he did not denote the magnitude of certainty. (V21, PCR1456). Thus, the conclusion that any asymmetry exceeded normal

variation was not based on quantification. (V21, PCR1456). Dr. Mayberg reviewed images 61 and 65. (V21, PCR1461). These images showed that Buzia's head was not absolutely straight when he was laying down for the test. The result is that the images are asymmetrical. (V21, PCR1462). Progressing through the "slices" it became apparent that the head was not positioned exactly straight. (V21, PCR1463). The person interpreting the "slices" of the brain would have to compensate for the juxtaposition "to be very careful not to ascribe asymmetry on any one slice." (V21, PCR1464). The asymmetry that Dr. Wu found as clinically significant could be simply that Buzia's head was not straight in the machine. (V21, PCR1465). Dr. Mayberg was able to see on two out of three views that the ventral part of the temporal lobe was symmetric on the outside edge of the brain. That could be confirmed by the sagittal views. (V21, PCR1468). The third view, the coronal view, suddenly showed an asymmetry, but it was due to the positioning of the head. (V21, PCR1468). Neither did Dr. Mayberg see asymmetry in the amygdal and hippocampus. (V21, PCR1469). It was difficult to speculate how an injury to the maxillary sinus could cause damage to the temporal lobe. (V21, PCR1470). Injury would normally occur to the part of the brain closest to the point of impact at the maxillary sinus, not all the way back in the temporal lobe. (V21, PCR1471).

In Dr. Mayberg's opinion, there was no way to correlate any asymmetry found

by Dr. Wu to Buzia's behavior at the time of the murder in 2000. (V21, PCR1471). Any asymmetry in the insula shown by "slice 20" was normal. The PET scan showed a normal brain. (V21, PCR1489).

Dr. Eric Cotton, M.D., is board certified in radiology and nuclear medicine. He is the medical director of National PET Scan. Buzia's PET scan was done at one of National PET Scan's facilities. (V21, PCR1499). He is commonly called upon to render opinion on PET scans. There was no reason Dr. Cotton was not asked to interpret Buzia's PET scan and that it would be "farmed out" to a doctor in California. (V21, PCR1500). The fact that Dr. Wu came into his facility and supervised a PET scan would concern Dr. Cotton if Dr. Wu was not licensed in Florida because administration of a PET scan is the practice of medicine. (V21, PCR1503).

Dr. Cotton reviewed Buzia's PET scan. In his opinion, it was a normal scan. (V21, PCR1503). There was nothing in the scan to suggest there was any sort of brain damage. (V21, PCR1504). The coronal view showed that the head was slightly tilted to the side. A doctor should be able to "read through" the asymmetry produced by the head position. (V21, PCR1504). Dr. Cotton had previously reviewed scans from 3 other patients which Dr. Wu had also read. Dr. Wu found the scans abnormal; however, in Dr. Cotton's opinion the scans were normal. (V21, PCR1519-20).

Dr. Jeffrey Danziger, psychiatrist, had testified at the penalty phase, and both he

and Dr. Riebsame agreed that Buzia suffered from alcohol and cocaine dependence. Notwithstanding, Buzia was not impaired to any substantial degree at the time of the murder. (V21, PCR1528). Buzia had a clear recollection of the events and showed goal-directed behavior. (V21, PCR1529). He used a diversion to gain entry to the house and, after striking Mrs. Kersch, moved her to a back bedroom so she could not be seen. (V21, PCR1530). Buzia then cleaned up the house and procured a weapon while he was waiting for Mr. Kersch to come home. After attacking and robbing Mr. Kersch, Buzia used the money he stole to buy crack and beer. The next morning he tried to cash a check at the bank. All these actions are goal-directed, purposeful behavior suggestive of reflection, planning and deliberation. This behavior was inconsistent with someone with a delirium or psychotic illness. (V21, PCR1530). The fact that, after Buzia disabled both Mr. and Mrs. Kersh, he went into the garage and obtained an axe and struck them both again, suggests calculation, thinking and forethought. (V21, PCR1532).

Dr. Danziger's conclusion was that Buzia "doesn't suffer from any psychiatric diagnoses other than substance abuse." This conclusion was based on Buzia's behavior, actions and decisions at the time of the murder. (V21, PCR1534). Dr. Danziger had reviewed Dr. Sesta's test data, but there was nothing in that data "that would meet the criteria for dementia or any severe cognitive impairment." (V21,

PCR1534). Sesta's finding of "mild impairment" was not surprising, given Buzia's history of alcohol and cocaine dependence. (V21, PCR1535). Insofar as "anosmia," or the inability to smell: snorting cocaine can affect the ability to smell because the receptors in the nose are damaged. (V21, PCR1535).

Dr. Riebsame, board certified forensic psychologist, was hired by Mr. Caudill in 2000 to evaluate Buzia. (V21, PCR1547). He was provided "a great deal of information" and spoke with family members as the defense attorneys found them. (V21, PCR1548). Dr. Riebsame spent 15-20 hours conducting psychological testing on Buzia. (V21, PCR1548-49). Buzia is a bright individual, and there was no indication of any kind of abstract reasoning issue or cognitive impairment. (V21, PCR1549). The trail-making test showed normal functioning with no indication of impairment. There was no evidence that would "point in the direction of frontal lobe damage or decision making dysfunction." (V21, PCR1551). Dr. Riebsame was aware Buzia had undergone MRI scans after his arrest. Trial counsel provided the medical records documenting the MRI results, which were consistent with Buzia's reporting of no symptoms and no cognitive impairment. (V21, PCR1553). The MRI did identify a venous angioma, but the physician had documented that there was no impairment caused, or symptoms from, the angioma. (V21, PCR1553-54).

Dr. Riebsame discussed further testing with trial counsel. Because there was no

indication or historical evidence of brain impairment, further neuropsychological workups would "not be necessarily beneficial." (V21, PCR1554). Dr. Riebsame did not recommend further testing in Buzia's case because there was no clinical or historical evidence on which to base a recommendation. (V21, PCR1555). Dr. Riebame will recommend a PET scan if it is indicated. In fact, he did so in the case of Hoskins in the same circuit as Buzia. (V21, PCR1555). In 2000, Dr. Riebsame was aware that Buzia was struck in the face with a pipe in 1994. He had the medical records. The physicians that treated Buzia at that time saw no cognitive impairment or brain injury. (V21, PCR1556). Frontal lobe damage affects impulse and emotional control, and decision making. (V21, PCR1556-57). If there is brain impairment, there is typically a pattern of academic failure and work failure. There is usually a lengthy criminal record which includes impulsive or violent crimes. In Buzia's case, there was no history of academic failure. Work history was satisfactory because he held down managerial positions. (V21, PCR1558). At some point, the alcohol and drug dependence took over. However there was no indication of mental disorder. (V21, PCR1559). Buzia had impulse control, as illustrated by the stories of friends about him walking away from fights. (V21, PCR1560).

Dr. Riebsame had reviewed Dr. Wu's report, which indicated a problem in the temporal lobe. (V21, PCR1561). However, it is the frontal lobe that affects decision

making. The temporal lobe is more often related to language deficits. A very serious injury to the temporal lobe might change a person's behavior, but it would be dramatic. (V21, PCR1562). The majority of Dr. Sesta's test scores show that Buzia is in the normal average to superior range in terms of executive functioning or decision-making skills. Sesta's test data actually supports Dr. Riebsame's opinion that Buzia shows good impulse control. Dr. Riebsame would not change his opinion from the testimony he gave in 2003. (V21, PCR1570). A point difference of 24 points between the verbal and performance does not show abnormality. Buzia's verbal IQ is in the 94-95 percentile and his performance skills are average. (V21, PCR1571). Buzia is a high functioning individual. (V21, PCR1571). The Shipley, again, showed no cognitive impairment. (V21, PCR1572).

None of the testing done by Sesta or the PET scan done by Dr. Wu would change Dr. Riebsame's opinion from that which he testified to at the penalty phase. (V21, PCR1572). Further, it is "real life functioning" that is the best information in determining a person's mental state. Neuropsychological test date can be helpful, as can PET scan results. (V21, PCR1564). However, "it's best to look at the real life functioning and then try to make sense" of the data. The murder of Mr. Kersch was not impulsive. Buzia looked through Mrs. Kersch's purse then prepared himself for Mr. Kersch's arrival. (V21, PCR1565). If striking Mrs. Kersh with the tray had been

impulsive, the typical reaction would be to panic and flee. (V21, PCR1566).

The reason Dr. Riebsame was hired by trial counsel in 2000 was to develop mitigation. (V21, PCR1577). At the penalty phase in 2003, Dr. Riebsame testified about alcohol and cocaine abuse, dysfunctional family, alcoholic father, crack cocaine binge Buzia was on in the days before the murder, and that Buzia was in cocaine withdrawal at the time of the murder. (V21, PCR1572-73).

Dr. Sesta was called in rebuttal and said Buzia does not have a degenerative disorder that would affect his brain. His brain function at the time of the crime is the same as it is today. (V22, PCR1706, 1708). Dr. Sesta explained that there were at least four explanations as to why Buzia suffered a brain injury at the time of his 1994 injury:

1) When Buzia was hit with the pipe, the brain tissue slapped back and forth against the skull;

2) "Shearing:" brain matter flew off the top of the heavier white brain matter;

3) "Pressure:" the pipe hit Buzia's face and "deformed" the neurological structure of the brain;

4) "Microcavitization," the brain pulled away from the skull tissue, depressurized and caused interstitial fluids to burst and cause damage.

(V, R1709-10). In Dr. Wu's opinion, Buzia has an injury to the right hemisphere of his brain which affects behavior. He is not insane and does not have dementia. Buzia could not conform his behavior to the requirements of the law. (V22, PCR1711-12). Dr.

Sesta said temporal damage or temporal lobe seizures can impact frontal lobe functioning. (V22, PCR1725). The temporal lobe, when damaged, can affect behaviors, involving rage and aggression and other impulsive behaviors. The damage to the temporal lobe can cause damage to the frontal lobe. (V22, PCR1727). Dr. Sesta did not find any impairment in Buzia's frontal lobe function. (V22, PCR1728). Buzia has a cognitive disorder NOS. (V14, PCR9; V22, PCR1726).

SUMMARY OF ARGUMENTS

Argument 1. Trial counsel was not ineffective at the penalty phase. Counsel completed a comprehensive mitigation investigation and presented a complete picture of Buzia's life. Counsel also retained several mental health experts and made a strategic decision which mental health testimony to present. The postconviction testimony presented at the evidentiary hearing was cumulative. Counsel had strategic reasons for not calling witnesses. Counsel's reliance on the mental health expert was reasonable. The trial judge determined the credibility of defense mental health experts and found them lacking. Any additional evidence would not serve to change the outcome of the proceeding, given the four strong aggravating circumstances.

Argument 2. Trial counsel was not ineffective for failing to file a motion to suppress the confession. Trial counsel found no basis to suppress the confession because it was voluntary. Even if the confession had been suppressed, there was

overwhelming evidence of guilt.

Argument 3. Trial counsel was not ineffective for failing to show the jury the last 20 minutes of the videotaped confession. Counsel made a strategic choice not to show that section. Counsel objected to the prosecutor's comment in closing argument, and the objection was sustained. Counsel made a strategic decision not to request a curative instruction. There was no deficient performance or prejudice.

Argument 4. Trial counsel was not ineffective at the guilt phase. The trial judge properly recognized and applied *Strickland*. Evidence of guilt was overwhelming. The testimony of experts showed that even if the blood had been tested, finding the presence of cocaine was speculative. Even if the blood had been tested in a timely manner, it would not have changed the outcome: voluntary intoxication is not a defense to murder, and Buzia was also convicted of felony murder. The fact Buzia was convicted of felony murder also precludes the argument that brain damage would negate premeditation. The trial judge determined the credibility of the experts and found the proof of brain damage unreliable. Buzia's confession was voluntary, and hiring a "confessionologist" would not change that. Counsel was not ineffective for failing to discover that Donna Birk's fingerprint identifications were not reliable. This evidence did not become available until 4 years after the trial. Trial counsel was not ineffective in closing argument. The State used an unanticipated and

rare strategy to prevent defense counsel from having rebuttal closing argument. It was not unreasonable to fail to anticipate the State's maneuver.

Argument 5. The summary-denial claim is waived for appellate purposes because it is not adequately briefed. Without waiving the inadequacy, the State has attempted to respond to each claim. Voluntary intoxication is not a defense to murder and Buzia was also convicted of felony murder. Buzia killed Mr. Kersch with an ax, and the prosecutor's comment is a fair comment on the evidence. Specific verdict forms are not required on aggravating circumstances. The *Ake v. Oklahoma* claim is procedurally barred.

Argument 6. The evidence regarding the fingerprint identifications of Donna Birks is not newly discovered evidence because it did not exist at the time of trial. Counsel was not ineffective because he could not have discovered the information with due diligence. The State did not violate *Brady* because they were unaware of the situation. The unreliable fingerprint identifications were not discovered until 4 years after Buzia's trial. Further the fingerprint evidence was not material under either the *Strickland*, *Jones*, or *Brady* standard.

Argument 7. The prosecutor did not violate *Brady* by failing to test Buzia's blood for cocaine. Buzia has failed to show exculpatory evidence was suppressed that would have been material.

Argument 8. There is no error, individual or cumulative.

Argument 9. Whether Buzia is competent to be executed is premature.

ARGUMENTS

ARGUMENT 1

TRIAL COUNSEL WAS NOT INEFFECTIVE AT THE PENALTY PHASE.

Buzia argues on pages 52-79 that counsel was ineffective for failing to investigate and present mitigation in three areas:

(1) Brain damage;
(2) Genetic predisposition to substance abuse; and
(3) "Persuasive" narrative of life and bio-psychosocial history.

Buzia also claims the trial court erred in failing to address the issues and "articulate the prejudice standard it was applying."

Prior to addressing the claims of ineffective assistance of counsel, the trial judge recognized *Strickland v. Washington*, 466 U.S. 668 (1984), as the prevailing authority:

> According to the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant must meet a two-prong test to successfully allege ineffective assistance of counsel.
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. **Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.** Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted front a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687, 104 S. Ct. at 2064. The Supreme Court further stated that

> 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

466 U.S. at 689, 104 S. Ct. at 2965. (Emphasis supplied)

(V13, PCR2282-2283). The trial judge properly recognized the *Strickland* standard for prejudice.

As to the specific claim raised on appeal, the trial court held:

> With regard to the penalty phase, in ground two the Defendant argues that trial counsel conducted an incomplete mitigation investigation, made a poor presentation of that mitigation, and had an unreasonable overall mitigation strategy. When evaluating these claims this Court notes that the State proved the weightiest aggravators beyond a reasonable doubt: prior violent felony; heinous, atrocious, and cruel; and cold, calculated and premeditated. *See Morton v. State*, 995 So. 2d 233, 243 (Fla. 2008). In light of the fact that the Defendant was shown to have committed a brutal axe murder on an elderly acquaintance, after beating the victim's wife nearly to death, trial counsel did a remarkable job in convincing four jurors to recommend a life sentence. The specific claims raised in ground two will be addressed below.
>
> The first subclaim of ground two is that counsel failed to conduct a proper mitigation investigation. **Specifically, the Defendant alleges that counsel failed to investigate and discover the Defendant's brain damage, failed to present evidence of his family predisposition to**

substance abuse, failed to prepare witnesses, and failed to properly demonstrate the effects of alcohol and drugs on the Defendant's life. Much of the argument is based upon Attorney Robert Norgard's testimony about prevailing norms in capital representation. With all due respect to Mr. Norgard, this Court finds that his expert opinion on prevailing norms is of little or no assistance to this Court as the finder of fact.

Trial counsel called a total of fifteen witnesses in mitigation during the penalty phase. These witnesses painted a vivid picture of the Defendant's life and the impact that his substance abuse had on him. There were several other witnesses who were contacted by counsel, either by letter or telephone, but who requested not to testify because they had negative information about him. Counsel honored those requests.

Trial counsel presented testimony from, among others Patty Breslin, the Defendant's mother; William Bennett and William Behr, friends from Florida State University who knew the Defendant when he began using controlled substances; Amber Buzia, who testified about the Defendant's presence during her upbringing; Gary Selje, the Defendant's former brother-in-law, who told of his experiences with the Defendant and with the family as a whole; Robert Smart, Jonathan Hicks, William McKenna, Thomas Crepeau, Harry Zegers, and Mary Carol Lohr who testified about the Defendant in his youth through his high school years. The theme of the mitigation presentation was that the Defendant was a good person and they were shocked that he committed these violent acts. **Trial counsel was counting on Breslin to be a valuable witness in mitigation, but she "choked" on the stand, minimizing her role in the Defendant's substance abuse and denying some of the incidents that had allegedly occurred.** Breslin's weakness as a witness surprised trial counsel because he thought that she had come to understand that unflattering information about her family would actually assist the Defendant, but she was apparently unable to overcome her embarrassment with the Defendant's plight.

The Defendant argues that trial counsel's presentation of these lay mitigation witnesses was ineffective. **He claims that counsel should have elicited more information from those witnesses and that trial**

counsel should have called other witnesses who had less positive information because 'bad is good." Several of the witnesses were recalled during the evidentiary hearing to present additional mitigation testimony. Some claimed that they never spoke to counsel before testifying, leaving them to feel unprepared during questioning and not knowing if there were any topics to avoid. Trial counsel refuted some of these claims, averring that he or his partner deposed or spoke with several by telephone before the penalty phase, but agreed that there were few, if any, face-to-face meetings. FN3. However, during these witnesses' testimony **at the evidentiary hearing, there was little additional information presented, except some additional anecdotes about the Defendant. This additional information was cumulative to information already provided.** Counsel is not ineffective for failing to present cumulative evidence that would not have impacted the result of the trial *See Barnhill v. State*, 971 So. 2d 106 (Fla. 2007).

> FN3. For example, the record reflects that William Bennett was deposed on March 9, 2003, approximately two weeks before the penalty phase began. Trial counsel was present at the deposition, but all questioning was done by the State.

As for the claim that the witnesses were unprepared because they did not know what topics to avoid, there can be no prejudice. The witnesses were not called to give narrative testimony which would require an idea of what topics to highlight or avoid; they were supposed to answer the questions that were asked. If counsel wanted them to avoid any particular topics, he would not have or did not ask about them. **The Defendant has not shown what probative information did not come out because of lack of preparation.** Also, this Court specifically finds that the penalty phase presentation was not rambling, inconsistent, or lacking in substance. The Defendant has not demonstrated any ineffectiveness with regard to the preparation of the lay mitigation witnesses.

In a similar vein, the Defendant argues that counsel should have called additional witnesses, for example the Hellers or the McIntoshes, to testify at the penalty phase. **Trial counsel chose not to call these witnesses** because they told him that they had unfavorable information about the Defendant and they did not want to damage the case. Jean McIntosh,

Charles Heller, and Roxanne Heller testified at the evidentiary hearing. **As with the witnesses described above, their testimony was merely cumulative to what was presented to the jury and would not have changed the result of the trial**. Trial counsel's opinion that he had called enough character witnesses to provide a chronology of the Defendant's life, without forcing reluctant witnesses to appear, was reasonable.

The majority of the eight-day evidentiary hearing was spent litigating whether the Defendant suffered from brain damage. At the evidentiary hearing, the Defendant presented several expert witnesses who testified that the Defendant clearly suffered from brain damage and that this brain damage caused him to meet the statutory mitigators of extreme mental disturbance and inability to conform his conduct to the requirements of the law. The State presented significant evidence and impeachment putting those conclusions into doubt. However, the question to be resolved here is not whether the Defendant actually suffers from brain damage; it is whether counsel's actions at the penalty phase were reasonable.

At the time of the penalty phase, counsel had retained Dr. Riebsame, whose report indicated that there was no reason to believe that the Defendant suffered from brain damage. This was based upon his clinical screening of the Defendant, which showed the Defendant to have a high level of intelligence with no neurological deficits. Dr. Riebsame had conducted a limited neurological screening which showed no evidence of brain damage. He also took into account the Defendant's goal-directed behavior while committing the murder and his real life functioning. Since the 1994 facial injury, the Defendant had not had the academic failures, work failures, or criminal record showing a pattern of impulsive or violent crimes associated with the particular type of brain damage that was now being diagnosed. FN4. An MRI done after the murder, at the recommendation of Dr. Bernstein, showed only a venous angioma, a congenital seizure disorder, but the Defendant did not report a history of seizures. Based upon all of this medical and clinical information in his possession, Dr. Riebsame did not believe there was any reason to do further neurological testing. FN5.

FN 4. In fact, the Defendant always maintained employment. He worked with his uncle's food distribution company in Cape Cod, then while in Orlando, he worked at the Outback Steakhouse and the Meyer Bakery, after which he rose to a management position at Universal Studios. Then, he worked at the Mayflower Retirement Home. He did not lose any of these jobs due to inappropriate, impulsive, or violent incidents while working. He also routinely did odd jobs for people, which is how he eventually became acquainted with the Kersches.

FN5. Contrary to collateral counsel's assertion, counsel did not "inexplicably ignore" Dr. Bernstein's report. Some further testing was done, in the form of the MRI, which did not show any evidence of brain damage. A PET scan was requested, but ultimately, counsel decided not to expend the funds to do it, presumably because the other diagnostic testing that had been done did not show a need for it.

Trial counsel was not ineffective for relying on Dr. Riebsame's evaluation. *See Darling v. State,* 966 So. 2d 366 (Fla. 2007). While collateral counsel repeatedly argues that there was no downside to conducting a confidential neurological evaluation, based upon the information before him, trial counsel had no reason to expect that doing so would result in the discovery of useful information. **The fact that the Defendant has since secured more favorable mental health experts does not establish that Dr. Riebsame's original evaluation was insufficient.** *Davis v. State,* 928 So. 2d 1089. 1124 (Fla. 2005); *Carroll v. State,* 815 So. 2d 601, 618 (Fla. 2002).

Finally, even if counsel could be faulted for failing to do more comprehensive testing, he would still not be deemed constitutionally ineffective. The defense's strategy was to show that the Defendant was a good person who had fallen into a pattern of substance abuse, which caused him to commit an uncharacteristic, violent act. To further this strategy, he tried to humanize the Defendant, focusing on the good side of his personality and then chronicling his descent into substance abuse. This was accomplished by presenting the testimony of several of the witnesses listed above. Evidence of brain damage would have

contradicted the theory of mitigation. While the "bad is good" theory of mitigation is a valid strategy it some cases , that was not the tact taken by trial counsel. 'Strategic decisions do not constitute ineffective assistance if alternative course of action have been considered and rejected." *Rutherford v. State*, 727 So. 2d 216, 223 (Fla. 998). **Counsel had the Defendant's mental health evaluated, but it did not appear to be a viable strategy. This Court finds that "humanization" of the Defendant was a reasonable strategy.** *See Jones v. State,* 928 So. 2d 1178 (Fla. 2006).

It should be noted, in the alternative, that even if this Court found that trial counsel's mental health in investigation was unreasonable according to the first prong of ***Strickland,*** **the result of the trial would not have changed.** The evidence of brain damage was not overwhelming, as the Defendant alleges**; in fact, in this Court's opinion as the fact-finder, it was dubious, at best.** The Defendant's experts uniformly found that he suffered from obvious, clinically-significant brain damage, and they determined that it was caused in 1994 from a facial injury. The conclusions were made even though all indications were, at the time of the injury, that there was no concern by the emergency room physicians that the Defendant had suffered a brain injury. **Further, it appears that some of the test results were manipulated to show brain damage;** specifically, Dr. Sesta vacillated between different scoring methods to score the Defendant's deficits, apparently in order to attain a score that, barely, showed the Defendant to have mild brain impairment. FN6. Finally, the Defense experts consistently avoided the State's key question— if the Defendant suffered from this brain damage in 1994, why was there never a manifestation of it, except when the Defendant was under the influence of drugs or alcohol? There was no evidence that the Defendant was violent with any person between the injury and the crimes at issue, although there was such evidence of violence before the injury when the Defendant was drunk. He had no pattern of criminal offenses that would demonstrate a functional inability to control his impulses. Yet violence and impulsivity are the markers that the Defendant's brain damage is supposed to produce. The only conclusion that could be drawn is that **the brain damage defense is a red herring**, and that the Defendant's drug use was the only relevant mitigating factor

> that could be given any weight. **The drug use was extensively presented to the jury and to the court and given its appropriate weight.**
>
> > FN6. For example, he scored the Defendant under Dr. Reitan's scoring methodology on the Halstead Impairment Index and the TPT localization tests, right after telling this Court that Dr. Reitan's methods are not as generally accepted as the demographically-adjusted scoring set forth by Dr. Heaton. Under Dr. Reitan's scoring, the Defendant scored a higher level of brain impairment than he would have under Dr. Heaton's scoring. This manipulation of results renders his opinion unreliable to this Court. (Emphasis supplied.)

(V13, PCR2285-2289). The trial judge both cited and correctly applied *Strickland.*

The circuit court's factual findings are supported by competent, substantial evidence, and this Court should defer to those findings. *See Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004). As recognized by the trial judge, trial counsel called a total of fourteen (14) lay witnesses and two police officers to establish mitigation at the penalty phase. Additionally, they called Dr. William Riebsame as an expert in psychology. The witnesses and their testimony is summarized as follows:

1. Patricia Breslin, mother, testified to the drinking habits of Buzia's parents (R1522, 1548, 1553) family history and births of her children, her husband was a traveling salesman, that he made a good income, that her husband began to show a preference for Buzia's younger brother, Jack (R1545); there was no mental illness in her family or her husband's, Buzia went to a very good private boarding school named Lamere, Buzia started drinking when he was a senior there, that her husband got more abusive to her when Buzia was in grade school, they divorced before he went away to Lamere, that after they both came to the Orlando area she thought Buzia drank too much, (R1579) and she thought her

husband was an alcoholic by the time she divorced him. (R1580).

2. William McKenna testified that he attended La Lamere School with Buzia, (R1586), they played baseball together, that he had no contact with Buzia after they graduated (R1590), and that he was shocked to hear of the arrest of Buzia for murder. (R1591).

3. Thomas Crepeau testified he attended La Lamere, had a close relationship with Buzia (R1596) while there and that when he learned he was arrested for murder, he thought "that's not John . . . . that's certainly not the John we knew and loved in high school", he would never do something like that. (R1596). He admitted he had not seen Buzia since high school. (R1597).

4. Harry Zegers testified he went to La Lamere and met John Buzia there and played on the soccer team with him (R1601), Buzia was friendly and well liked (R1602), lost all contact with him after high school, and was shocked to hear about the murder because he is not that type of person. (R1603, 1604).

5. Gary Selje testified he met Buzia in 1978 (R1606), when he met and started dating Kathy Buzia. He later married Kathy and remained with her until 1996, when he left her in central Florida and went back to Madison, Wisconsin. (R1617). Buzia lived with them for periods of time in Madison and in Texas (R1609), was around him when Buzia worked in Orlando at Universal and after that when he lost that job. (R1611–1614). During this time Buzia increased his drinking to where he would drink 12 beers a day (R 1614, 1615), and then around 1996 he began to take cocaine, which Kathy and Gary were also taking. Believes he got to where he might do three or more packets a day. (R1616,1617) Gary left and went to Madison in 1996 (R1617) and as he got more involved with the cocaine he changed and became less sociable and did not have as many friends. (R1620,1621).

6. Jonathan Hicks testified he grew up with Buzia in Odgen Dunes, Indiana, played sports with Buzia, went to England on a soccer trip with him, and socialized with Buzia during high school. (R1624-1625). Then he lost contact with him after high school. He testified when he heard of the murder he was absolutely shocked. (R1627).

7. Amber Buzia testified that she is Buzia's niece, Mary's daughter. (R1630). Lived in central Florida when he worked at Universal, and was around him and his parents. Alcoholism was a problem in the family, and a severe problem for

her mother Mary, who has been in rehab centers four (4) times. (R1635). Has seen Buzia drinking and buzzed but not drunk. (R1636). Their family used cocaine, and Buzia would be around and could tell he was high on cocaine. He at one time lost weight and developed twitching. (R1637). She identified a photo found in Buzia's wallet when he was arrested as a sonogram of her baby.

8. Robert Smart testified he grew up with Buzia and is now a pastor. (R1640). The Buzia family was a fun family when they were young and Buzia was a friend he loved very much. (R1642). He lost contact with Buzia after John went away to La Lamere. When he heard of this murder he was sorrowful, and wanted to contact John to communicate the love of God and forgiveness. (R1645).

9. William Behr testified he knew Buzia from FSU when they were attending school and working in food services together. (R1652-1654). The Defendant was a hard worker, took pride in his work and was good at managing people. (R1656). Lost contact with Buzia after he graduated from FSU, until Buzia became employed at an Outback restaurant his brother was managing. Ran into Buzia there and they had a brief talk to catch up and Behr was glad to have seen him. (R1259).

10. P.J. Behr is William's brother, and first met Buzia when he hired him at the Outback. His qualifications were excellent per his resume. Buzia was a good worker and he never had problems in an area of the restaurant where he was working. He had a good attitude as well. (R1667). Outback records reflect Buzia was let go because he was tardy to work too much. (R1668). Was incredulous when he heard about his murder. After he left Outback saw Buzia working at a nearby Subway store. (R1669).

11. William Bennett testified he attended FSU with Buzia and they became close friends and played sports together. Bennett is a lawyer now. (R1693). Buzia was outgoing, a leader among their friends, good looking, and very athletic. (R1695). The frequently drank beer in excessive amounts due to all the fraternity parties. (R1699, 1670). Observed John doing cocaine several times with some mutual friends. (R1703). Buzia was not aggressive with others, in fact refused to hit a friend once who spit in his face at a bar. (R1711). Met Buzia's father at a going away party for Buzia, and his father appeared intoxicated. (R1713). John always had friends from high school calling him but wouldn't take their calls. At a wedding in South Florida while they were still in

school, saw Buzia involved with cocaine and he asked Bennett to give them money to buy more cocaine. (R1715, 1716). Buzia specifically came back to Bennett again and asked for money for cocaine. Knew of times Buzia was on cocaine because he would either get aggressive and pumped up or passive. Did not have contact with Buzia after they left school until the early 1990's when saw him in city court in Orlando on a charge of soliciting prostitution. (R1723, 1725). He was stunned when he heard of the murder because it was not just within his character – not the person he knows. (R1726). When he saw him he looked bad. Talked to his relatives and they told him Buzia had substance abuse problems. (R1728).

12. Mary Carol Lohr testified she is Buzia's cousin, and was around the family when they were children and lived in Ogden Dunes. She did not sense there were alcohol problems back then. (R1737). Visited them when she was 13 and remembers hearing arguing between Buzia's parents. Her mother was an alcoholic, and Buzia's father was never around when they visited. (R1730). Mrs. Buzia drank, but it never interfered with the family. (R1743). Cathy Buzia, the Defendant's sister had alcohol problems since Mary lived with her, and has learned she continues to have a problem. (R1745). Cathy Buzia's health has been affected by her drinking, resulting in hospitalizations for liver damage or chronic alcoholism. (R1745, 1747). When she heard of this murder by the Defendant she was shocked and didn't believe it. (R1748). She once saw Buzia's father slap him in the face at the dinner table for refusing to try a jalapeno pepper. (R1751).

13. Sally Borghetti (via video) grew up with the Buzia family and was close to Appellant's older sister, Mary. (R 1797-1798). The Buzias were a normal household, and Borgetti did not see signs of alcohol abuse even though Borgetti's mother thought there was(R 1800). She last saw Mary when she was in college. Borgetti was at Cape Cod and Patricia Breslin was smoking marijuana in the home and the household was permissive. (R 1802, 1805).;

14. John Raaen testified that Buzia worked on the grounds crew where he lived and was the best worker and was dependable (R1813). Raaen had no reason to believe Buzia was taking drugs; however, after the murder the other workers said Appellant had a drug problem. (R 1814, 1816).

15. Randal Durkee and Donald McAfee are Winter Park Police Officers and testified they were involved in arresting Buzia at the bank the morning after the

murder and indicated he looked high or intoxicated, looked disheveled and smelled of alcohol. (R1755-1769).

16. Dr. William Riebsame testified to his opinions regarding the Defendant's addiction to cocaine and alcohol, how it affected his life and that the Defendant was operating at a level of about 40 on the global functioning scale at the time of the murder and was suffering from cocaine withdrawal delirium. (R1840-1867).

As the trial judge found, the testimony Buzia presented at the evidentiary hearing was cumulative to the evidence presented at the penalty phase. Defense counsel is not ineffective for failing to present evidence that is merely cumulative. *Jones v. State*, 949 So. 2d 1021 (Fla. 2006). This Court has written on cumulative evidence numerous times:

> Moreover, the **cumulative mitigation** testimony would not have outweighed the State's evidence in aggravation. *See, e.g., Bell v. State*, 965 So. 2d 48 (Fla. 2007) (finding that the defendant did not demonstrate the prejudice prong because the unpresented penalty phase testimony could not have countered the quantity and quality of the aggravating evidence); *see also Gaskin v. State*, 737 So. 2d 509, 516 n.14 (Fla. 1999) ("Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings."). The additional testimony would only have added, to the mitigation already found. Even if given more weight, the mitigation would not outweigh the three strong aggravators: (1) Rhodes committed the murder while on parole; (2) Rhodes was previously convicted of a violent felony; and (3) the murder was committed while Rhodes was engaged in the commission of an attempted sexual battery.

Rhodes v. State, 986 So. 2d 501, 512-513 (Fla. 2008).

Although additional witnesses were presented at the evidentiary hearing,

> the record supports the court's findings that counsel adequately investigated and prepared mitigating evidence for the penalty phase. During the penalty phase, the defense presented a number of witnesses who testified about Barnhill's social history. While counsel chose not to call the mother and sisters as witnesses after investigation and discussion with the defendant, the facts of his childhood were nonetheless presented through other family members and friends. Nothing of a significant difference was presented at the evidentiary hearing; the testimony that was presented is cumulative to and corroborates the evidence that was presented at the penalty phase. Even with the mental health testimony, the testimony at the evidentiary hearing was consistent in finding that Barnhill suffers from antisocial personality disorder. However, counsel's decision to use Dr. Eisenstein and not Dr. Riebsame at the penalty phase resulted in the presentation of a mental health picture by the defense that did not include testimony concerning antisocial personality disorder.
>
> The fact that there were other witnesses available who could have testified concerning Barnhill's upbringing and his mental health does not demonstrate that counsel was ineffective in choosing the theory and strategy that was presented at the penalty phase. Barnhill simply has not demonstrated a substantial deficiency on the part of counsel that has undermined our confidence in the penalty phase proceeding. We, therefore, affirm the trial court's denial of relief on this issue.

Barnhill v. State/McDonough, 971 So. 2d 106, 115-116 (Fla. 2007).

Counsel conducted a comprehensive investigation, contacted numerous witnesses, made strategic decisions on which witnesses to call, and presented a picture of Buzia's life. At the penalty phase, Mr. Caudill presented the testimony of 14 lay witnesses, 2 police officers and psychologist Dr. Riebsame. Additional witnesses were presented at the *Spencer* hearing. As Mr. Caudill testified, Patricia Breslin choked on the stand. Mr. Caudill made a strategic decision not to call the Hellers because of the

negative information. As in *Barnhill*, although collateral counsel has presented more quantity, the same information was presented to the jury and judge. "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Schoenwetter v. State/McNeil*, 35 Fla. L. Weekly S409 (Fla. July 1, 2010); *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000).

The trial judge, as the finder of fact, made credibility determinations. This Court has held that it will not substitute its judgment for that of the trial court on questions of fact, and likewise on the credibility of witnesses and the weight given to the evidence so long as the trial court's findings are supported by competent, substantial evidence. *Windom v. State* 886 So. 2d 915, 927 (Fla. 2004); *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001).

Even if the testimony presented at the evidentiary hearing had been presented at the penalty phase, the outcome would not have changed. There were four strong aggravators and, as the State argued on cross-appeal, a fifth that should have been found.

ARGUMENT 2

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO SUPPRESS BUZIA'S CONFESSION.

Buzia argues on pages 80-82 that trial counsel should have filed a motion to suppress the videotaped confession because the *Miranda* waiver was not voluntary due to his "intoxication and withdrawal from drugs and alcohol." Further, trial counsel should have hired an expert to testify as to Buzia's intoxication. Last, Buzia claims the trial judge did not address intake of drugs or alcohol.

The trial court held:

> The Defendant next argues that his confession, given the day after the murder, should have been suppressed. - **There was no evidence, however, that the Defendant was under the influence of drugs when he was arrested, approximately sixteen hours after the murder. In fact, the evidence was that he left the murder scene to smoke some crack cocaine, but then the following morning, he was arrested while trying to cash a check to obtain more drugs. Upon his capture, he understood the officer's commands, did not have trouble walking, and did not resist the officers' efforts to search him.** *Id.* at 1207. As trial counsel suggested, there was no basis to move for suppression of the videotape, as there was no indication that he was under the influence of drugs when he was questioned. Even if there was a basis for suppression however, the results of the trial would not have changed, for the reasons stated above. (Emphasis supplied)

(V13, PCR2284).

This Court has held that it will not substitute its judgment for that of the trial court on questions of fact, and likewise on the credibility of witnesses and the weight given to the evidence so long as the trial court's findings are supported by competent, substantial evidence. *Windom v. State* 886 So. 2d 915, 927 (Fla. 2004); *Porter v. State*,

788 So. 2d 917, 923 (Fla. 2001). The post-conviction court's findings with regard to this issue are supported by competent, substantial evidence. Mr. Caudill testified at the evidentiary hearing that he saw no reason to suppress the confession and no reason to hire an expert. (V14, PCR84, 85, 170-171). "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Schoenwetter v. State/McNeil*, 35 Fla. L. Weekly S409 (Fla. July 1, 2010); *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). Dr. Buffington testified at the *Spencer* hearing that his interview with Buzia indicated Buzia was probably not under the influence of cocaine intoxication the day of the murder. (R2624-2625).

This Court recently addressed the use of such an "expert" and held:

> As to the failure to call a "confessionologist," Derrick specifically claims that a "confessionologist" would have testified that the techniques used during Derrick's confession could lead to false confessions; thus, the confession should be suppressed.[7] We rejected a similar claim in *Bryant v. State*, 901 So. 2d 810 (Fla. 2005). There, Bryant claimed that trial counsel provided ineffective assistance by failing to obtain a false confession expert. *Id.* at 821. Bryant neither provided proposed testimony nor claimed to have retained a confession expert. *Id.* Instead, Bryant concluded that an expert could testify that "[Bryant's] confession is typical of those which are false." *Id.* at 821-22 (alteration in original). This Court held that such a claim was legally insufficient. *Id.* at 822. Likewise, Derrick's claims that trial counsel rendered ineffective assistance by failing to present testimonial evidence from the "confessionologist" are legally insufficient. We reject the claim as we did in Bryant because Derrick does not provide specific factual allegations

> regarding the "confessionologist's" testimony. In making this, determination, we also deem it important that Derrick does not allege that his confession to Detective Vaughn was actually false.
>
> FOOTNOTES
> [7]We question whether the testimony of an expert "confessionologist" would even be admissible but do not reach that decision in this postconviction proceeding. *See Beltran v. State*, 700 So. 2d 132, 133 (Fla. 4th DCA 1997) (questioning whether expert testimony regarding the voluntariness of a confession is ever admissible).

Derrick v. State, 983 So. 2d 443, 451 (Fla. 2008). At the evidentiary hearing, Buzia presented the testimony of Dr. Morton and argued that, based on this testimony, the confession would have been suppressed. The trial judge, being the finder of fact as to credibility, rejected Dr. Morton's speculative opinion and found that there was no evidence to support a finding of intoxication. Buzia was arrested at 8:30 a.m. (R2). The confession was began at approximately 10:30 a.m. (R773).

Dr. Buffington testified at the *Spencer* hearing that cocaine eliminates itself from the body very rapidly, and "Some metabolites are gone shortly after, and then others could be outwards of twelve plus hours." (R2627-2628). The murder occurred around 2:30 p.m. and according to Buzia's experts at the evidentiary hearing, he immediately went in search of alcohol and drugs. The confession was 20 hours after the murder, so whether Buzia was under the influence is speculative.

Even if the confession had been suppressed, there was ample evidence of guilt,

including He was arrested driving Mr. Kersch's car while in possession of Mr. and Mrs. Kersch's credit cards and wallets. (R899, 907). He tried to cash a check on Mr. Kersch's account. (R543, 560). He had purchased a 12-pack or beer and gas using Mr. Kersch's credit card. (R748). There were matches to Buzia's shoes which left blood footprints at the murder scene. (R1209). His shoes and socks had blood spatter on them. (R1162, 1165). DNA testing showed that Mrs. Kersch's blood was on Buzia's T-shirt, socks and shorts. (R1052-53). Mr. Kersch's DNA was on Buzia's shorts. (R1053).

ARGUMENT 3

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ENSURE THE JURY VIEWED THE ENTIRE VIDEOTAPE OF THE CONFESSION.

At pages 82-83, Buzia argues trial counsel was ineffective for failing to play the last 20 minutes of the videotape for the jury.

The trial court held:

> The next subclaim of ground two addresses trial counsel's decision not to play the final twenty minutes of the interrogation videotape for the jury. In that part of the tape, the Defendant asks about the victims and shows remorse for his actions. Trial counsel justified his decision not to play that portion of the tape because the Defendant also asked for the interviewer's gun and said he "might as well just die now." Trial counsel stated during his testimony at the evidentiary hearing. "Seminole County juries tend to be above the national average when it comes to their favoring the death penalty and our concern was that if we present a piece of evidence where our client says kill me now, they might want to assist

him and it might make them more apt to vote for the death penalty." This placed counsel in a no-win situation of either removing the end of the tape, leaving the State able to argue that the Defendant did not show remorse, or playing the tape to show his remorse, but also providing the Defendant's statement that he deserved to die for his crime. Trial counsel acknowledged that he could have moved to redact the comment as being more prejudicial than probative, but there is no basis to believe that such a request would have been granted. **In light of counsel's testimony, it was a valid strategic decision not to present this portion of the tape.**

The Defendant further argues that he was prejudiced when the State made closing argument about the unadmitted portion of the tape. The State points out that **trial counsel objected to the comment and the objection was sustained.** Counsel did not seek a curative instruction or a mistrial because he did not feel that either request would be successful. This Court, upon review of the record, concurs, finding that under the totality of the circumstances, this comment did not vitiate the entire penalty phase and would 'not have justified a mistrial. *See Dessaure v. State*. 891 So. 2d 455 (Fla. 2004). Similarly, no curative instruction would have been given, or even if one had, it would not have affected the result of the trial. Finally, it was a fair interpretation of the evidence for the State to argue that the Defendant appeared dazed because of what he had done. Even showing the last twenty minutes of the tape have would not have prevented the State from presenting that hypothesis. **This claim is without merit.**

Next, the Defendant claims that counsel was ineffective for failing to move for suppression of the videotaped interview on the basis of the Defendant's alleged intoxication.3 Alternatively, the Defendant claims that even if a motion to suppress would have been unsuccessful, trial counsel could still have argued to the jury that the statement was involuntary. As noted above, counsel reasonably believed that there was no basis to argue that the statement was involuntary. Therefore, he could not have, in good faith, argued that it should be disregarded by the jury because it was not voluntarily made. This claim should be denied. (Emphasis supplied)

---

3 This claim is also argued in Augment 2 herein.

(V13, PCR2289-2290).

This Court has held that it will not substitute its judgment for that of the trial court on questions of fact, and likewise on the credibility of witnesses and the weight given to the evidence so long as the trial court's findings are supported by competent, substantial evidence. *Windom v. State*, 886 So. 2d 915, 927 (Fla. 2004); *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001). The post-conviction court's findings with regard to this issue are supported by competent, substantial evidence.

Mr. Caudill testified that the only time they would have shown that portion would have been in the penalty phase. (V14, PCR100). There was a portion of the tape during which Buzia asks for a gun to kill himself. Caudill explained that:

> We find that Seminole County jurors tend to be above the national average when it comes to their favoring the death penalty and our concern was that if we present a piece of evidence where our client says kill me now, they might want to assist him and it might make them more apt to vote for the death penalty.

(V14, PCR101). "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Schoenwetter v. State/McNeil*, 35 Fla. L. Weekly S409 (Fla. July 1, 2010); *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000). Last, Buzia fails to inform this Court that when the

prosecutor commented on the last twenty minutes of the tape, defense counsel objected and the objection was sustained. (V14, PCR103). Counsel made a strategic decision not to request a curative instruction because he didn't think it would "do any good." (V17, PCR103).

Even if the last 20 minutes of the videotape had been played, it would not have changed the outcome given the four strong aggravating circumstances.

ARGUMENT 4

TRIAL COUNSEL WAS NOT INEFFECTIVE AT THE GUILT PHASE.

At pages 83-88, Buzia argues counsel was ineffective at the guilt phase for three reasons:

> (1) Failure to preserve and test defendant's blood samples for the presence of alcohol and/or drugs to support suppression of the videotaped confession;[4]
>
> (2) Failure to present evidence of brain damage to negate premeditation; and
>
> (3) Failure to present a coherent closing argument.

(1) Blood Samples. The trial court held:

> The claims in ground one relate to trial counsel's performance during the guilt phase of the trial. **The Defendant did not demonstrate that any action taken, or not taken, by trial counsel would have had an effect on the guilt phase of the trial. The evidence of the Defendant's guilt**

[4] This argument is similar to that presented in Argument 2 herein.

> **was overwhelming.** As noted by the State: the Defendant knew the victims and was identified by Thea Kersch, the surviving victim, as her attacker; blood from both Charles and Thea Kersch was found on the Defendant's clothes; the Defendant's bloody shoeprints were found in the home; the Defendant was arrested Charles Kersch's car and was in possession of Charles Kersch's wallet; he tried to cash a check drawn from the Kersch's bank account and used Charles Kersch's credit card to purchase beer and gasoline; and he confessed to the crime. Trial counsel testified that, in his professional opinion, there was no reasonable chance that the Defendant would be acquitted or found guilty of only lesser charges. Thus, trial counsel's strategy was focused on sparing the Defendant from the death penalty. The specific claims of ineffectiveness are addressed below.
>
> The Defendant's first argument in ground one is that counsel failed to have the Defendant's blood tested for drugs immediately after the arrest. Trial counsel was under the mistaken impression that the State was going to conduct drug testing at its testing facility, so he did not make any arrangements to do so. The State did not have the blood tested, and when the blood was finally sent to Wuesthoff Laboratories at counsel's request about eighteen months later, the results were negative. Collateral counsel presented several experts at the evidentiary hearing who opined that cocaine breaks down quickly in blood and it was unsurprising that there were no traces of cocaine in the blood under the circumstances in this case. However, both Dr. Riebsame and Dr. Danziger testified that the Defendant used cocaine both before and after the crime. At best, then, timely testing would only have shown that there were drugs in the Defendant's system: it would not have shown whether he was under the influence at the time he committed the murder. Furthermore, since voluntary intoxication is not a defense, even if it could have been shown that he was under the influence of drugs when he committed the crime, it still would not have affected the verdict of guilt.

(V13, PCR2283-84). These findings are supported by competent, substantial evidence.

Buzia was arrested on March 15, 2000, at 8:30 a.m. approximately 18 hours after the murder at 2:30 p.m. the day before. (R2). His blood was drawn at 7:00 p.m.

(V5,PCR823). Trial counsel filed a motion to preserve the blood sample on March 20, 2000, the same day they were appointed (R14--16). On March 30, 2000, this Court ordered the State to preserve any blood, hair or other standards. (R18). The testimony at the evidentiary hearing showed that the sheriff's office refrigerated the blood sample, which was the proper procedure used for preserving blood. (V17, PCR738). On October 12, 2001, trial counsel filed a Motion to Allow Independent testing of Defendant's Blood. (R274-75). This Court granted the motion to allow independent testing. (R283). The order directed the Seminole County Sheriff to deliver one vial of blood to Wuesthoff lab in Melbourne and retain custody of the other vial. The tests were negative for drugs. (R2627, 2628).

Dr. Buffington, testified at the *Spencer* hearing that cocaine eliminates itself from the body is very rapidly with some metabolites are gone shortly after, and then others could be outwards of twelve plus hours. (R2628). Dr. Buffington's testimony at the evidentiary hearing was consistent with that at the *Spencer* hearing: that there might not have been any cocaine left in Buzia's blood due to the time lapse between when the blood was taken and the last time Buzia used cocaine. (V18, PCR980). There are two different metabolites in cocaine. The parent compound is typically gone within 2-4 hours and other compounds can last for 12-18 hours. (V18, PCR979). Buzia arrived at the Kersch house at 2:30 p.m. on March 14 and was arrested around 8:30 a.m. on

March 15. (R2) His blood was taken at 7:00 p.m. (V5, PCR823-24). The time between the murder and the blood draw was 28 hours, well outside the timeline for detecting cocaine metabolites. Buzia took the Kersches' money and immediately went in search of cocaine. Thus, it was not the preservation of the blood sample that was crucial, but the time lapse between Buzia's last consumption and the blood test. Although Buzia now conveniently tells experts that he smoked cocaine after the murder, in his videotaped confession he denied cocaine use. (R696, 723). Credit card receipts showed purchase of beer, and the containers were found in Mr. Kersch's car when Buzia was arrested. There was no testimony that Buzia appeared to be high on cocaine at the time of the confession. To the contrary, Buzia told trial counsel the confession was voluntary. (V14, PCR171).

Trial counsel was not deficient. He made every effort to preserve and test the blood. Buzia has failed to show there was any action he could have taken that would have lead to suppression of the confession. Buzia argues that a jury could have seen this tape and found it involuntary. This is pure speculation. Buzia has failed to show prejudice. In order to show the outcome would have been different, Buzia would have to show that the confession would have been suppressed and that the State could not prove its case without the confession. The officer who conducted the interview testified at trial that Buzia understood the questioning and did not appear to be high on

alcohol or drugs. (R685, 723). Buzia clearly relayed his activities, which were corroborated by the evidence. (R589, 659, 664).

Even if the confession had been suppressed, the evidence against Buzia was overwhelming. Buzia was arrested driving Mr. Kersch's car while in possession of Mr. and Mrs. Kersch's credit cards and wallets. (R899, 907). He tried to cash a check on Mr. Kersch's account. (R543, 560). He had purchased a 12-pack or beer and gas using Mr. Kersch's credit card. (R748). There were matches to Buzia's shoes which left blood footprints at the murder scene. (R1209). His shoes and socks had blood spatter on them. (R1162, 1165). DNA testing showed that Mrs. Kersch's blood was on Buzia's T-shirt, socks and shorts. (R1052-53). Mr. Kersch's DNA was on Buzia's shorts. (R1053).

(2) <u>Brain Damage.</u> Buzia claims that the evidence presented at the evidentiary hearing shows he has brain damage which would have negated a finding of premeditation. The trial court held:

> Next, the Defendant argues that evidence of brain damage, had it been sought, would have negated a finding of premeditation. FN. 2. The facts of this case refute this claim as it relates specifically to premeditation. The Defendant's alleged brain damage would cause him to have poor impulse control. It must be remembered that Charles Kersch, the murder victim, was the second person attacked that day. Even if this Court were to accept that the attack on Thea Kersch was impulsive or without premeditation, the Defendant still had time to reflect on events before Charles Kersch arrived home. And in that time, instead of leaving the residence, he concealed Ms. Kirsch in the back bedroom, beat her again,

> stole her money, attacked Charles Kersch upon his arrival home, and then, again instead of leaving him injured in the kitchen, the Defendant went to the garage twice to get axes to finish Charles Kirsch off There were ample opportunities for him to reflect upon his actions, Because the murder was not impulsive, a showing of brain damage would not have negated the premeditation necessary for this to be first-degree premeditated murder.
>
> > Fn. 2. The Court's analysis of the merits of the Defendant's brain damage evidence is done later in this order.

(V 13, PCR2284).[5]

Buzia was convicted of both premeditated and felony murder, so even if premeditation were negated, he is still guilty of first-degree murder. Second, this murder was not only premeditated, but also this Court upheld the cold, calculated, and premeditated aggravating circumstance. *Buzia v. State*, 926 So. 2d 1203, 1214-1216 (Fla. 2006). The testimony of the experts was contradictory, and the trial court resolved credibility issues as the final arbiter which determines credibility and weight of the evidence. *Suggs v. State*, 923 So. 2d 419, 428 (Fla. 2005); *Davis v. State*, 928 So. 2d 1089, 1126 (Fla. 2005). Buzia makes conclusory statements that the testimony regarding being struck in the head in 1994 negates premeditation. No expert testified as to this conclusion. In fact, Dr. Danziger testified to just the opposite, relating to the facts of the case. Buzia had a clear recollection of the

[5] As the trial court notes, the complete analysis regarding brain damage was "later" in the trial court order. Because the claims on appeal were rearranged, this analysis

events and showed goal-directed behavior. (V21, PCR1529). He used a diversion to gain entry to the house and, after striking Mrs. Kersch, moved her to a back bedroom so she could not be seen. (V21, PCR1530). Buzia then cleaned up the house and procured a weapon while he was waiting for Mr. Kersch to come home. After attacking and robbing Mr. Kersch, Buzia used the money he stole to buy crack and beer. The next morning he tried to cash a check at the bank. All these actions are goal-directed purposeful behavior suggestive of reflection, planning and deliberation. (V21, PCR1530). The fact that, after Buzia disabled both Mr. and Mrs. Kersh, he went into the garage and obtained an axe and struck them both again, suggests calculation, thinking and forethought. (V21, PCR1532).

Even if Buzia had brain damage, the issue here is whether counsel was deficient. Mr. Caudill consulted three experts, arranged for two MRI's, and requested a PET scan which he ultimately did not do based on the advice of Dr. Riebsame. Trial counsel was not ineffective for relying on the opinion by a qualified expert. *Darling v. State/McDonough*, 966 So. 2d 366, 378 (Fla. 2007). The fact that Buzia has now secured the testimony of a more favorable mental health expert simply does not establish that the original evaluation was insufficient. *Davis v. State/Crosby*, 928 So. 2d 1089, 1124 (Fla. 2005). Simply presenting the testimony of experts during the

---

now appears in Argument 1 herein. (V13, PCR2287-2289).

evidentiary hearing that are inconsistent with the mental health opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief. *See Carroll v. State*, 815 So. 2d 601, 618 (Fla. 2002); *Cherry v. State*, 781 So. 2d 1040, 1052 (Fla. 2000). As the Florida Supreme Court stated in *Darling v. State/McDonough*, 966 So. 2d 366, 377 (Fla. 2007):

> This Court has established that defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire. *See State v. Sireci*, 502 So. 2d 1221, 1223 (Fla. 1987). Even if the evaluation by Dr. Hercov, which found no indication of brain damage to warrant a neuropsychological workup, was somehow incomplete or deficient in the opinion of others, trial counsel would not be rendered ineffective for relying on Dr. Hercov's qualified expert evaluation. See id. Therefore, trial counsel was not ineffective for failing to order a neuropsychological evaluation.

As the trial court held, Buzia failed to meet his burden on either prong of *Strickland.*

(3) <u>Closing Argument</u>. Third, the trial court held:

> Finally, while counsel testified that he had fashioned a mystery closing argument that he was holding in reserve, he was admittedly caught off guard by the State's waiver of its closing. The "nonsensical" initial argument was reasonable trial strategy, but it backfired due to the State's subsequent waiver, "[A]n attorney is not ineffective for decisions that are a part of a trial strategy that, in hindsight, did not work out to the defendant's advantage. Even a waiver of closing argument does not necessarily constitute ineffective assistance of counsel." *Mansfield v. State*, 911 So. 2d 1160,1174 (Fla, 2005) (citations omitted). As the Florida Supreme Court did in *Mansfield,* this Court "[does] not conclude that it was a breach of a reasonable professional norm in this case for trial counsel to have planned to make a substantive rebuttal argument after the State closed. Nor do we find that the defendant was prejudiced by trial

> counsel not giving the rebuttal argument." *Id.* When viewed with counsel's perspective that a guilty verdict was not in doubt, the decision to make a poor first closing argument was not prejudicial. For the above reasons, each of the claims set forth in ground one should be denied for failure to demonstrate prejudice as required by *Strickland.*

(V13, PCR 2285).

These findings are supported by competent, substantial evidence. Both Mr. Caudill and Mr. Figgatt testified they made a strategic decision to present a "weak" argument in the first round so that the State would not have the opportunity to rebut their arguments. However, the State waived closing argument, an event which virtually never happens. Because the State waived, trial counsel was precluded from making his final closing argument. Defense counsel made a strategic decision. Strategic decisions are virtually unassailable. There is a strong presumption that the performance of trial counsel was not ineffective. *See Strickland*, 466 U.S. at 690. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689. The defendant bears the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* *See also Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). The evidence of Buzia's guilt was overwhelming. Trial counsel made a strategic decision to try to

sandbag the State, but got sandbagged instead. Although in hindsight the strategy did not work, hindsight is not the standard for judging the reasonableness of counsel's actions.

Even if trial counsel had been able to present their rebuttal closing argument, the outcome would not change. The evidence was overwhelming. Buzia confessed, Thea Kersch survived, and Buzia not only left DNA evidence at the scene but also carried the victims' blood on his clothes.

ARGUMENT 5

THE TRIAL COURT DID NOT ERR BY ENTERING SUMMARY DENIAL ON CERTAIN CLAIMS

On pages 89-92, Buzia states that the trial judge erred in summarily denying unidentified claims. This issue is inadequately pled because Buzia has failed to identify the specific claims which the trial judge denied summarily, and is not adequately briefed to present a viable claim. *See Simmons v. State*, 934 So. 2d 1100, 1111 n.12 (Fla. 2006) *citing Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997)*; Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). Without waiving this argument, the State will attempt to identify the specific claims about which Buzia complains.

(1) Depth and severity of alcohol problem to negate premeditation. Buzia does not cite to trial court order, and offers only one cite to alleged factual support. A review of the order summarily denying claims reveals that this claim may be Claim 1a

from the Motion to Vacate, which the trial judge summarily denied as follows:

> Evidence of the Defendant's whereabouts and actions leading up to the crime were presented during the penalty phase. However, they were not presented during the guilt phase where the Defendant argues they could have been used to negate premeditation. Evidence of "voluntary intoxication is not admissible to show that the defendant lacked the specific intent to commit an offense." Fla. Stat. 775.051(2000). Therefore, the Defendant/s claim that counsel was ineffective for failing to present evidence of the depth and severity of the Defendant's drug and alcohol problem should be DENIED.

(V4, PCR726).

Buzia was convicted of both premeditated and felony murder; he was also convicted of robbery and burglary which support the felony murder. (V1, PCR 202, 205). Voluntary intoxication is not a legal defense to a crime and is not admissible to support a defense of lack of specific intent. §775.051 *Fla. Stat.*; *Jones v. State/McDonough*, 949 So. 2d 1021 (Fla. 2006). The facts support not only premeditation, but also cold, calculated premeditation as found by this Court. *Buzia v. State*, 926 So. 2d 1203, 1214-1216 (Fla. 2006). Summary denial was appropriate.

(2) <u>Prosecutor's improper closing argument</u>. This appears to be Claim 2g from the Motion to Vacate, which the trial judge denied as follows:

> The Defendant specifically argues that the State mischaracterized the evidence and impermissibly called the Defendant an "ax murderer" during closing arguments to the jury in an effort to inflame the jury. "[P]rosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate

> review is whether 'the error committed was so prejudicial as to vitiate the entire trial." *State v. Murray*, 443 So. 2d 955, 956 (Fla. 1984) (citing *Cobb v. State*, 378 So. 2d 230, 232 (Fla. 1979)). The Florida Supreme Court has held that a prosecutor's statement during closing g arguments that the defendant was a malevolent … brutal rapist and conscienceless murderer" was "not so prejudicial as to vitiate the entire trial" and thus, did not constitute fundamental error. *Chandler v. State*, 702 So. 2d 186, 191 n. 5 (1997). Further, "[w]hen it is understood from the context of the argument that the charge is made with reference to the evidence, the prosecutor is merely submitting to the jury a conclusion that he or she is arguing can be drawn from the evidence." *Davis v. State*, 698 So. 2d 1182, 1190 (Fla. 1997). The closing statements made by the State during the penalty phase of this trial were clearly presented as arguments drawn from the evidence and were not so prejudicial as to vitiate the entire trial. As such, the Defendant's claim that counsel was ineffective for failing to object to improper comments made by the State during its closing argument in the penalty phase should be DENIED.

(V4, PCR726). Buzia killed Mr. Kersch with an ax, a fact this Court repeatedly stated in *Buzia v. State*, 926 So. 2d 1203 (Fla. 2006). Thus, the prosecutor's statement was not objectionable, and counsel is not ineffective for failing to object to an unobjectionable, fair comment on the evidence. Because the prosecutor was making a fair comment based on the evidence presented at trial, counsel cannot be deemed ineffective for failing to object. *See Spann v. State*, 985 So. 2d 1059, 1068 (Fla. 2008); *Mungin v. State*, 932 So. 2d 986, 997 (Fla. 2006) (finding that defense counsel was not ineffective for failing to object because none of the comments were improper). Even if counsel had objected to the statement, the outcome would not change.

(3) <u>Failure to request specific verdict form</u>. This appears to be Claim 2h from

the Motion to Vacate, which the trial judge denied as follows:

> The Florida Supreme Court has held that there is no requirement for "a special verdict form indicating the aggravating factors found by the jury." *Kormondy v. State*, 845 So. 2d 41, 54 (2003). "[Counsel cannot be deemed ineffective for pursuing futile motions." *Gordon v. State*, 863 So. 2d 1215, 1219 (Fla. 2003). The Defendant's claim that counsel was ineffective for failing to request a specific verdict form should be DENIED as a matter of law.

(V4, PCR727). Buzia further fails to recognize *State v. Steele*, 921 So. 2d 538 (Fla. 2005), and ignores the fact that counsel cannot be ineffective for failing to raise a meritless claim. *Darling v. State/McDonough*, 966 So. 2d 366 (Fla. 2007); *Raleigh v. State/McDonough*, 932 So. 2d 1054, 1064 (Fla. 2006); *Jones v. State/Crosby*, 845 So. 2d 55, 74 (Fla. 2003). *Steele* establishes that this claim has no merit. This claim fails legally and should be summarily denied.

(4) Inadequate mental health evaluation. This issue is not supported by any record cite. It appears to be Claim 3 from the Motion to Vacate, which the trial judge denied as follows:

> The Defendant's third claim is that the Defendant's mental health counselor was ineffective for failing to conduct the appropriate tests for organic brain damage and mental illness. The Defendant argues that under *Mason v. State*, 489 So. 2d 734 (Fla. 1986), due process requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. However, the Court in *Mason* was evaluating whether trial counsel was ineffective for not requesting a competency hearing: the court in *Mason* found that counsel was not ineffective as there was evidence that the defendant was competent to stand trial. *Id.* at 736. The effectiveness of counsel regarding the

> selection of this expert is covered in ground 1d, but there is no constitutional right to the effective assistance of a mental health expert. **Additionally, this is an issue that was or could have been heard on direct appeal and is therefore procedurally barred**. *Marshall v. State*, 854 So. 2d 1235, 1248 (Fla. 2003). The Defendant's claim that the Defendant's mental health counselor was ineffective for failing to conduct the appropriate tests for organic brain damage and mental illness should be DENIED. (Emphasis supplied)

(V4, PCR727). This claim is based on *Ake v. Oklahoma*, 470 U.S. 68 (1985) and the issue is procedurally barred because it was not raised on direct appeal. See *Evans v. State/McDonough*, 946 So. 2d 1, 6 (Fla. 2006); *Marshall v. State*, 854 So. 2d 1235, 1248 (Fla. 2003).

All the claims (which *may* have been) raised herein were properly summarily denied. Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record. *Gore v. State*, 24 So. 3d 1, 11 (Fla. 2009); *Owen v. State*, 986 So. 2d 534, 543 (Fla.2008); *Connor v. State*, 979 So. 2d 852, 868 (Fla.2007). A court's decision whether to grant an evidentiary hearing is subject to de novo review. *See State v. Coney*, 845 So. 2d 120, 137 (Fla.2003). Allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for postconviction relief. See *Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008); *Melendez v. State*, 612 So. 2d 1366, 1369 (Fla.1992) (holding counsel cannot be deemed ineffective

for failing to make meritless argument).

ARGUMENT 6

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO DISCOVER THAT DONNA BIRKS FINGERPRINT IDENTIFICATION WAS INCONCLUSIVE; THERE IS NO NEWLY-DISCOVERED EVIDENCE; THE STATE DID NOT VIOLATE *BRADY V. MARYLAND.*

At pages 92-96, Buzia raises several claims regarding fingerprint analyses:

(1) Counsel was ineffective for filing to hire an independent fingerprint analyst to challenge Donna Birks' fingerprint identification;

(2) The State violated *Brady v. Maryland* in failing to advise that Donna Birks' fingerprint identification was inconclusive; and

(3) The inconclusive fingerprint identification is newly-discovered evidence.

(1) Ineffective assistance of counsel. Regarding hiring an independent fingerprint analyst, the trial court held:

> In claim 1e, the Defendant claims that counsel was ineffective for failing to have an independent fingerprint examiner analyze the palm print that was mistakenly identified as the Defendant's. The fingerprint was later determined to be of insufficient quality to make any identification; the Defendant was not excluded as the person who left the bloody palm print.
>
> **The Defendant has not met either prong of *Strickland* with regard to counsel's failure to consult an independent fingerprint analyst.** At the time of trial, Donna Birks was a respected expert in Seminole County who had over twenty years of experience in fingerprint analysis. Counsel had no reason to believe that she had actually made several improper

> identifications since 1998, the year before the murder. Therefore, counsel's decision to expend resources in other areas was not unreasonable because he could not have known that her fingerprint analysis would "later become an issue. The Defendant has also not demonstrated any prejudice by counsel's actions. The other substantial evidence of guilt illustrated above and in the Florida Supreme Court's affirmance of the Defendant's judgment and sentence, clearly shows that Donna Birks' exclusion or impeachment would have had no effect on the trial. Even without the identification, the jury certainly would have inferred that the unidentified bloody print found in the garage belonged to the Defendant, as it corroborated details expressed in his confession.

(V13, PCR2284-85).

These findings are supported by competent, substantial evidence. The trial judge cited the correct *Strickland* standard at the beginning of his order and applied that standard correctly. Buzia's trial was in 2003. The evidence that Donna Birks' fingerprint identifications may not be reliable first became available in 2007. (V6, PCR943). Buzia presented no evidence at the evidentiary hearing to show that a reasonable attorney would have any reason to investigate Donna Birks. Further, if the palm print had insufficient detail to identify anyone, it would not have changed the outcome. Buzia confessed to going into the garage and getting the axe from the top of the cabinet.

(2) <u>Brady</u>. Regarding the alleged *Brady* violation, the trial court held:

> In claim four, the Defendant argues that the State violated *Brady* v. *Maryland.* 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), with regard to the fingerprint evidence and the blood and hair evidence

collected from the Defendant. FN7. In order to prove a *Brady* violation,

> a defendant must prove the following: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Melendez v. State, 718 So. 2d 746, 748 (Fla. 998) (quoting *Hegwood v. State*, 575 So. 2d 170, 172 (Fla. 1991)).

> FN7. In the motion, the Defendant alleges a violation of *Giglio* v. *United States,* 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed.2d 104 (1972) as well, but there was no evidence presented of the State knowingly using false testimony to convict the Defendant.

The alleged *Brady* violation is that the State knew or should have known that Donna Birks' fingerprint identifications were questionable as far back as 1998. In actuality, her errors were not discovered until a whistleblower in the Sheriff's Office, Tara Williamson, disclosed her concerns in 2007, four years after the trial. Prior to that, there was no reason for the State to believe that Birks work was substandard. The fact that Ann Mallory, who is not a certified forensic examiner, supervised the department is not a "red flag" as claimed by the Defendant, unless she was actually conducting forensic work. There is no evidence that she was doing so. The Defendant has not provided any other evidence that shows that the State knew or should have known of the problems in the fingerprint department of the Seminole County Sheriff's Office. Therefore, the Defendant has failed to meet his burden with respect to the first prong of *Brady.* Since the State was unaware of the evidence, this Court cannot find that the evidence was suppressed. Thus, prong three of *Brady* also fails. Finally, as discussed above, the Defendant has not demonstrated that the result of the trial would have been different if the fingerprint evidence was not presented, or even if it was impeached.

> The Defendant's fifth claim is that newly discovered evidence of Donna Birks' suspension would probably produce an acquittal at trial. As the State argues, Birks' suspension did not occur until 2007, so the jury could not have heard any evidence of the suspension at the trial in 2003. Even if this were read as a claim that the misidentification of the fingerprint was newly-discovered evidence, that claim would be rejected for the reasons stated in claim 1e.

(V13, PCR2290-91).

These findings are supported by competent, substantial evidence. There was no evidence the State knew, or should have known, that Donna Birks' fingerprint evaluations were inaccurate. The first time any party knew this information was on March 12, 2007, when Tara Willliamson filed a memo with her superiors. (V6, PCR943). An administrative review began immediately thereafter. (V6, PCR944). Buzia acknowledges he was notified by the State of that review on May 3, 2007. (V1, PCR31). Buzia has failed to present any evidence that the State knew about Birks before the investigation into her actions began. Although this Court afforded an evidentiary hearing on this matter, the only evidence presented was that the palm print on the cabinet was insufficient to identify. Buzia failed to show that there was any *Brady* violation, and this claim failed for lack of proof. *Reaves v. State*, 826 So. 2d 932, 942 (Fla. 2002)(defendant has burden of proof in postconviction proceeding and conclusory allegations fail to meet that burden). Neither has Buzia shown materiality under *Brady* given the overwhelming evidence of guilt. Buzia admitted that he got

the two axes from the garage. The identification of his print is not needed to establish he went to the garage and got the axes.

(3) <u>Newly-discovered evidence.</u> As to the claim of newly-discovered evidence, the trial judge held:

> The Defendant's fifth claim is that newly discovered evidence of Donna Birks' suspension would probably produce an acquittal at trial. As the State argues, Birks' suspension did not occur until 2007, so the jury could not have heard any evidence of the suspension at the trial in 2003. Even if this were read as a claim that the misidentification of the fingerprint was newly-discovered evidence, that claim would be rejected for the reasons stated in claim 1e.[6]

(V13, PCR2291).

In *Jones v. State*, 591 So.2d 911 (Fla. 1991), this Court articulated a two-step inquiry for determining whether a defendant is entitled to relief for newly discovered evidence. *McLin v. State*, 827 So.2d 948, 956 (Fla. 2002) (*citing Jones*, 591 So.2d at 915-16). The first prong is that in order to be considered newly discovered, the evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence. *Jones v. State*, 709 So.2d 512, 521 (Fla.1998). The second

[6] The findings on Claim 1e are in the first section of this argument. The record cite for the findings on Claim 1e is at (V13, PCR2284-85). Included in those findings is that there is no prejudice because in Buzia's confession he states he went into the garage and got a second ax from the top of the shed. This fact is also found in this Court's opinion in *Buzia v. State*, 926 So. 2d 1203 (Fla. 2006).

prong requires that in order to provide relief, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *McLin*, 827 So.2d at 956 (*quoting Jones*, 591 So.2d at 915).

Buzia presented no evidence that trial counsel knew or could have known of this evidence at the time of trial.

The three claims fail under *Strickland, Brady,* and *Jones* on all prongs of all three cases. The evidence of guilt was overwhelming and, even if this evidence were available, it would not have been material under any standard.

ARGUMENT 7

THE STATE DID NOT VIOLATE *BRADY V. MARYLAND* BY FAILING TO PRESERVE BLOOD SAMPLES.

Buzia alleges the State failed to properly preserve and/or store the blood. As argued at the trial level, this issue was procedurally barred and could have been raised on direct appeal. Buzia alleged this was a *Brady* violation; but failed to explain how the State failed to disclose exculpatory evidence, given the fact that counsel was aware of the situation and there was no exculpatory evidence. In fact, the testimony at the evidentiary hearing showed that even immediate testing of the blood may not have resulted in a positive test for cocaine. This claim is speculative, there has been no showing exculpatory evidence was suppressed, and Buzia cannot show materiality.

To establish a claim based on the State's withholding of material, exculpatory evidence in violation of *Brady v. Maryland*, Downs must establish the following factors:

> (1) that the Government possessed evidence favorable to the defendant ;
>
> (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence;
>
> (3) that the prosecution suppressed the favorable evidence; and
>
> (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Melendez v. State, 718 So.2d 746, 748 (Fla. 1998) (quoting Hegwood v. State, 575 So.2d 170, 172 (Fla.1991)).

Buzia failed to establish any of the four prongs. Defense counsel knew the blood existed. There is no evidence of exculpatory evidence.

The trial judge held:

In order to prove a *Brady* violation,

> a defendant must prove the following: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Melendez v. State, 718 So. 2d 746, 748 (Fla. 998) (quoting *Hegwood v. State*, 575 So. 2d 170, 172 (Fla. 1991)).

> Fn. 7. In the motion, the Defendant alleges a violation of *Giglio* v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed.2d 104 (1972) as well, but there was no evidence presented of the State knowingly using false testimony to convict the Defendant.

(V13, PCR2290).

Although the trial judge outlined the *Brady* issue, there was no ruling and this issue is waived for appellate purposes. Failing to get a ruling is a waiver of the issue. *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983); *Rivera v. State*, 913 So. 2d 769 (Fla. 5th DCA 2005).

Thus, this issue is not only waived, but also is procedurally barred. Further, the claim has no merit and fails for lack of proof.

ARGUMENT 8

THERE IS NO ERROR, INDIVIDUAL OR CUMULATIVE

Because Buzia has failed to establish any individual error, there can be no cumulative error. *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008).

ARGUMENT 9

THE INCOMPETENT-TO-BE-EXECUTED CLAIM IS NOT RIPE FOR REVIEW

Buzia alleges no facts in support of this allegation, nor did he offer any support

of this claim at the trial court. In fact, he even concedes that this claim is not ripe for consideration at this time. (Brief at 100). *See Thompson v. State*, 759 So. 2d 650, 668 (Fla. 2000); *Provenzano v. State*, 751 So. 2d 37 (Fla. 1999); Fla. R. Crim. P. 3.811(d). This claim has no merit. *Johnson v. State*, 804 So. 2d 1218, 1225-1226 (Fla. 2001). This claim should be summarily denied. *See Darling v. State/McDonough*, 966 So. 2d 366 (Fla. 2007).

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests this Honorable Court affirm the order of the trial court and deny all relief.

Respectfully submitted,

BILL McCOLLUM
Attorney General

BARBARA C. DAVIS
Florida Bar No. 0410519
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118
(386) 238-4990
Fax - (386) 226-0457

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Marie-Louise Samuels Parmer, and Maria Chamberlin, Capital Collateral Regional Counsel, 3801 Corporex Park, Suite 210, Tampa, Florida 33619, this _____ day of November, 2010.

_____
Assistant Attorney General

CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

_____
Assistant Attorney General