Electronically Filed 04/17/2013 08:57:58 PM ET

RECEIVED, 4/17/2013 20:58:33, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

GARY RICHARD WHITTON

Appellant,

v. CASE NO. SC11-2083

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR WALTON COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399

DEPARTMENT OF LEGAL AFFAIRS
PL-01, THE CAPITOL
Tallahassee, Florida 32399-1050
(850) 414-3300, Ext. 3583
(850) 487-0997 (Fax)

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

References to the appellant will be to "Whitton" or "Appellant." References to the appellee will be to the "State" or "Appellee." References to Whitton's record on direct appeal will be to "TR" followed by the appropriate volume and page number. References to the post-conviction record on appeal will be to "PCR" followed by the appropriate volume and page number. References to the supplemental volumes on appeal will be to "SPCR" followed by the appropriate volume and page number. References to Whitton's initial brief will be to "IB" followed by the appropriate page number.

STATEMENT OF THE CASE AND RELEVANT FACTS

Gary Whitton was born on February 4, 1959. He was 31 years old when he murdered James Mauldin. The relevant facts concerning the October 9, 1990 murder of Mr. Mauldin may be found in this Court's opinion on direct appeal. Whitton v. State, 649 So.2d 861, 862-864 (Fla. 1994).

On direct appeal, Whitton raised two guilt phase claims and five penalty phase claims. On December 1, 1994, this Court rejected each of Whitton's claims and affirmed. Whitton v. State, 649 So.2d at 867. Whitton next filed a petition for a writ of certiorari in the United States Supreme Court. On

October 2, 1995, the Court denied review. Whitton v. Florida, 516 U.S. 832 (1995).

On March 26, 1997, Whitton filed an initial post-conviction motion seeking relief from his convictions and sentences. The motion was a "shell" motion that identified twenty-four claims for relief. (PCR Vol. 1-42). Subsequently, Whitton filed two more amendments. In his third amended motion, filed on November 1, 2004, Whitton filed 22 claims. (PCR Vol. XII 2252-2395).[1]

The collateral court held a case management conference (Huff hearing) on December 16, 2004. (PCR Vol. XIII 2532). In an order dated March 21, 2005, the collateral court granted an evidentiary hearing on several of Whitton's claims. (PCR Vol. XIII 2533).

An evidentiary hearing was held October 31 – November 3, 2005. On June 2, 2011, the collateral court denied Whitton's third amended and supplemented motion for post-conviction relief. (PCR Vol. XXIV 4685-4802; PCR Vol. XXV 4803-5002; PCR Vol. XXVI 5003-5202; PCR Vol. XXVII 5203-5402; PCR Vol. 5403-

[1] On January 18, 2005, Whitton filed a supplement to his third amended motion. In the supplement, Whitton challenged the use of a prior robbery, as a prior violent felony, for which Whitton was convicted in Alabama. Whitton also claimed that counsel was ineffective for failing to call Whitton's co-defendant, Harry Packer. According to Whitton, Mr. Packer would testify that Whitton was a minor participant or perhaps even an innocent bystander. (PCR Vol. XIII 2482-2487). On February 11, 2005, the State filed a response. (PCR Vol. XIII 2488-2500). Whitton offered no evidence to prove the claim below and does not raise it here.

5551).[2] Whitton filed a notice of appeal on October 21, 2011. On December 5, 2012, Whitton filed his initial brief. This is the State's answer brief.

SUMMARY OF THE ARGUMENT

ISSUE I: In this claim, Whitton presents numerous sub-claims alleging various violations of due process. Whitton failed to prove the State violated Whitton's right to due process.

ISSUE II: In this claim, Whitton raises numerous sub-claims of ineffective assistance of counsel at the guilt phase. Whitton wholly failed to show counsel was ineffective at the guilt phase of his capital trial.

ISSUE III: In this claim, Whitton raises a claim of improper ex parte communications between the judge, bailiff, and jury. The evidence offered at the evidentiary hearing proved juror questions were properly handled in the presence of counsel for the defense, the state, and the defendant. Evidence that none of the alleged ex parte communications were *ex parte* defeats Whitton's claims.

ISSUE IV: In this claim, Whitton raises numerous sub-claims of ineffective assistance of counsel at the penalty phase. Whitton claims that counsel was deficient in his presentation of both

[2] The collateral court granted Whitton's motion for rehearing, in part, clarifying its ruling on Whitton's lethal injection claim but otherwise denying relief. (PCR Vol. XXVIII 5587-5599).

lay and expert testimony. Whitton failed to show counsel was ineffective. Counsel presented evidence in mental mitigation and to demonstrate Whitton had a horrific childhood. At the evidentiary hearing, Whitton presented more lay witnesses at the evidentiary hearing than were presented at trial. The gist of their testimony, albeit in more detail, was the same as offered by trial counsel at trial. Accordingly, counsel was not ineffective in the presentation of lay mitigation testimony. Insofar as expert testimony, Whitton has failed to prove counsel was ineffective. Trial counsel called an expert witness at trial. Although Whitton presented a more favorable expert at the evidentiary hearing, trial counsel is not rendered ineffective as a result.

ISSUE V: In claim V, Whitton raises a claim of cumulative error. However, Whitton has failed to show error. Where there is no error, there can be no cumulative error.

ARGUMENT

ISSUE I

WHETHER THE STATE DEPRIVED WHITTON OF DUE PROCESS

In his first claim, Whitton purports to raise claims pursuant to Brady v. Maryland, 373 U.S. 83 (1963). In order to establish a Brady violation, three elements must be shown: (1) the evidence at issue was favorable to the defendant, either

because it is exculpatory or is impeaching; (2) the evidence was suppressed, willfully or inadvertently, by the State, and (3) because the evidence was material, its suppression resulted in prejudice. Strickler v. Greene, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); see also Johnson v. State, 921 So.2d 490, 507 (Fla. 2005); Rogers v. State, 782 So.2d 373, 378 (Fla. 2001). To establish the materiality element of Brady, the defendant must demonstrate a reasonable probability, that had the evidence been disclosed to the defense, the results of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Conahan v. State, --- So.3d ----, 2013 WL 1149736 (Fla. 2013).

Whitton also seems to, at least to some of the sub-claims, raise a claim the State violated the dictates of Giglio v. United States, 405 U.S. 150 (1972). To establish a Giglio violation, three prongs must be shown: (1) the testimony was false; (2) the prosecutor knew it was false, and (3) the testimony was material. Guzman v. State, 868 So.2d 498, 505 (Fla. 2003) (citing Ventura v. State, 794 So.2d 553, 562 (Fla. 2001)). If the defendant successfully establishes the first two prongs, then the State bears the burden of proving that the testimony was not material by showing that there is no reasonable possibility that it could have affected the verdict

because it was harmless beyond a reasonable doubt. See Johnson v. State, 44 So.3d 51, 64–65 (Fla. 2010); Guzman, 868 So.2d at 506–07.

The standard of review for both Brady and Giglio claims is mixed. In applying a mixed standard of review, this Court defers to the trial court's factual findings that are supported by competent, substantial evidence and reviews the application of the law to those facts *de novo*. Suggs v. State, 923 So.2d 419, 426 (Fla. 2005); Lightbourne v. State, 841 So.2d 431, 437–38 (Fla. 2003)). While Whitton purports to raise this first claim and its attendant multiple sub-claims as Brady or Giglio violations, some of the sub-claims are not Brady or Giglio claims at all but some sort of generalized due process violation.

A. Kenneth McCollough and Jake Ozio's testimony

(1) ***Kenneth McCollough***

In this part of Whitton's sub-claim, Whitton alleges the State intentionally offered the false testimony of Kenneth McCollough (a Giglio claim) and suppressed evidence of McCollough's alleged sexual perversion and relationship with the prosecutor's mother (a Brady claim).

Whitton's Brady claim can be denied because, as found by the collateral court, Whitton has never offered any evidence to support the notion that McCollough's alleged sexual proclivities

constitute Brady material. To the extent that such evidence would arguably be admissible as impeachment evidence, which the State does not concede, Whitton has failed to show that if this "evidence" would have been disclosed there is a reasonable probability of a different outcome. Trial counsel extensively impeached McCollough at trial. (TR Vol. VIII 1647-1652). Additionally, the defense clearly knew of McCollough's relationship with the prosecutor's mother because the defense brought it out at trial. (TR Vol. VIII 1650). Absent a "suppression" of evidence, there can be no Brady violation.

In support of his Giglio claim concerning McCollough, Whitton presented several witnesses to testify. At the time of the evidentiary hearing, McCollough was dead. McCollough did not execute an affidavit recanting his trial testimony.

At the evidentiary hearing, Sheila Lowe, one of McCollough's many ex-wives, testified that was married to Kenneth McCollough. They were married in 1990 for about a year. (PCR Vol. XVIII 3482). She had known him since 1981 and claimed she knows of his reputation for truthfulness and honesty in the community. According to Ms. Lowe, McCollough was not truthful about nothing, never. That was his reputation. (PCR Vol. XVIII 3483). During cross-examination, she admitted that her testimony about McCollough's reputation was based on how he was with her and what she knew about him. She could not be

specific. (PCR Vol. XVIII 3485). She told the collateral court that it was her personal opinion that McCollough is a liar. She did not have any other basis to believe that he is a liar except what she personally believes. (PCR Vol. XVIII 3487). On re-direct, Ms. Lowe told the collateral court that nobody would trust McCollough. (PCR Vol. XVIII 3488).

Billy Key testified that he met McCollough in jail. On October 22, 1993, Key spoke with McCollough who told him he wanted to retract his testimony about Whitton. Key testified that McCollough told him that he knew nothing about Whitton's case and the prosecutor told him what to say. Key told the collateral court that McCollough said Whitton did not say anything to him about the crime. (PCR Vol. XIX 3772).[3]

George Broxson testified that he was serving a life sentence. (PCR Vol. XX 3927). Broxson offered no evidence that McCollough "recanted" to him. Instead, Broxson testified that McCollough told him he wanted to work out a charge against him (deviant sex crime) and told Broxson that he would do whatever it took for this crime not to come out in public. (PCR Vol. XX 3930). Mr. Broxson also explained that a snitch is someone who

[3] Interestingly, the notion that McCollough knew nothing about Whitton's case and that Whitton did not say anything about the crime to McCollough was actually refuted by another witness called by Whitton at the evidentiary hearing. Donald Hanish testified that McCollough helped Whitton with his case and saw McCollough and Whitton working on Whitton's legal paperwork. (PCR Vol. XIX 3738).

will tell on their own mother to get themselves out of trouble. (PCR Vol. XX 3933). McCollough had trouble with other inmates. They wanted to beat him up. Mr. Broxson guessed it was because of McCollough's deviant crimes. (PCR Vol. XX 3934).

Donald Hanish, a five time convicted felon, testified that Kenneth McCollough was a snitch and known by the name of "Satan". Like Broxson, Hanish did not testify that McCollough recanted to him. Instead, Hanish was offered as a sort of "snitch" expert. According to Hanish, inmates avoid snitches. It was common knowledge around the jail that McCollough was a snitch. Hanish could not say whether Whitton knew that McCollough was a snitch. (PCR Vol. XIX 3736-3737). Hanish told the collateral court that McCollough did have access to Whitton's legal work because he helped him on his case. (PCR Vol. XIX 3738). Hanish saw he and Whitton work on the paperwork. McCollough had the books that Whitton needed and nobody else had it. (PCR Vol. XIX 3738). Hanish never heard Whitton talk about his case. (PCR Vol. XIX 3738).

The collateral court denied the claim concluding that Whitton had failed to offer any evidence to support it. The court found that "vague testimony about Mr. McCollough's relationships, reputations, and intentions do not demonstrate to this Court that Mr. McCollough testified untruthfully at trial." (PCR Vol. XXIV 4702).

The collateral court correctly denied this claim when it found that Whitton had produced no credible evidence that the State knowingly presented the false testimony of Kenneth McCollough or indeed that McCollough ever actually recanted or his alleged recantation is true. This Court has acknowledged that recantation evidence is exceedingly unreliable. Lambrix v. State, 39 So.3d 260, 272 (Fla. 2010). The collateral court rejected Whitton's claim concluding that Whitton failed to offer any clear evidence to support that McCollough testified untruthfully at trial or that the State knew he testified untruthfully. Because this finding is supported by competent, substantial evidence, this Court should affirm. Lambrix v. State, 39 So.3d 260, 272 (Fla. 2010).

(2) ***Jake Ozio***

In this part of Claim I, Whitton claims that Jake Ozio lied at trial. Whitton appears to raise this claim under two separate theories. First, Whitton appears to allege a Giglio violation. Second Whitton challenges the collateral court's ruling denying Whitton's request to take Ozio's deposition to perpetuate testimony. (IB 15).[4]

[4] The standard of review applied to Whitton's allegation the collateral court erred in denying his motion to take a deposition to perpetuate testimony, is an abuse of discretion. The standard of review on the deposition issue is an abuse of discretion. Hurst v. State, 18 So.3d 975, 1007 (Fla. 2009)

During post-conviction proceedings, collateral counsel procured an affidavit from Jake Ozio. In it, Ozio claimed that, contrary to his trial testimony, he did not hear Whitton admit to stabbing or killing anyone. (SPCR Vol. IV 798-800). Ozio refused to return to Florida to testify at the evidentiary hearing.

The collateral court denied the substantive Giglio claim, noting first that Whitton never attempted to move the affidavit into evidence. The collateral court that, even if he had, it would consider the affidavit unreliable because "Ozio was unwilling to stand behind his word and accept the consequences of his statements." (PCR Vol. XXIV 4703, n. 44). The collateral court concluded that Whitton had offered no reliable evidence that Ozio lied at trial. (PCR Vol. XXIV 4702-4703). The collateral court also denied Whitton's request to take Ozio's deposition to perpetuate testimony. (TR Vol. XXI 4155-4172).

This Court should affirm the collateral court's ruling for two reasons. Nowhere in Ozio's affidavit did Ozio claim he told the police or the prosecutor that he intended to lie at trial or that he did not overhear Whitton say that he stabbed the victim but would testify to it anyway. Accordingly, even if the collateral court had considered Ozio's affidavit, no Giglio

("[T]he decision whether to grant a motion to perpetuate testimony lies within the discretion of the trial court.")

violation would be proven. Essential to a Giglio claim is proof that the prosecutor knew that Ozio's testimony was false and presented anyway. Conahan v. State, --- So.3d ----, 2013 WL 1149736 (Fla. 2013). Absent any evidence that the prosecutor knew Ozio's testimony was false, the collateral court correctly denied Whitton's Giglio claim in any event.

The collateral court did not abuse its discretion if refusing to order the parties to travel to Washington to take Ozio's deposition to perpetuate testimony. Permitting the admission of an alleged recantation witness's testimony, by deposition, when the witness refuses to testify at an evidentiary hearing invites collateral defendants to obtain false recantations on the promise that no adverse consequences can be forthcoming. Such manipulation of the criminal justice system should not be permitted or encouraged. This Court should affirm.

B. Shirley Ziegler

Contrary to Whitton's allegation, this is not a Brady claim. (IB 15 n.21). It cannot be a Brady claim because trial counsel brought the alleged misconduct of State agents toward Ms. Ziegler to the trial court's attention before Ziegler testified. As such, there was no "suppression" of anything. (TR Vol. IX 1887-191). Nor is it a Giglio claim. This is so because Whitton makes no allegation of false testimony. Indeed,

Ziegler testified for the defense. Instead, Whitton presents this as some sort of generalized "due process" claim.

Shirley Zeigler was an FDLE agent DNA analyst who testified for the defense in this case. According to Whitton and Ms. Ziegler, she was so intimidated by actions of the Walton County Sheriff's Department and prosecutor Clay Adkinson that she felt compelled to request armed FDLE escorts to testify for the defense. Ms. Zeigler testified at the evidentiary hearing that none of the perceived intimidation affected her ability to testify truthfully in Whitton's case.

At trial, the defense intended to call Ms. Shirley Ziegler to testify that she received a swabbing from Whitton's boots from Lonnie Ginsberg, an FDLE serologist, which did not match either Whitton or Mr. Mauldin. Prior to her testimony, however, trial counsel reported to the trial court that Ms. Ziegler had been subject to efforts to prevent her from testifying. Trial counsel told the court he would be seeking an evidentiary hearing and sanctions at a later time, up to and including a mistrial and dismissal. (TR Vol. IX 1888). Thereafter Ms. Ziegler testified for the defense. (TR Vol. IX 1888, 1899-1910). Subsequently, trial counsel filed a motion for a new trial based on the alleged misconduct. (TR Vol. IV 655). At sentencing, trial counsel told the court he had no testimony or evidence to

present on any prejudice to the trial proceedings. (PCR Vol. XXVII 5290).

Whitton raised this claim in his third amended motion for post-conviction relief. The court granted an evidentiary hearing on the claim.

Ms. Ziegler testified that she was scheduled to testify on Whitton's behalf. On the day she was to travel to testify, she got several calls from DeFuniak Springs. One was from the defense releasing her from her subpoena. (PCR Vol. XVII 3202). Subsequently, the defense changed its mind and wanted her to testify. (PCR Vol. XVII 3202).

Somewhere between the time she was initially released from the defense subpoena and the time of her "re-subpoena," she got a call from someone who said he was the sheriff. He wanted her to leave the lab and go home so the defense would not be able to re-subpoena her. Ms. Ziegler told the court that if she came to Defuniak Springs she definitely would not testify. (PCR Vol. XVII 3201). Ms. Ziegler testified that the prosecutor, Mr. Adkinson, called her and told her he was going to discredit her and FDLE and DNA in particular, and he definitely did not want her in the courtroom or courthouse. (PCR Vol. 3203).

Ms. Zeigler then called for help. Eventually, Steve Platt and two other agents escorted her to DeFuniak Springs for her "protection." (PCR Vol. XVII 3202). Ms. Ziegler testified that

she believed the State was upset with her because the blood did not match. (PCR Vol. XVII 3203).

When Ms. Ziegler arrived at the courthouse, the prosecutor came up to her and told her that he wanted to speak with her. According to Ms. Ziegler, Mr. Adkinson grabbed her by the arm and pulled her up as if "you are coming with me." The three FDLE escorts then walked over and told the prosecutor that Ms. Ziegler was not going anywhere with Mr. Adkinson unless they went along. (PCR Vol. XVII 3204). Suddenly, Mr. Adkinson got nice. Before he had not been polite. (PCR Vol. XVII 3205). If she had not had three agents there, she would have been "petrified." (PCR Vol. XVII 3205).

During cross-examination at the evidentiary hearing, Ms. Ziegler told the collateral court that none of the phone calls or the prosecutor's actions impaired her ability to truthfully testify to the results she got in the lab. (PCR Vol. XVII 3208).[5]

[5] Steve Platt also testified that Ms. Ziegler called him about the Gary Whitton case. She was upset about phone calls she had received and the way she had been treated. So Mr. Platt and two others escorted Ms. Ziegler because they were concerned about her well-being. Ms. Ziegler told them she felt physically threatened. (PCR Vol. XVII 3231). Once they arrived, he saw an assistant state attorney try to usher Ms. Ziegler out of the area where they were waiting. Mr. Platt interceded and it didn't go any further. (PCR Vol. XVII 3232). Mr. Platt did not see anyone physically harm Ms. Ziegler and he did not hear any of the conversations about which Ms. Ziegler complained. (PCR Vol. XVII 3233).

The collateral court denied the claim. The Court found that none of the allegedly intimidating conduct impaired Ziegler's ability to testify truthfully at trial. (PCR Vol. XXIV 4705).

The collateral court correctly denied the claim. The essence of this sort of generalized due process claim is that the defendant was denied a fair trial because of alleged State misconduct. McGirth v. State, 48 So.3d 777 (Fla. 2010). To demonstrate the denial of a fair trial, the defendant must show some sort of cause and effect between the alleged prosecutorial misconduct and results. For instance, if Whitton could show the alleged misconduct intimidated Ms. Ziegler into changing her testimony or prevented it altogether, Whitton may have a viable claim. But this is where Whitton falls short. Ms. Ziegler testified at the evidentiary hearing that nothing allegedly done by the prosecutor or sheriff's office had any impact on her ability to testify truthfully at trial. Absent any nexus between the alleged misconduct and Mrs. Ziegler's ability to testify favorably for the defense, Whitton cannot show he was deprived of a fair trial or due process.

C. ***The DNA Samples***

In this sub-section of claim I, Whitton alleges the prosecutor falsely argued that Ms. Ziegler and Mr. Ginsberg tested different areas of Whitton's boots. According to

Whitton, the falsity stemmed from the prosecutor's argument that Ginsberg used gauze and while Ziegler tested a swab. Whitton points to Ziegler's testimony at the evidentiary hearing that a swabbing is just a piece of gauze. (IB 20).

Whitton raised this claim in his third amended motion for post-conviction relief. The court granted an evidentiary hearing on the claim. After the evidentiary hearing, the collateral court denied the claim. The court concluded that Whitton had presented no evidence that the prosecutor's arguments were "false." (PCR Vol. XXIV 4705).

This claim may be denied for two reasons. First, this is not a Giglio claim. A Giglio claim arises from the knowing presentation of false evidence to the jury. Argument is not evidence. Instead of a Giglio claim, this is really a substantive claim of improper argument. Such a claim is procedurally barred in post-conviction proceedings because it could have been, and should have been, raised on direct appeal. Ferrell v. State, 29 So.3d 959, 977-978 (Fla. 2010).

Even if an improper argument could constitute a Giglio violation, there is none here. At trial, Ms. Laura Rousseau testified that she found blood splatter in boots that were recovered from Whitton's residence. (TR Vol. VIII 1720-1721). She determined the blood splatter within the boots was consistent with medium velocity spatter. Such spatter is

normally consistent with a beating or stabbing. The spatter traveled from top to bottom inside the boots. She was able to determine that the boots were a target for forceful bloodshed. The boots were not being worn, however, when the blood splatter got on the interior of the boot. (TR Vol. VIII 1722). Both boots had blood spatter inside them. (TR Vol. VIII 1723-1724).

Lonnie Ginsberg testified that he tested Mr. Mauldin's blood. Mr. Mauldin's blood type was "A." Mr. Mauldin was a secretor. (TR Vol. VIII 1732, 1739). Whitton's blood type is "O". Whitton is also a secretor. (TR Vol. VIII 1733, 1739).

Mr. Ginsberg tested Whitton's cowboy boots. (TR Vol. VIII 1742). There was blood on various portions of the two boots. There was some blood on the outside of the boots and some blood on the inside. (TR Vol. VIII 1743). Mr. Ginsberg found type A blood in the boots. (TR Vol. VIII 1743).

On cross-examination, Mr. Ginsburg identified Defense Exhibit 8 as some swabbings he took from the cowboy boots. (Defense Exhibit 8). Mr. Ginsberg testified that he "swabbed with like a gauze pad the blood off of the particular item. " (TR Vol. VIII 1748). He swabbed the boots to send the particular blood sample to another lab who can perform DNA analysis. Mr. Ginsburg testified that he sent the swabbing off to the lab in Jacksonville for DNA testing. (TR Vol. VIII

1748). Mr. Ginsberg was not asked, and did not testify, where from the boots he took the swabbing(s). (TR Vol. VIII 1748).

Ms. Zeigler testified at trial that she received a swabbing from the boots from Lonnie Ginsburg. (Defense Exhibit 8). (TR Vol. IX 1903). Ms. Ziegler's identified Defense Exhibit 8 as one small swabbing. Ms. Ziegler testified that the swabbing did not match either the victim or Whitton. (TR Vol. IX 1904). On cross-examination, Ms. Ziegler testified that the envelope that she received for testing contained one small swabbing. (TR Vol. VIII 1908). Ms. Zeigler testified that she did not know where the particular swabbing she tested came from on the boots. Ms. Ziegler explained that a proper swabbing involves taking a different swabbing from each stain rather than one swabbing from multiple stains. (TR Vol. VIII 1909).

During closing argument, the prosecutor told the jury that Ms. Ziegler testified that she received one small swabbing from Mr. Ginsberg. The prosecutor mentioned Ms. Ziegler's testimony that the proper procedure in swabbing evidence was to swab each area separately. The prosecutor told the jury that there was more than one location on Whitton's boots where blood was found. The prosecutor told the jury that Ms. Ziegler testified that she received one swab, "not a gauze pad as Lonnie said he took that blood off there with." (TR Vol. X 1954). The prosecutor then

pointed out that Ms. Ziegler could not say where that swabbing she got came from. (TR Vol. X 1954).

Whitton claims that the prosecutor's argument that Ms. Ziegler got a swab while Ginsberg prepared something different (a gauze pad) was disproven when Ms. Ziegler testified at the evidentiary hearing that a swab is just a piece of gauze constituted a Giglio violation. Whitton is mistaken when he says the prosecutor's argument constitutes a Giglio violation.

The gist of a Giglio violation is that the jury is intentionally misled by false evidence. None of that happened here. First, in context, it is clear that the gist of the prosecutor's argument was that Ginsberg had detected blood on multiple locations on the boots but Ziegler had only tested one location. (TR Vol. VIII 1954). Second, if the alleged violation is the difference between the prosecutor calling a swab a "piece of gauze" or a "swab", there can be no Giglio violation here. Ms. Ziegler continually referred to the sample she received as a "swab" not "gauze." Only at the evidentiary hearing, long after the prosecutor's closing argument, did she explain that a swab and a gauze pad are the same thing. Even if that had not been the case, both Mr. Ginsberg and Ms. Ziegler identified Defendant's Exhibit 8 as the "swabbing" taken from Mr. Ginsberg's boots. As such, the jury could see that what both Mr. Ginsberg and Ms. Ziegler referred to as a "swab" was a

gauze pad. Indeed, Mr. Ginsberg explained that to do a swab, one uses a gauze pad. (TR Vol. VIII 1748). There can be no misleading of the jury when the jury can see, and hear, that the swabbing sent by Mr. Ginsberg and Ms. Ziegler was a gauze pad. Whitton has failed to show a Giglio violation.

D. ***The other DNA lab***

In this claim, Whitton claims the State committed a Brady violation by not disclosing a tape recorded conversation between LT Mann, a Walton County law enforcement officer, and a person at Serological Research Institute. During the conversation, LT Mann said: "we've got problems because the DNA does not match." The analysts from SERI observed that the defense is going to have a field day with it. LT Mann told the analyst, "We're not going to bring it up." LT Mann also said they hopefully they would be able to "do this other test". LT Mann also said "that is where you come in."[6]

Whitton claims the failure to disclose this audio recording constituted a Brady violation. Whitton makes no effort to explain how this recording would be Brady material. Even if he had, Whitton cannot show a Brady violation occurred. This entire conversation was about investigators' exploration of additional testing. Investigators investigate and there is

[6] Whitton claims there was additional blood to be tested that did not connect the defendant to the crime. (IB 21). Whitton has never offered any proof this was the case.

nothing wrong in investigating. Additionally, the only possible "Brady" in this conversation is that the DNA did not match. However, Whitton knew the "DNA d[id] not match." Indeed, Whitton called Shirley Ziegler to testify as to the results of her DNA testing. Whether the Sheriff doubted Ms. Ziegler's competence and experience, wished additional testing, or was concerned that the defense would have a field day with the DNA results is not evidence that is exculpatory or impeaching. In short, nothing about this recording constituted Brady material. Even assuming it should have been disclosed, Whitton makes no showing the results of the trial would have been different. Accordingly, his Brady claim must fail.

E. ***Cell mark: insufficient vs. inconclusive***

Whitton claims that a Cellmark report provided to the defense in discovery that reported a blood stain submitted for DNA testing was insufficient for testing was inconsistent with a Cellmark note, discovered during post-conviction proceedings, reflecting that an analyst called the prosecutor and left a message about the "inconclusive" results. Whitton claims that "insufficient evidence" to test is different from "inconclusive results." (IB 22). Whitton does not offer any argument, however, on how the disclosure of this note would have probably altered the outcome of the trial. (IB 22).

This collateral court correctly denied the claim. First, Whitton offered NO evidence at the evidentiary hearing to back up the allegation in his brief that "Cellmark tested" the blood found on Whitton's boots. Whitton presented no evidence at the evidentiary hearing that the result of testing on the blood was actually inconclusive as opposed to insufficient to test. Whitton did not call any witness to testify about the notation or to demonstrate the report was inaccurate in any way. Whitton only wants this court to assume the analyst's note to the file note means that there was sufficient evidence to test but testing was inconclusive. This Court should decline Whitton's invitation to assume. More fundamentally, however, even if the results were inconclusive, this fact is not Brady material. Inconclusive testing would not have exculpated Whitton. Inconclusive results would not even be impeaching in a case where the State offered no DNA evidence. Even if the note should have been disclosed, it would not have helped Whitton. Whitton admitted at trial that the blood found in his boots was Mr. Mauldin's. Whitton claimed he got the blood on his boots when he walked through the room and found Mr. Mauldin already dead. Because there was no dispute that the blood on Whitton's boots belonged to Mr. Mauldin, the Cellmark note cannot be Brady material.

F. ***The Car Wash***

This "car wash" issue is a red herring. The relevance of the car wash ticket was always to establish that Whitton was in the vicinity of the gas station/car wash at a certain time following the murder. The State never proceeded on a theory Whitton purchased a car wash ticket with the specific intent to cover up his crime.

Whitton testified at trial that he stopped for gas at the Conoco station where the car wash ticket was issued after he went to James Mauldin's room and found him dead. Another witness, Mary Hicks, testified a car wash ticket is issued free of charge if a person purchases 8 gallons of gas at the Conoco gas station. She also testified that, on this particular day, the time on the ticket reflected the time the ticket was actually issued (not pre-printed).

During his initial closing argument, the prosecutor pointed to the car wash ticket was relevant because it established a time, 2:37 a.m. (TR Vol. X. 1949). Indeed the prosecutor told the jury that the purpose of introducing "the bill" was to establish that Whitton was at the car wash at 2:37 a.m. (TR Vol. XI 1949).

During his rebuttal, the prosecutor told the jury that Whitton got a ticket for a car wash and all he had to do to get it was punch in some numbers to use it. He followed that by

noting that the ticket showed that Whitton was active during that time, not sitting at home. (TR. Vol. X 1989). Previously, the prosecutor had discussed the possibility that Whitton had "washed" his car out to remove blood that he got on himself during the attack. (TR Vol. X 1988). However, it is logical to conclude he was not implying the car wash and Whitton's efforts to "wash" his car out were related or one in the same. Trace blood evidence was found inside of Whitton's car and one does not, ordinarily, go through a car wash to wash the inside of the car.

Even if the State implied, during closing argument, that Whitton may have gotten his car washed, there is no prejudice. A small amount of Mauldin's blood was found on the inside of Whitton's car. Whitton testified at trial he got blood on his socks and boots when he entered Mauldin's room at the Sun and Sand Motel. (TR Vol. IX 1814-1886).

The State never proceeded on a theory that Whitton had gotten a huge amount of blood on the inside or outside of the car and Whitton went through the car wash with the windows down to wash both the outside and the inside of the car. No witness testified, at trial, that Whitton actually used the car wash or that the car wash ticket had been used. As the State offered no testimony that was false or that it knew to be false, Whitton's claim must fail.

G. ***Lying to Maureen Fitzgerald***

In this claim, Whitton alleges the State argued that Whitton lied to Maureen Fitzgerald about the name of the hotel that Mauldin was staying in. Whitton claims the prosecutor knew that Whitton told her that it "Sun and Sand" hotel but elicited testimony to make it appear Whitton gave Fitzgerald another name, "Sun Den." (IB 24). Whitton points to a police report where Officer Sunday reported his interview with Ms. Fitzgerald. According to Officer Sunday, Ms. Fitzgerald reported that she thinks the hotel Whitton mentioned was the Sun and Sand. (Defense Exhibit 5, page 16). Whitton claims the prosecutor's argument that Whitton told her another name constituted a Giglio violation. (IB 24). The record refutes this.

At trial, Ms. Fitzgerald, a friend of Mr. Mauldin, testified for the State. (TR Vol. VII 1480 - 1497). Ms. Fitzgerald told the jury Whitton came by her house in October 1990. He also called her on the 8th or 9th of October. Whitton told her that Mr. Mauldin was staying at a hotel in Destin. She testified she may have written it down. She did not remember what it was. (TR Vol. VII 1489-1450).

When Ms. Fitzgerald persisted in her testimony that she did not recall the name of the hotel that Whitton gave her, the prosecutor showed her a statement she gave to investigators Mann and Sunday on October 15, 1990. The defense attorney had this

same report. (TR Vol. VII 1491). The name she gave the police on October 15, 1990 was the Sun Den. (TR Vol. VII 1497).

Whitton also testified at trial. He testified he told Ms. Fitzgerald where Mr. Mauldin was staying. He told the jury at the time he did not pay attention to what the name of the motel was and he did not even remember the name of the motel that he gave her. (TR Vol. IX 1863).

During closing argument, the prosecutor told the jury that Whitton gave her a different name than the Sun and Sand. (TR Vol. X 1950). The prosecutor did not, however, argue that the jury should find Whitton guilty because he lied to Ms. Fitzgerald.

Whitton cannot establish a Giglio violation for two reasons. First, to the extent that Whitton claims that the prosecutor's argument constitutes a Giglio violation, Whitton is mistaken. Instead of a Giglio claim, this is really a substantive claim of improper argument. Such a claim is procedurally barred in post-conviction proceedings because it could have been, and should have been, raised on direct appeal. Ferrell v. State, 29 So.3d 959, 977-978 (Fla. 2010).

Second, even if this were not the case, there is evidence in the record to support that Ms. Fitzgerald actually made a statement to the police that Whitton told her the Sun Den. (TR Vol. VII 1497). Accordingly, the prosecutor's argument was not

false. The fact Ms. Fitzgerald may have said something different in a separate statement, on another day, does not establish the prosecutor knowingly introduced false evidence to the jury. See Barwick v. State, 88 So.3d 85, 104–05 (Fla. 2011) (witness's description of events, as testified to at different trials, represented changed interpretation of facts, not false testimony). Even so, there is no reasonable probability this testimony affected the jury's verdict because Whitton was caught in at least three other lies shortly before and after the murder. First, Whitton intentionally wrote down the wrong license plate number on the hotel registration he filled out for James Mauldin. At trial, he admitted he gave a false tag number. He claimed he did so because James was intoxicated when he checked in and he did not want to be responsible in case James broke something or stole something from the room. (TR Vol. IX 1825). Upon his arrest, Whitton told Detective Cotton that he had dropped Mauldin off at the hotel, stayed a few minutes and never returned. (TR Vol. VIII 1753-1775). At trial, Whitton admitted lying to Cotton, telling the jury he was scared. Whitton even lied to his boss about why he did not come to work on October 8th and 9th; telling him his sister had an accident. (TR Vol. IX 1840; TR Vol. VII 1529-1538). Given the fact the prosecutor never argued to the jury they should convict him because he lied to Ms. Fitzgerald, neither Ms. Fitzgerald

nor Whitton was sure what name Whitton game Fitzgerald, and the fact the jury heard about at least three other lies that Whitton told close in time to the murder, there is no reasonable probability the jury's verdict was effected by allegedly false or misleading testimony about whether Whitton told Ms. Fitzgerald he took Mr. Mauldin to the Sun Den or the Sun and Sand.

H. **The Allegedly Corrupt Prosecution**

This claim is merely a compilation of all the other claims raised by Whitton in his motion for post-conviction relief. At the bottom line, the evidence supported Whitton's conviction for first degree murder. Whitton put on nothing at the evidentiary hearing to show an innocent man was convicted of this crime. Whitton put on nothing at the evidentiary hearing to establish that the case against Whitton was considerably weaker than the one heard by Whitton's jury. This "catch-all" claim should be denied.

ISSUE II

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE OF WHITTON'S CAPITAL TRIAL

Much of claim two is just a repeat of Claim I in another form. In this claim, Whitton brings myriad sub-claims of ineffective assistance of guilt phase counsel. The State will take each in turn.

A. ***The Car Wash ticket***

In this part of his claim, Whitton alleges trial counsel was ineffective for not challenging the State's use of a car wash ticket found in Whitton's car after the murder. Whitton claims that trial counsel should have presented evidence that the car wash ticket was not used. (IB 26-27).

At trial, the State presented evidence that a car wash ticket was found in Whitton's rental car. (TR Vol. VII 1503). The ticket was time and date stamped October 10, 1990 at 2:37 a.m. (TR Vol. VII 1504). The car wash ticket was from a Conoco station on Beverly Drive in Pensacola, Florida. Mary Hicks, an employee of the Conoco station on Beverly Drive testified that when a customer buys a fill-up of at least 8 gallons, the customer will get a car wash for free. Ms. Hicks identified the car wash ticket found in Whitton's car as one that would have been issued by the Conoco station where she worked. Ms. Hicks told the jury that it was a double car wash ticket. (TR Vol. VII 1519-1520).

In addition to the car wash ticket, a trace amount of blood was found in Whitton's car. Blood was also found on the inside and outside of Whitton's boots. (TR Vol. VIII 1743). Both the blood found in Whitton's car and the blood found on his boots was Type A, the same blood type of the victim (Whitton is Type 0). (TR Vol. VIII 1725- 1752).

Whitton testified at trial. Whitton did not deny getting blood on his boots and did not deny that he transferred Mr. Mauldin's blood from his feet to his car. Whitton explained that he left his home around 10:30 the evening of the murder, drove to Destin and found Mr. Mauldin dead in his hotel room. (TR Vol. IX 1839). Whitton told the jury that after he found Mr. Mauldin dead in his hotel room, he drove back home. On the way he stopped at the Conoco station. (TR Vol. IX 1839). Whitton told the jury that after he had been in the hotel room where he found Mr. Mauldin's body, he felt something wet inside his boots, which were so worn they had holes. (TR Vol. IX 1838). He assumed he got the blood on the inside of the boots where it seeped through the holes in his boots. (TR Vol. IX 1870).

Whitton raised this claim in his third amended and supplemented motion for post-conviction relief. After an evidentiary hearing, at which Whitton offered a report from a LT Mann who had determined the car wash had not been used, the collateral court denied the claim. (TR Vol. 4712-4713).

This Court should affirm. In his claim before this Court, Whitton does offer any theory as to how evidence that Whitton did not actually get a car wash would have helped Whitton.

The car wash ticket was not relevant to show Whitton used the ticket. The car wash ticket was relevant to show that

Whitton was at the Conoco station in the early morning hours following the murder and had the opportunity to commit the murder. During his initial closing argument, the prosecutor pointed to the car wash ticket as it was relevant to time only. (TR Vol. X. 1949). During his rebuttal, the prosecutor told the jury that Whitton got a ticket for a car wash and all he had to do to get it was punch in some numbers to use it. He followed that by noting that the ticket showed that Whitton was active during that time, not sitting at home. (TR. Vol. X 1989). Previously, the prosecutor had discussed the possibility that Whitton had "washed" his car out to remove blood that he got on himself during the attack. (TR Vol. X 1988). However, it is logical to conclude he was not implying the car wash and Whitton's efforts to "wash" his car out were related or one in the same. Trace blood evidence was found inside of Whitton's car and one does not, ordinarily, go through a car wash to wash the inside of the car. Accordingly, the car wash ticket would only be at issue, in these proceedings, if there was some dispute whether Whitton went to Mr. Mauldin's hotel room on the night of the murder and got blood on the inside of his boots or stopped at the Conoco station afterwards and got the car wash ticket because he filled up his car with gas.

However, there is no dispute about either of those things. Whitton testified at trial he went to Mr. Mauldin's hotel room

on the night of the murder and got blood on his socks and boots. He also told the jury he stopped at the Conoco station, on the way home, and got gas. (TR Vol. IX 1814-1886). As the car wash was probative of nothing except two things about which Whitton admitted to at trial, Whitton can show no prejudice for trial counsel's failure to "discover" and present evidence that the car wash ticket had not been used.

B. ***Fingerprint inside sandwich wrapper***

In this part of Whitton's ineffective of guilt phase counsel claim, Whitton alleges that trial counsel was ineffective for failing to present evidence that an unknown fingerprint found on the inside of a sandwich wrapper could not have gotten there during the manufacturing process. At trial, there was no dispute that there was an unknown fingerprint on a sandwich wrapper found in the victim's room. Indeed, trial counsel presented evidence about unknown prints found in the victim's room, including the sandwich wrapper.

During the defendant's case in chief, trial counsel called FDLE agent, Tom Simmons, to the stand. (TR Vol. IX 1788-1812). Mr. Simmons told the jury he found fingerprints on several items in Mr. Mauldin's room that did not match either the victim or the defendant. These items included an ice bucket found in the refrigerator, a Boone's farm wine bottle, a sandwich wrapper found on one of the beds, and a small empty paper bag. When

questioned about the fingerprints on the sandwich wrapper, Mr. Simmons agreed the fingerprint found on the sandwich wrapper could have been left there when the bag was opened. (TR Vol. IX 1810). During cross-examination, Mr. Simmons testified that if the fingerprint had gotten on the sandwich wrapper at the time of manufacture, it would have been protected until the sandwich was opened. (TR Vol. IX 1811). He also agreed that the fingerprint on the sandwich wrapper could have gotten there just as easily at the time the sandwich was made as at the time the sandwich was opened. (TR Vol. IX 1811). During re-direct, however, Mr. Simmons told the jury the sandwich inside the wrapper would have rubbed against the interior surface of the wrapper (where the print was found). (TR Vol. IX 1812).

During closing arguments, trial counsel argued that the presence of these unknown fingerprints on items inside Mr. Mauldin's motel room created reasonable doubt that Whitton was the killer. In particular, trial counsel noted that the print on the sandwich bag was on the inside, not the outside. Trial counsel offered that the most reasonable explanation is that the person who opened it and laid it in the room was the real killer. (TR Vol. X 51).

Whitton raised this claim in his third amended and supplemented motion for post-conviction relief. The collateral court granted an evidentiary hearing on the claim.

To support his claim, Whitton presented an affidavit from Darrell Vanier who said that it would be "impossible" for a person at the plant to put a fingerprint on the inside of a sandwich package. Mr. Vanier asserted that employees are required to wear gloves to prevent contamination. Mr. Vanier also averred that if an employee was not wearing gloves for some reason, it would still be "essentially impossible" because of the way the wraps are placed on the machinery. (SPCR Vol. IV 796-797).

The collateral court denied the claim. The collateral pointed out that trial counsel was able to elicit testimony from his own expert that the fingerprint may have been placed on the wrapper after the sandwich was opened as well as testimony that it was unlikely that it was placed there at the time of manufacture. (PCR Vol. XIII 4718-4720).

While Whitton wants this Court to infer that the real killer ate a sandwich in Mauldin's room, Whitton put on no evidence at the evidentiary hearing to support such an assertion. At most, Whitton offered additional evidence, to that which was offered at trial, that the fingerprint found on the sandwich wrapper was not likely placed there during the manufacturing process. At the evidentiary hearing, Whitton offered no evidence that cast doubt on other reasonable explanations, to prove who the print belonged to, or to prove

that such a person had the opportunity or motive to commit the murder.

At trial, trial counsel used the presence of unknown fingerprints on several items, including the sandwich wrapper to suggest that another person visited Mauldin and subsequently killed him. Even if trial counsel had offered the evidence offered at the post-conviction evidentiary hearing, there is no reasonable probability of a different outcome. The collateral court's ruling should be affirmed.

C. ***Obstruction of Justice***

In this claim, Whitton avers that Agent Ziegler was threatened with physical harm in an attempt to prevent her from testifying. Whitton claims that trial counsel was ineffective for "failing to ask and determine the extent of the Sheriff's/prosecutor's misconduct, to seek a mistrial, or to introduce this evidence to the jury." (IB 28).

Because Whitton raised this same allegation in his "due process" claim, the State has set the relevant facts surrounding this claim in its argument in that part of its answer brief. Accordingly, the State will not repeat them here.

The collateral court denied Whitton's claim of ineffective assistance of counsel. The court noted that evidence of the alleged intimidation would not have been admissible unless Agent Ziegler had changed her testimony and she didn't. The Court

noted that Ms. Ziegler testified at the evidentiary hearing that neither the phone call nor the prosecutor's actions impaired her ability to testify truthfully about the results of her testing. According, the collateral court found that Whitton had failed to prove either deficient performance or prejudice. (PCR Vol. XIII 4723).

The collateral court correctly rejected this claim. First, Whitton has offered no theory of the admissibility of this "evidence." Counsel is not ineffective for failing to introduce evidence that is not relevant to the guilt or innocence of the accused. Even if such evidence were admissible, Whitton can show no prejudice from the State's actions. Through Ms. Ziegler, the jury heard that a swabbing from Whitton's boot did not match the victim's. Accordingly, even if trial counsel could have inquired about Ms. Ziegler's perceptions, she would have told the jury that none of the State's actions influenced her testimony in any way. At the bottom line, Whitton was able to obtain the testimony he sought from Ms. Ziegler. Whitton has failed to show any prejudice for trial counsel's alleged failure to bring this information before the jury.

D. ***Cellmark "desperation"***

In this claim, Whitton alleges counsel was ineffective for failing to offer evidence that the state sent Whitton's boots to Cellmark for DNA testing after Ziegler reported that the one

swabbing she received from Whitton's boots did not match Whitton or Mr. Mauldin. (IB 28). Cellmark reported that there was insufficient material to obtain DNA results. (SPCR Vol. I 110). Without any explanation, Whitton claims counsel "unreasonably did not introduce these facts." (IB 28).

Whitton raised this claim in his third amended and supplemented motion for post-conviction relief. The collateral court denied the claim. The collateral court found that Whitton failed to demonstrate how the state's efforts to obtain additional DNA testing would be admissible or even relevant. The court also noted that Whitton testified, at trial, that he has stepped in Mr. Mauldin's blood which seeped into his boot. The collateral court found that, as such, Whitton could show no prejudice from counsel's failure to introduce the Cellmark evidence. The collateral court also noted that introducing evidence of the state's effort to obtain additional DNA testing may have injected doubt about the validity of the defendant's own favorable DNA testimony in its suggestion that the state doubted the veracity of Ms. Ziegler's test results. (PCR Vol. XIII 4726).

This claim may be denied for two reasons. First, Whitton offers no theory of the admissibility of the "Cellmark desperation." Evidence that the state wanted additional testing is not relevant to the defendant's guilt or innocence. Second,

introducing the report would not help Whitton at all. At most, introducing the Cellmark report (or calling the tester) would have revealed there was insufficient material to obtain a result from Whitton's car or boots.

In any event, Whitton never contested the fact that Mauldin's DNA might be on his boots. Instead, Whitton offered an innocent explanation. At trial, Whitton testified that he found Mr. Mauldin dead and must have walked through Mr. Mauldin's blood, getting blood on both the outside and inside of his boots. Given Whitton's theory of the case and his own trial testimony, the Cellmark report would be completely unhelpful. Counsel is not ineffective for failing to introduce evidence that is not helpful to his case.

E. ***Five minutes v. thirty minutes***

In this part of the claim, Whitton avers that trial counsel was ineffective for failing to call a medical expert to rebut the state's expert's testimony that Whitton's attack on Mr. Mauldin lasted thirty minutes, that Mr. Mauldin was aware was happening to him, and that Mr. Mauldin felt pain. Whitton claims that, had counsel prepared, these conclusions would not be possible. (IB 29).

This is not a claim of ineffective assistance of counsel at the guilt phase. Whitton offers no explanation how "rebutting" the state's evidence as to the duration of the fight and Mr.

Mauldin's pain and suffering is relevant to the issue of Whitton's guilt or innocence. Indeed, Dr. Kielman's testimony, at issue in this claim, was not even presented at the guilt phase. Instead, Dr. Kielman's testified at the penalty phase about the duration of the struggle between Whitton and Mr. Mauldin. Accordingly it appears this claim is misplaced in Whitton's brief as a guilt phase claim and this claim is, in reality, a penalty phase claim that trial counsel was ineffective for failing to call Dr. Riddick to challenge the state's evidence in support of the HAC aggravator.

Even then, Whitton's claim fails because. Dr. Riddick's testimony at the evidentiary hearing unquestionably supported the HAC aggravator.

At the evidentiary hearing, Whitton put on the testimony of Dr. Leroy Riddick. Unlike Dr. Kielman, he did not go to the murder scene and did not do, or even attend, the autopsy. Dr. Riddick testified that, in his opinion, it was not plausible the attack took thirty minutes. (PCR Vol. XIX 3692). He testified the attack more likely lasted no more than five minutes. (PCR Vol. XIX 3692-3693).

Dr. Riddick also did not agree with Dr. Kielman that Mr. Mauldin suffered pain and suffering. He said that pain is such a subjective thing that it is difficult for a pathologist to express an opinion on it. (PCR Vol. XIX 3693). Dr. Riddick

considered that Mr. Mauldin's blood alcohol level was very high. He noted that things like adrenaline kick in and as a result, people get hurt and they do not realize they are hurt. (PCR Vol. XIX 3693-3694). Dr. Riddick could not opine whether Mr. Mauldin felt pain or not. (PCR Vol. XIX 3694). According to Dr. Riddick, there is a possibility he was not feeling anything at the time. There is a possibility Mr. Mauldin could have been experiencing pain. (PCR Vol. XIX 3694). Dr. Riddick simply disputed that a physician could opine whether a victim was in pain or not.

During cross-examination, Dr. Riddick testified he reviewed Dr. Kielman's autopsy and found nothing wrong with the way Dr. Kielman conducted the autopsy. (PCR Vol. XIX 3697). Riddick agreed with Dr. Keilman on the manner of death. He agreed with Dr. Kielman on the cause of death. (PCR Vol. XIX 3697-3698).

Dr. Riddick agreed generally with Dr. Kielman on the number of wounds but thought there may have been more that Dr. Kielman found. (PCR Vol. XIX 3698). Dr. Riddick agreed the wounds which Dr. Kielman had enumerated were correct. (PCR Vol. XIX 3698). Dr. Riddick agreed there were defensive wounds on Mr. Mauldin's body. (PCR Vol. XIX 3699). Dr. Riddick agreed with Dr. Kielman that the evidence demonstrated there was movement about the room. He agreed with Dr. Kielman that Mr. Mauldin likely died close to where he was found. (PCR- Vol. XIX 3699).

Dr. Riddick also agreed with Dr. Kielman the assailant and Mr. Mauldin engaged in a violent conflict. (PCR Vol. XIX 3700). Dr. Riddick agreed with Dr. Kielman that the stab wounds to the chest were inflicted at very close range. (PCR Vol. XIX 3701).

Dr. Riddick could not tell from the evidence that the attack did not last 30 minutes. This was not his medical opinion. Instead, Dr. Riddick testified that it was just his experience and the fact that 30 minutes is a long time. Dr. Riddick could not testify to a reasonable degree of medical certainty, based on the blood, how long it took to inflict all the wounds to Mr. Mauldin. (PCR Vol. XIX 3707).

Given Dr. Riddick's testimony, Whitton has failed to show counsel was ineffective for failing to call Dr. Riddick to contest Dr. Kielman's opinion that the attack lasted thirty minutes and the attack was very violent. Certainly he has failed to show that calling Dr. Riddick would have defeated the HAC aggravator.

First, Dr. Riddick agreed with Dr. Kielman the assault was very violent and both victim and the assailant moved around the room. Second, and perhaps more importantly, there is no real conflict between Dr. Riddick's testimony and Dr. Kielman's. Dr. Kielman did NOT testify the infliction of wounds took thirty minutes. Rather, when asked how long the duration of the whole incident was, Dr. Kielman testified he could not say because

"there is no way I can measure that." (TR Vol. XI 2144). He thought only it was thirty minutes, at most. (TR Vol. XI 2144). Dr. Riddick testified, on the other hand, that although he could not say how long the attack took from the physical evidence, he thought it could have been five minutes. There is no real conflict between the doctors' testimony.

While Dr. Riddick disagreed with Dr. Kielman's opinion the blows would have been painful because pain is a subjective thing, this Court should look to its own common sense when evaluating his opinion. The evidence at trial showed this murder to be exceptionally violent. Dr. Riddick did not disagree. Mr. Mauldin was stabbed and beaten. Dr. Riddick did not disagree. Mr. Mauldin clearly tried to defend himself from Whitton's violent assault. Dr. Riddick did not disagree.

This Court has consistently found that when the heinous, atrocious, or cruel (HAC) aggravating circumstance in cases where a victim was stabbed numerous times. Guzman v. State, 721 So. 2d 1155 (Fla. 1998). This is so, even in cases where the medical examiner determined the victim was conscious for merely seconds. Francis v. State, 808 So. 2d 110 (Fla. 2001) (upholding the application of HAC even when the "medical examiner determined that the victim was conscious for merely seconds").

In this case, both Dr. Kielman and Dr. Riddick agree that the attack was violent. Both agree the assailant and his victim were locked in a violent struggle that moved around the hotel room. Both agree that the victim tried to fight off death but was ultimately unsuccessful. Both agree Mr. Mauldin was not rendered unconscious within seconds but fought for his life. Finally, both agree that, while it cannot be shown with any degree of medical certainty how long the attack lasted, it could have lasted five minutes. Given that Whitton's own expert, had he been called by trial counsel, would have provided evidence to support the HAC aggravator, Whitton can show neither deficient performance nor prejudice. His claim should be denied.

F. ***The time of death***

In this part of the Whitton's claim, Whitton avers trial counsel was ineffective because he failed to offer evidence to prove that Whitton was not present at the time of Mauldin's death. Whitton claims that if counsel would have called a medical examiner, like Dr. Riddick, trial counsel would have been able to show Whitton was not present at the time of death. Whitton has never really offered any evidence that this is the case. Indeed, before this Court, Whitton does not point to any proof that if the time of death was, as Dr. Riddick opined between 5:00 p.m. and 11:00 p.m., he could not have committed

the murder.[7] As is typical of all of Whitton's ineffective of guilt phase counsel claims presented in this brief, Whitton simply points to an alleged deficiency and avers, in a conclusory fashion, that counsel was ineffective for not presenting some other evidence.

Pretending this is properly pled before this Court for the sake of argument, this issue arose because Dr. Kielman testified that, in his opinion, death occurred somewhere within 24 hours from the time Mr. Mauldin was found dead at 11:00 a.m. on October 10, 1990. (TR Vol. VIII 1698). At the evidentiary hearing, Dr. Riddick testified that, in his opinion, death occurred between 12-18 hours before Mr. Mauldin was found at 11:00 a.m. If true, this would make the time of death sometime between 5:00 p.m. and 11:00 p.m. (PCR Vol. XIX 3695).[8]

Dr. Riddick based this, primarily, on a police officer's opinion that when he entered the motel room where Mr. Mauldin was found dead, Mr. Mauldin's body was in full rigor. (TR Vol. XIX 3709). He also relied on Dr. Kielman's autopsy report. Dr.

---

[7] Dr. Riddick's opinion put Mr. Mauldin's death between 5:00 p.m. and 11:00 p.m. A hotel clerk testified that he saw Whitton's car arrive at the hotel a little bit after 10:30 p.m. (TR Vol. VII 1431). Accordingly, Dr. Riddick's testimony would not have helped Whitton and Whitton cannot show that he "was not present" at the time of death.

[8] Whitton mistakenly says between Dr. Riddick put the time of death between 2:00 p.m. and 11:00 p.m. Counting backwards 12-18 hours from 11:00 a.m. the following day Dr. Riddick opined that TOD was between 5:00 p.m. and 11:00 p.m.

Kielman did not put in a time of death. Instead, the report contained a _____ for the time followed by the initials p.m. Dr. Riddick testified to him this entry (or lack of an entry) meant to him that Dr. Kielman "was thinking about it happened the night before rather than the next day." (PCR XIX 3709-3710). Dr. Riddick agreed that if the non-medically trained police officer was incorrect and the body was not yet in full rigor the time of death could have been later including 12:00 midnight, 12:30 a.m. or even 1:00 a.m. (PCR Vol. XIX 3723).

The collateral court denied the claim. (PCR Vol. XIII 4732-4735). In pertinent part, the collateral court found that Dr. Riddick's estimate of the time of death "carries little weight." (PCR Vol. XIII 4735). The collateral court found that Whitton failed to demonstrate the jury would have been persuaded by Dr. Riddick's testimony.

This Court should affirm. The collateral court found Dr. Riddick's testimony to be unpersuasive. The court's finding is supported by competent substantial evidence.

Although Whitton claims that Dr. Riddick's testimony was based on "scientific facts", the record refutes his allegation. The first "scientific fact" upon which Dr. Riddick relied was the opinion of a non-medically trained police officer, LT Mann, that when he found Mr. Mauldin dead, Mr. Mauldin's body was in full rigor. The other "scientific fact" was the fact that Dr.

Kielman had, apparently, inadvertently omitted the time of death from his autopsy report. From an incomplete notation, Dr. Riddick assumed that Dr. Kielman believed the time of death was in the evening rather than the following morning. Notably, it does not appear that Dr. Riddick talked to either Dr. Kielman or Lt Mann to support his assumptions. Additionally, Dr. Riddick agreed that if the police officer was mistaken and the body was not yet in full rigor, the time of death could have been later than 11:00 p.m., including 12:00 midnight, 12:30 a.m. or even 1:00 a.m.

It simply incredible to suppose the jury would have been swayed to an acquittal by a medical examiner who did not go to the scene, who relied on a non-medically trained police officer's "diagnosis" of full rigor and assumed, without talking Dr. Kielman, that Dr. Kielman must have thought the time of death was before midnight because he failed to note the actual time of death on an autopsy report, especially when Dr. Kielman was available to explain. This Court should reject this claim.

G. ***Motive***

In this claim, Whitton avers counsel was ineffective for failing to call several witnesses to support the notion that Whitton did not have the motive to steal the $1135.88 that he helped Mr. Mauldin withdraw from the bank on the day he died. (TR Vol. VII 1411 -1420). At trial, the state introduced

evidence that Whitton lived alone in a rented house at 800 Dominguez Street, Pensacola, Florida. Debra Sims had previously lived in that home that was owned by her parents. (TR. Vol. VII 1498-1509).

On the day after the murder, Whitton's overdue bills were paid. Peter Booth testified that on October 10, 1990, a gas bill from Whitton's house was paid. The amount of the bill was $95.92. The payment was late as the bill was due five days earlier. (TR Vol. VII 1511-1516). Robert Dobson testified that a utility bill from Whitton's rental home was paid on October 10, 1990. The bill was one month delinquent. There was a past due amount on the bill of $49.41. The total amount of the bill was $97.97. The bill was paid two days before the power would have been shut off for being delinquent. Whoever paid the bill paid for it in cash with a $100.00 bill. (TR Vol. VII 1524-1528). Rachael Johnson testified that on October 10, 1990, a motor vehicle registration tag was purchased. The tag number for the matching vehicle is 2VR-8692. The vehicle is registered in the name of Gary R. Whitton. The tag costs $34.05 and was paid in cash. (TR Vol. VII 1478- 1480).

In his motion for post-conviction relief, and again before this Court, Whitton claims counsel was ineffective for failing to present evidence that Whitton was not desperate for cash and therefore no motive for murder. Whitton claims counsel should

have called: (1) Debra Sims to testify that the weekend before the murder she gave Whitton $200. (2) Terry Norwood who would testify that she gave Whitton $100 for a kitchen set Whitton sold her, (3) pay stubs from August to show Whitton received $1,000 in August 1999, (4) student loan documents to show he received about $800 in student loan funds in July 1990, and (5) testimony of Cindy Shelton and Debra Sims whom Whitton told he intended to work off shore.

Terry Norwood did not testify at the evidentiary hearing. Cindy Shelton and Debra Sims did. Ms. Shelton testified that Whitton told her he and Mr. Mauldin were going to work off shore. (PCR Vol. XVIII 3480-3481). Debra Sims testified that the bills paid after the murder were her bills. The weekend before the murder, she gave Whitton $200 cash to pay the bills. (PCR Vol. XVIII 3498). Ms. Sims also testified that Whitton told her he was going to work off shore with Mr. Mauldin. (PCR Vol. XVIII 3501). Whitton also presented a log of items from the Florida State archives showing a pay stub from August 1990 and loan disbursement in July 1990.

The collateral court denied the claim. (PCR Vol. 4736-4740). In pertinent part, the collateral court found that Whitton failed to prove that Whitton still had the cash from July and August 1990. Additionally, the court found that, even if trial counsel would have called Ms. Sims to testify about the

$200, it was not convinced that Mr. Whitton was so financially comfortable that a $1000 windfall would not have been an attractive proposition.

The collateral court correctly denied this claim. This is true for several reasons. First, Whitton did not call Ms. Norwood. Accordingly Whitton failed to prove counsel was ineffective for calling Ms. Norwood to testify she had given Whitton $100 shortly before the murder. Nor did Whitton present any evidence that he still had the approximately $1800 in salary and student loans he had received in the two and three months before the murder. Indeed, at the evidentiary hearing, Whitton himself offered testimony suggesting that all that money was already spent. At the hearing, Debra Sims testified she had to give Whitton money for bills because "he didn't have the money to do that." (PCR Vol. XVIII 3497). Whitton failed to prove that counsel was ineffective for failing to present non-existent evidence.

Second, Whitton has never offered any support for the idea that Whitton's statements to Ms. Shelton and Ms. Sims would be admissible. In a footnote in his brief, without any citation to the evidence code, Whitton suggests that his stated intention to go work offshore would be admissible because it is a statement of intent or plan to prove or explain subsequent conduct by the defendant. (IB n. 54).

The state disagrees. Section 90.803(3)(a), Florida Statutes (2006), permits the admission of a statement of the declarant's intent when it is offered to prove or explain acts of subsequent conduct of the declarant. Such a statement is not hearsay because it is not being offered to prove of the matter asserted but is instead offered simply to explain subsequent conduct. *Charles W. Ehrhardt, Florida Evidence, 795 (2007 Edition).*

But Whitton does not claim his self-serving statements were admissible to prove a subsequent act because undisputedly he did not go work offshore. Instead, Whitton claims the testimony would be admissible to prove he intended to work offshore and as such he had no motive to kill Mr. Mauldin because he intended to go work offshore. Such a statement would be inadmissible hearsay. *Section 90.801(3), Florida Statutes.*

Even if that were not the case and trial counsel should have put on all of the testimony and evidence that Whitton claims he should have in this claim, there is no reasonable probability of a different outcome. Common sense, and not legal analysis, dictates that money enough to pay one's delinquent bills for one month is a nice thing but having money left over, say $1135.88 is even better. Whitton failed to show that trial counsel was ineffective for failing to offer corroborating testimony that Whitton had some money prior to the murder.

H. ***Blood evidence***

In this claim, Whitton avers that trial counsel was ineffective for failing to present evidence that if Whitton would have killed Mr. Mauldin, there would have been much more blood in his vehicle than the small amount actually found. Whitton claims that counsel was ineffective for failing to call someone like Dr. Riddick who testified that there would be a lot of blood in the assailant's car after such a violent attack. Dr. Riddick also testified that the killer could not wash the so much blood off in the bathroom because it would take a Brillo pad to get it off, especially if it had started to dry. (IB 35). (PCR Vol. XIX 3690-3691).

At trial, trial counsel did not call a witness like Dr. Riddick. The small sample found in Whitton's car was a key point in trial counsel's reasonable doubt defense, however. During closing argument, Mr. Bishop reminded the jury about the violence of the attack which created a very bloody crime scene. He also pointed out that only a small amount of blood was found in Whitton's car. Trial counsel argued this fact was inconsistent with Whitton being the murderer, because it was reasonable to believe the murderer would be covered with blood. (TR Vol. X 1969). He reminded jurors of this again just one page later. (TR Vol. X 1970).

Whitton raised this claim in his third amended and supplemented motion for post-conviction relief. The collateral court denied the claim. The court concluded that Whitton had offered no proof of the claim at the evidentiary hearing. The court also noted that the location of the blood found in the car was inconsistent with Whitton's story of just walking through it. (PCR Vol. XXIV 4740).[9]

The collateral court correctly denied the claim. While Whitton relies solely on Dr. Riddick's testimony to prove his claim, Dr. Riddick could not exclude the possibility that Whitton did do some serious cleaning up. When asked, Dr. Riddick said that was beyond his ability to testify. (PCR Vol. XIX 3702). Dr. Riddick could also not exclude the possibility that Whitton traveled to Mr. Mauldin's hotel room with the intent to kill him and brought a change of clothes with him. (PCR Vol. XIX 3702).

Given that Dr. Riddick could not exclude the possibility of a major clean up or a change of clothes, Whitton cannot show counsel was ineffective for failing to present a witness like Dr. Riddick. Instead, without a witness like Dr. Riddick who

[9] Whitton claims the collateral court was wrong when he said blood was not found on the floor of Whitton's car. Mr. Ginsberg testified that blood matching Mr. Mauldin's blood type was found on the front seat and front passenger seat. Blood was also detected on the rear floor mat but there was not enough to test. (TR Vol. VIII 1725- 1752).

would have to concede there were ways Whitton could commit the murder and not track much blood into his car, trial counsel was able to argue the small amount of blood was consistent with Whitton's version of events and inconsistent with the State's. This part of Whitton's claim should be denied.

I. ***Alleged Incompetent Police Investigation***

In this part of Whitton's claim, Whitton alleges trial counsel was ineffective for failing to present evidence the police investigation was inadequate. In particular, Whitton points to the fact that days after the murder, relatives of the victims were allowed to come in and remove evidence, Mr. Mauldin's suitcase containing knives was released without a forensic testing, and a gray gym bag containing other items of evidentiary value was released to the family as was a red address book. (IB 36). Whitton avers that reasonably competent counsel would have shown the processing of the crime scene and handling of evidence was incompetently done. (IB 36).

The collateral court denied this claim. The court found that Whitton had failed to offer any evidence to support his claim about the gray gym bad or the red address book. The court also found that Whitton failed to prove that counsel knew about

the knives and as such could not be ineffective.[10] (PCR Vol. XXIV 4741-4742).

This claim may be denied for one reason. Whitton offered nothing at the evidentiary hearing to support a finding that any of the evidence not explored by trial counsel was helpful to Whitton. For instance, Whitton offered no evidence the knives in the bag were connected to the murder in any way. Whitton offered no evidence that the still unidentified items in the gym bag were of evidentiary value or exculpatory. Whitton offered no evidence that the red address book would have been helpful to Whitton's defense. Failure to offer any evidence to show that, if counsel would have explored this evidence, there is a reasonable probability of a different outcome means Whitton has failed to prove his claim. Ferrell v. State, 29 So.3d 959, 977 (Fla. 2010).

J. ***Allegation that Victim was drunk, flashing cash, getting rolled***

In this claim, Whitton claims that trial counsel was ineffective for failing to call a Mr. Lee, a cab driver who saw Mauldin earlier in the day drunk, flashing a roll of cash, and

[10] The collateral court picked up on Whitton's suggestion this was Brady evidence. Indeed, in his brief, Whitton hints at a Brady violation regarding the suitcase with knives in it as "exculpatory." (IB 36). However, both below and before this Court Whitton does not make a Brady claim. Even if he had, Whitton has never shown any connection between the knives in the brown bag and the murder nor has he shown the suitcase with the knives was exculpatory.

trying to hook up with a prostitute. Whitton avers that trial counsel should have also called a Cindy Shelton who could testify that Mauldin told her that he had been rolled a few days before the murder. At the evidentiary hearing, Whitton called Mr. Lee and Ms. Shelton to testify.

Mr. Lee testified that on the day Mauldin was killed, he picked Mr. Mauldin up after lunch. (PCR Vol. XVIII 3582). He picked up Mr. Mauldin from his motel and took him to the liquor store. (PCR Vol. XVIII 3584). Mauldin bought a fifth of whiskey. He had been drinking but he wasn't falling down drunk. (PCR Vol. XVIII 3584). Mr. Mauldin wanted Lee to hook him up with a prostitute. Lee refused. (PCR Vol. XVIII 3584). Mr. Lee could tell Mr. Mauldin had money. When Mr. Mauldin paid the fair he took $20 from a huge roll of cash. It was so large he had a hard time getting it out of his pocket. He was not waving the money around but Mr. Lee warned him about carrying around that kind of money. (PCR Vol. XVIII 3586). Mr. Mauldin asked him again about a prostitute because he needed a woman bad. Mr. Lee demurred. (PCR Vol. XVIII 3586).

During cross-examination, Mr. Lee testified that he picked up Mr. Mauldin right at his door and then right back again after the liquor store. (PCR Vo. XVIII 3590). Mr. Lee considered that Mauldin was "flashing his money around" simply because he had such a huge wad. Mr. Mauldin did not wave the money around

or announce that people should look at all his money. The only time Mr. Lee saw the money was when Mr. Mauldin paid the fare. (PCR Vol. XVIII 3591). After dropping him back at the motel, Mr. Lee did not see Mr. Mauldin again. He saw no injuries on Mr. Mauldin and Mr. Mauldin did not relate to him that he had been jumped by a prostitute in the days before the murder. (PCR Vol. XVIII 3592).

Ms. Shelton testified that she overheard Mr. Mauldin tell Whitton that he had just been rolled by a prostitute. According to Ms. Shelton, Mr. Mauldin thought the prostitute was a woman but it turned out to be a man. (PCR Vol. XVIII 3476).

The collateral court denied this claim. First, the court ruled that Ms. Shelton's testimony about Mr. Mauldin said would not have survived a hearsay objection. Additionally, the collateral court found that Whitton had offered no evidence that another culprit had actually killed Mr. Mauldin. The collateral court found no prejudice for counsel's failure to call Mr. Lee. (PCR Vol. XXIV 4744).

The collateral court correctly denied the claim. Ms. Shelton's testimony that she overheard Mr. Mauldin tell Mr. Whitton that he had been rolled by a male prostitute is inadmissible hearsay because Whitton offers it to prove that Mauldin was rolled by a prostitute. Such evidence is classic

hearsay and inadmissible. Wright v. State, 586 So.2d 1024, 1030 (Fla. 1991).

While trial counsel could have put on Mr. Lee to bolster a reasonable doubt defense, Whitton has never produced any evidence that Mr. Mauldin found a prostitute on his own or that she was the murderer. Moreover, while Whitton tries to paint a picture that Mr. Mauldin was flashing cash, Mr. Lee's testimony refutes that. Instead, Mr. Lee said the only time he saw Mr. Mauldin's money was when he took it out of his pocket to pay the cab fare. Mr. Lee specifically denied that Mr. Lee was "flashing" around his money so as to attract unwanted attention. Because Whitton failed to show that Mr. Mauldin was successful in finding a prostitute or that anyone else, in fact, had the motive and opportunity to kill Mr. Mauldin, Whitton failed to prove that counsel was ineffective for failing to call Mr. Lee to testify at the guilt phase of Whitton's capital trial. The collateral court's rejection of this claim should be affirmed.

K. ***Allegation of Counsel's Failure to challenge inconsistencies in Maleszewski's testimony***

In this claim, Whitton claims that trial counsel was ineffective for failing to impeach Mr. Maleszewski's trial testimony. At trial, Whitton testified that on the night of the murder, he left Pensacola at about 10:00 p.m. or 10:30 p.m. and drove to the Sun and Sand Motel in Destin, Florida. He claimed

that he found Mr. Mauldin dead and left the motel shortly thereafter. Whitton also testified that on the way home, he stopped at a Conoco gas station and got gas. (TR Vol. IX 1814-1886).

Mr. Maleszewski testified that he saw Whitton's vehicle in front of Mr. Mauldin's hotel room a little after 10:30 p.m. He had gone to bed and a little after that he heard a car door slam. He looked out and saw Whitton's car. (TR Vol. VII 1431). No one was with the car. The next time he saw the car was about 12:20 a.m. He heard a car door slam, looked out and saw Whitton's car. Someone was inside it. The driver got out of the car, went to the rear of the car, opened the trunk, and then got back into the car and cranked it. (TR Vol. VII 1433). He did not see the car leave. (TR Vol. VII 1433).

On cross-examination, defense counsel asked Mr. Maleszewski whether it wasn't closer to midnight when he first woke up and saw Whitton's car. Mr. Maleszewksi did not dispute it and told the jury only that it was after 10:30. (TR Vol. VII 1452). Mr. Maleszewski also agreed that he told a defense investigator that, rather than the two hour period between sightings that he had testified to on direct, it was 10-15 minutes between the time he first heard a car door slam and the second time he saw Whitton's car. (TR Vol. VII 1459). Mr. Maleszewski told the jury that it is hard to tell when you are asleep. (TR Vol. VII

1459). During re-direct, Mr. Maleszewski said he could not really tell how long it was between the first time he saw the car and the second time. (TR Vol. VII 1461). He does know it was Whitton's car. (TR Vol. VII 1461).

Trial counsel also presented the testimony of James Graham, a defense investigator to impeach Mr. Maleszewski's testimony with a prior inconsistent statement. Mr. Graham testified that when he interviewed Tony Maleszewksi, Tony told him that he woke up the first time at about midnight when he heard a car door slam. He looked out and saw the defendant's car. He said he went back to bed. Mr. Graham testified that Mr. Maleszewksi told him that the second time he heard the car door slam and looked out to see someone in Whitton's car was about 10 but no more than 15 minutes later. (TR Vol. IX 1785-1788). The prosecution did not cross-examine Graham or present evidence (like LT Mann or Officer Sunday) to dispute Graham's testimony.

The collateral court denied the claim. (PCR Vol. XXIV 4745-4750). The court found that Whitton had failed to offer any evidence to support his claim of ineffective assistance of counsel.

In Whitton's motion, and in his brief before the court, Whitton asserts that LT Mann and Officer Sunday's report could have been fodder for impeachment of Mr. Maleszewski as a prior inconsistent statement. Whitton takes passages from the reports

and asks this Court to assume what they mean. (See SPCR Vol. I, 10, 40-41).

Whitton must ask this Court to assume what the reports meant because Whitton did not call LT Mann, Officer Sunday, or Mr. Maleszewski at the evidentiary hearing to determine whether Mr. Maleszewski made an inconsistent statement at all. Indeed, from the reports it seems clear that Mr. Maleszewski gave an exactly consistent statement with the time he testified to at trial about seeing Whitton's car at about 12:20, seeing someone walk around and open the trunk, then return to the car and crank it up. (SPCR Vol. I 10, 40-41). While Whitton is correct that neither report mentions the first sighting (or for that matter whether LT Mann talked to the hotel clerk or relied on Sunday's report), Whitton failed to offer evidence at the evidentiary hearing why this is the case. It could be that Mr. Maleszewski did not report it. It could be that the officer who actually interviewed Mr. Maleszewski did not write it down. It could be some other reason.

Having failed to determine whether Mr. Maleszewski made an inconsistent statement at all to the police, Whitton asks this Court to assume he did, that counsel could have, and should have, impeached him with it, and if he would have, the jury would have found Mr. Whitton innocent because Whitton's testimony about his actions on the night of the murder would

have been shown to be "true." This Court should decline Whitton's invitation to assume all of these things.

Moreover, the record shows two things. First, counsel successfully got Mr. Maleszewski to admit that he really did not know what time it was when he first saw Whitton's car because he was asleep and sleepy. Trial counsel also got Mr. Maleszweski to admit that it could have been only 10-15 minutes between sightings. (TR Vol. VII 1452-1461).

Second, trial counsel actually presented evidence, through Mr. Graham, that Mr. Maleszewski made an inconsistent statement about when he saw Whitton's car and how long it was between his two sightings. Counsel's actions in bringing forth Mr. Maleszewski's concessions as well as calling a "prior inconsistent statement" impeachment witness ensured the jury heard testimony that could have bolstered Whitton's trial testimony. Whitton cannot show counsel was ineffective.

L. ***Allegation of an Inadequate Investigation of Snitches***

At trial, the State used the testimony of two fellow inmates, Kenneth McCollough and Jake Ozio, to testify that Whitton admitted to the murder. (TR Vol. VIII 1637- 1659); Jake Ozio. (TR Vol. VIII 1610-1636). In his brief to this Court, Whitton claims counsel was ineffective for failing to do four things: (1) call Sheila Lowe to testify that McCollough had a reputation for untruthfulness, (2) call George Broxson to

testify, (3) call Donald Hanish to testify that Satan was a snitch who always got off light and that Satan had access to Whitton's papers because he was supposedly helping him on the case, and (4) trial counsel failed to investigate that McCollough was "betrothed" to the prosecutor's mother. (IB 43).

Whitton presented this claim in his third amended and supplemented motion for post-conviction relief. The collateral court granted an evidentiary hearing on the claim.

Whitton presented the testimony of Sheila Lowe, Billy Key, George Broxson and Donald Hanish to support this claim as well as portions of his first claim on appeal. In answer to that portion of claim one where these witnesses' testimony was relevant to the claim, the State summarized these witnesses' testimony. Accordingly, the State will not repeat it here.

After the evidentiary hearing, the collateral court denied the claim. First, the collateral court found that Ms. Lowe's testimony amounted to inadmissible opinion testimony, not proper reputation testimony. (PCR Vol. XXIV 4753). As to Mr. Key's testimony, the collateral court concluded that Mr. McCollough's alleged recantation came after trial. Accordingly, trial counsel cannot be ineffective for failing to introduce evidence that did not exist at the time of trial. (PCR Vol. XXIV 4752).

As to Broxson and Hanish, the collateral court found that any conversations with McCollough would not have been admissible

because it was hearsay. Moreover, the collateral court found that neither witness offered testimony to show that McCollough's or Ozio's testimony was false. Accordingly, the collateral court found that Whitton failed to show counsel was ineffective for failing to call Broxson or Hanish to testify. (PCR Vol. XXIV 4755).

The collateral court was correct. A review of Ms. Lowe's testimony demonstrates Ms. Lowe was expressing her inadmissible personal opinion rather than offering admissible reputation evidence. While Whitton tried to elicit testimony that Ms. Lowe was aware of McCollough's reputation for truthfulness, her testimony reflects this is not the case. Instead, Ms. Lowe made clear that it was she who though McCollough was a liar. Pursuant to Rule 405, Florida Rules of Evidence, Ms. Lowe's opinion would not be admissible. Antone v. State, 382 So.2d 1205, 1213-14 (Fla. 1980) (holding improper a question of a witness which sought "to elicit the individual and personal view of the witness). Counsel is not ineffective for failing to introduce inadmissible evidence. Owen v. State, 986 So.2d 534, 546 (Fla. 2008) (explaining that trial counsel cannot be deemed ineffective for failing to introduce inadmissible evidence).

As to Key, his testimony establishes that trial counsel was not ineffective. Key's testimony established that McCollough's alleged desire to recant came well after Whitton's trial was

over. Trial counsel cannot be ineffective for failing to introduce evidence that did not exist at the time of trial. Johnston v. State, 63 So.3d 730, 744 (Fla. 2011).

Finally as to Broxson and Hanish, the most they could have testified to is that a snitch is someone that inmates usually avoid and that McCollough was thought to be a snitch. Counsel is not ineffective for failing to call Broxson or Hanish at trial.

The only possible relevance to these two witnesses is that because McCullough is a snitch and because inmates know to avoid snitched, Whitton must not have confessed to McCollough. Alternatively, this evidence could be relevant to show that McCollough would make something up to get out of jail free and that McCollough could have learned details about Whitton's case from Whitton's papers and not Whitton.

At trial, trial counsel extensively impeached both Ozio and McCollough. Trial counsel cross-examined Ozio on the crimes for which he was awaiting trial and questioned him about the fact he was aware that he knew he needed to help himself out on his own case. (T Vol. VIII 1618). Trial counsel brought out that Ozio was facing a five year minimum mandatory sentence for carrying a firearm during the course of a burglary of a dwelling. (TR Vol. VIII 1618). Ozio admitted it would help him to help the police. (TR Vol. VIII 1619). Trial counsel also

elicited testimony that Ozio was still pending a plea and sentencing at the time he told law enforcement about Whitton's statements and that, subsequently, the firearm charge was reduced on the firearm charge to eliminate the minimum mandatory requirement. (TR Vol. VIII 1622). Trial counsel also brought out that Ozio was put on probation before trial instead of being sent to prison. (TR Vol. VIII 1625).

Likewise, trial counsel impeached Kenneth McCollough on his prior convictions. (TR Vol. VIII 1647). Trial counsel ensured the jury heard again that McCollough's nickname was “Satan” and that McCollough believed himself to be a jailhouse lawyer. (TR Vol. VIII 1647). Trial counsel also brought out that McCollough did not tell anyone about his conversation with Whitton for quite some time. Trial counsel got McCollough to admit that he was not a law abiding citizen. (TR Vol. VIII 1651).

Trial counsel also questioned McCollough about his relationship with the prosecutor’s mother who came and visited McCollough while in jail. (TR Vol. VIII 1650). Trial counsel brought out the fact that her visits and her relationship with the prosecutor was common knowledge and that Whitton knew it too. (TR Vol. VIII 1650).

Trial counsel also pointed out that in his deposition McCollough could not remember Whitton's statement "I stabbed the bastard" yet seemed to remember it later at trial. (TR Vol.

VIII 1652). Trial counsel brought out, before the jury, that McCollough had filed a motion for a modification of his sentence and it was still pending. (TR Vol. VIII 1652). During closing argument, trial counsel argued extensively that both Ozio and McCollough were unworthy of belief. (TR Vol. X 1976-1982).

The record shows that trial counsel attacked both Ozio and McCollough's credibility at trial and extensively argued the pair was unworthy of belief. Trial counsel also offered actual evidence that it was unlikely Whitton would talk to McCollough because Whitton knew that McCollough was seeing the prosecutor's mother. On the other hand, neither Broxson nor Hanish could testify, at the evidentiary hearing, that Whitton knew McCollough was a snitch or did not make the statements McCollough alleged he did. The collateral court's order should be affirmed.

M. ***Allegation that a new trial is required.***

This is not really a sub-claim. This is a cumulative error claim. However, Whitton has failed to show that trial counsel was ineffective. When there is no error, there is not cumulative error. Atwater v. State, 788 So.2d 223, 238 (Fla. 2001) (where no errors occurred, cumulative error claim is without merit) Accordingly, Whitton's claim should be denied.

ISSUE III

WHETHER THE TRIAL JUDGE ERRED IN RESPONDING TO JURORS' NOTES AND WHETHER THE COLLATERAL COURT ERRED IN DENYING WHITTON'S MOTION TO INTERVIEW JURORS

In this claim, Whitton raises two sub-claims. The first sub-claim concerns allegedly "secret" notes between the jurors, the trial court and the bailiff, Tim Campbell. The second sub-claim concerns Whitton's post-conviction motion to interview jurors. Both of Whitton's claims present substantive claims of error rather than claims of ineffective assistance of counsel.

A. **The "Notes" issue**

Whitton raised this claim in his third amended and supplemented motion for post-conviction relief. (PCR Vol. XII 2254-2261). An evidentiary hearing was granted on the claim. Five juror notes were unsealed during the post-conviction proceedings at Whitton's request. These notes can be found in the post-conviction record at Volume IX, pages 1767-1770.

Note 1: The first note was apparently presented in the penalty phase. The note appears to be from the jurors in which they expressed an objection to a "lady in the audience" who had a tape recorder recording the proceedings. The jury informed the court it objected to the taping because it gave them an uneasy feeling. (PCR Vol. IX 1767).

Note 2: The second note appears to have been written during the penalty phase deliberations. The second note requests a list (copy) of Judge Melvin's instructions.

Note 3: The third note requests the court to instruct the jury as to what would be the soonest Whitton could get out of prison considering gain time, being a model prisoner, etc. The note asked specifically whether 25 years would be the soonest Whitton could get out of prison. (PCR Vol. IX 1768).

Note 4: The fourth note is Judge Melvin's response to the third note. In this note Judge Melvin simply instructs the jury to refer to the jury instructions. (PCR Vol. IX 1769).

Note 5: The fifth note is the only note that came during the guilt phase of Whitton's capital trial. There are two parts to this note: This first part of the note is written by Judge Melvin. It reads: "I understand you may have a question. If so, please write it down and Tim will hand it to me." (PCR Vol. IX 1770). The second part of the note, apparently written by Ms. Keyser, an alternate juror, read: "Mrs. Keyser's feet cannot touch the floor in the jury box which is causing her feet to swell. Could I get a box to prop up my feet?" (TR Vol. VIII 1675).

Although Whitton couches this part of his claim in terms of "secret" notes, the record from Whitton's trial refutes his claim, at least in part. Both the first note and the fifth

notes were clearly not secret at all. Indeed, both were addressed in open court. During the penalty phase of Whitton's capital trial, the jury presented a note to the trial court. The note informed the trial judge that there was a "lady in the audience" who had a tape recorder recording the proceedings. The jury informed the court it objected to the taping because it gave them an uneasy feeling. (PCR Vol. IX 1767). Contrary to Whitton's suggestion that this was a "secret note", the record reflects that Judge Melvin, in open court, with counsel and the defendant present, advised the jury she had "dealt with the situation that you brought to my attention". She also announced that she would "file this note with the clerk." (TR Vol. XI 2152). Whitton made no objection to the trial court's "dealing" with the situation. Nor did counsel request the jurors be interviewed. (TR Vol. XI 2152).

Likewise, the fifth note was not secret at all. Like the first note, the last note reflects that trial counsel was present during this "secret" communication. (TR Vol. VIII 1674). Indeed, during the discussion of the juror's note, trial counsel, Mr. Bishop, noted that "we are all here in the courtroom." (TR Vol. VIII 1674). During the guilt phase of Whitton's capital trial, the trial judge advised the parties that she just got a note that reads, "[s]ome of the jurors want to ask a question. May they write it down?" The trial court

told the parties the note was handed to her by the bailiff. (TR Vol. VIII 1674). The judge suggested that she needed to bring the jury in to tell them they need to write their questions down. Trial counsel for Mr. Whitton suggested the trial court simply send a message through Mr. Campbell (the bailiff). Counsel observed there was no need to bring the jurors into the courtroom because the parties could observe Tim Campbell, the bailiff, deliver the note. The trial court agreed. (TR Vol. VIII 1674-1675). Before sending it into the jury room with Mr. Campbell, the judge read the note, into the record. Her note read: "I understand you may have a question. If so, please write it down and Tim (Mr. Campbell) will hand it to me." (TR Vol. VIII 1675). When the note came back from the jurors, the trial judge read it into the record. It read: "Mrs. Keyser's feet cannot touch the floor in the jury box which is causing her feet to swell. Could I get a box to prop up my feet?" (TR Vol. VIII 1675). The judge directed that Ms. Keyser get something to prop up her feet. (TR Vol. VIII 1675). Trial counsel made no objection to providing Ms. Keyser a box for her feet. (TR Vol. VIII 1675).

The record is silent as to three of the juror notes. The way the trial judge handled these three notes is not in the trial record. However, before penalty phase deliberations, the

trial judge cautioned the jury that they should not ask the bailiff anything. (TR Vol. X 2032).

(1) The evidentiary hearing

The collateral court granted an evidentiary hearing on this claim. Several participants in Whitton's trial testified on this issue.

Judge Laura Melvin testified that she reviewed the juror's notes prior to the evidentiary hearing. She had no independent recollection of the notes. (PCR Vol. XVIII 3523). Judge Melvin testified that her bailiff was excellent. He understood her very firm rule that he was not to answer any questions the jury asked of him. Instead, he was to tell her of any questions and she would respond. If the bailiff came to her and said "Judge, the jurors have a question," she would say, as she did in one note, to write it down. She would then go over the juror's note with the attorneys and the defendant, unless the attorneys waived the defendant's presence. Sometimes the jury would need to be brought back in and sometimes it would be appropriate to handle the question with a return note. (PCR Vol. XVIII 3525). One of the notes that said "Please refer to jury instructions" is the kind of response she would have made. (PCR Vol. XVIII 3526).

Judge Melvin that the only time she might not consult the attorneys about a note is if the jurors ask if they can go to

lunch, complain that it is hot in the courtroom and request the air conditioner be turned up, or ask for a smoke break. (PCR Vol. XVIII 3527). Other than that, under no circumstances would she respond to a question without full discussion with the attorneys and the defendant unless the defendant's presence is waived. (PCR Vol. XVIII 3527). If the jury asked a question about the merits of the case, she would not have responded to it without informing the attorneys. (PCR Vol. XVIII 3527). When asked about the notes that did not appear anywhere in the record, Judge Melvin explained that it is possible the notes came when the court reporter was not present or available. In such a case, she might handle the matter in chambers. She would give the parties the option of waiting to put in on the record. She would allow them to make the call of handing it then or waiting for the court reporter. (PCR Vol. XVIII 3529). If she got a note from the jury, she would have shared it with the attorneys. (PCR Vol. XVIII 3529).

Trial counsel, William Bishop, remembered a note or notes being sent between the jury to the judge. (PCR Vol. XX 3959). Mr. Bishop specifically remembered the note about the time Whitton would have to spend in prison. (PCR Vol. 3959-3960). He also remembered the situation with the one woman with her feet not reaching the floor. (PCR Vol. XX 3959). Mr. Bishop

testified that he assumes the trial judge made him aware of the notes. (PCR Vol. XX 3959-3960).

Trial counsel, James Tongue testified that he did recall the jury had a question which was submitted to the Judge in writing. He could not recall at the evidentiary hearing what the question was. (PCR Vol. XX 3870). He could not recall when during the trial the note was sent and he only recalls one note. (PCR Vol. XX 3870).

Whitton did not testify at the evidentiary hearing. Accordingly, Whitton presented no evidence that he was not present when the trial court received and responded to each note.

The collateral court rejected this substantive claim. The court found that Whitton failed to demonstrate any of the communications between the trial court and jury were "ex parte." (PCR Vol. XXIV 4692). The collateral court also found the collective testimony of Judge Melvin and both trial counsel demonstrates that no *ex parte* communications occurred between the trial judge and jury. (PCR Vol. XXIV 4692).

This claim should be denied for two reasons. First, the claim is procedurally barred in these post-conviction proceedings. Since the collateral court found, and the record supports, a conclusion that none of the communications were "ex parte," any claim regarding the trial judge's handling of the

notes or response to the various inquires could have been preserved by a contemporaneous objection and then raised on direct appeal. Lebron v. State, 799 So.2d 997, 1017 n.2 (Fla. 2001); Mendoza v. State, 700 So.2d 670 (Fla. 1997). Failure to do so bars the claim in post-conviction proceedings. *See generally* Troy v. State, 57 So.3d 828, 838 (Fla. 2011).

Second, this claim may be denied because the collateral court found and the record supports that there was no *ex parte* communications. The record demonstrates unequivocally that notes 1 and 5 were not ex parte because the court discussed them in open court. Additionally, trial counsel testified that he specifically recalled the jury's question about the time Whitton may have to serve in prison before eligible for release. Finally, Judge Melvin's testimony that she would never answer a question that went to the merits of the case without consulting with the attorneys and the defendant, unless the defense attorneys waived the defendant's presence provided competent substantial evidence supporting the collateral court's conclusion that no ex parte communications about the note occurred. No *ex parte* communications, no error! This Court should reject his part of Whitton's third claim on appeal.

B. ***The Juror Interview Issue***

Whitton also challenges the collateral court's denial of his motion to interview jurors. In his initial brief, Whitton

claims the standard of review is *de novo*. Whitton is mistaken. The standard of review on a motion to interview jurors is an abuse of discretion. Marshall v. State, 976 So. 1071, 1080 (Fla. 2007).

During post-conviction proceedings, on January 14, 2004, Whitton filed a notice of intent to interview jurors. (PCR Vol. IX 1754-1756). Whitton filed a renewed notice on June 7, 2004. (PCR Vol. X 1830-1831). On June 28, 2004, the State filed a response in opposition to the motion. (PCR Vol. X 1982-1991).

The collateral court denied the motion. The court found that Whitton had offered no compelling reasons why inquiry to or interview of the jurors. (PCR Vol. XIII 2536-2537).

Before this court, Whitton avers that any prohibition on interviewing jurors is unconstitutional. Without elaboration, Whitton claims he is entitled to interview jurors under the "unique" circumstances of this case. (IB 49). This sub-claim should be denied for four reasons.

First, any constitutional attack on Florida's rules that generally prohibit juror interviews is procedurally barred in post-conviction proceedings. Such claims could be, and should be, raised on direct appeal. Failure to do so acts as a procedural bar in post-conviction proceedings. Rose v. State, 774 So.2d 629, 637 n. 12 (Fla. 2000) (holding that the claim "attacking the constitutionality of the Florida Bar Rule of

Professional Conduct governing interviews of jurors [was] procedurally barred because Rose could have raised this issue on direct appeal).

Second, this claim should be denied because it is without merit. This Court has repeatedly rejected claims that rule 4-3.5(d) (4) and Florida Rule of Criminal Procedure 3.575 are unconstitutional. Floyd v. State, 18 So.3d 432, 459 (Fla. 2009).

Third, Whitton's claim that he is entitled to juror interviews under the unique circumstances of this case should be denied because Whitton has failed to fully brief this issue or to present any argument on why the "unique" circumstances of this case warrant juror interview. Failure to present any argument on an issue waives the claim on appeal. Barwick v. State, 88 So.3d 85, 101-102 (Fla. 2011); Bradley v. State, 33 So.3d 664, 685 (Fla. 2010).

Fourth, to the extent Whitton claims he is entitled to a jury interview to explore the various notes between the trial judge and the jury, this Court should deny the claim because Whitton has not demonstrated an entitlement to a jury interview.

Florida courts recognize a strong public policy against post-trial juror interviews. Consistent with this strong public policy and to preclude "fishing expeditions", this Court has established a high threshold over which a defendant must cross.

First, the moving party must bring forth, under oath, allegations, that if true, would require the trial court to order a new trial. Baptist Hospital of Miami v. Maler, 579 So.2d 97 (Fla. 1991)(ruling that in light of strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it, an inquiry is never permissible unless the moving party has made sworn factual allegations that, if true, would require a trial court to order a new trial).

Additionally, inquiry may be permitted only in the face of allegations which involve an overt prejudicial act or external influence (e.g. cases in which a juror related personal knowledge of non-record facts to other jurors, an assertion a juror received information outside the courtroom, a juror is improperly approached by a party, the jury votes by lot or game of chance, where jurors allegedly read newspapers contrary to the court's orders, or where jurors directed racial slurs against the defendant). Marshall v. State, 854 So.2d 1235, 1241-1242 (Fla. 2003); Devoney v. State, 717 So.2d 501 (Fla. 1998).

Matters which inhere in the verdict or seek to invade the jury's deliberative process may not be the subject of juror interviews. For instance, inquiry into whether jurors understood the trial court's instructions, whether a juror did

not understand a particular instruction, whether a juror attempted to discuss guilt prematurely, jurors' consideration of a defendant's failure to testify, or discussion of matters the trial judge instructed the jury to disregard are not permitted as these are matters which inheres in the verdict or relates to deliberation. *See also Section 90.607(2) (b), Florida Rules of Evidence* (noting that a juror is not competent to testify as to any matter which essentially inheres in the verdict).

Whitton cannot show that any of the sealed records entitle him to interview jurors because none of the notes meet the threshold requirements of the Florida Supreme Court's decision in Baptist Hospital and its progeny. Certainly, Whitton can make no showing the fact a juror's feet were swelling because they did not hit the floor, even if true, would entitle him to a new trial. Second, the jurors' question as to the soonest a defendant would be released if a life sentence were imposed, the judge's answer, and the jury's request for a list (copy) of the judge's instructions are clearly matters that inhere in the deliberative process. Additionally, Whitton cannot show any of the trial judge's responses were erroneous. Accordingly, Whitton is not entitled to a jury inquiry into these matters.

Finally, as to the last note, Whitton has not demonstrated any overt prejudicial act or external influence that would authorize a jury interview. Whitton has not established that

any concern the jurors had about someone recording the proceedings reasonably could have influenced their ability to fairly determine Whitton's guilt or innocence and/or recommend an appropriate sentence. Nothing about the juror's note associated the crime, the defendant or the victim, with the "lady" making a tape recording. Nor is there anything in the note that would lead fairly to a conclusion the anonymous lady's actions in taping the proceedings threatened to inject impermissible factors into the jury's deliberations. Indeed, without any objection from trial counsel, the judge informed the jury she had taken care of it and the jury voiced no more concerns. Absent any connection with the crime, the defendant, or the victim, Whitton's request to interview jurors about the note is simply a fishing expedition with no bait. This Court should affirm the trial judge's ruling.

ISSUE IV

WHETHER TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE OF WHITTON'S CAPITAL TRIAL

In this claim, Whitton brings a claim of ineffective assistance of penalty phase counsel. Before this Court, Whitton parses this claim into two parts. First, Whitton claims that trial counsel was ineffective in the presentation of lay testimony. Second, Whitton claims trial counsel was ineffective in the presentation of expert testimony.

I. **The Lay testimony**

A. Trial

During the penalty phase, trial counsel called several lay witnesses to testify in mitigation. The first was Royal Whitton. (TR. Vol. XI 2181- 2188). Royal is Whitton's older brother. Royal told the jury about his parents' drinking habits. He testified his parents drank heavily. Royal told the jury that someone in their family got whipped every day. Whitton's mother's idea of potty training was to stick their head in the toilet. (TR Vol. XII 2182). The house was heated by the stove. Once Gary made a hole in the wall while getting wood for the stove. Whitton's father came home drunk and he started screaming about the hole. (TR Vol. XI 2183). Whitton's father picked up Whitton by the collar and seat of his pants and threw him into the wall head first. (TR Vol. XI 2183). Royal has a vivid memory of Whitton's head sticking inside the wall. (TR Vol. XXI 2183). Physical abuse was commonplace. It was a daily occurrence. (TR Vol. XX 2183). He told the jury that his family did nothing that normal families do. They never went fishing, never went on picnics, never did anything together. Royal also described their physical living conditions. The house was always freezing. There were no bedrooms because the walls were all torn down. The kids would tear the wallpaper off the walls to heat the woodstove. (TR Vol. XI 2184). There were

nine kids in the family and the kids had no beds. Five kids had one mattress to share and the others slept on the floor. (TR Vol. 2184-2185). When the snow built up on the side of the house, the kids would sometimes have snow on their beds.

Trial counsel next called Debra Renee Sims. (TR Vol. XI 2188-2191). She is a friend of Gary Whitton. They are very close. Whitton was like a brother to her. She even leaves her children in his care and her children love him. She told the jury that Whitton helped her out when she and her husband separated and that he helped her out with the kids. He was very protective of her children. Whitton talked to her about the dangers of alcohol abuse.

Shirley George next testified for the defense. (TR Vol. XI 2191- 2199). She knew Whitton through her daughter, Renee Sims. She had known Whitton for four years. Whitton was a frequent guest in her home. Her first impression of Whitton was that he was a real lost child. Whitton treated her daughter like she was his little sister. He started calling her Mom. Ms. George testified Whitton was doing real well with his sobriety. She never saw him take a drink and he was proud of the what he had accomplished regarding his alcoholism. Ms. George told the jury Whitton was excellent around children and that she trusted him completely. He related very well to her grandchildren. He talked to them on their level but did not talk down to them.

Because of this, he was able to effectively talk to them about their behavior. Ms. George told the jury she works at a place called Favor House which is a spouse abuse shelter where battered women and children can come for refuge. Saw some of the same characteristics in Gary that are found in abused children. While he did not talk to her about his childhood, he did tell her that he wished he had had a mother like her. They sort of "adopted" each other.

Trial counsel next called Ruth McGuiness (TR Vol. XI 2199-2208). Ms. McGuiness was Whitton's paternal aunt. She knew the children were subject to abuse but never actually witnessed any abuse from her brother. She did see Whitton's mother abuse him. (TR Vol. XI 2201). Once, when Whitton was about four or five years old, Ms. McGuiness saw Whitton sitting on the steps when it was about 30 degrees outside and blowing snow. He was outside with a pair of boxer shorts and a T-shirt and had wet himself. He was crying silently. Whitton told her that his mother would not let him go into the house. She took him into the house. (TR Vol. XI 2201-2202). Ms. McGuiness told the jury that she saw Whitton's mother slap her children, pull their hair, and hit them. Once she found all the kids locked in one room. There was only one bed. The bed had a hole in the middle where the kids had urinated so much that it stunk. It stunk so bad she could hardly breathe in there. (TR Vol. XI 2202). Ms.

McGuiness testified that all the plaster in the Whitton home had been torn off the walls and was lying all over the floor, on the bed, and on the kids. They were living in it. (TR Vol. XI 2202). Ms. McGuiness told the jury that Whitton's mother would beat the children and stand them in a corner for hours at a time. Once she observed her punish one of the boys for tearing the crust off a piece of bread with butter on it. She stood him in the corner for five to six hours. (TR Vol. XI 2202). Ms. McGuiness saw Mrs. Whitton hit her four-day-old daughter for crying. (TR Vol. XI 2203). Ms. Whitton would give the baby wine in her baby bottle to put her to sleep. (TR Vol. XI 2203). Ms. McGuiness described how Whitton's mother, when the kids got on her nerves, would often drug the kids with paregoric so they would sleep. (TR Vol. XI 2203). She expressed her disapproval for this treatment many times but her brother was a very intimidating person. (TR Vol. XI 2203). The police would come out to the house and do nothing and child welfare would come out but would have to make an appointment first. This allowed the Whitton family to clean up the house and put food in the refrigerator. (TR Vol. XI 2204). The kids did not get a lot to eat. (TR Vol. XI 2204). Ms. McGuiness was afraid of Whitton's father. He beat his wife. Once he got into her face and threatened to beat her. (TR Vol. XI 2204).

Finally, trial counsel called Ms. Dorothy McGuire to testify for the defense. (TR Vol. XI 2208- 2211). She is friends with Gary Whitton. Ms. McGuire met Whitton in Lakeview in 1988. Her husband's big brother in an alcohol treatment facility. Ms. McGuire found Whitton to be very considerate of her feelings. He was with her husband, Jim, for six months while he was in the program at Lakeview. About a year and a half after her husband was discharged, he had a relapse. Whitton encouraged her to go to some AA meetings with her. Whitton thought that by doing so, she would have a better grasp on some of the things that alcoholics go through. She always thought that Whitton helped her to cope with her husband's alcoholism.[11]

As a result of the mitigation offered at trial, Judge Melvin found that Whitton suffered a deprived childhood and poor upbringing. She assigned this mitigator considerable weight. She found that Whitton was abused as a child and gave this mitigator considerable weight. Judge Melvin found that Whitton

[11] At the request of defense counsel, the trial judge instructed the jury that mitigating factors are not limited by statute and they could consider any other aspect of the defendant's character or record and any other circumstances of the offense. The jury was also instructed it could consider family background, potential for rehabilitation, alcoholism, drug use or dependency, mental problems that do not reach the level of statutory mitigating factors, abuse of the defendant by his parents, contributions to society, and charitable or humanitarian deeds. (TR Vol. XI 2248).

was abused by his two alcoholic parents. She gave this mitigator considerable weight. She also found that Whitton was a hard worker when employed and gave this mitigator little weight. Judge Melvin found that Whitton had shown potential for rehabilitation and gave that some weight. She found that Whitton had performed humanitarian deeds and assigned this mitigator some weight. She found that Whitton was an alcoholic and gave this some weight. Judge Melvin also found that Whitton had an unstable personality consistent with alcoholism and child abuse and gave this mitigator some weight. Finally, she found that Whitton is a human being and child of God and gave this mitigator great weight. (TR Vol. IV 691-697).

B. The Evidentiary Hearing

During the evidentiary hearing, Whitton put on a considerable amount of lay testimony that established Whitton had a horrific childhood, one with no safety, security, basic necessities, or love. Whitton outlines the testimony in his initial brief. The kindness of teachers and a loving Aunt were the only bright spots in Whitton's childhood.

Penalty phase trial counsel, James Tongue, testified that he considered it important to have family members testify. (PCR Vol. XX 3893). Trial counsel testified that he met with the family before the trial. Mr. Tongue testified that the strategy was to show Whitton as a person with problems of his own, who

also was a person that tried to help others and a person whose life had value. (PCR Vol. XX 3897).

The theme of the penalty phase was that Mr. Whitton was a life worth saving. Trial counsel said he wanted to show that Whitton had not been a danger to others before and even if they had decided he did commit this one act of violence, there was no indication or likelihood that he would repeat it, even in prison. (PCR Vol. XX 3901). The defense wanted to humanize Whitton to the jury. (PCR Vol. XX 3901). They wanted to save his life. In attempting to do so, the presented evidence of both his tragic childhood and his good qualities as a human being. (PCR Vol. XX 3902).

C. ***The collateral court's ruling***

The collateral court found that trial counsel was not ineffective at the penalty phase in the presentation of lay testimony. The court concluded that although Whitton produced more detail at the evidentiary hearing about instances of child abuse and neglect, this fact does not render trial counsel's performance deficient. The collateral court found that the witnesses that trial counsel did present at trial outlined in vivid detail the circumstances that a young Gary Whitton faced and still recommended death by a vote of 12-0. The Court found that the lay testimony presented at the evidentiary hearing was

largely cumulative of the evidence heard at the penalty phase. (PCR Vol. XXIV 4759).

D. *Argument about the lay testimony*

The type and character of the lay testimony presented at the evidentiary hearing was much the same as trial counsel presented at the trial. At trial, Royal Whitton and Ruth McGuiness portrayed, without any evidentiary contradiction by the state that Whitton was physically and emotionally abused and deprived. He was beaten and neglected. He was uncared for and apparently unloved by two parents who had no business having children. While Whitton presented testimony at the evidentiary hearing in more detail, the character of the testimony is similar.

The standard for assessing ineffective assistance claims "is not how present counsel would have proceeded, in hindsight, but rather whether the defendant has established both deficient performance and prejudice under Strickland. Brown v. State, 846 So. 2d 1114, 1121 (Fla. 2003). The fact that, after years in which collateral counsel and his predecessors have had to investigate Whitton's social history, Whitton can produce more witnesses and more detail does not render trial counsel's performance ineffective. Indeed, if that was the standard, then every counsel with a finite period of time to prepare would be deemed ineffective in comparison with collateral counsel who

often has years to prepare. *See* Freeman v. State, 858 So. 2d 319, 326 (Fla. 2003) (While additional evidence regarding specific examples of abuse could have been presented, that is not the standard Strickland contemplates in evaluating counsel's performance. It is not negligent to fail to call everyone who may have information about an event. Once counsel puts on evidence sufficient, if believed by the jury, to establish his point, he need not call every witness whose testimony might bolster his position. Cherry v. State, 781 So. 2d 1040, 1051 (Fla. 2000). Given the testimony of Whitton's horrific childhood that trial counsel did present at trial, Whitton cannot show that had trial counsel put on all the lay evidence presented by Whitton at the evidentiary hearing, he probably would have received a life sentence. This claim should be denied.

II. **The Expert Testimony**

A. Trial

At trial, trial counsel presented the testimony of Dr. James Larson. (TR Vol. XI 2152 -2181). Dr. Larson told the jury that he is a psychologist who examined Whitton in August and September 1991. He has testified as an expert somewhere close to a 100 times. (TR Vol. XI 2154). Dr. Larson had access to Whitton's background (childhood information) and administered psychological tests to Whitton. Dr. Larson told the jury that

Whitton had a verbal IQ of 85, a performance IQ of 87 and a full scale IQ of 84. (TR Vol. XI 2156-2157). Dr. Larson explained this was half way between retarded and average. He would consider Whitton dull normal range or what some would call "low-normal" range. (TR Vol. XI 2157).

Dr. Larson also administered the MMPI. Whitton tried to put his best foot forward in taking this test. Dr. Larson could tell that Whitton was not trying to fake mental illness. (TR Vol. XI 2159). Dr. Larson testified that Whitton's MMPI results did not reflect serious mental illness. (TR Vol. XI 2160). However, Whitton's test results revealed a lot of personality instability. Dr. Larson testified that this kind of instability is associated with children who grown up in disruptive homes, children who had a very chaotic environment or uneven parenting. It is also the kind of profile we frequently see associated with alcohol abuse of alcohol addiction or drug addiction. Dr. Larson testified that such a profile generally fits a person who is not functioning very well from a mental health point of view. (TR Vol. XI 2160). In doing his evaluation, Dr. Larson obtained records from a mental health center in Pensacola. The records correspond with what Whitton told him about his history. (TR Vol. XI 2161). Whitton reported he was a long term alcoholic and had presented himself for treatment several times.

Larson obtained Whitton's treatment records. He described them to the jury as a thick stack of records. (TR Vol. XI 2161). Dr. Larson reviewed those records as part of his evaluation. The records indicate that Whitton had several extended periods of treatment at the Lakeview alcohol treatment program. The first time was in 1988 for about 6 months. Whitton lived in a half-way house in 1989 and was then in an alcohol treatment program in 1990. (TR Vol. XI 2161-2162).

Dr. Larson concluded that Whitton does not suffer from any major mental illness, but that he is alcohol dependent. (TR Vol. XI 2162). Dr. Larson told the jury that Whitton had insight into his problems. Whitton recognized he was an alcoholic. He was both actively involved in trying to get better and motivated to get better. (TR Vol. XI 2162). Dr. Larson compared Whitton with someone who is involuntarily committed for treatment. Whitton, in contrast, presented himself for treatment for his alcoholism.

In the course of his evaluation, Dr. Larson gathered information and records about Whitton's life and social history. Whitton also discussed his childhood. Dr. Larson testified that in the "thick" stack of records he had, Dr. Larson obtained information about Whitton's childhood. Dr. Larson told the jury Whitton's test results, his records, and his related history are consistent with an abusive childhood.

From Dr. Larson, the jury heard that Whitton was a child of alcoholic parents, that he was physically abused by his father and that his father sexually abused one of Whitton's siblings. (TR Vol. XI 2164). Dr. Larson testified that Whitton's family split after his parents divorced and he was moved from place to place, from parent to parent. Dr. Larson told the jury that Whitton's mother remarried but married another alcoholic. Dr. Larson told the jury that Whitton's whole childhood was inundated with being in an alcoholic family, and being emotionally and physically abused. Life was a real struggle until Whitton finally left home. (TR Vol. XI 2165).

Dr. Larson told the jury that the people who were Whitton's role models taught him to be a drug abuser and alcoholic. He developed personality instability as a result. Dr. Larson testified that such a personality pattern leaves a person very different from people who are raised in good homes. (TR Vol. XI 2166). Dr. Larson opined that because Whitton's mother was a practicing alcoholic during her pregnancy, Whitton may have suffered the effects of fetal alcohol syndrome. Dr. Larson testified that the literature continues to grow in terms of damage that can happen to the fetus during pregnancy. There's more and more evidence that's accumulated about the dangers that alcohol has for a developing fetus. (TR Vol. XI 2166). Dr. Larson also testified that children exposed to alcohol in the

womb may be retarded and have strange facial features. However, even if there is not severe damage, that alcohol during pregnancy can cause very subtle changes in the brain. (TR Vol. XI 2167). This may affect how people do in school and their IQ. It can also cause diffuse brain damage and change how the personality functions. (TR Vol. XI 2167). Dr. Larson told the jury that there is also support for the notion that Fetal Alcohol syndrome sets the stage of later substance abuse or addiction. It would also affect development, causes learning and behavior problems, and "just snowballs." (TR Vol. XI 2167-2168).

Dr. Larson testified during cross examination that he could not tell whether Whitton was under "emotional duress" at the time of the murder because he didn't have information from third parties about what was going on at the time (of the murder). (TR Vol. XI 2173). He did not find any statutory mitigators. (TR Vol. XI 2177). Dr. Larson opined that the following mitigators did apply: (1) limited intellectual ability, (2) educational deprivation, (3) neglect, (4) cultural and emotional deprivation, (4) physical abuse, (5) emotional abuse, (6) possible fetal alcohol syndrome, (7) alcohol abuse, (8) he was an adult child of an alcoholic, (9) he was deficient of positive role models, and (10) he lacked a prior violent history. (TR Vol. XI 2176-2177).

B. The Evidentiary Hearing

At the evidentiary hearing, Whitton called Dr. George Woods to testify. Dr. Woods is a neuropsychiatrist in California. (PCR Vol. XVII 3329). He evaluated Whitton. (PCR Vol. XVII 3339). In the course of his evaluation, he reviewed several affidavits from those who knew Whitton as a child, and could witness to his abusive childhood. In the course of his evaluations, Dr. Woods considered several affidavits, including affidavits from Ms. Bushnell, Mr. Bovee, Mr. Bob Fowler, Kim Hart, Charles Jessmer, and others. (PCR Vol. XVII 3344-3353). He also talked to a number of the people who executed an affidavit. Dr. Woods believed he had a "wealth of information" about Whitton, which was important to his evaluation. The type of information he acquired is the type of information that experts in his field rely upon to make an informed conclusion. (PCR Vol. XVII 3354).

Dr. Woods' primary diagnosis is Fetal Alcohol Syndrome. Whitton also suffers from PTSD. (PCR Vol. XVII 3341). The most relevant feature of Fetal Alcohol Syndrome, for the purposes of his proceeding is that Fetal Alcohol Syndrome causes neuropsychological impairment. (PCR Vol. XVII 3342).

In Dr. Woods' view, there were many illustrations of profound abuse in Whitton's life. (PCR Vol. XVII 3365). He described them for the collateral court. (PCR Vol. XVII 3366-

3371). One thing he described is that people in Whitton's neighborhood speak of the Whitton family as the worst family in terms of loving their children and providing for them. In Dr. Woods' view, the Whitton children were little more than feral animals. (PCR Vol. XVII 3368).

Dr. Woods also testified that Whitton's mother killed Michael Whitton, Whitton's brother. Apparently, Ms. Whitton got so overwhelmed, she threw Michael down the stairs and killed him. Whitton's father concocted a story to cover it up. Other family members believed that their mother killed Michael. Certainly, Valerie Whitton did. Whitton moved his family next to his step family, the Jesmers so they could watch Dorothy and so she would not "kill another child." (PCR Vol. XVII 3375). Dr. Woods believe this incident was significant because a belief that one's parents killed a sibling causes fear in surviving children. Dr. Woods opined that the Whitton children were afraid of their mother and their father. (PCR Vol. XVII 3376). Kids who grow up in such a traumatic environment develop "affective disregulation" where the kids do not know how to respond. As a result, they engage in self-destructive behaviors. They lack social skills, they do not have friends, they are secretive. (PCR Vol. XVII 3376).

In addition to his own evaluation, Dr. Woods testified Dr. Barry Crown conducted neuropsychological testing with Whitton.

When asked whether he found anything of interest in Whitton's testing, Dr. Woods said testing "confirmed his diagnosis." (PCR Vol. XVIII 3410). The results were consistent with the notion that Whitton's right side did not develop normally because one side of the brain controls the opposite part of the body. (PCR Vol. XVIII 3410-3411). At the bottom line, Whitton has a damaged brain. (PCR Vol. XVIII 3412).

Dr. Wood disagrees with Dr. Larson's conclusion that Whitton suffers from no mental disease or defect. From his neuropsychological tests, Whitton clearly has impairments of memory sequencing and ability to weigh and deliberate. All these reflect left frontal lobe and left temporal lobe impairment in certain academic functions. (PCR Vol. XVIII 3414). A person with Whitton's "mental infirmity" has trouble with abstract thinking, which is the ability to look past what is on his plate. Whitton would also have difficulty with organizing information. (PCR Vol. XVIII 3415). Dr. Woods told the collateral court that certain traits are characteristic of people who suffer from what Whitton suffers: (1) inability to change behavior depending on situation, (2) poor short term memory, (3) mental inflexibility, (4) impulsivity, and (5) attention deficits. (PCR Vol. XVIII 3418). This constellation of factors present in Whitton's case results in disabilities in areas of reasoning, judgment, and control of impulses. (PCR

Vol. XVIII 3418). He does not think Dr. Larson had all the information necessary to make a firm diagnosis of fetal alcohol syndrome. (PCR Vol. XVIII 3421).

Dr. Woods testified that he is familiar with statutory mitigators in Florida. He believes that both statutory mitigators apply. (PCR Vol. XVIII 3420). In Dr. Woods' view, Whitton is under an extreme emotional disturbance because his brain has been bad all his life. (PCR Vol. XVIII 3446). Dr. Woods has to say that the "extreme emotional disturbance" mitigator applied on the day of the murder because Whitton suffers that every day of his life. Whitton takes a shower under an extreme emotional disturbance. (PCR Vol. XVIII 3446). Dr. Woods told the collateral court that Fetal Alcohol Syndrome does not automatically preclude an understanding of the difference between right and wrong and he cannot say that Whitton does not know that stealing money is wrong. (PCR Vol. XVIII 3448-3449).

C. ***The Collateral Court's Ruling***

The collateral court rejected Whitton's claim, finding no prejudice in failing to call Dr. Woods instead of Dr. Larson or in failing to better educate Dr. Larson so as to alter his opinion on Fetal Alcohol Syndrome from possible to definite. The collateral court found, first, that Whitton offered no evidence that the additional evidence considered by Dr. Woods and introduced at the evidentiary hearing would have changed Dr.

Larson's opinion. (PCR Vol. XXIV 4761). The collateral court noted that Whitton offered no proof that Dr. Larson would have changed his diagnosis. The collateral court also rejected any notion that the evidence at the evidentiary hearing proved that Dr. Larson did not have an understanding of the law or that Dr. Larson's opinion regarding statutory mitigation would have been any different if provided more information. (PCR Vol. XXIV 4762). The collateral court concluded that Dr. Woods' testimony only shows that his opinion is different from Dr. Larson's. (PCR Vol. XXIV 4762-4763).

D. ***Argument on the experts***

It can be fairly argued that Dr. Woods provided more favorable testimony. He testified there was brain damage; Dr. Larson did not. Dr. Woods testified there was Fetal Alcohol Syndrome; Dr. Larson saw it as a possibility. Dr. Woods testified that both statutory mental mitigators applied while Dr. Larson found several non-statutory mitigators applied. However, this Court has said on numerous occasions that trial counsel is not ineffective in his presentation of a mental health expert simply because post-conviction counsel can present a more favorable expert at the post-conviction proceedings. Valentine v. State, 98 So.3d 44, 53 (Fla. 2012).

For the most part, Whitton's claim centers on his claim that Dr. Larson did not do enough to gather as much information

as Dr. Woods did during the post-conviction years. However, Whitton offered no testimony that Dr. Larson would have opined any differently if he would have had the information used by Dr. Woods in reaching his opinion. At trial, Dr. Larson described the records upon which he relied as a thick stack of records that documented Whitton's history of treatment for his alcoholism as well as information about his childhood. Additionally, Whitton put on no evidence that trial counsel failed to provide Dr. Larson with any records that Larson requested or needed to render his opinion. Where experts are used to investigate and prepare mental health mitigation defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if in retrospect the evaluations were not as complete as they could have been. Valentine v. State, 98 So.3d 44, 53 (Fla. 2012). Through Dr. Larson and the lay witnesses, which trial counsel used in tandem to show the jury Whitton's horrific childhood and its long lasting impact on Whitton, trial counsel investigated and presented the jury with a picture of a man whose horrific childhood was totally bereft of parental love and support, whose abilities and capabilities were affected well into his adulthood in terms of making decisions, thinking through problems, and maintaining a stable and productive life. Although Dr. Woods reached different conclusions, Whitton failed to prove that

counsel's performance was deficient. Whitton also failed to prove that calling Dr. Woods instead of Dr. Larson and/or calling Dr. Larson with more "information" probably would have resulted in a life recommendation or sentence. Hoskins v. State, 75 So.3d 250 (Fla. 2011) (rejecting Hoskins' claim that because defense counsel knew that Dr. Krop's testimony would not support the statutory mental mitigators, counsel was ineffective for not obtaining another mental expert who would). This claim should be denied.

ISSUE V

WHETHER THE COLLATERAL COURT ERRED IN DENYING WHITTON'S CLAIM OF CUMULATIVE ERROR

In this claim, Whitton raises a claim of cumulative error. Whitton raised this claim in his motion for post-conviction relief. The collateral court denied the motion. The collateral court found all of Whitton's claims were procedurally barred or without merit. (PCR Vol. XXIV 4785). The collateral court was **correct**. Where there is no error, there can be no cumulative error. Atwater v. State, 788 So.2d 223, 238 (Fla. 2001) (where no errors occurred, cumulative error claim is without merit).

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the collateral court's order denying Whitton's motion for post-conviction relief.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Meredith Charbula

_____
MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399
Department of Legal Affairs
PL—01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3583 Phone
(850) 487-0997 Fax
Attorney for the Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email to Mark Olive this April 17, 2013, at the following email address: Meolive@aol.com

/s/ Meredith Charbula

_____
MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

/s/ Meredith Charbula

_____
MEREDITH CHARBULA
Assistant Attorney General